

# **HEARING OFFICER DESKBOOK**

## **A REFERENCE FOR VIRGINIA HEARING OFFICERS**

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Supreme Court of Virginia**

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## ADMINISTRATIVE LAW ADVISORY COMMITTEE

The [Administrative Law Advisory Committee](#) (ALAC) approved this revision of the Hearing Officer Deskbook at its meeting on October 30, 2009. The Hearing Officer Deskbook was first produced by ALAC and published by the Office of the Executive Secretary of the Supreme Court of Virginia in 2001.

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....ii

I. APPLICABILITY .....1

II. QUALIFICATIONS AND RESPONSIBILITIES ..... 2

    A. Hearing Officer Qualifications ..... 2

    B. Hearing Officer Responsibilities ..... 2

III. ASSIGNMENT OF THE CASE ..... 4

IV. PRE-HEARING ISSUES ..... 5

    A. Scheduling, Notice and Location..... 5

    B. Exchange of Information ..... 6

    C. Pre-Hearing Statements and Settlement Conferences ..... 6

    D. Subpoenas..... 8

    E. *Ex Parte* Communications..... 9

V. THE HEARING ..... 10

    A. Failure to Attend Hearing ..... 10

    B. Written Statements ..... 10

    C. Evidence ..... 11

    D. Experts..... 11

    E. Standard and Burden of Proof ..... 12

    F. The Hearing Record and Transcript..... 12

    G. Open Meetings and the News Media ..... 13

    H. Recusal/Disqualification ..... 13

VI. POST-HEARING ISSUES ..... 15

## HEARING OFFICER DESKBOOK

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|   |    |
|---|----|
| Duration of a Hearing Officer’s Authority .....   | 15 |
| VII. THE DECISION/ RECOMMENDATION.....  | 16 |
| Drafting the Decision .....   | 16 |
| VII. APPENDICES .....   | 18 |
| Appendix A – Hearing Officer System Rules of Administration   |    |
| Appendix B – The Decision (Excerpt from <a href="#"><i>Manual for Administrative Law Judges</i></a> , Morrell E. Mullins, 2001 Interim Internet Edition, William H. Bowen School of Law, University of Arkansas at Little Rock) |    |

### I. APPLICABILITY

This Deskbook contains procedural guidelines that are intended to assist hearing officers in the conduct of formal hearings for administrative agencies of the Commonwealth pursuant to [§ 2.2-4020](#) of the Code of Virginia. These guidelines create no legal mandates or requirements, but they should be used to assist hearing officers in handling hearings and proceedings. They are, however, intended for use only when agency statutes and rules are vague or do not address the issue in question. Whenever there is a statute or an agency rule on point, it applies. Although these guidelines were written for hearings pursuant to [§ 2.2-4020](#) of the Code of Virginia, they are useful guidelines for other adjudicative settings. They also may be used with certain modifications for informal fact-finding proceedings held pursuant to [§ 2.2-4019](#) of the Code of Virginia.

The Office of the Executive Secretary of the Supreme Court of Virginia, the Administrative Law Advisory Committee, state agency personnel, and several hearing officers have contributed to the development of this publication. It marks the continuation of a process to articulate standard procedural guidelines and its contents may be changed or supplemented from time to time at the request of agencies and hearing officers. The Office of the Executive Secretary of the Supreme Court of Virginia publishes these guidelines and may be contacted for suggestions or additional copies.

## II. QUALIFICATIONS AND RESPONSIBILITIES

### A. Hearing Officer Qualifications

Hearing officers must meet the following standards:

1. Active membership in good standing in the Virginia State Bar,
2. Active practice of law for at least five years, and
3. Completion of courses of training as required by statute and approved by the Executive Secretary of the Supreme Court of Virginia pursuant to Rule Two (B) (6) and Three (A) (1) of the [Hearing Officer System Rules of Administration](#). Additional training requirements may be imposed by agencies to qualify the hearing officer to hear cases for those agencies.

#### ***Comment***

These hearing officer qualifications apply only to hearing officers on the list prepared and maintained by the Office of the Executive Secretary of the Supreme Court of Virginia. The qualifications do not apply to hearing officers used by agencies exempt from the requirement to use a hearing officer from this list.

The Hearing Officer System Rules of Administration (included as [Appendix A](#)) require hearing officers to have prior experience with administrative hearings or knowledge of administrative law, demonstrated legal writing ability, and a willingness to travel to any area of the state to conduct hearings. According to Rule Two (B) (2) of the Hearing Officer System Rules of Administration, one is engaged in the "active practice of law ... when, on a regular and systematic basis, in the relation of attorney and client, one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill."

### B. Hearing Officer Responsibilities

Generally, the hearing officer's responsibilities are to:

1. Adhere to timelines that may be imposed by the agency.
2. Establish the time, place and nature of the hearing and provide reasonable notice of these to the parties.

## HEARING OFFICER DESKBOOK

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3. Manage the pre-hearing exchange of information so that all parties have access to the information that may be admitted into evidence and to the witnesses that may be called.
4. Establish the hearing procedure to be used and communicate this to the parties so that they will know what to expect. This may be done during the pre-hearing exchange or immediately before the hearing.
5. Manage the transcript and record of the case. The record should include a transcript or audible recording of the hearing, all evidence submitted or information exchanged, and any subsequent motions and post-hearing filings.
6. Make a timely decision and communicate it promptly to the parties.

Parties to the case should be treated professionally by the hearing officer and receive a cogent decision in a timely manner. It is incumbent upon the hearing officer to control the hearing and the parties in a professional manner. This includes creating a setting for the hearing that enables the parties to provide the hearing officer with the evidence needed to render a proper decision. Accordingly, the hearing officer must be prepared to deal with and make any necessary accommodations for parties with special needs. It is also the hearing officer's responsibility to manage the record. The record should be clear, complete, and orderly, so that anyone reading the hearing officer's report may ascertain the evidence and testimony that he has relied upon in deciding the case or in recommending a decision to the agency.

If a hearing officer fails to perform these responsibilities in a professional and ethical manner, the hearing officer may be removed or disqualified pursuant to the Hearing Officer System Rules of Administration. ([Appendix A](#)).

### III. ASSIGNMENT OF THE CASE

A hearing officer should adhere to the following guidelines when accepting an assignment of a case:

1. A hearing officer should never accept a case that would create a conflict of interest.
2. A hearing officer who has an ongoing assignment with an agency should not take a case involving that agency.
3. A hearing officer should not represent a client that has a matter pending before an agency for which the hearing officer has an ongoing assignment.
4. In deciding whether to accept a case, a hearing officer should consider other commitments, real and potential conflicts of interests, and any other factors that may limit the hearing officer's ability to act as an effective, unbiased adjudicator.
5. Standard rules of legal ethics with regard to conflicts should apply.

#### ***Comment***

See the "Recusal and Disqualification" section of this handbook and the Hearing Officer System Rules of Administration, included as Appendix A. For further guidance on potential conflicts, see the [Rules of Professional Conduct](#) (Rules of the Supreme Court of Virginia, Part Six, Section II) and [Unauthorized Practice Rules](#) (Rules of the Supreme Court of Virginia, Part Six, Section I).

## IV. PRE-HEARING ISSUES

### A. Scheduling, Notice and Location

1. Absent instructions from the agency to the contrary, the hearing officer is responsible for scheduling the hearing and providing notice to the parties, once the hearing officer has been appointed. Even if the hearing officer is not responsible for scheduling the hearing, the hearing officer should ensure that the agency complies with all legal requirements for scheduling the hearing and providing notice.
2. Hearings should be scheduled at a time and manner convenient to all parties. Virginia Code Section [2.2-4020](#) sets the standards for reasonable notice of the time, place, and nature of the proceeding. If the parties agree, the hearing can be held sooner than indicated on the notice. The hearing officer may grant a change in time, place or date in order to prevent substantial delay, expense, or detriment to the public interest, or to avoid undue prejudice to a party. However, the hearing officer must remember that any rescheduling cannot interfere with statutory or regulatory deadlines.
3. Unless previously specified by the agency, the place at which the hearing will be held shall be determined by the hearing officer. The hearing should be held at a place that is convenient to the parties.
4. Virginia Code Section [2.2-4020](#) requires reasonable notice to the parties of the basic law or laws under which the agency contemplates its possible exercise of authority and the matters of fact and law asserted or questioned by the agency.

#### ***Comment***

Cases heard pursuant to Virginia Code Sections [2.2-4019](#) and [2.2-4020](#) of the Administrative Process Act impose a deadline of 90 days for issuing a decision once a case has been heard. Hearing officers should bear in mind that some agencies have deadlines for issuing decisions that run from the time of scheduling a hearing.

What is considered "reasonable" notice depends on the circumstances and cannot be determined in a vacuum. In most cases, reasonable notice is 30 days prior to the date scheduled for the hearing. However, the agency's basic law or circumstances may indicate a shorter period.

The hearing officer should be as flexible as possible in scheduling hearings, and may wish to consider evening and weekend hearings if that is convenient to the parties.

### **B. Exchange of Information**

1. The Administrative Process Act does not permit discovery. However, Section [2.2-4019](#) provides that "agencies may, in their case decisions, rely upon public data, documents or information only when the agencies have provided all parties with advance notice of an intent to consider such public data, documents or information."
2. The hearing officer can make the hearing operate more smoothly and prevent surprises by requiring all parties to exchange the information that they intend to rely upon in advance of the hearing. Information to be exchanged should include a list of witnesses each party intends to call and any documents that will be offered into evidence. The hearing officer may also require that copies of all such documents be sent to him or her in order to prepare for the hearing. Some hearing officers set the deadline for the exchange of information at one week before the hearing, so that there is an opportunity to issue a reminder if necessary. Reminding the parties that they may not call any witnesses or enter any evidence not exchanged in advance of the hearing will help to ensure compliance.
3. When it is desirable to have an advance written exchange of confidential or proprietary information, the hearing officer can use safeguards to ensure confidentiality. For example, the hearing officer may issue a protective order or obtain the commitment of the parties receiving the material to limit its distribution. As an additional safeguard, all copies of such material should bear a prominent statement of the limitations upon its distribution.

### **C. Pre-Hearing Statements and Settlement Conferences**

1. On motion by a party or by the hearing officer's own order, the hearing officer may schedule a pre-hearing conference. Any pre-hearing conference should be scheduled with due regard for the convenience of all parties, and allow reasonable notice of the time, place, and purpose of the conference to all parties. A conference should be held in person and on the record, unless the hearing officer concludes that personal attendance by the hearing officer and the parties is unwarranted or impractical; in this instance, the conference may be held by telephone or other appropriate means. Among the topics that may be included in a pre-hearing conference are:
  - a. Identification, simplification and clarification of the issues;

## HEARING OFFICER DESKBOOK

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- b. Explanation of procedures, establishment of dates (i.e. for hearings or submissions), and explanation of the roles of the parties, representatives, and the hearing officer;
  - c. Stipulations and admissions of fact, and of the content and authenticity of documents;
  - d. Disclosure of the number and identities of witnesses;
  - e. Exploration of the possibility of settlement; and
  - f. Identification of such other matters as shall promote the orderly and prompt conduct of the hearing.
2. A hearing officer may require all parties to a case to prepare pre-hearing statements at a time and in a manner established by the hearing officer. Among the topics that may be included in a pre-hearing statement are:
- a. Issues involved in the case;
  - b. Stipulated facts (together with a statement that the parties have communicated in a good faith effort to reach stipulations);
  - c. Facts in dispute;
  - d. Witnesses and exhibits to be presented, including any stipulations relating to the authenticity of documents and witnesses as experts;
  - e. A brief statement of applicable law;
  - f. The conclusion to be drawn; and
  - g. The estimated time required for presentation of the case.
3. Early, informal resolution of disputes is encouraged. However, the hearing officer should not attend or preside at any settlement or alternative dispute resolution conferences, and settlement discussions shall not be made a part of the record. Instead, the hearing officer should contact the agency to ensure that such settlement is permissible, invite a motion to pursue resolution through alternative dispute resolution, then grant and record that motion in the record. Ordinarily, a stay should be issued upon request of both parties to pursue alternative dispute resolution.

### **Comment**

## HEARING OFFICER DESKBOOK

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The hearing officer may wish to discuss any guidelines for written testimony, and estimate the time required for the hearing. After the hearing or conference, it may be helpful to summarize the pre-hearing conference and any agreements reached, and mail copies to all parties.

### D. Subpoenas

1. Section [2.2-4022](#) provides that "[t]he agency or its designated subordinates may, and on request of any party to a case shall, issue subpoenas requiring testimony or the production of books, papers, and physical or other evidence."
2. Hearing officers are not presumed to have the power to issue subpoenas. However, the authority to issue subpoenas may be addressed in the appointment letter from the agency. If not addressed, the hearing officer should contact the agency to determine whether the agency has delegated this authority.
3. Any person who is subpoenaed may petition the hearing officer to quash or modify the subpoena. A hearing officer may quash or modify a subpoena where the evidence sought is irrelevant or inadmissible, or when the subpoena was illegally or improvidently granted. If a hearing officer refuses to quash a subpoena, the objecting party may petition the circuit court for a decision on its validity. If a party refuses to comply with a subpoena, the hearing officer may procure enforcement from the circuit court. The appropriate circuit court is determined by § [2.2-4003](#).

### **Comment**

The statutory right to a subpoena duces tecum is not unlimited. Section [2.2-4022](#) creates a right for the parties to subpoena evidence that is relevant and admissible as evidence in the administrative proceeding. See *State Health Dept. Sewage Handling & Disposal Appeal Review Board v. Britton*, 15 Va. App. 68, 421 S.E.2d 37 (1992).

In some agencies, the hearing officer must issue a subpoena upon request, subject to a motion to quash. In other agencies, the hearing officer may refuse to issue a subpoena absent a showing of relevance and need. In either case, to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the subpoena chooses to disclose it.

Even if reimbursed for travel expenses and compensated by witness fees, a witness who is required to travel far from home will be inconvenienced at least, and may undergo severe hardship. Furthermore, subpoenas duces tecum may compel the transportation of bulky documents and may deprive a business of records and files needed for its daily operation. These burdens should not be lightly imposed. The

hearing officer may, in appropriate cases, and subject to agency rules, shift some of these burdens to the party seeking documents by permitting their inspection and reproduction on the premises where they are regularly kept. The hearing officer also may encourage agreements between the parties which provide for the submission of copies of specified material at the hearing, subject to verification procedures agreeable to the parties.

Sometimes subpoenas will be requested for material the hearing officer has previously ruled need not be produced. Upon learning of this, the hearing officer should deny the request unless it appears that the earlier ruling should be changed. It is not usually worthwhile, however, to search the record of a lengthy pre-hearing conference or other pre-hearing actions to determine whether the matter has already been considered. The subpoenaed witness can always move to quash.

### **E. *Ex Parte* Communications**

1. In order to ensure an impartial and fair proceeding, *ex parte* communications with any party, counsel, or other interested person should be avoided from the outset.
2. Upon receiving an *ex parte* communication, the hearing officer should promptly make note of that communication for the record and bring it to the attention of all the parties involved. All parties should be afforded adequate opportunity to comment on the record regarding the communication.

### ***Comment***

Communications between the hearing officer and one party without the presence of the other party are always suspect. Some *ex parte* communications are innocent in the sense that the person approaching the hearing officer is unaware that this action is improper. When such an incident occurs, the hearing officer should prepare a written memorandum describing the communication and file it in the record. Some communications may not be related to the merits of the case, but they still generate controversy. For example, although a request for a postponement is not about the merits of the case, the request should not be granted without consulting the other party or parties. If the hearing officer believes the communication has no bearing on the case, it does not need to be recorded. However, these are rare instances, reserved for telephone calls confirming the date of a hearing and the like, and a hearing officer should err on the side of recording every communication to relieve any doubt of impropriety.

## **V. THE HEARING**

### **A. Failure to Attend Hearing**

1. A party who fails after proper notice to attend a pre-hearing conference should be notified of any rulings made during the conference and provided the opportunity to object.
2. In the absence of a party who, after proper notice and without good cause, fails to attend, the hearing officer may proceed with the hearing and render a decision.

#### ***Comment***

Although a hearing officer may proceed with a scheduled conference if one party fails to appear, hearing officers are encouraged to delay ruling until the absent party has been consulted.

A hearing officer may delay the hearing while trying to find the absent party. After hearing a case in which a party fails to attend, the hearing officer may hold the record open until the report is issued to the agency. Unless otherwise limited in the agency's rules, it is in the discretion of the hearing officer whether to reconvene the hearing. If the party who failed to appear provides a reason for such absence, which, if proven, would constitute good cause, a hearing officer who still has authority over the case may reconvene the hearing. A hearing officer's determination of good cause should not be made ex parte.

### **B. Written Statements**

A hearing officer may allow written statements of a witness to be admitted into the record and should direct parties to exchange all written statements in a reasonable time before the hearing. Prior exchange of written statements allows parties to subpoena those submitting the statements for cross-examination, or to object to the introduction of the written statement.

#### ***Comment***

In order to address comparability or credibility issues, the hearing officer may wish to establish guidelines for the submission of written statements prior to the hearing. Preparation and exchange of written statements can be very beneficial, especially in complex cases. In proceedings where written statements are involved, the hearing officer should require such information to be exchanged as part of the prehearing development of a case in order to allow parties an opportunity to subpoena witnesses

## HEARING OFFICER DESKBOOK

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for cross-examination. For credibility and cross-examination purposes, it is always preferable that a witness be present and testify at a hearing.

The probative weight of a written statement is left to the hearing officer's discretion.

See: *Baker v. Babcock & Wilcox Co.*, 11 Va. App. 419, 399 S.E.2d 630 (1990) (claimant was not denied his right to cross-examine a witness who submitted a written statement because the claimant failed to subpoena her or otherwise pursue cross-examination); *Klimko v. VEC*, 216 Va. 750, 222 S.E.2d 559, cert. denied, 429 U.S. 849 (1976) (claimant was not denied his right to cross examination and confrontation because he did not pursue them); *Virginia Real Estate Commission v. Bias*, 226 Va. 264, 308 S.E.2d 123 (1983) (findings of administrative agencies will not be reversed solely because evidence was received that would have been inadmissible in court).

### C. Evidence

Hearsay may be admissible, provided it is otherwise reliable. A hearing officer is directed by Virginia Code § [2.2-4020](#) (C) to: “receive probative evidence, exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttal, or cross-examination, rule upon offers of proof, and oversee a verbatim recording of the evidence, . . .”

See: *Mirabile Corp. v. Va. Alcoholic Bev. Control Bd.*, No. 2126-02-4, 2003 Va. App. LEXIS 493 (Ct. of Appeals Sept. 30, 2003) (admission of a photocopy of a minor’s identification card was not error as there was testimony that the photocopy was a true copy of the original, nor was the board required to call the minor, where neither the minor nor the original were available);

Hearsay is not inadmissible per se. Unless statute or agency rule requires otherwise, any evidence may be admitted if it appears to be relevant, reliable, and not otherwise improper.

#### **Comment**

The probative weight of hearsay evidence is left to the hearing officer's discretion. The hearing officer should ensure that rulings resulting from attempts to introduce evidence are explained on the record.

### D. Experts

Expert opinions may be admitted in administrative proceedings. Before the date of the hearing, all parties should exchange the names, addresses, and qualifications of any expert that may testify. It is within the hearing officer's discretion to qualify an expert and determine the weight afforded to expert opinions. Hearing officers are not bound by expert opinions presented to them, and at times must resolve conflicts between expert

testimonies. By statute, in civil cases, no expert or lay witness shall be prohibited from expressing an opinion on the ultimate issue of fact. (§ [8.01-401.3](#) (B)) However, this section prohibits such witnesses from expressing any opinion which constitutes a conclusion of law.

### **E. Standard and Burden of Proof**

1. No single standard of proof governs in all types of administrative hearings; the standard applicable to a particular type of hearing depends on the relevant statute or agency rule.
2. The burden of meeting this standard of proof may shift between the parties.

### **F. The Hearing Record and Transcript**

1. The record usually consists of:
  - a. A letter of appointment.
  - b. Notice of a party's request for a hearing.
  - c. Any rulings by the agency.
  - d. Notices of all proceedings.
  - e. Any pre-hearing orders.
  - f. Any motions, briefs, pleadings, petitions and intermediate rulings.
  - g. All evidence produced, whether admitted or rejected.
  - h. A statement of all matters officially noticed.
  - i. Proffers of proof and objections and rulings thereon.
  - j. Proposed findings, requested orders and exceptions.
  - k. A transcript or recording of the hearing.
  - l. Any initial order, final order or order on reconsideration.
  - m. Matters placed on the record after an *ex parte* communication.
  - n. Agency submissions to the hearing officer.

## HEARING OFFICER DESKBOOK

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2. The record should be organized, indexed, tabbed, and otherwise assembled so that easy reference to the record can be made and readily cited.
3. The hearing officer's responsibility for assembling and preserving the record begins when the hearing officer accepts the case assignment. It continues until the hearing officer submits a final decision or report.

### **Comment**

It is the hearing officer's responsibility to ensure that either a transcript or a recording of the hearing is made. If the hearing is to be recorded, the hearing officer should test the equipment before the hearing to ensure that it is operating correctly.

### **G. Open Meetings and the News Media**

1. In the absence of statute or agency rule to the contrary, hearings are open to the public.
2. During the course of a hearing, the hearing officer will be called upon to make decisions whether to sequester witnesses or to limit the distribution of evidence.
3. The hearing officer has the right to control media and spectators in the interest of providing a fair hearing and protecting the interests of all involved.

### **H. Recusal/Disqualification**

Subsection C of Section [2.2-4024](#) requires that a hearing officer who may be unable to act fairly and impartially withdraw from the case.

1. Any party may request the disqualification of the hearing officer by promptly filing an affidavit with the appointing authority upon discovering a reason for disqualification.
2. Possible reasons for recusal or disqualification include, but are not limited to:
  - a. Conflict of interest, including:
    - (i) having a financial interest in the outcome of the case;
    - (ii) the hearing officer's firm representing one of the parties involved;
    - (iii) a member of the hearing officer's family being employed by one of the parties involved.

## HEARING OFFICER DESKBOOK

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- b. Bias toward or against one of the parties involved;
- c. Prejudgment of one or more of the issues involved; or
- d. Disability.

### **Comment**

See the [Rules of Professional Conduct](#) (Rules of the Supreme Court of Virginia Part Six, Section II) and [Unauthorized Practice Rules](#) (Rules of the Supreme Court of Virginia, Part Six, Section I).

An impartial decision-maker is essential. While no one is totally free from all possible forms of bias or prejudice, the hearing officer must conscientiously strive to set aside preconceptions and rule as objectively as possible on the basis of the evidence in the record. In addition, and despite a hearing officer's subjective good faith, a hearing officer who has a financial interest (even if small or diluted) in the outcome of the case should not decide that case.

When a hearing officer questions whether or not to recuse himself or herself, it is preferable to choose recusal. If grounds for finding bias truly exist, then recusal is preferable to risking a later reversal and jeopardizing the validity of the entire proceeding. A hearing officer's unreasonable failure to recuse himself or herself may lead to permanent removal from the Supreme Court of Virginia's list of hearing officers. Requests to remove a hearing officer from a case should be made before the hearing.

## **VI. POST-HEARING ISSUES**

### **Duration of a Hearing Officer's Authority**

1. A hearing officer's authority begins with acceptance of the case assignment.
2. Subject to statute or agency rule, a hearing officer has authority over a proceeding until:
  - a. the agency revokes such authority; or
  - b. a decision or recommendation has been rendered and the appropriate period for appeal or reconsideration has expired.

## VII. THE DECISION/ RECOMMENDATION

### Drafting the Decision

- A. A hearing officer's decision or recommendation may contain the following:
1. Title page with the name of the case, type of decision, the date of issuance, and the name of the hearing officer;
  2. List of appearances, including the name and address of every person who entered an appearance and the persons or organizations represented;
  3. Service sheet, including the name and address of every person on whom the decision should be served;
  4. Findings and conclusions, and the reasons therefor, on all material issues of fact, law, or discretion presented on the record, including specific citations to the applicable portions of the record;
  5. An order as to the final disposition of the case, including relief, if appropriate;
  6. The recommended date upon which the decision will become effective, as appropriate, subject to further appeal; and
  7. A statement of the right to appeal, including any deadlines for appeal.
- B. In reaching a decision or recommendation, the hearing officer should consider the entire record, and the hearing examiner should refer frequently to specific evidence in the record in the opinion or report.
- C. The decision or recommendation should be written as soon after the conclusion of the hearing as possible, while all evidence and testimony are fresh in the hearing officer's mind. Section [2.2-4021](#) requires that hearing officers render a decision or recommendation within 90 days of the date of the proceeding or at a later date agreed to by the parties.
- D. The hearing officer should deliver the decision or recommendation to the parties and deliver the record as directed by the agency.

### **Comment**

The opinion or report accompanying a hearing officer's decision or recommendation should be concise and well reasoned. Its length and detail should be determined by the

## HEARING OFFICER DESKBOOK

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complexity of the issues involved. See [Appendix B](#) for further guidance in writing the decision/recommendation, excerpt from *Manual for Administrative Law Judges*, Morrell E. Mullens, 2001 Interim Internet Edition, William H. Bowen School of Law, University of Arkansas at Little Rock, which can be found at <http://ualr.edu/malj/malj.pdf>. The hearing officer should consult the agency to see if the agency prefers a certain format for notices and decisions.

## VIII. APPENDICES

**Appendix A** – Hearing Officer System Rules of Administration

**Appendix B** – The Decision (Excerpt from [\*Manual for Administrative Law Judges\*](#), Morrell E. Mullins, 2001 Interim Internet Edition, William H. Bowen School of Law, University of Arkansas at Little Rock)

## **Appendix A**

Hearing Officer System Rules of Administration

# Hearing Officer System Rules of Administration

## Rule One - Applicability; Definitions.

- A. These rules are promulgated in accordance with § 2.2-4024 of the Code of Virginia and shall govern the administration of the Hearing Officer System as established and implemented by Article 4 of Title 2.2-4000. The rules shall apply to the constitution of the hearing officers list and the appointment of all hearing officers required to be selected from the list on and after July 1, 1986.
- B. References herein to "he," "it" and "its" shall apply equally to "she," "him," "his" or "her." The singular shall include the plural.

## Rule Two - Appointment; Qualifications; Retention.

- A. **Appointment.** Any person desiring to be included on the hearing officer list must request appointment by submitting a letter of request and resume to the Executive Secretary of the Supreme Court of Virginia, 100 North Ninth Street, Third Floor, Richmond, VA 23219. The letter of request must contain information sufficient to satisfy the minimum qualifications as established by these rules.
- B. **Qualifications.** All hearing officers shall possess the following minimum qualifications for appointment to the hearing officer list:
  - 1. Active membership in good standing in the Virginia State Bar;
  - 2. Active practice of law for at least five years. In order to satisfy this requirement, the applicant must have completed five years of active practice of law with two of these years in Virginia. For purposes of these rules, the active practice of law exists when, on a regular and systematic basis, in the relation of attorney and client, one furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge and skill. If not presently engaged in the active practice of law, the applicant must, in addition to the requirements of this section, have previously served as a hearing officer, administrative law judge, or possess extensive prior experience with administrative hearings;
  - 3. Prior experience with administrative hearings or knowledge of administrative law;
  - 4. Demonstrated legal writing ability;
  - 5. Willingness to travel to any area of the state to conduct hearings; and
  - 6. Completion of one training program for administrative hearing officers sponsored by the Office of the Executive Secretary. Such programs will be conducted on an annual basis.
- C. **Failure to Appoint.** After reviewing the request for appointment, if the Executive Secretary concludes that the applicant should not be appointed to the hearing officer list, he shall so advise the applicant in writing specifying the reason for his failure to make the appointment. The

applicant may, within 10 calendar days of the postmark of the notification letter, request by letter reconsideration and a personal appearance before the Executive Secretary. Within 15 calendar days of receipt of such request, the Executive Secretary shall arrange for this meeting or reconsideration and shall advise the applicant of his decision.

- D. **Retention.** Upon compliance with the provisions of subsections (A) and (B) of this rule, the Executive Secretary of the Supreme Court of Virginia shall notify the applicant of appointment to the hearing officer list. Retention of the Hearing Officer shall be determined by the Executive Secretary.

## **Rule Three - Training.**

- A. **Continuing Education.** Once appointed to the hearing officer list, a hearing officer must satisfy the following minimum training requirements in order to maintain appointment to the hearing officer list:
1. Completion of one training program each calendar year. Such training programs for administrative hearing officers will be sponsored by the Office of the Executive Secretary and will be conducted on an annual basis.

If you are unable to attend the annual training program, you must notify the Educational Services Department of the Office of the Executive Secretary to request a waiver. If the waiver is granted, conference materials (video presentations and accompanying handouts) will be mailed to you, along with a "Certificate of Completion" form that must be signed and returned by the date specified. Failure to complete the continuing education requirements may result in removal from the list maintained by the Office of the Executive Secretary.

- B. **Specialized Training.** In order to comply with the demonstrated requirements of an agency requesting a hearing officer, the Executive Secretary may require additional specialized training before a hearing officer will be designated as qualified to be assigned to a proceeding before that agency. Any hearing officer desiring to be assigned to proceedings before such an agency must request instructions from the Executive Secretary on compliance with the specialized training requirements. The following is a list, which may from time to time be amended, of those agencies which require specialized training:
1. Special Education (Department of Education)
  2. Rate-Setting Procedures (Departments of Education, Corrections and Social Services)
  3. Department of Employee Dispute Resolution
  4. Department of Medical Assistance Services

## **Rule Four - Removal and Disqualification.**

- A. **Removal.** The Executive Secretary shall have the authority to remove hearing officers from the hearing officer list. Any agency or individual seeking removal of a hearing officer from the list shall submit such a request to the Executive Secretary in the form of a letter specifying the grounds

for removal. Within 10 calendar days of receipt of such request, the Executive Secretary shall forward, by certified mail, a copy of the request for removal to the hearing officer involved. Within 15 calendar days of the postmark of such certified letter, the hearing officer shall submit a written response. The response should address the allegations contained in the request for removal and should indicate whether an ore tenus hearing is desired. If an ore tenus hearing is not requested, the Executive Secretary shall rule on the request for removal within 15 days of receipt of the response from the hearing officer. He shall communicate his decision to the requesting individual or agency and to the hearing officer. If an ore tenus hearing is requested, the Executive Secretary shall convene such a hearing within 30 days of receipt of the request.

1. Procedure at Hearing. The following general procedure shall be followed at the ore tenus hearing:
  - a. The Executive Secretary shall convene the hearing, state the purpose and read the list of allegations.
  - b. The person making the request for removal shall be allowed to testify as to the acts or omissions that he believes constitute the need for dismissal. That person may call any other witnesses necessary to support the request.
  - c. The hearing officer shall be allowed to testify and produce any witnesses or evidence to rebut the request.
  - d. All testimony shall be taken under oath.
  - e. All witnesses are subject to cross-examination and may be questioned by the Executive Secretary.
  - f. The Rules of Evidence shall not be strictly applied.
  - g. The Executive Secretary may call any witnesses that he desires to hear.
  - h. Both parties may present oral arguments.
  - i. At the conclusion of the hearing, the Executive Secretary will render his decision or advise the parties of a date that such decision will be made. Such date shall not be more than 15 calendar days from the hearing.
2. Grounds for Removal. In considering requests for removal, the Executive Secretary shall consider allegations of:
  - a. Continuous pattern of untimely decisions; failure to render decision within regulatory time frames;
  - b. Unprofessional demeanor;
  - c. Inability to conduct orderly hearings;
  - d. Improper ex parte contacts;
  - e. Violations of due process requirements;
  - f. Mental or physical incapacity;
  - g. Unjustified refusal to accept assignments;
  - h. Failure to complete training requirements of Rule Three (A);
  - i. Professional disciplinary action.
3. Reconsideration. Upon notification of removal from the hearing officer list, the hearing officer may, within 10 calendar days of the postmark of the letter of notification, request reconsideration of the decision. Such request shall be in the form of a letter and shall contain any additional information desired for consideration. No ore tenus hearing shall be held. The Executive Secretary must render a decision on the reconsideration within 10 calendar days of receipt of the request for a reconsideration. Upon receipt of this decision,

the hearing officer shall have available judicial review in accordance with the Administrative Process Act.

- B. **Disqualifications.** A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law in the Commonwealth. Any party may request the disqualification of a hearing officer by filing an affidavit with the Executive Secretary of the Supreme Court of Virginia prior to the taking of evidence at the hearing. The affidavit shall state, with particularity, the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification. A copy of this affidavit shall be sent to the hearing officer. Within 5 calendar days of receipt of the affidavit, the hearing officer shall submit any response by affidavit to the Executive Secretary. The issue shall be determined not less than 10 calendar days prior to the hearing by the Executive Secretary. No ore tenus hearing shall be permitted. The filing of an affidavit for disqualification shall not stay the proceedings or filing requirements in any way except that the hearing may not be conducted until a ruling on the request for disqualification has been made. If the Executive Secretary determines that the hearing officer shall not be disqualified, the hearing shall proceed as scheduled. If the Executive Secretary determines that the hearing officer is disqualified, he shall appoint a new hearing officer so that the hearing can proceed as scheduled whenever possible.

## Rule Five - Selection.

- A. **Organization of List.** The hearing officer list will be maintained by geographic regions. The regions are composed as follows: Region One - Judicial Circuits 1, 2, 3, 4, 5, 7, 8, 9; Region Two - Judicial Circuits 17, 18, 19, 20, 31; Region Three - Judicial Circuits 6, 11, 12, 13, 14, 15; Region Four - Judicial Circuits 27, 28, 29, 30; Region Five - Judicial Circuits 10, 21, 22, 23, 24; Region Six - Judicial Circuits 16, 25, 26. Appropriate hearing officers will also be designated as having received any required specialized training.
- B. **Selection.** Upon request from the head of any agency, his designee, or from any entity authorized by statute to utilize the hearing officer list, the Executive Secretary, or his designee, will select a hearing officer from the appropriate region using a system of rotation. The hearing officer within the appropriate region with the oldest previous selection date will be named. In cases requiring specialized training, the same procedure will be followed except that the person selected must also have received the specialized training.
1. Requests for selection of a hearing officer should be submitted by contacting the Executive Secretary by telephone at 804/786-6455. When making the request, the following information shall be provided:
    - a. Name and address of requesting party;
    - b. Style of hearing;
    - c. Location (county or city) of the parties.
  2. When the request for selection is received, the Office of the Executive Secretary shall advise the requestor of the name and address of the selected hearing officer. All further contacts and arrangements with the hearing officer will be made by the requesting party.

- Should the first person selected be unavailable to conduct the hearing, the requesting party shall advise the Executive Secretary immediately and request another hearing officer.
3. Upon making the selection, the Executive Secretary shall, at least two days after the selection, confirm the selection by letter to the requesting party.

## **Rule Six - Compensation.**

- A. **Compensation.** The agency or entity requesting appointment of the hearing officer shall be responsible for all compensation of the hearing officer. Each agency or entity shall have authority to determine the rate of compensation.
- B. **Suggested Compensation.** In order to create greater uniformity, the following compensation guidelines are suggested. These guidelines are not mandatory, but are suggested as an indication of reasonable allowances.
  1. **Hourly rate**
    - Hearing time \$100.00
    - Administrative time 75.00
    - Clerical 25.00

**Hearing time** - hours reading the record, conducting the prehearing conference and the hearing, or writing the decision.

**Administrative time** - hours in research, composing and reviewing correspondence, and telephone calls.

**Clerical** - preparing and mailing correspondence, making arrangements for hearings, faxing, and other tasks normally performed by clerical staff.
  2. **Other expenses** - Hearing officers shall be reimbursed for actual expenses associated with travel to the hearing at the rates established in the state's Travel Regulations. If a hearing location is greater than 35 miles from the place of business, the hearing officer shall be compensated an additional \$100 for each round trip to a hearing site. Postage, telephone, fax, and photocopying shall be billed at the actual cost.
  3. **Billing** - All fees and billing arrangements shall be discussed and agreed to with the employing agency. All bills shall be itemized and calculated in increments of 0.1 hours. Agencies shall not be charged for telephone calls made where no business has been transacted. Bills are to be submitted to the agency receiving services.

Effective 7/1/05

## **Appendix B**

The Decision (Excerpt from [\*Manual for Administrative Law Judges\*](#), Morrell E. Mullins, 2001 Interim Internet Edition, William H. Bowen School of Law, University of Arkansas at Little Rock)

### VIII. THE DECISION

After receipt of all supplemental material and briefs the ALJ should prepare the decision, the findings of fact and conclusions of law. Agency rules and practice will govern the details of how the ALJ submits the decision to the agency and serves it upon the parties. The notice of decision should provide for filing of exceptions and briefs.

Some agencies have authorized their Administrative Law Judges to make the agency's decision, subject only to discretionary review by the agency<sup>318</sup>. The title page of such a decision should state that it is an agency decision issued pursuant to delegated authority (citing the pertinent rules) and the notice of decision should describe how and when petitions for review may be filed. Any order attached to the decision should include a similar statement of delegated authority and should provide that, absent filing of a petition for discretionary review or review on the agency's own initiative, it will become effective as the final agency order after a specified time. The form for issuance of other decisions is similar, with such changes as are necessary to show that they are not final until affirmed by the agency or the agency review board.

The ALJ's jurisdiction usually ends upon the issuance of the decision, except that errors may be corrected by issuance of an errata sheet<sup>319</sup>. This should be used to correct serious errors of substance only, never to correct obvious typographical mistakes or errors already the subject of exceptions.

#### A. Oral Decision

In cases involving few parties, limited issues, and short hearings the ALJ may save substantial time by rendering the

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<sup>318</sup>See ACUS Recommendation 68-6, Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency, 1 CFR § 305.68-6 (1993). See also, e.g., 29 CFR § 2200.91(2000) (Occupational Safety and Health Review Commission); 17 CFR § 12.101, .106 (2000) (CFTC, reparation cases: "Voluntary Decisional Proceedings"). For an article discussing discretionary review by agencies, see Gilliland, *The Certiorari-Type Review*, 26 ADMIN L. REV. 53 (1974).

<sup>319</sup>Form 14 in Appendix I is a sample errata sheet.

decision orally -- if permitted by agency rules or policies. However, it must be emphasized that agency rules or policies control. The rest of this section is relevant only to the extent that the ALJ has authority, in the first instance, to render an oral decision.<sup>320</sup>

If the ALJ is authorized to issue an oral decision, the parties can be advised before the hearing to prepare for oral argument on the merits at the close of the testimony. After all evidence has been received and any procedural matters disposed of, the ALJ may recess the hearing for a few minutes to give counsel an opportunity to read their notes and prepare for oral argument. After listening to oral argument and rebuttal, the ALJ, perhaps after another short recess, may deliver the decision orally on the record.

This procedure obviously increases the risk of overlooking some material fact or legal precedent, but in a case simple enough to truly warrant an oral decision, that risk is not substantial. There are, moreover, compensating advantages in addition to the time saved. If witness credibility is involved the demeanor and the actual testimony of the witness are fresh in the ALJ's mind.

Some cases involving formal adjudications will be governed by the provision of the APA which entitles the parties to a reasonable opportunity to submit proposed findings or conclusions, and supporting reasons, before a recommended, initial, or tentative decision<sup>321</sup>. Advising the parties before the end of the hearing that an oral decision will be made at the close of the hearing, and that parties desiring to submit proposed findings and conclusions should be prepared to do so orally, probably meets this requirement<sup>322</sup>.

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<sup>320</sup>For some cases where the ALJ exceeded any authority to rule orally under agency rules or precedents in force at that time, see *Local Union No. 195, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry*, 237 NLRB 931, 99 LRRM 1098 (1978); *Plastic Film Products Corp. and Amalgamated Clothing and Textile Workers Union*, AFL-CIO 232 NLRB 722, 97 LRRM 1313 (1977).

<sup>321</sup>5 U.S.C. § 557(c) (1994).

<sup>322</sup> See, Charles E. McElroy, 2 NTSB 444, 1973 NTSB Lexis 30 (Order EA-499, Docket No. SE-1772) (1973). However, it should be noted that this opinion seems to focus on compliance with the

Sometimes, agency rules expressly authorize oral decisions. The Rules of Practice of the National Transportation Safety Board, for example, provide that "The law judge may render his initial decision orally at the close of the hearing . . . except as provided in § 821.56(b)." <sup>323</sup>

When an oral decision is issued from the bench the transcript pages upon which the oral decision appears constitute the official decision. No editing except typographical corrections should be made. A footnote should be inserted after the decision stating, in effect: "Issued orally from the bench on \_\_\_\_\_ in transcript volume \_\_\_\_\_ at page \_\_\_\_\_ through page \_\_\_\_\_ ." <sup>324</sup>

## B. Written Decision

Most cases, because of their complexity, the size of the record, the number of parties, or the number of issues, do not lend themselves to oral disposition. The following discussion is directed to the drafting of written opinions, although some of the suggestions may also be applicable to oral decisions.

Ideally, the ALJ starts planning the decision when the case is assigned. Each procedural step, including learning and shaping the issues, determining what evidence is needed, arranging for and obtaining essential material, and conducting the hearing, should be aimed toward producing a clear, concise,

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agency's rules.

<sup>323</sup> 49 CFR § 821.42 (2000). For some other examples of agency rules authorizing the ALJ to render a decision orally, see 7 CFR § 1.142(c) (2000) (Department of Agriculture); 46 CFR § 201.161 (2000) (Maritime Administration, referring to decision "whether oral or in writing").

<sup>324</sup> For examples of agency rules which expressly deal with the transcript of an oral decision, or otherwise reducing an oral decision to writing, see 7 CFR § 1.142(c)(2) (2000) (Agriculture: copy to be excerpted from the transcript and furnished the parties by the Hearing Clerk); 39 CFR § 961.8(g) (2000) (Postal Service: written confirmation of oral decision to be sent to the parties); 49 CFR § 821.42 (d) (2000) (NTSB, copy excerpted from transcript and furnished to parties).

and fair record<sup>325</sup>. Any weakness or delinquency in these earlier steps makes the final task more difficult.

Still, the most difficult writing problem usually occurs when the ALJ, facing an onerous deadline, assembles the transcript, exhibits, notes, and briefs, and starts to put down on paper the findings and conclusions. Each ALJ differs in writing habits, but all ALJs should strive constantly for improvement.

Some aspects of decision-writing, like any other form of composition, probably cannot be "taught," at least not in the sense of learning some rote formula or mechanical "rules" which will make the ALJ rival Oliver Wendell Holmes as a wordsmith. All of us probably have harbored mild envy, at one time or another, toward a colleague who seems to have a natural talent for writing. There are ALJs who seem to have a remarkable ability to organize the material, and to use language in a way which converts a thick, jumbled record into a coherent decision where everything falls into place, capturing the essence of what happened and what the case is about, and how it should be decided. Such a decision leaves the reader with a sense of inevitability -- that this was the only way that this particular decision could have been written. Most judicial opinions fall considerably short of such an ideal, but it is a goal worth keeping in mind. Unless the ALJ is simply a genius, however, it takes considerable effort and experience to attain such a state of craftsmanship.<sup>326</sup>

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<sup>325</sup> Form 23 reflects one Judge's innovative effort to keep the record and materials organized by using the ongoing computer revolution. In complex cases, Judge Tidwell, U.S. Claims Court, sometimes issues an order requiring parties to supplement their usual paper filings by providing the court with electronic copies (on floppy disk) of filings which are greater than two pages in length. Using the search capabilities of word processing programs such as WordPerfect, Judge Tidwell is able to locate information and points in the materials much more efficiently than otherwise could be done by trying to visually scan hundreds of pages of material. Letter from Judge Moody R. Tidwell, U.S. Claims Court, dated April 3, 1992, to Morell E. Mullins.

<sup>326</sup> For several articles on this subject, see Borchers, Patrick, *Making Findings of Fact and Preparing a Decision*, 11 J.NAALS 85 (1991) [cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7

In the meantime, there are certain approaches, procedures, and tools that may help to make deciding and writing the case easier. Some of these will be the focus of the rest of this chapter.

### 1. Format

No rigid structure can be prescribed for all written decisions, but some uniformity in basic outline is customary. Every decision should contain certain preliminary material, including a *title page* with the name of the case, the type of decision (e.g. initial decision or recommended decision), the date of issuance, and the name of the ALJ. If the decision is long, there should be a *table of contents* and *headnotes* that summarize the principal issues and the decision. Also, a list of *appearances* should be included, with the names of all persons and organizations who entered an appearance and the persons and organizations represented. The name and address of each person on whom the decision is to be served should be included on a *service sheet*, usually attached at either the beginning or end of the decision.

The form of the text depends largely on the nature of the case, agency practice, and the ALJ's style. The following suggestions may be helpful:

(a) The opening paragraphs should describe succinctly what the case is about. They may include a summary of the prior procedural steps and the applicable constitutional provisions, statutes, and regulations.

(b) Although the relief requested by the parties may be described in the introduction, *detailed contentions should not be recited*. These lengthen the opinion unnecessarily since, if they

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(1997)]; Michael Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151 (1997); Patrick Hugg, *Professional Legal Writing: Declaring Your Independence*, 11 J. NAALS 114 (1991)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7 (1997)]; Patrick Hugg, *Professional Writing Methodology*, 14 J. NAALJ 165 (1994); Harold H. Kolb, Jr., *Res Ipsa Loquitur: The Writing of Opinions* 12 J. NAALS 53 (1992)[cited in Frost, *The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact and Conclusions of Law*, 17 J. NAALJ 151, 171, n. 7 (1997)]; Irvin Stander, *Administrative Decision Writing*, 10 J. NAALJ 149 (1990).

are material and relevant, they must be set forth in detail in discussing the merits. Not observing this proscription is a common failing in opinion writing.

(c) If proposed findings and conclusions have been submitted, the ruling on each of them should be apparent from the decision,<sup>327</sup> so the ALJ does not necessarily need to refer to each of them specifically<sup>328</sup>. Likewise, insignificant or irrelevant issues raised by the parties need not be addressed specifically but can be disposed of with a statement that all other questions raised have been considered and do not justify a change in the result<sup>329</sup>. However, a ALJ must be extremely careful in applying this principle. If the agency or a reviewing court disagrees about the significance of a particular issue, remand may result.<sup>330</sup>

(d) The decision should include specific findings on all the major facts in issue without going into unnecessary detail.<sup>331</sup>

(e) The ALJ should apply the law to the facts and explain the decision. Whether the facts, law, and conclusions should be combined or placed in separate sections of the decision depends on the agency's requirements, the ALJ's style and such other factors as the type of case and the nature of the record.

(f) The decision should end with a summary of the principal findings of fact and conclusions of law. In addition to making specific findings and conclusions, there should be ultimate findings framed in the applicable statutory or regulatory

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<sup>327</sup>*Cf.*, 5 U.S.C. § 557(c) (1994).

<sup>328</sup>*Transcontinental Coach Type Service Case*, 14 CAB 720 (1951). *Cf.*, *Michigan Consol. Gas Co. v. FPC*, 203 F.2d 895 (3d Cir. 1953).

<sup>329</sup>*In Northwest Air Service, Operating Authority*, 32 CAB 89, 97-98 (1960), the Board denied a motion requesting a specific ruling by the ALJ on each proposed finding. For a similar holding, see *Allegheny Segment 3 Renewal Proceeding*, 36 CAB 52, 54, n. 3 (1962).

<sup>330</sup> See, e.g., *Affiliation of Arizona Indian Centers, Inc. v. Dept. of Labor*, 709 F.2d 602 (9th Cir. 1983); *P&Z Company*, 6 OSHC (BNA) 1189, 1977 OSHD P22,055 (1977).

<sup>331</sup>See e.g., *People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council*, 266 N.W. 2d 858 (Minn. 1978).

language.<sup>332</sup>

In a case involving many issues or complicated facts, the decision can be divided into labeled sections and subsections, with appropriate titles and subtitles. This will usually make reading, studying, and analysis of the decision easier and quicker. These divisions, with their titles, should be set forth in the table of contents.

Frequently, adopting a framework, or outline, for the decision with appropriate headings before drafting the decision will make organizing the record, deciding the issues, and writing the conclusions easier and clearer. This outline can, and probably should, change as the decision-making progresses.

(g) Footnotes should be used for such material as citations of authority and cross-references, but rarely for substantive discussion. Footnotes on each page are preferable to a numerical listing of notes (endnotes) at the end of the opinion or in an appendix. The latter arrangement is inconvenient for the reader and hinders careful reading of the decision.

(h) Citations must be sufficiently detailed to enable the researcher to find the source without difficulty. This can be assured by using a standard reference work.<sup>333</sup>

(i) Maps, charts, technical data, accounts, financial reports, forecasts, procedural details, and other germane background material too lengthy to be included in the text may be attached as appendices.

(j) In many cases the ALJ issues an order or proposed order. In some cases other actions are appropriate. For example, in franchise cases, a certificate must sometimes be issued or amended. Such documents should usually be added as

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<sup>332</sup> Expressly setting out "ultimate" findings in words which track the statutory language or criteria is a precaution which is strongly advisable because there are older Supreme Court cases which suggest that such findings cannot be inferred from the decision's other findings and conclusions. See, *Yonkers v. United States*, 320 U.S. 685 (1944); *Wichita Railroad v. Public Utilities Commission*, 260 U.S. 48 (1922). But see, *Penn Central Merger Cases*, 389 U.S. 486 (1968).

<sup>333</sup> *E.g.*, A UNIFORM SYSTEM OF CITATION (17th ed. 2000), commonly referred to as the "Harvard Blue Book." A recent competitor to the Harvard Blue Book is Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual* (Aspen L. & Bus. 2000). The latter publication is updated at [www.alwd.org](http://www.alwd.org)

supplements to the decision.

## 2. Research

The ALJ must study the record and make an independent analysis of the facts and contentions. This requires careful examination of legal and policy precedents of the agency and of the courts.

In some agencies technical assistants may be available to Administrative Law Judges to help analyze and cross-index detailed or complicated data. At other agencies law clerks are available to provide this help.<sup>334</sup>

In researching agency decisions the ALJ should cover those not yet published in the bound volumes of the official reports. Many agencies have a section charged with indexing and digesting decisions and orders; the ALJ should enlist its help in finding relevant agency authority. Some agencies maintain a list of all their cases appealed to the courts and supply their ALJs with current copies.<sup>335</sup>

The ALJ may also seek the advice of the senior ALJs of the agency, who may recall a relevant case that has escaped the attention of other researchers. Of course the standard research texts should also be used -- notably the commercial services, texts, and law reviews. Moreover, the ALJ must take advantage of the on-going revolution in electronic data bases and computer-based electronic research. Today's commercially available services, such as Lexis® and Westlaw®, and websites maintained by agencies themselves, enable a user to conduct legal, and other, research in ways which simply would not have been feasible for a decision-writer laboring under a heavy caseload and time deadlines ten years ago. For example, an ALJ using computerized legal research literally could have at the fingertips every case decided by a particular agency, if the agency's cases are in the relevant data base. Every case "in the computer" mentioning a particular regulation can be retrieved with a few strokes on a keyboard. Or, an ALJ could locate almost every reference in the

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<sup>334</sup> For an article dealing with legal and technical assistants, see Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 ADMIN. L.J. 107 (1987).

<sup>335</sup> See, e.g., cases collected by the now-defunct CAB, in its *Compilation of Court Cases of the Civil Aeronautics Board*.

CFR (except perhaps the changes which have only been recently published) to a term like "in camera." Research that took hours, or simply could not have been done without poring for days over printed materials, can be finished in minutes, using computerized legal research. The main problem, of course, is that the cases or other materials for which the ALJ is searching must first be in the particular data base. Although noncommercial Internet research tools are becoming increasingly available, their data bases generally do not go back as far, and are not as complete as, the commercial data bases.

Another convenient source of information about relevant facts, policy, and law is the briefs of the parties. Proposed findings of fact and conclusions of law, if reliable, can save the ALJ time and effort. Of course, the ALJ must consider the reliability of counsel or the party, or both. But it is certainly acceptable to make proper and careful use of proposed findings and conclusions.<sup>336</sup>

Although this use of counsel's briefs and arguments is beneficial, the ALJ alone is responsible for the decision. The ALJ must use the utmost care to be sure that findings of fact are supported by the record and the conclusions of law by reliable precedent. This may require study of the legislative history of relevant statutes or review of the law of another agency which regulates a similar industry or activity.

### **3. The Decisional Process**

The cornerstone of the formal administrative process is the principle that the decision of the Administrative Law Judge is an independent intellectual judgment, based solely upon the applicable law (including agency regulations and precedent) and the facts contained in the record. This has several consequences.

Unless the material is properly entered into the record of the case, the ALJ should not consider public or private statements of agency members, Congressmen, congressional committees, or administration officials. Other than statements that are considered part of the legislative history of the relevant statute, the only non-record pronouncements of government officials relevant to the decision are *official* and *operative* pronouncements -- agency rules and decisions, but not policy statements by the agency members; current Executive Orders, but not speeches by administration officials; statutes and relevant legislative history, but not newspaper interviews of

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<sup>336</sup> See, e.g., *Schwerman Trucking Co. v. Gartland Steamship Co.*, 496 F.2d 466, 475 (7th Cir. 1974).

Congressmen.

Such statements, however high the source, are normally made without benefit of the facts and arguments developed in the hearing process. Still more important, in many cases the APA would prohibit the use of matters which are not on the record. "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title."<sup>337</sup> Even if the proceedings are not controlled by the APA's statutory limitations, it is still the better part of judging to avoid basing a decision on anything extraneous to the record.<sup>338</sup>

A few words are necessary concerning the relationship which the decision should bear to the established policies of the agency. It is the ALJ's duty to decide all cases in accordance with agency policy.<sup>339</sup>

This duty can be especially perplexing in at least two types of situations. First, court decisions (other than those of the Supreme Court) may have found the agency's policy or view to be erroneous, but the agency disagrees, and announces its "nonacquiescence," at least outside the circuit where the unfavorable decision was rendered. In this case, the agency takes

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<sup>337</sup> 5 U.S.C. § 556(e) (1994). This section also provides for official notice.

<sup>338</sup> See, *Home Box Office, Inc., v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (rulemaking). *But see*, *Action for Children's Television v. FCC*, 564 F.2d 468 (D.C. Cir. 1977) (rulemaking); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (rulemaking). While the cases cited here involved rulemaking of one sort or another, and (in the main) ex parte contacts at agency head level, the point in the text remains the same. The administrative law judge's use of extra-record materials is likely to provide colorable grounds for appeal, at the very least.

<sup>339</sup> "Once the agency has ruled on a given matter, [moreover,] it is not open to reargument by the administrative law judge; . . . although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions." *Iran Air v. Kugelman*, 996 F. 2d 1253, 1260 (D.C. Cir. 1993), (opinion by Judge Ruth B. Ginsburg), quoting Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 12-13 (1973).

the position that the ALJ is bound to apply the agency view if the agency has authoritatively declared nonacquiescence<sup>340</sup>. Nonacquiescence has been strongly criticized by some reviewing courts.<sup>341</sup>

Second, the ALJ may have to decide a case under statutory criteria which are open-ended, such as "public interest," and the

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<sup>340</sup> See *Insurance Agents International Union*, 119 NLRB 768 (1957). As described in an article in 1998, "Non-acquiescence is a policy of federal administrative agencies in which the agency, rather than appealing a court decision which is unfavorable to the agency, chooses to ignore it. In the context of Social Security disability claims, this has been a bone of contention for many years." Joyce Krutlick Barlow, *Alcoholism as a Disability Under the Social Security Act - An Analysis of the History, and Proposals for Change*, 18 J. NAALJ 273, 290, n. 97 (1998).

<sup>341</sup> *Ithaca College v. NLRB*, 623 F.2d 224 (2d Cir. 1980). More recent cases continue to criticize non-acquiescence. See for example, *Rogers v. Chater*, 118 F. 3d 600, 602 (8th Cir. 1997) ("The Commissioner's policy of non-acquiescence is flagrantly unlawful.") (dicta). For a case which recognizes that the ALJ is somewhat whipsawed if an agency is "nonacquiescent," see *Hillhouse v. Harris*, 547 F. Supp. 88, 93 (W.D. Ark. 1982), aff'd, 715 F.2d 428 (8th Cir. 1983) (referring to ALJ being in the position of trying to serve two masters, the courts and the Secretary of Health and Human Services). "Nonacquiescence" has generated a substantial number of law review articles, among them, Diller & Morowetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Estreicher & Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990); Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664 (1993); J. Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989) Weis, *Agency Non-Acquiescence: Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845 (1987); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985).

agency's decisional precedents are policy-intensive, rather than strictly legalistic. On the one hand, if the ALJ operating under such a regime can discern the agency policy, then the ALJ's decision must adhere to that policy. On the other hand, if the parties have introduced evidence or arguments not previously considered by the agency, or if there are facts or circumstances indicating that reconsideration of established agency policy may be necessary, the ALJ has not only a right but a duty to consider such matters and rule accordingly.

Moreover, although the ALJ should follow agency policy and the law, the ALJ's decision may be the last opportunity to call the attention of the agency (or the courts if the agency denies review) to an important problem of law or policy. An ALJ, while adhering to agency policies may well have a duty to the agency itself to include in his or her written opinion a temperate, careful discussion or analysis calling attention to a serious legal problem with present agency policies. The agency can ignore, or even criticize, an ALJ who is wrong, but if the agency concludes that the ALJ has identified a serious problem, the ALJ who is correct may prevent substantial inequity and injustice. Such action by an ALJ cannot be undertaken lightly but must reflect long and careful research and analysis. The ALJ's facts and reasoning, based on the record and the law, should be so clearly set forth that the agency will know exactly what has been done and why.

Turning to another delicate subject, the ALJ also must preserve the integrity of the decisional process in ways that are less obvious. For instance, the ALJ should never write a decision motivated by a desire to curry favor with the current heads of the agency, or based on considerations of the result which the ALJ thinks the current agency heads subjectively want. An ALJ's responsibility is to follow agency policy, or where necessary in a case of first impression, establish a policy consistent with existing agency policy. Attempting merely to predict future agency positions would be an abdication of this role. The whole purpose of the ALJ's decision is to give the agency the benefit of a considered decision after a proceeding specifically designed to elicit the truth. Nothing whatever is gained, and a lot can be lost, if an ALJ's decision seeks to set before the agency members only a mirror of their own thoughts, no matter how obtained.

It follows that the ALJ should not be swayed by any tentative finding of fact or tentative conclusion of law or policy contained in an order of investigation, an order to show cause, or any other action by which the agency has indicated how it may be thinking. Such premature findings may be based on

staff recommendations and, although necessary for procedural reasons, are not, cannot be, and are not intended to be, the agency's final decision. Indeed, to attribute that kind of finality to preliminary agency determinations would be to flirt with violations of procedural due process.<sup>342</sup>

Agency staff's views should be subjected to the same impartial scrutiny as the views of any other interested persons. The staff position is not automatically correct merely because it is put forward as an objective, untainted furthering of the public interest. It is the ALJ's responsibility to decide where the public interest lies, and the theory of the system presumes that this is best achieved by an impartial weighing of all facts and arguments.

Turning to more mechanical aspects of decision-making, the ALJ sometimes must exercise discretion in determining which issues in a complex case to consider first -- but once an issue that is determinative has been decided, the ALJ usually should proceed no further. It may be argued that if the agency disagrees as to the single decisive issue it will not have the benefit of the ALJ's independent analysis and recommendation on alternative issues. However, in a complex case the major issues may be so numerous that to decide all of them in their various combinations could be a waste of time and generate an unreasonably long and complicated decision. It will likely be quicker and easier for the agency (if it disagrees with the ALJ) to develop one alternative dispositive issue than it is for the ALJ to develop a dozen alternatives initially. Nevertheless, in a case where the decision is close on either of two determinative issues, or where two important policy or legal issues are raised, it may be advisable to decide both.

The ALJ should not uncritically accept the parties' contentions as to which issues are decisive. The parties' lack of skill, abundance of cunning, or excessive zeal, may cause them to make contentions which are incorrect as a matter of fact or law. After analyzing the record and reading the briefs the ALJ should make an independent determination of the decisive issues and focus the decision on those issues, regardless of the parties' emphasis.

A decision must not, however, rest upon a point which has not been raised at the hearing, in briefs, or in oral argument. Thorough preparation and proper management of the earlier stages of the proceeding should avoid this problem; but if, after the proceeding has been concluded, the ALJ finds an unexplored issue

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<sup>342</sup> See, *Withrow v. Larkin*, 421 U.S. 35 (1975).

which may be dispositive, supplementary briefs or memoranda, at a minimum, should be requested.

The ALJ should decide all the issues necessary to dispose of the case unless circumstances indicate that some or all should be deferred. A decision may be deferred, for example, if it would be affected by the outcome of an appeal pending before the agency,<sup>343</sup> or before the Supreme Court<sup>344</sup>. However, there may be countervailing constraints, such as statutory time limits within which to issue a decision. These can limit the ALJ's authority to defer rendering a decision.

If in the course of hearing and deciding the case the ALJ discovers facts that indicate agency action may be necessary on other issues, recommendations for institution of another proceeding may be appropriate. For example, in a case involving the desirability of extending weekend family air fares to other days of the week, the ALJ realized that the legality of all family fares should be investigated, and recommended that the agency start such a proceeding<sup>345</sup>. The agency did so.<sup>346</sup>

If the parties timely raise new procedural questions after the close of the hearing, such as a motion to strike all or part of a brief, the ALJ should rule on them in his decision if practicable. However, when the question must be ruled upon before decision, such as a motion to receive newly discovered evidence, the ALJ should rule upon it promptly, deferring issuance of the decision if necessary. But if the parties merely renew procedural motions or objections made and disposed of at the hearing, the ALJ should let the record speak for itself unless new matters are presented that require further action or discussion.

#### **4. Style**

Administrative cases sometimes involve complicated technical

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<sup>343</sup>See Flying Tiger-Additional Points Case, 58 CAB, 319, 322, 364, 365 (1971).

<sup>344</sup> This practice is, of course, common among the lower federal courts. See, e.g., U.S. v. Hayles. 492 F.2d 125 (5th Cir. 1974).

<sup>345</sup>Capital Family Plan Case, 26 CAB 8, 9 (1957).

<sup>346</sup>Family Excursion Fares E-11867 (CAB, Oct. 11, 1957).

matters, statistical concepts, intricate details and abstract ideas. The ALJ should strive to present these in a fashion that a layman can understand. Technical or abstruse words should be avoided if possible; if not, they should be explained in a footnote.

Decisions should be as brief as the subject matter permits. Complicated statistical, financial, and scientific questions frequently require detailed analysis, computations, or calculations. If these are included in the text, the opinion may become unnecessarily complicated, difficult to comprehend, and unreasonably long. It is frequently preferable to include only the basic findings in the text and place the detailed material in appendices.

Sometimes factual findings should be supported by specific citations to the record. If, for example, a factual determination is based on a single item of evidence, the transcript reference should be given; or if in a rate case the ALJ makes independent cost computations from the conflicting bases and theories of different parties, citations to the record should be included, showing the derivation of each computation. However, a determination on a major factual question frequently results from consideration of numerous items of testimony of varying weight. In such circumstances, excessive references to the record can be misleading to the reader. The substance of the decision must be anchored in the record, but the number and selection of citations to the record in some respects is a matter of style.

If the evidence is conflicting, but a finding is essential, the ALJ may be tempted to compromise by using weak phrases such as "it appears" or "it seems." The ALJ should not try to evade responsibility in this fashion. A finding must be positive.

It may occasionally be desirable to quote directly from the transcript of the oral testimony. This device can be effective for emphasis, but should be used carefully. Long verbatim excerpts from the transcript may be unclear and prolix, and editing them for the opinion may lead to charges of selective quotation.

With respect to a sometimes-overlooked resource which is available to the ALJ, it is frequently advantageous to borrow directly from a brief -- a document which is, after all, part of the record. If counsel has submitted an objective finding of fact or an articulate statement of law or policy with which the ALJ entirely agrees, it is wasted effort to recast it in the ALJ's own words. However, wholesale incorporation by reference of a party's entire brief and proposed findings, of course, ordinarily should be avoided.

It may sometimes be necessary for the decision to contain derogatory findings about a particular individual. If, for example, the testimony of a certain witness contradicts one of the findings, the ALJ may have to explain why the witness was not competent or credible. This should be avoided if possible without weakening the opinion; but if and when it is necessary, the explanation should be as temperate as the integrity of the decision will permit. Similarly, if it is necessary to correct an error or refute an absurd argument, the name of the person responsible should be omitted if that will not impair the coherence of the decision. Although the ALJ should not needlessly offend or insult any person, the decision should be scrupulous in stating the facts accurately and clearly.

Where credibility is in issue the reviewing authority may look to the ALJ's demeanor findings on the theory that the ALJ observed the witness and therefore was in the best position to evaluate the witness' credibility. Consequently, the ALJ should exercise extreme care in such findings, and avoid conclusory statements such as "from the witness' demeanor it is concluded that he cannot be believed." Instead, credibility findings should be supported by specific conduct or observations. For instance, a witness may be talkative and comfortable in response to all questions, except those addressing the issue on which credibility is doubtful, but whenever the questioning turns to that issue, the witness becomes evasive and starts looking away from the ALJ and toward counsel, as if for signals. At any rate, to the extent possible, findings grounded on witness demeanor should have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort under questioning. (For an article addressing this topic, see James P. Timony, *Demeanor Credibility*, 49 CATHOLIC U. L. REV. 903 (2000))

### **C. Writing the Decision**

The ability to conduct a hearing and decide a case fairly and accurately is crucial, but an inability to clearly and concisely explain the resulting decision impairs the value of all other aspects of the ALJ's performance. Writing is a difficult art, and despite high qualifications, writing experience, and training, an ALJ may have difficulty putting findings and thoughts on paper. Except for the fortunate few endowed with exceptional writing ability, each ALJ must constantly work on maintaining and improving this skill.

The inferior quality of much legal writing has inspired corrective action by many schools, writers, teachers, and

critics. Some federal agencies have attempted to improve their written materials. A recent example is National Labor Relations Board, *NLRB STYLE MANUAL: A GUIDE FOR LEGAL WRITING IN PLAIN ENGLISH* (Revised, January 2000).

In addition, there are numerous excellent books on style and writing simple English. Some of special relevance to lawyers and ALJs are set out in Appendix III.

Legal writing need not be complex or confusing. Judge John M. Woolsey's opinion in the *Ulysses Case*,<sup>347</sup> familiar to many judges, is an example of clear judicial writing:

II. I have read 'Ulysses' once in its entirety and I have read those passages of which the Government particularly complains several times. In fact, for many weeks, my spare time has been devoted to the consideration of the decision which my duty would require me to make in this matter.

'Ulysses' is not an easy book to read or to understand. But there has been much written about it, and in order properly to approach the consideration of it it is advisable to read a number of other books which have now become its satellites. The study of 'Ulysses' is, therefore, a heavy task.

III. The reputation of 'Ulysses' in the literary world, however, warranted my taking such time as was necessary to enable me to satisfy myself as to the intent with which the book was written, for, of course, in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic -- that is, written for the purpose of exploiting obscenity.

If the conclusion is that the book is pornographic that is the end of the inquiry and forfeiture must follow.

But in 'Ulysses,' in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic.

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<sup>347</sup>United States v. One Book Called Ulysses, 5 F. Supp. 182 (S.D.N.Y. 1933).

In writing on a difficult legal question involving a book written in an unconventional manner, Judge Woolsey's use of "I" is particularly striking. For a case of this type involving somewhat subjective standards, the use of the first person makes his thinking clear. It emphasizes that this decision, the law, and the book, *Ulysses*, deal with human beings. The only legal words in the excerpt quoted are "I hold, therefore." The language used is clear and simple English, and it tells clearly what he did personally to reach his decision. The decision is four pages long. The complete opinion contains a few unusual words and several long ones, but the entire opinion and the reasons for Judge Woolsey's action are easily understood by a layman.

Most Judges do not write with the elegance of Judge Woolsey. Sometimes, they simply do not have enough time to revise and rewrite. Nevertheless, they at least should strive to write simply enough so that anyone can understand them. Plain, simple English is more likely to convey a Judge's findings to the reader than complicated legalistic phrasing.

Nothing suggested in this book will be sufficient to give any ALJ the smooth and clear legal writing ability to which all judges aspire. Nevertheless, there are certain customs and patterns, which, if followed, can make the ALJ's decision shorter and easier to read.

Set out below, therefore, are several areas in which improvement is frequently needed. Study of this material can serve as a starting point for an ALJ seeking greater skill. No attempt is made to give a mini-course in writing or a review of grammar. This discussion deals primarily with matters of brevity, clarity, and stylistic quirks. Thorough discussions of these subjects and related matters of style and grammar will be found in books cited in Appendix III.

## 1. Brevity

**a. Needless Words.** Strunk and White's *The Elements of Style* is a good place to start. This book of only 85 pages is filled with clear suggestions for making writing more readable. The authors, emphasizing that one should omit needless words, say: "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in

outline, but that every word tell."<sup>348</sup>

**b. Short Simple Words.** Long, cumbersome, and confusing words and phrases are used frequently by professional and business people including judges, lawyers, and teachers. There are, no doubt, numerous reasons for this tendency, such as a desire for precision, a desire to impress a client, or the tendency to use highly technical words even though one is writing for the layman.

Sometimes, the longer word or phrase is merely a short word lengthened unnecessarily -- a kind of inflation. A classic example is substitution of *utilize* for *use*. Unfortunately, the tendency to *utilize*, rather than *use*, remains prevalent. A few examples of the "longer word" problem follow, but their number is legion.

| <i>Long</i>                          | <i>Short</i>     |
|--------------------------------------|------------------|
| finalize                             | finish, complete |
| effectuate                           | effect           |
| preplan, plan ahead, plan in advance | plan             |
| point in time                        | time             |
| at the present writing               | now              |
| are bound to be in agreement         | agree            |
| in the not too distant future        | soon             |
| have duly noted the contents of      | have read        |
| to the fullest possible extent       | fully            |
| along the lines of                   | like             |
| regardless of the fact that          | although         |
| under circumstances in which         | when             |
| in reference to                      | about            |
| in the event that                    | if               |

Use the longer words or phrases only if the shorter ones will not do.

**c. Redundant Phrases.** Lawyers habitually group two or more words meaning the same thing, such as *null and void; last will and testament; rest, residue, and remainder; transfer, convey, and pay over; or alter, change, or modify*. If a lawyer is trying to impress a client, well-known redundant phrases may be helpful, but even that is doubtful. Probably more clients are annoyed by needlessly repetitious language than are impressed by the use of stock phrases.

A judge needs only to explain to his readers -- the parties and their attorneys, the agency, the interested public, and

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<sup>348</sup> Strunk & White, *The Elements of Style* 23 (3d ed. 1979).

perhaps a reviewing court -- what was done and why. A reader does not like words that confuse or words that are used for display. A reader wants only to learn with minimum time and effort what the judge said.

**d. Short Sentences.** Long sentences are hard to understand. A timeless motto for writers is, "Short sentences can be read; long sentences must be studied."<sup>349</sup> The Judge should state facts and reasons in terms easily understood by the layman as well as by the lawyer. By the use of a few connecting words with short sentences it is frequently easy to make the story flow evenly. Even if the use of simple words and short sentences in an opinion results in a little jerkiness that a stylist might avoid, little is lost so long as the meaning is clear.

Tests over a seven year period show that the average sentence length in popular magazines has been kept between twelve and fifteen words<sup>350</sup>. Although a Judge may argue that a legal decision is more important and deals with deeper subjects than those in popular magazine articles, ease of reading and comprehension is surely as important in the documents that rule our lives as in those that entertain us.

Long sentences make writing hard to understand. The reader, either consciously or subconsciously, needs a break -- a rest. Furthermore, one thought per sentence is easy to understand.

Therefore, break up long sentences. Aim to keep average sentence length below twenty-five words. Try to separate a long compound sentence into two or more shorter sentences. A related problem is the questionable connection of two sentences by the word *however*:

He was driving only 30 miles per hour, however, this was too fast.

One way to revise such a sentence:

He was driving 30 miles per hour. This was too fast.

Occasionally thoughts are so interrelated that one sentence with several clauses and phrases may seem essential. However, if no matter how arranged it is still difficult to understand, then break up the sentence into three or four parts. Clarity is more

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<sup>349</sup> The revisor of the 1992 edition and the present edition cannot recall the source of this quotation, but reluctantly disclaims authorship.

<sup>350</sup>R. Gunning, *Technique of Clear Writing* 34 (1968).

important than stylish beauty.

Sometimes even breaking up a sentence or rewriting it does not clarify the meaning. The reason may be that the thinking is not sound or the facts are inconsistent. This applies not only to sentences but to paragraphs and even entire decisions. As Dean Landis said:

Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons on which they depend. . . .<sup>351</sup>

If a thought does not look right on paper, consider backing up for a rethinking or an entirely new approach. What you believe initially to be stylistic problems in expressing the idea or point actually may be symptoms of more basic defects in the substance of the idea or point.

**e. Paragraphs.** Although a paragraph is used to group thoughts, there is no rigid rule for length of a paragraph. A paragraph may vary in length from a one word sentence to many sentences of substantial length and complexity.

Paragraph length should depend on what the writer is trying to communicate. Still, the writer needs to seek a balance between extremes. On the one hand, large blocks of print scare the reader. On the other hand, several short paragraphs in succession may be annoying. Most good paragraphs have between two and ten sentences. If a paragraph seems too long, it is usually possible to divide it into two or more paragraphs without disturbing or distracting the reader.

## 2. Punctuation

Punctuation is the simplest device for making things easier to read. It is also an important road sign to the reader: i.e., making it easier to understand the intended meaning of a passage.

Punctuation is frequently left to a stenographer. This is a mistake. Even a stenographer who knows how to punctuate may not know precisely what you want to say. Punctuation can be used to emphasize, to clarify, and to simplify. Commas, semi-colons, periods, hyphens, dashes, and all the other punctuation symbols have specific purposes. If used correctly they will simplify

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<sup>351</sup>J. Landis, *The Administrative Process* 105 (1938).

writing and make your writing easier to read. Useful rules can be found in the U.S. Government Printing Office Style Manual,<sup>352</sup> and other grammar and style manuals. Rules vary somewhat, but reliance on any standard work should suffice to keep meanings clear and easy to understand.

### **3. Active or Passive Voice**

Use of the active voice rather than the passive voice is frequently preferable for two reasons. First, it saves words:

The convict was sentenced by Judge Jones.  
Judge Jones sentenced the convict.

Second, it is more likely to reveal who the actor is:

Drivers' licenses will be issued.  
The clerk will issue drivers' licenses.

In addition, the active voice is normally more direct and vigorous. The subject of the active-voice sentence is acting or doing something. Consequently, the active voice should be used in the absence of a good reason for using the passive.

This does not mean that the passive voice always should be avoided. To the contrary, passive may be preferable when the thing done is important and who did it is not, or when the actor is unknown or indefinite. The passive voice can also be used for emphasis, or when detached abstraction is desired.

### **4. Ambiguity**

Avoid the ambiguous. Like much advice, this is easier said than done. Often we do not realize that what we have said or written could be susceptible to more than one meaning. "This brief reads like a first draft dictated to a stenographer needing improvement." Sometimes we even refuse to see the ambiguity in our words when it is pointed out. At any rate, ambiguity slows and confuses the reader. It may even be used as a deliberate way to deceive.

Ambiguity may be especially likely when the writer uses a word with two meanings or two words with the same meaning near each other. For example, a lawyer or a judge should not use "exception," meaning an exclusion, in, or near, a sentence containing "exception" used as a legal term meaning a formal

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<sup>352</sup>U.S. Government Printing Office (2000).

objection. (If this shortcoming occurs frequently in a piece of writing, it may be a clue that the piece is a first draft, possibly dictated to a machine or stenographer.)

When a writer deliberately uses, for the sake of "variety," two words meaning the same thing, the potential for ambiguity is no less. Problems resulting from deliberately using different words meaning the same thing, especially in the same passage of a decision or document, are discussed in the section on Elegant Variation.

In related vein, some people cannot bear to repeat a name or proper noun anywhere near its original use. They feel somehow that they must use a pronoun. But sometimes the antecedent of a pronoun is not clear. If so, do not hesitate to strike the pronoun and use the name of the individual or object. Minor stylistic awkwardness is a small price to pay for major misunderstandings. A lapse in stylistic elegance is not as bad as creating the impression among your readers that you were completely oblivious to the meaning of what you have written.

After writing and rewriting a decision, an ALJ frequently becomes so familiar with its contents that it is difficult to detect ambiguous passages. It always helps to turn it over to a law clerk or an associate for a fresh look.

## 5. Stylistic Quirks

Avoid stylistic quirks. These small distractions divert the reader's attention from what is being said to how it is being said. The reader has enough distractions without the writer increasing them by efforts to be verbally eccentric or cute.

**a. Elegant Variation**<sup>353</sup>. Elegant variation is the use of variety for its own sake -- changing words and structure to hold the reader's attention and to avoid boredom. The following is an example:

The first *case* was settled for \$2,000, and the second *piece of litigation* was disposed of out of court for \$3,000, while the price of *amicable accord* reached in the third *suit* was \$5,000.<sup>354</sup>

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<sup>353</sup>H. Fowler, *A Dictionary of Modern Usage* 148-151 (2d ed. E. Gowers 1965).

<sup>354</sup>R. Wydick, *Plain English for Lawyers* 57 (1979).

But what has happened? The reader may wonder whether distinctions were intended between *case*, *piece of litigation*, and *suit*, and between *settled*, *disposed of out of court*, and *amicable accord*.

(Some writers have real difficulty avoiding elegant variation. These poor souls may be the by-product of high school and college English teachers' otherwise appropriate efforts to make their students use synonyms and produce "lively" writing. However, to any judge who is writing a decision, clear communication is primary, and liveliness is secondary.)

There are at least two ways, stylistically, to handle an elegant variation: (1) Repeat the same words or phrases. It is better to bore the reader than to confuse him. (2) Sometimes it is possible to put the repetitious material in an opening clause followed by two or more phrases or clauses that implicitly refer back to the opening clause. For example, the sample sentence could be reworded as follows:

"The first case was settled for \$2000, the second for \$3000, and the third for \$5000."

Although breaking a document, or passage, into lettered or numbered divisions may sometimes confuse the reader, this procedure, used carefully, can frequently assist the reader. "The complainant has: (1) not filed a response to respondent's motion to suppress; (2) ignored repeated admonitions to conclude discovery by the agreed-upon date; (3) been late in every filing required by the agency's rules . . . ."

**b. Litotes.** Some judges use litotes, affirmative statements expressed by denying the contrary, either as false courtesy to spare someone's feelings or to express a doubtful finding. Avoid litotes unless they are clearly needed. Use *kindly* rather than *not unkindly*, *naturally* rather than *not unnaturally*. George Orwell recommended inoculation against using litotes by memorizing this sentence: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."<sup>355</sup>

**c. Genderless English.** Avoiding the appearance of gender-bias in writing is worthwhile, but requires some effort. Moreover, the effort can be overdone, especially if the writer resorts to creating new words, like substituting "personhole" for "manhole." However, a little good faith effort often can avoid

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<sup>355</sup>G. Orwell, *Politics and the English Language*, in SHOOTING AN ELEPHANT AND OTHER ESSAYS 90 (1950).

passages like "the writer should know that his failure to demonstrate his sensitivity to gender-bias can result in his leaving an impression that he is totally ignorant about the way language conditions his behavior." Nevertheless, the writer is in a sometimes-difficult situation. If you use *his* for any pronoun, you may be criticized. *His* or *her* frequently sounds awkward, and substituting *their* may obscure the meaning.

At the very least, be aware of the problem. And certainly, be consistent in referring to males and females. If you refer to men by their last names or first names do the same with women. Try to omit irrelevant references to physical characteristics of either sex. Avoid patronizing and stereotypes. Do not say *fair sex*, *weaker sex*, or *the ladies*; say *women*. If you use *Esquire* on a service sheet, use it for all lawyers regardless of sex. Bias implicit in such phrases as *a manly effort* or *a weak sister* should be avoided. But don't overdo it by neutering everything in sight.

There are not always clear-cut answers to problems of gender and language, but so long as sex is irrelevant the judge should word the decision carefully to avoid any sexual bias.

## 6. Miscellaneous

**a. Names.** If referring to a person or organization, it generally is appropriate to set out the name in full the first time it is mentioned, followed parentheses containing a shorter version of the name such as a word, abbreviation, or shortened title. Thereafter the word, abbreviation, or shortened title can be used throughout the decision. In most situations, do not assume that the reader is already acquainted with the NLRB or AAA. (In fact, there could be several groups with the "AAA" initials.) Write out "National Labor Relations Board (NLRB)" the first time it is mentioned; treat the American Automobile Association similarly. If the names of persons or things are similar or confusing, the ALJ should devise short easily distinguishable names or descriptions (with parenthetical explanations, if necessary).

Personal honorific titles such as Doctor, Professor, or General ordinarily should not be used if they are irrelevant. A party may infer that the ALJ is assigning some weight to the title.

**b. Technical Terms.** Technical terms are frequently necessary when dealing with many subjects. An ALJ who is familiar with the subject may tend to use complex and technical language incomprehensible to many persons interested in his decision. The ALJ should resist this tendency and, if possible, use words and expressions comprehensible to a lay reader. If that is

impossible, unusual words and phrases should be defined. This can be done in a footnote or a special section for definitions. Alternatively, the ALJ may summarize in the main text and put the technical details and computations in an appendix.

**c. Attribution.** Excessive or needless attribution wastes a great deal of space, especially in judicial writing. As a consequence of realizing that anything in the written decision may have legal effect, the ALJ is tempted to overreact by repeating the source of every bit of information. There are several convenient devices for avoiding this problem. The ALJ may only need to state:

"Mr. X testified as follows:"

and continue with indirect quotations for a sentence, paragraph, or page without repeating the attribution.

The ALJ may place a summary of the testimony or statements of each witness under separate subheadings such as *Green's testimony* or *Smith's statement*.

Provided the result is clear, the ALJ may attribute the testimony early in the passage with no further reference until the last sentence, then say: "Mr. Jones concluded his testimony by stating that. . . ."

**d. Speech Tags.** These are journalistic expressions such as *he said*, used to attribute direct quotations. Ordinarily, speech tags should not be placed in the middle of a sentence. Also, a speech tag need not be repeated even for a long quotation. Once is usually enough.

**e. Ellipsis.** Ellipsis is the omission of a word or words that the reader will, by inference, understand or apply. It is frequently an easy way to avoid needless and boring repetition.

"X bank has \$9 million in negotiable municipal bonds, Y bank \$7 million, and Z bank \$4 million."

Ellipsis is also used to shorten quotations by inserting three periods (four if the sentence is ended) for the omitted material.

**f. Latin Terms.** *Et al.*, an abbreviation for *et alii*, is Latin for *and others*. *Etc.*, an abbreviation for *et cetera*, is Latin for *and other things*. *And etc.* is redundant. *Et al.* may be useful in legal instruments to indicate persons whose names are not known, or for the names of parties too numerous to mention.

*Sic* is Latin for *so* or *thus*. It should be used only to assure the reader that what is immediately preceding is correctly quoted when on its face it appears doubtful. It should never be used to criticize grammatical errors, to call attention to jokes, or (in place of quotation marks) to indicate an ironical use of a word. *Sic* may be used to indicate that a misspelling in quoted

material appears in the original.

**g. Write It Down.** Although this point is not directly related to the actual writing of opinions, the ALJ should cultivate the habit of marking such details as dates, names, addresses, telephone numbers, and even the time of day, on relevant documents. The ALJ should also record such matters in office appointment books, calendars, and professional diaries. This suggestion will not directly improve an ALJ's writing, but it will save time and effort in writing opinions. All judges realize the necessity for written records and exact dates, but many waste hours looking for and attempting to verify details.

### **7. Being Clever**

Dr. Samuel Johnson reportedly said: "Read over your composition, and when you meet with a passage that you think is particularly fine, strike it out." Although there are plenty of exceptions to this dictum, it contains some wisdom. Attempting to shine with cleverness is a good way to look foolish, and egocentric.

Once more, cleverness is NOT the first priority of decision-writing. Judges, like all writers, on occasion will have an inspiration or perform a brilliant bit of stylistic acrobatics on some obscure point, that viewed a few days no longer seems very brilliant.

The ideal is not to demonstrate your own brilliance. The ideal lies in the opposite direction. The ideal is a decision which takes so little effort to read and understand that the reader becomes unaware of the writer.

### **8. Rewriting**

The preceding suggestions of how any judge, ALJ or otherwise, can simplify and clarify the written decision should be helpful. Judges may find that a good way to ensure clarity and sound reasoning is to have an able colleague review, edit, and criticize the decision.

Finally, all judges know that the only way to write any document is to assemble the relevant material and the dictionary, thesaurus, stylebook, and guide to citations, and to write. Then rewrite, rewrite, and rewrite.<sup>356</sup>

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<sup>356</sup> For an excellent book which concentrates on the much-neglected topic of how to revise one's writing, see Ede, WORK IN PROGRESS: A GUIDE TO WRITING AND REVISING (St. Mary's Press, 1989).