Law & Inequality: A Journal of Theory and Practice

Volume 4 | Issue 1 Article 6

1986

Fact-Finding and Opinion Writing for Administrative Law Judges

Jean F. Greene

William Keppel

Marcia Gelpe

Fact-Finding and Opinion Writing for Administrative Law Judges

Panel Presenters

The Honorable Jean F. Greene
Federal Administrative Law Judge for the United States Environmental Protection Agency and Chairman of the National Conference of Administrative Law Judges of the American Bar Association.

William Keppel
Attorney-at-Law, Dorsey & Whitney.

Marcia Gelpe
Professor of Law, William Mitchell College of Law, and member of the Minnesota Pollution Control Agency.

The Honorable Jean F. Greene

I look around and see very experienced judges before me. I will do my best to be informative and amusing on the subject of findings of fact. My comments will focus on the question of what constitutes the findings of fact and the related issue of how detailed the findings of fact should be.

The findings of fact should be organized, concise, clear, and well-reasoned. A finding should not include absolutely everything in the record. It ought to consist of a set of basic facts that are needed in order to springboard to the conclusions of law. As an example of what I am talking about—or rather, what I am not talking about—let us look at a case decided under the Hazardous Materials Control Act. This Act regulates polychlorinated biphenyls, or PCBs. As of January 1, 1980, the Act requires all electrical equipment containing PCBs to be labeled with a sign that reads "Danger: PCBs."

On January 5, 1980, five days after the deadline, two inspectors from the United States Air, Water, and Soil Protection Agency, which has jurisdiction to enforce this Act, arrived at the Bear Paw Corporation to inspect the premises. Bear Paw Corporation is in the business of rehabilitating or rebuilding transformers. Bear Paw purchases them from such places as electric power plants. Some of the transformers are rebuilt; others that are beyond help are stored and eventually discarded.

When the inspectors arrived on January 5, they saw the following. One hundred transformers were lined up in the defendant's backyard outside its rehabilitation premises. Only ten of the transformers had labels of any kind on them. The first five transformer labels read "Danger." The second five read only "Caution: PCBs." None of the transformers were labeled with what the regulation required—"Danger: PCBs."

One of my colleagues made the following findings with respect to this situation.

FINDINGS OF FACT AND CONCLUSION OF LAW

> On or about January 5, 1980, Mr. John Jones and Mr. James Smith of the United States Air, Water, and Soil Protection Agency arrived at the respondent Bear Paw Corporation's place of business, which is located at Four Rabbit's Foot Road, Waterside, Illinois 10011, in order to conduct an inspection on that facility which they were authorized to do by law.
>
> The day was clear and neither Mr. Jones nor Mr. Smith had any difficulty in inspecting the respondent's facility. There were nine employees of the respondent present at the facility on the day of the inspection.
>
> Mr. Jones and Mr. Smith talked at length with Mr. Samuel Strong, who had been the manager of the facility since June 5, 1975. Mr. Jones and Mr. Smith showed Mr. Strong their United States Government identification and told Mr. Strong why they were there. He agreed to show them around, having evidenced a clear understanding of their purpose in being there.
>
> Mr. Smith and Mr. Jones counted 100 transformers on the facility. Of these 100, some 90 transformers did not appear to have labels. At least after careful examination of all of the transformers, they could not find labels on 90 of them. Mr. Smith and Mr. Jones found the label "Danger" on five of the tranformers. Another five, which were located immediately outside the doorway on the northeast corner of the shop, had labels on them which said "Caution: PCBs."
>
> In talking with Mr. Strong, Mr. Smith and Mr. Jones learned that the company had ordered labels for all the transformers on December 5, 1979, in anticipation of the deadline on January 1, 1980, but only these ten labels had arrived. He and Mr. Thomas Tough, the assistant plant manager, had installed the ten labels on the ten transformers that were standing closest to the doorway. They chose to label these transformers because it had snowed just before the labels arrived, and they did not care to venture further into the yard. It was easiest to label the ten closest to the door. Mr. Smith and Mr. Jones explained to Mr. Strong and Mr. Tough, who had come in just after the inspection had begun, that the labels on the transformers did not say what the regulation required, i.e., "Danger: PCBs."
>
> I have concluded that, as a matter of law, the five trans-

> formers standing by the northeast doorway of the respondent were labeled "Caution: PCBs," but were not labeled as they were required to be labeled by the regulation. I conclude that the respondent was in violation of the regulation. With respect to these transformers the respondent must pay a civil penalty in an amount to be discussed in a subsequent paragraph.
>
> As for the 90 transformers that were apparently not labeled at all, I conclude that those transformers were in violation of the regulation.

The approach illustrated above is very different from the one I would have taken. My rewritten version of these findings is as follows:

> FINDINGS OF FACT AND CONCLUSION OF LAW
>
> On January 5, 1980 the respondent had on its premises 100 transformers, none of which were labeled as required by law.
>
> Respondent Bear Paw Corporation is in violation of the law.

No other facts have to be found with respect to this situation except those two sentences.

In my colleague's findings of fact, all sorts of things were said, but much of the detail was unnecessary. If a judge is going to make all these findings, she has made *no* findings. Opinions which contain extraneous material are not helpful to the reviewing authority or anyone else attempting to understand the basis for the decision. Now I caution judges that if they omit this material as I do, any number of people will criticize them for not being very good judges because they did not write very much, and surely there must have been a lot more to say about the case. Indeed, in my own office I am criticized for not writing enough. In examining my findings, however, I cannot find anything else that is really necessary.

Expert testimony should be used with caution. I am very careful to include in the findings only that portion of the expert's testimony that is in her field of expertise. For example, an expert has testified about air pollution. I do not include in the findings the expert's testimony concerning the amount of smog in the air if the expert did not do her own calculations.

My philosophy is similar in the area of opinion writing. Seven pages is sufficient to convey a decision unless it is a major case. By major case I mean a proceeding with four or five hundred defendants and complicated law. My philosophy is to be very brief. I start with a statement describing the nature of the proceeding. Next I describe the status of the case. I will then state

what the parties contend and give my conclusion. I discuss only the evidence I find persuasive, not the whole record or everyone's testimony.

During my ten years as a judge, I have written only one opinion that exceeded eleven pages and only two opinions that exceeded seven pages. These cases involved fairly difficult technical material. My colleagues will write lengthy opinions—thirty, forty, and even fifty pages—which include facts, findings, and conclusions that I would have written in a few pages. Opinions that are too long waste time, facilities, secretaries, and other resources.

I believe it is polite, when a very large record exists, to recite briefly why the principal evidence the losing party cited to support her case is not relied upon. Also, I recite what I find particularly persuasive and sometimes what I find particularly not persuasive. I assume it will be understood that I do not rely on evidence which is not mentioned in the opinion.

The previous example demonstrates that my findings are very brief. I do not combine my reasons and my findings. I like the notion of having very sparse but right-to-the-point findings that leapfrog to the conclusions of law.

William Keppel

Being one of the non-judges here, it gives me great pleasure to say, "I dissent." I dissent in part with what Judge Greene told you about findings. I have been involved in adjudicatory hearings where the administrative law judge's decision was over 100 pages. In one case, the hearing involved a $1.5 billion pipeline and, in another case, a more than $1 billion power plant.

These hearings covered issues of the greatest complexity. For example, the hearing in the power plant case took five months—four days a week starting at 8:30 in the morning and running until 5:30 at night with an hour off for lunch.

I do not quarrel with the basic premise that findings should be concise. In appropriate cases, however, findings should be quite detailed because of the complexity of the issues, the nature of the subject matter of the proceeding, and the amount of money involved—in other words, where there is a high potential that the case is going to get into court.

The power plant case was before the Minnesota Supreme Court only months after it was decided by the agency.[1] In those cases, a prudent administrative law judge would make, and a pru-

1. Kilowatt Org. v. Department of Energy, 336 N.W.2d 529 (Minn. 1983).

dent counsel would urge the judge to make, some fairly detailed findings of fact to make it easier for the reviewing court to understand the basis for the decision on each material issue. An opinion may actually head off review proceedings if it is well written and detailed.

I also do not agree with Judge Greene's example concerning the transformers. Certain circumstances raised by the scenario may well have merited her colleague's detailed discussion. For example, there was a finding that Mr. Smith showed the inspector around the plant. If Smith's consent to the agency's inspection is an issue, and if I were the agency's attorney, I would want a finding that Mr. Smith showed the inspector around the plant. Similarly, if substantial compliance with the regulation is a defense, I would want a specific finding regarding the ten inadequately labeled transformers. If I were the attorney for Mr. Smith, I could argue that "Caution: PCBs" means the same thing to a reasonable person as "Danger: PCBs." While the agency may not accept that argument, a reviewing court surely may.

What I am saying is that findings should be made on all relevant issues that ultimately may come before the agency or a reviewing court. These issues include not only those necessary to decide whether the essential elements of a violation or claim have been proven, but also those related to any anticipated defenses. To some extent, you must ask yourself, who am I writing for? You are not writing only for yourself or even for the agency. You are writing for the parties, you are writing for the reviewing courts, and, to some extent, you are writing for posterity. You should take into account the audience and, of course, the nature of the issues. If the issue is simply what the labels said, then I do not quarrel with Judge Greene. If consent or substantial compliance or other defenses may be at issue, however, then findings should include statements of fact which will help the agency resolve these issues and will permit a reviewing court to understand what the agency did and why.

Part of our differences may also lie in that Judge Greene is talking about a two-part decision: one document entitled "Findings, Conclusion and Recommended Decision," and then a separate opinion explaining why certain issues were decided the way they were. Local practice is quite different in this respect. Typically, I see decisions reflected in a single document without a separate opinion. The explanation of the decision which Judge Greene referred to would be incorporated in the findings and conclusions (or would generally not be provided).

The essential question before us is, how much detail is required? The cases and the various administrative procedure acts show that a regurgitation of the evidence is not expected or desired. I agree with Judge Greene that a judge does not have to recount the testimony. Nevertheless, some level of fact—that is, something short of the ultimate facts of the case (which in my mind are closer to conclusions of law)—must be stated. They are not raw facts or testimony. They are facts, however, of a basic and underlying nature that support the ultimate factual findings which are usually stated in the language of the statute or rule.

It is also prudent to cite to the hearing record where a factual dispute exists so that the facts that support your findings are apparent. If you are going to do the work to review the record, I do not see why you would not support your factual findings, where underlying facts are hotly disputed, to citations in the exhibits or in the testimony. Pride in one's work product and the desire not to be reversed would dictate that decisions be bolstered as much as possible.

Perhaps the best way of determining how much detail is required is to look at the purposes the findings serve. In other words, the amount of detail required is that which is sufficient to satisfy the reasons for requiring findings. There are at least five such purposes. First, the reviewing court must be able to understand what the basis of the decision is and why it is so decided. The United States Supreme Court has stated that a reviewing court must judge the propriety of the administrative action solely on the grounds invoked by the agency in its findings, conclusions, and decision.[2] The court should not be filling gaps or substituting reasons if the agency has failed to do an adequate job in drafting its decision. Consequently, some detail is required for a court to understand what the agency has done and the basis for the decision.

A second reason for a degree of detail is to prevent courts from usurping administrative authority. If the findings and conclusions are inadequate, reviewing courts will be tempted to fill in the gaps as they would like them filled in. If you only provide a bare bones decision, you might find the courts supplying the basis for a different decision, and that is undesirable. The appropriate division of authority between courts and agencies would be better maintained if administrative law judges and agencies explained their decisions more fully.

A third reason for findings is to ensure careful decision mak-

2. Securities Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1947).

ing. It is my belief that by requiring an explanation of the basis and the justification for the decision, we are going to get higher quality decisions. When you have to substantiate your decision with detailed findings on each material issue, a justifiable and just decision will result. You may well find the decision should be different than you initially thought.

A fourth reason is to advise the parties as to the outcome of the case and why they won or lost, even though a bottom line or bare bones decision would have met the statutory or legal standards. Notions of fundamental fairness require that the basis for a decision be announced to the parties who may be adversely affected by it so that they do not have to guess. A well-drafted decision also aids the party who lost in deciding whether the next step of review is desirable. You will actually minimize the likelihood of judicial review (and of reversal) by a well-drafted and detailed decision.

Finally, detailed findings keep administrative agencies within their own jurisdiction. The ability of an agency to expand its jurisdiction will be reduced if it must provide written justification of each material finding in light of applicable statutory or regulatory guidelines.

If you look at why we have findings in the first place, some detail—even beyond the minimum which is legally required—is prudent. It also promotes an aura of fairness. I certainly urge the inclusion of detailed findings upon judges in cases that I am involved in because if I win, favorable detailed findings make the chance of reversal on appeal less likely. So I tend to encourage overwriting, figuring that the courts can sift out any chaff. Given the heavy workloads of most administrative law judges and their lack of support staff, I believe that I will better serve my client's interest by doing as much work for the judge as possible. Thus, I draft detailed proposed findings which are cited to the record. If I am successful, a favorable detailed decision is easier to defend in the courts. That helps the judge and that helps me and my client.

Marcia Gelpe*

It is a cardinal rule of any type of writing that you should write for your audience. Lawyers recognize this when they write opinion letters to clients or briefs for courts. These two types of documents are written differently. Similarly, judges in the state

* The opinions in this article are those of Professor Gelpe and not those of the Minnesota Pollution Control Agency. A version of this article was published in Minn. State Bar Ass'n. Ad. L. News, February 1986, at 1.

and federal courts understand that they are writing for the attorneys in the case and for attorneys in future cases. Administrative law judges write for the parties and for eventual court review, but they write mainly for an agency.

In most administrative law schemes, the decision of an administrative law judge in either an adjudication or a rule-making proceeding is to be referred to the agency responsible for the ultimate decision. While the agency is to give serious consideration to the administrative law judge's opinion, and in some cases very substantial deference to it, the ultimate decision rests in the hands of the agency. This is because the agency has certain responsibilities that the administrative law judge does not have. For example, in rule making it is the agency, not the administrative law judge, that is properly responsible for incorporating political factors into the decision. In adjudications, it is the agency, more than the administrative law judge, that sees all agency decisions and is responsible for consistency in the adjudicatory opinions over time.

Here are six guiding rules for what an administrative law judge's report should contain.

1. *Statement of the issues*. The report should state separately each issue that is being decided. Separation of issues is crucial if the next two recommendations are to be followed. In addition, a separate statement of each issue helps the administrative law judge and the agency officials to structure their opinions.

2. *Characterization of each issue*. Issues may be factual, legal, policy, or a mixture of two or all three. Agencies treat each type of issue differently. Thus, characterization of the issues in the report will help the agency.

The final administrative decision maker should accord greater deference to the report of the administrative law judge on factual issues than on policy issues. While the administrative law judge has expertise in factual determinations and operates in a situation well suited to determining the facts accurately, the final agency decision maker has both the political responsibility and the best access to information on the values of affected constituencies to make policy choices. In some cases, an agency may decide to accord great deference to the administrative law judge on legal issues, based on the value of having a neutral lawyer address such issues. On the other hand, the agency may sometimes prefer to rely on the expertise of its own legal counsel, particularly when the issue involves interpretation of the agency's own legal authority.

This can be illustrated by an example. In the environmental

area, a perpetual problem for regulatory agencies is distinguishing fact problems from policy problems. When a permit is issued for a garbage-burning power plant, one of the issues is the appropriate limit on emissions of toxic air pollutants. These emissions are not subject generally to set numerical standards. The question is whether the agency should limit these emissions and, if so, how stringently. There are four sub-issues. First, what harm do the toxic emissions cause? Second, what is the cost of the proposed level of control? Third, what level of control should be imposed to prevent the identified harm? This is not the end of the problem because, to a significant extent, no one has obtained or can obtain firm data on the harm of some pollutants. When the harm is uncertain a fourth issue faces the agency: what level of control should be imposed to prevent the possibility of harm from toxic emissions. There is a tendency to confuse these issues, that is, to phrase the question of what to do in the face of uncertainty as a question of whether harm has been proved or whether the proven harm justifies the control costs. A report by an administrative law judge that identifies and decides the issues as separate is most helpful to the agency.

3. *Role of the administrative law judge on each issue*. The administrative law judge's role in determining whether a specific fact has been shown is different from her role in determining whether the agency has made a reasonable policy choice. The administrative law judge's conception of her role is most likely to be unclear on policy choices. The administrative law judge may determine the agency made an impermissible policy choice, or the agency made a policy choice the judge views as unwise. The agency is entitled to treat these two decisions differently, so the administrative law judge must clearly state which type of decision is involved.

For example, in a rule-making proceeding for controversial rules in Minnesota, the administrative law judge must determine whether the agency has shown a need for the rule and that the rule is reasonable.[3] The determination of need will involve some factual issues. When considering factual issues, the administrative law judge's role is to see that the evidence bears out the agency's findings. On questions of policy, the administrative law judge has a more limited role: to determine whether the agency's policy was reasonable or unreasonable. This is not the same as deciding whether the policy is the best choice. In most cases, there is a range of reasonable choices. If an administrative law judge deter-

3. Minn. Stat. §§ 14.131, 14.14(2), 14.15(4)(1984 & Supp. 1986).

mines that the agency's policy choice is impermissible, the final agency decision maker must decide whether to go along with the administrative law judge's determination. The question for the agency is whether the administrative law judge held the agency's proposed choice impermissible because it was not reasonable or simply because the judge thought some other policy would be better. If it is the former, the agency is more likely to go along with the administrative law judge's position than in the latter case. Of course, even in the latter case, the agency decision maker may be convinced that the administrative law judge's policy choice should be adopted by the agency.

4. *Reasons*. It is very important that the opinion state the reasons for specific findings. The reasons may determine whether the agency decision maker accepts or rejects the findings.

Assume the issue in a rule-making proceeding on acid rain is the amount of acid in a lake that will kill certain fish. The agency may propose an acid level of four. Different testimony at the hearing before the administrative law judge might indicate that an acid level of three, five, or six kills fish. The report may set out the testimony and find that the appropriate level is five. In reaction, the agency staff says that the administrative law judge is wrong and that the best choice was four. The final agency decision maker must decide whether to agree with the report, with the staff, or to choose another number.

The immediate question is why the administrative law judge made the finding that an acid level of five kills fish. For example, the administrative law judge might have found that the quality of the testimony of the expert who said the appropriate level was five was better than the quality of the testimony of the others. The administrative law judge might have thought that expert seemed most confident, least shakeable, and most professional. In that case, the agency should agree with the report unless the staff gives specific reasons for disagreeing. Alternatively, the administrative law judge might have found that the expert whose testimony indicated the appropriate level is five had the best credentials. In that situation, the final agency decision maker is more likely to reconsider the issue than in the prior case. Credentials are a matter of paper record and agency personnel can review them as well as the administrative law judge can. As a third example, the administrative law judge might have found the testimony was conflicting and selected an average of the alternatives.[4] In that case, the agency

4. *See, e.g.*, Minnesota Power & Light Co. v. Minnesota Pub. Util. Comm'n, 42 N.W.2d 324 (Minn. 1983) (the court approved a Minnesota Public Utilities Commis-

would be most likely to take a fresh look at the issue. The agency's ability to pick a number out of the middle is as strong as that of the administrative law judge.

When the administrative law judge is looking at the reasonableness of a proposed rule, it is also important for the report to give specific reasons. For example, the report should specify whether the agency's proposed rule was found unreasonable because the agency's argument was circular, because the agency ignored a number of important factors, or because the agency could have taken a better path.

5. *Recommendations on policy choices*. The prior recommendations should not be read as suggesting that the administrative law judge give no independent opinions. An administrative law judge may think the path recommended by the agency is permissible (reasonable) but wrong. The report should state this. The administrative law judge should not strike down the proposed rule, but should state in the report that the rule is permissible but that it would be better to do something else. Again, this should be supported by reasons. An agency decision maker should value the independence and fresh look that an administrative law judge brings to an issue. While the administrative law judge's view is not legally binding, it may be influential.

6. *Specificity in findings and conclusions*. It is much easier to read and pay close attention to a report that is specific and brief. The more specific the opinion, the more precisely the agency can react. Findings of fact should not include restatements of the evidence. Any discussion of evidence should be in a discussion section. The report should include references to the record where it is important. It will help agency personnel find their way around a complex record.

If administrative law judges follow these recommendations, they will make the jobs of agency decision makers easier. They will also probably improve the quality of the ultimate decision.

---

sion finding that the agency reached by "taking a weighted average" of two recommendations).