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The Unseen Hand in Administrative Law Decisions: Organizing Principles for Findings of Fact & (and) Conclusions of Law

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THE UNSEEN HAND IN ADMINISTRATIVE LAW DECISIONS: ORGANIZING PRINCIPLES FOR FINDINGS OF FACT & CONCLUSIONS OF LAW

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I. INTRODUCTION

Unlike appellate decisions which abide by long-standing organizational and stylistic conventions, the form and vocabulary of administrative law decisions vary greatly from agency to agency. Granted, some basic consistency of content exists in that most federal and state agencies require "[a] final decision, determination or order adverse to a party in an adjudicatory proceeding [to be set forth] in writing [and to] state in the record ... *findings of fact and conclusions of law* or reasons for the decisions, determination or order."[1] Even so, administrative law decisions do not resemble one another nearly as much as appellate decisions do.

While there is substantial agreement among Administrative Law Judges (ALJs) that "findings of fact" are based on testimony or evidence and that "conclusions of law" are based on constitutional, statutory, procedural, or decisional law,[2] there is less consensus regarding the proper form and content of Findings or Conclusions or on

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[1]The West Virginia State Administrative Procedures Act on orders or decisions is typical in its requirements. It states: "Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by **findings of fact and conclusions of law.**" VA. CODE ANN. §29A-5-3 (Michie 1966) (emphasis added).

The Federal Administrative Procedure Act has similar requirements. It states:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--
>
> (A) **findings and conclusions**, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction relief, or denial thereof.

Administrative Procedures Act, §5, 5 U.S.C. §557(c)(3)(1996) (emphasis added).

[2]Irwin Stander, *Administrative Decision Writing*.J. NAALJ 149, 160-161 (1990).

the proper vocabulary of a decision. Some agencies and administrative law judges write Findings and Conclusions with almost enigmatic concision. For example, the Honorable Jean F. Greene wrote, as a finding of fact

> *"On January 5, 1980 the respondent had on its premises 100 transformers, none of which were labeled as required by law,"* and as a conclusion of law, *"Respondent BearPaw Corporation is in violation of the law."*[3]

Others write detailed Findings and Conclusions on the rationale that these details will enable the litigants and reviewing courts to understand the reasons for the decision. Some judges prefer enumerated Findings, some use narratives, some write principally for the interested parties, others for multiple or secondary audiences.[4]

To complicate matters still further, ALJs often rule on mixed questions of fact and law, a practice which blurs the distinctions between the two. Frequently, it is nearly impossible to distinguish between a *finding of fact* ("Claimant's decedent John Krawchuk, age 52, on or about May 10, 1973, was employed by the Defendant, The Philadelphia Electric Company. At the time his average earnings were $473.00 per week.") and a *conclusion of law* ("Claimant's decedent was employed by the Defendant, Philadelphia Electric Co., on or before May 10, 1973, earning average weekly wages of $473.00.")[5] And, just as frequently, Findings and Conclusions are organized in perplexing, seemingly random patterns.

These problems and others cause litigants, lawyers and agency reviewers to complain that they cannot understand the rulings and provoke reviewing courts to remand cases for clarification. Part of the

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[3]Jean F. Greene, *Fact-Finding and Opinion Writing for Administrative Law Judges*, 4 LAW & INEQ. J. 91, 93 (1986).

[4]RUGGERO J. ALDISERT, OPINION WRITING §6.4, at 73 (1990) ("[T]he style of writing [judicial opinions] . . . must be for the primary markets. However, to achieve maximum understanding in the broad secondary market, the opening should also be designed to assist users--lawyers, judges, researchers and law students.") In addition to its other merits, Judge Aldisert's book is a valuable compendium of received wisdom on the writing of judicial opinions.

[5]Stander, *supra* note 2, at 165-167.

problem seems to be that the writing and organization of these decisions are controlled by an unseen hand in the form of statutory requirements, agency regulations, supervisory fiat and, occasionally, personal preference. But, unless the judge provides some frequent and visible signals regarding form and content, readers must determine for themselves a decision's organizing principles.

Using a combination of on-the-job experience, in-house training sessions, format manuals, "model" decisions, professional seminars and publications, ALJs quickly learn to write their decisions according to their agency's requirements, but do so without the benefit of the well-understood and widely accepted conventions that control, for example, most appellate decisions. While no such equivalent convention is possible given the nature and number of administrative law decisions, many ALJs seem receptive to standardizing some decision writing practices (if only on an inter-agency basis) and to discussing recurring writing problems.[6]

Recently, the *Journal of the National Association of Administrative Law Judges* has published several articles on Findings and Conclusions that analyze the problems summarized above and suggest some remedies.[7] Building on those points and others, the following article analyzes selected Findings of Fact and Conclusions of Law and makes several recommendations for improving the readability of administrative law decisions.

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[6]MORELL E. MULLINS, MANUAL FOR ADMINISTRATIVE LAW JUDGES 103 (1993):

> 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 judge. . . .

The form of the text depends largely on the nature of the case, agency practice, and the judge's style. *Id., at 102-3.* Having made this last observation, Professor Mullins then offers ten different suggestions about the organization and content of administrative decisions. *Id., at 103-4.*

[7]Stander, *supra* note 2, at 154-164; Patrick Borchers, *Making Findings of Fact and Preparing a Decision*, XI J.NAALS 85 (1991); Patrick Hugg, *Professional Legal Writing: Declaring Your Independence*, XI J. NAALS 114 (1991); Harold H. Kolb, Jr., *Res Ipsa Loquitur: The Writing of Opinions* XII J. NAALS 53 (1992).

II. ORGANIZATION

Modern appellate decisions are generally structured according to a predictable pattern. After identifying the parties, in the caption of the case, the decision writer begins by describing the procedural history of the case.[8] After that comes a description of the issue(s) giving rise to the appeal, a recitation of the relevant facts, an analysis of the relevant law, and the application of the relevant law to the case. The decision concludes with the disposition of the case. Sometimes the disposition is also given at the beginning of the case and some writers use an "orientation" paragraph to provide a short overview of the main points in the decision.[9] In multiple-issue cases, this standardized pattern is sometimes repeated several times.[10]

This pattern has several virtues, not the least of which is that it is reader-friendly. That is, because the pattern is familiar, regular readers of appellate opinions can quickly sift through even extremely long opinions and find the information they are seeking.

This conventional pattern has evolved to meet the reader's need for critical information at certain junctures in the opinion. By placing critical information (issues, facts, special vocabulary) at the beginning of the opinion, the writer identifies the opinion's principal legal and factual themes and, just as importantly, narrows the scope of the opinion. Moreover, this pattern has the rhetorical virtue of controlling the reader's expectations and, in some degree, the reader's response.

While administrative law decisions include many of the same organizational features as appellate decisions,[11] most administrative law decisions are not nearly as readable as appellate decisions. For example, appellate judges usually provide readers with the legal context for their application of the law by analyzing or summarizing the law *before* applying it to the facts of the case. Many ALJs reverse this order

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[8]Some opinions are preceded by a "syllabus" listing the principle points covered in the opinion.

[9]ALDISERT, *supra* note 4, §6.6 at 75-6.

[10]*Id.*, §9.5 at 136-39.

[11]For example, like appellate decisions, most administrative law decisions begin with a statement of jurisdictional and procedural information and with a statement of the issues (sometimes couched indirectly in the form of the litigants' competing claims or contentions).

by placing their Findings of Fact before their Conclusions of Law or Reasons for Decision. Consequently, they fail to provide a detailed legal context for their application of the law thereby making their decisions appear more elliptical in organization than appellate opinions. Although these organizational differences are attributable in part to the different functions served by appellate and administrative opinions,[12] they nonetheless adversely affect the readability of administrative law decisions because readers must digest the facts of the case without knowing the complete legal context. This "lack of context" accounts for many other problems with administrative law decisions, starting with the Statement of the Issue and continuing through the Findings of Fact and Conclusions of Law.

III. ISSUE STATEMENTS

When describing issues, for instance, appellate opinions are usually, very specific about the legal or factual point in contention,

> *Does the First Amendment prevail over copyright in a fair use case, where the copyrighted material was soon to be published by the copyright owner?*

In a case of this sort, experts may differ as to what constitutes "fair use" or "copyright," but the legal terminology and the factual context are clear to most readers.

a. Generic Issue Statements

By contrast, administrative law opinions frequently contain generic issue statements. Given the volume of decisions revolving around the same or similar issues, administrative law judges naturally and understandably develop their own shorthand for stating the issues. For example,

> *The issues to be resolved are as follows: Medical causation,*

[12]ALDISERT, *supra* note 4, §10.1 at 151.

liability for certain past medical expenses, and mileage to and from medical treatment.

Or,

The question is whether the evidence in the record establishes that the separation was a disqualifying event.

Or,

The matter in dispute concerns the Agency's decision to accelerate the Appellant's rural housing loan account.

Generic issue statements like these do not usually create problems for the parties to the dispute because they are familiar with both the relevant legal principles and the facts of the case. Moreover, they are the ones who raise the issues in the first place. But other readers--agency superiors, reviewing courts, potential litigants and their representatives--often have difficulty determining the exact nature of the disputed case. Sometimes, they must read most of the decision to understand the special vocabulary of the decision and to discover the key law and facts. Even then they may not accurately identify the law and facts the opinion writer used to reach a decision.

To remedy the problems created by caption-like or generic issue statements, ALJs should, whenever possible, create more precise and case-specific issue statements. Since, at the time the opinion is written, the ALJ knows exactly which legal provision(s) or fact(s) the case turns on, no good reason exists for creating a generic issue statement even in a routine case. While the case is still fresh in the judge's mind, it does not take a great deal more time to add relevant statutory references or key facts to the generic statements. In the following wage dispute case, for example, the judge has tailored the issue statement so that even non-parties will have a clearer idea of what the case is about,

Is Food Services, Inc. liable for **civil penalties** *under S.C. Code Ann. Section 41-10-80(B) for violations of S.C. Ann. Section 41-10-40(D) (Supp. 1995) by failing to* **pay wages** *due at the* **time and place** *required by S.C. Code Ann. Section 41-10-30(A)*

(Supp. 1995)?[13]

While non-parties may not know the particular requirements of the cited statutory provisions, they can nonetheless see that the first controls civil penalties, the second controls the time and place for paying wages. The overall legal context of the case is clear before the judge makes any Findings of Fact.

If, however, in the interest of efficiency or time-constraints, ALJs must use generic or boilerplate issue statements, they can improve that boilerplate by creating a fill-in-the blanks issue template which has slots available for the essential information: the specific legal provisions and the key facts necessary for resolving the case. Templates like the following one can help insure that judges tailor their issue statements to individual cases:

> UNDER (insert reference to applicable law)
> DOES /IS/CAN (insert legal question)
> WHEN (insert most important legally significant facts)?[14]

In those cases where the issue is one of law rather than fact, the judge should, at a minimum, indicate precisely what aspect of the law is at issue.[15]

b. Issue Lists

A different kind of problem arises when ALJs list all the issues which arise in a case. The virtue of Issue Lists is that they function as both a checklist and a "Table of Contents" for the decision. They insure that no potentially relevant legal point is omitted. The following Issue Lists are typical of many ALJ decisions:

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[13]*South Carolina Department of Labor, Licensing and Regulation, Division of Labor v. Food Services, Inc.*

[14]LAUREL CURIE OATES, ANNE ENQUIST, KELLY KUNSCH, THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS AND WRITING, §5.9.2, AT 153 (1993).

[15]The necessity for being precise about the statutory language at issue is treated in greater detail in the Conclusion of Law section of this article, *infra* part V.

Example #1

1) Did the nonconformity of the Aqua Solarium, i.e. the absence of a sunlamp and timer feature, substantially impair the unit's value to the plaintiffs?
2) Did the defendants seasonably cure the nonconformity?
3) Did the plaintiffs revoke their acceptance within a reasonable time after they discovered or should have discovered the ground for the revocation?
4) Did the plaintiffs revoke their acceptance before any substantial change in the unit?
5) Were the defendants guilty of acts proscribed by T.C.A. Section 47-18-101, et seq., the Consumer Protection Act?
6) If so, were the plaintiffs entitled to treble damages under the provisions of T.C.A. Section 47-18-109 (a)(3)?
7) Were the plaintiffs entitled to the cost of the unit and the cost of its removal from their house as their measure of damages?
8) Were the plaintiffs entitled to attorney's fees and costs pursuant to T.C.A. Section 47-18-109 (e)(1), a part of the Consumer Protection Act?
9) If the plaintiffs were entitled to attorney's fees and costs, was the trial court's award reasonable under the circumstances of this case?

Example #2

1) Did Claimant suffer a 4% work disability as a result of her injury of April 14, 1990?
2) Did Claimant aggravate, exacerbate or intensify the injury suffered in April of 1990 in stepping off the curb and thereby twisting her ankle upon leaving the seminar of 10/12/90? If so, are either of the injuries compensable?
3) Is Claimant unable to perform her duties as LPN for the Respondent within the restrictions imposed by Dr. Brown?
4) Are Dr. Shaw's restrictions reasonable and necessary?

5) Has Claimant suffered a 71.03% work disability following her second accident, following the fall from the curb on October 12, 1990?
6) Are Claimant's injuries of the nature and extent alleged by Claimant or as found by Judge Smith?

Although Issue Lists like these do identify each issue in the case, they do not let readers know which issue is most important nor do they always clearly indicate what organizing principle lies behind the list. Moreover, these lists are sometimes misleading. Often the listed issues are not the ones the ALJ focuses on in the decision, or they are not discussed in the order presented thereby frustrating the "Table of Contents" function.

Very often Issue Lists burden readers with the task of deciding which issue(s) is dispositive. Whenever possible the ALJ should use captions or verbal clues to indicate which issues are key and which are subsidiary. No "issue" should be listed if it is not subsequently treated in the decision. And, finally, all issues should be discussed in the order they are first presented in the decision. Since issue statements are very often the first substantive point made in a decision, ALJs should review them *after* they have completed their decisions to insure that they focus on the main points in the decision.

IV. FINDINGS OF FACT

Lack of context also frequently creates readability problems in the Findings of Fact because the ALJs principle of fact selection and organization may not be clear, especially in the case of enumerated Findings. In addition, readers may be confused by an ALJs special vocabulary and idiosyncratic style conventions.

a. Enumerated Findings

To insure ease of reference and to encourage precision and specificity, agencies and courts frequently require ALJs to enumerate their Findings. Faced with a long lists of Findings, readers may have problems connecting one Finding with another, assimilating the

information included in the Findings, understanding the relevant contexts for the Findings, or determining which Findings are most important to the ultimate disposition of the case. For example, a federal ALJs decision to deny a loan contains the following Findings:

> *1. March 31, the FmHA County Supervisor (Decision Maker) notified the appellants of FmHA's decision to deny them Rural Housing Loan assistance due to the following reasons:*
>
> *"The quality of your credit history is currently at an unacceptable level to receive a loan from the Farmer's Home Administration as evidenced by an outstanding judgement filed in July of 1992 (ITT Financial Services v. ---) and four rent payments currently past due."*
>
> *2. A credit report from CREDIT BUREAU OF JOPLIN, INC. dated March 24, 1994, reveals that the appellant possesses one collection account to ITT Financial Services that has not been satisfied.*
>
> *3. A disclosure statement dated February 1, 1988, between ITT Financial Services and the appellant reveals that the appellant paid the note in full September 8, 1992.*
>
> *4. A satisfaction of judgment was filed by ITT Financial Services on May 11, 1994.*
>
> *5. Form FmHA 410-8, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects that the appellant is $400.00 delinquent in his rental payments.*
>
> *6. Form FmHA 410-8, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects that the appellant's rental payments are $50.00 per month.*
>
> *7. Form FmHA, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects that the appellant has been 90 days delinquent three times previously.*

Findings like these create problems for most readers. These Findings may be properly based on testimony and evidence, but it is not immediately clear why Finding number one appears first rather than sixth. Nor is the organizing principle for the rest of the Findings clear.

Enumerated Findings like these tend, like all lists,[16] to emphasize the *separateness* of each item in the list. Readers can *guess* why the Findings are in this order, but may guess incorrectly. Moreover, unless the writer provides some clear clues about overall organization and connections *between* the Findings, readers must impose order on what appear to be disconnected pieces of information. Unless readers already know which organizing principles or statute the ALJ is relying on, the organization may appear random and the logical connections among the findings may be unclear.

b. Narrative Findings

To remedy this problem, ALJs can write *quasi-narrative* Findings and, for ease of reference, use *periodic enumerations* to isolate specific facts. Narrative findings exploit the natural story-telling patterns of *context*, *chronology*, and *relationships*, and can help the reader understand what has taken place. Moreover, as the following modification demonstrates *grouping related facts* is easier in narrative findings and the writer can use *transitions, parallel structure* and other *verbal clues* to emphasize connections which may be left implicit in enumerated findings.

> *(1) On March 31, 1994, the FmHA County Supervisor (Decision Maker) notified the appellant of FmHA's decision to deny them Rural Housing Loan assistance* **because** *"the quality of your credit history is currently at an unacceptable level to receive a loan from the Farmers Home Administration as evidenced by an outstanding judgement filed in July of 1992 (ITT Financial Services v. ---) and four rent payments currently past due."*
>
> *(2) A credit report from CREDIT BUREAU OF JOPLIN, INC. dated March 24, 1994, reveals that the appellant possesses one collection account to ITT Financial Services that has not been satisfied.* **However** *, (3) a disclosure statement dated February 1, 1988, from ITT Financial Services to the*

[16]See preceding comments on Issue Lists, *supra* part III. b.

appellant reveals that the appellant paid the note in full September 8, 1992. (4) ITT Financial Services filed a satisfaction of judgement on May 11, 1994.

(5) Form FmHA 410-8, "APPLICANT REFERENCE LETTER," dated March 15, 1994, reflects **that** *the appellant is $400.00 delinquent in rental payments,* **that** *(6) appellant's rent payments are $50.00 per month, and* **that** *(7) the appellant has been 90 days delinquent three times previously.*

The emphasized words provide small verbal clues which, along with the narrative approach, make it easier to understand the Findings. A similar technique in a routine Workers Compensation case makes it easier to understand the chronology of the case,

> **Prior to 1978,** the employee worked approximately five or six years for Entemann's Bakery and drove for Sealtest. **From 1978 to 1987** the employee did assembly and production line work, **first** for Wonderbread and **then** for General Motors. The employee went to work for New England Frozen Foods, Inc. in 1987. He continued to work for this company as a high lift operator until he was injured on April 11, 1991. He has not worked since.

c. Relationships and Computations

When enumerated Findings are required (statutorily or by an agency or supervisor), ALJs can use clarifying phrases to make those Findings easier to follow. If, for instance, the Findings focus on a series of related dates, the ALJ can insert information to help readers understand or perceive those relationships,

> (Original) *The employer became a self-insurer in September of 1991, the date of injury was March 9, 1992, the disability was claimed from March 19, 1992 to May 31, 1992, and then from February 4, 1993 to date and continuing.*

> (Modified) *The employer became a self-insurer in September of 1991,* **7 months and 9 days before** *the date of injury, March 19 1992. The disability was claimed* **for 2 months and thirteen**

> **days** *from March 19, 1992 to May 31, 1992, and then* **again** *from February 4, 1993 to date and continuing.*

While the modified version adds only a few words to the Findings, it nevertheless clarifies relationships among the facts by explicitly making the computations that are left implicit in the original. And, while readers could undoubtedly make those same computations, the modified version saves them the trouble. Any time the Findings require readers to do computations (of dates, wages, sequences, amounts, etc.), the ALJ can make the decision easier to follow by doing the computations beforehand.

Even when the Findings are not related to one another, decision writers can insert short transitional phrases ("a second test," "another expert," "in a separate incident," "a non-specialist," "at the time of death," etc.) near the beginning of each new Finding to alert the reader to the changed focus. Again, while the additional phrase may add a few words to the decision, it will make the decision much more readable.

d. Orientation Paragraphs

Occasionally, ALJs can use thesis or "orientation" paragraphs[17] at the very beginning of their Findings of Fact to provide a context for the individual findings and to give readers a clear thematic sense of what is forthcoming. In ruling on the validity of a "territorial agreement," a Public Utilities Commissioner began the Findings of Fact section with the following paragraph:

> *The parties proposed the territorial agreement in order* **to avoid** *duplication of facilities,* **reduce** *the cost of providing water to the area,* **provide** *emergency backup service to the River View Manor Home,* **prevent** *future flood-related water outages, and* **enable** *some fire fighting service in the area. The agreement was designed in response to petitions from area residents to both the City and the District. Currently, the City duplicates water service for an area that falls outside the city limits and within the District's water boundaries.*[18]

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[17]ALDISERT, *supra* note 4, §6.

[18]The emphasized words foreshadow the ALJs principal Findings and let readers know what to focus on while reading those Findings. The advantages of a clear orientation paragraph can be better appreciated when compared with the Findings in another Public

Orientation paragraphs such as this provide *general* information about the ALJs *main* Findings and make the subsequent Findings easier to follow. Although orientation paragraphs may duplicate Findings made later in the same decision, the added clarity of focus more than offsets any potential problems caused by repetitions.

e. Summary Paragraphs

Short summary paragraphs provide still another way of helping readers understand the significance of individual Findings. Properly constructed summary paragraphs bring together various thematic threads that have been woven into the Findings so that readers see the same pattern the judge saw. In a routine Workers Compensation case, an ALJ summarized the Findings in the following way:

> *The weight of the evidence supports a finding that any complaints pertaining to Ms. Johannsen's back are* **unrelated** *to her 1986 industrial injury and that the cervical problems are* **not disabling.** *I find that the employee is capable of earning her former wage of $354. Her* **high school and business school education** *combined with her* **work experience** *which involved reading, writing, notating, speaking, and filing enable the employee to perform*

Utilities Commission decision. Like the previously quoted decision on the validity of the water district "territorial agreement," this decision also concerns an agreement. The opening paragraph states that,

> *[t]he parties have agreed that Southwestern Bell Telephone Company (SWBT) should be directed to file a new tariff (with a 10 day effective date) substantially similar to the tariff presently pending but with the exception that the language regarding early termination of this service by a customer shall be changed to provide that under such circumstances the customer would incur termination charges calculated as follows: "billed monthly rate X number of months remaining in the service period X a 50% time termination percentage." The Agreement provides that when SWBT is requested to provide interconnection to an independent company SWBT shall provide such interconnection to such customer using ATM, DSO1, DS-3 or Analog Technology depending upon the customer's request.*

Aside from the problems caused by sheer sentence length and cryptic terminology, this paragraph does not provide readers with any strong clues about how the rest of the Findings will be organized.

substantial non-trifling work. Her skills and abilities are of value in the general labor market.

In a single concise paragraph, this summary emphasizes connections among the ALJs separate Findings on causation, education, work experience and extent of injury in a way that the separate Findings might not. Placed as it is at the end of the Findings section, it also prepares readers for the upcoming Conclusions of Law section of the decision.

V. CONCLUSIONS OF LAW

Conclusions of Law arise from the "basic" facts contained in the ALJs Findings of Fact. They are the "ultimate" facts on which ALJs base their decisions.[19] Theoretically, all readers of the decision should be able to see clear connections between the Findings of Fact and the Conclusions of Law.

In practice, however, Conclusions of Law are frequently written in ways that obscure or ignore those connections. That is, the Conclusions are not clearly organized, do not have a clear focus, and are not explicit about the logical relationships among the separate Conclusions. In addition, because the Conclusions of Law are frequently written in the technical language of specialized statutes, their vocabulary is sometimes obscure.

Because ALJs and the parties to the dispute are familiar with the relevant legal provisions, ALJs sometimes forget or ignore the needs of other potential audiences and simply list or quote the relevant statutory language without further explanation. Consequently, as is the case with Findings of Fact, readers must determine for themselves why a particular Conclusion is included and why it is placed where it is.

Sometimes, of course, the need for a particular Conclusion of Law is self-evident as is the Conclusion's connections with a particular

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[19]"The ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact." ALDISERT, *supra* note 4, at 55 (quoting *Helvering v. Tex-Penn Oil Col, 300 U.S. 481, 491 (1937)).*

> "[The findings of fact required by statutes] are usually called 'basic' facts, the conclusions 'ultimate' facts. The distinction was explained in a federal case as follows: (1) from consideration of the evidence, a determination of facts of a basic or underlying nature must be reached; (2) from these basic facts the ultimate facts, *usually in the language of the statute*, are to be inferred." BERNARD SCHWARTZ, ADMINISTRATIVE LAW §7.28, at 457 (3rd ed. 1991) (referring to *Saginaw BroadcastingCo. v. FCC,* 96 F.2d 554 (D.C. Cir. 1938), *cert. denied,* 305 U.S. 613 (1938). (emphasis added).

Finding of Fact. For example, most decisions contain Findings of Fact and Conclusions of Law respecting the court's jurisdiction over the parties and subject matter of the case:

Finding of Fact

1. This Division has personal and **subject matter jurisdiction** *over the parties and issues presented.*

Conclusions of Law

1. The Administrative Law Judge Division has **subject matter jurisdiction** *in this action pursuant to S.C. Code Ann. Sections 1-23-600 et. seq. and 1-23-310 et. seq. (1986 and Supp. 1994).*

The connections between this Finding of Fact and Conclusion of Law are clear, in part because the connections are emphasized both by the *repetition* of the key word--"jurisdiction"--and by the *enumeration pattern* which link the Finding to the Conclusion. This principle of repeating key words helps connect and unify comparatively straightforward Findings of Fact and Conclusions of Law. If, for example, an ALJ for a Public Utility Commission makes Findings on the *time, location, duration, and volume* of a toxic discharge, the judge can simply repeat those same terms in the Conclusions of Law so that readers can easily see how the Findings are related to the Conclusions. Moreover, if the Findings are enumerated, the Conclusions can easily be enumerated in the same order.

a. Random or Juxtaposed Conclusions

In lengthy or highly technical Findings and Conclusions decisions, the underlying organizing principle and purpose of the individual Conclusions of Law are sometimes extremely difficult to see. Unfortunately, the key-word repetitions and numbering schemes that work in comparatively simple cases, have only limited usefulness in complex cases. The following excerpt is typical in that it reaches a series of Conclusions (about jurisdiction, standard adoption, inspection obligations, rule promulgation, etc.) but does so in a seemingly random fashion:

The Missouri Public Service Commission has arrived at the following conclusions of law: The Commission has **jurisdiction** *over manufactured homes and*

manufactured home dealers pursuant to Chapter 700, RSMo 1986, as amended. In 4 CSR 240-120.100, the Commission **adopted** *the Federal Manufactured Home Standards as set forth in 24 CFR 3280.*

Section 700.040, RSMo Supp. 1993, states in pertinent part: "The Commission shall. . . perform **sufficient inspections** *of manufacturing and dealer premises to ensure the provisions of the code are being observed. . . ."*

Section 700.040.5, RSMo Supp. 1993, states that "[t]he Commission may issue and **promulgate such rules** *as necessary to make effective the code and the provisions of Sections 700.010 to 700.115." 4 CSR 240-120.060 states, in pertinent part, that "[t]he books records, inventory and premises of manufacturers and dealers of new manufactured homes. . . shall be subject to an inspection . . . to ascertain if a manufacturer or dealer is complying with Chapter 700, RSMo as it relates to new manufactured homes, the chapter, the federal standards and the Housing and Urban Development regulations. . ."*[20]

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[20]The widespread practice of merely juxtaposing Conclusions of Law in an apparently random fashion can also be seen in the following list of Conclusions in a water pollution case:

> *1. The Administrative Law Judge Division has subject matter jurisdiction in this action pursuant to S.C. Code Ann. Sections 1-23-600 et.seq. and 1-23-310 et. seq. (1986 and Supp. 1994).*
> *2. S.C. Code Ann. Section 48-1-50 (1987) authorizes the Department of Health and Environmental Services (DHEC) to take all necessary or appropriate action to secure for South Carolina the benefits of the Federal Water Pollution Control Act, and any other federal and state acts concerning water pollution control.*
> *3. S.C. Code Ann. Section 48-1-140 (1987) grants DHEC the authority to revise or modify NPDES permits in South Carolina*
> *4. S.C. Code Ann. Section 48-1-30 provides the authority for DHEC to promulgate regulations carrying out the provisions of Chapter 1 of Title 48 of the 1976 Code.*
> *5. S.C. Code Ann. Regs. 61-9 (Supp.1994) were promulgated by DHEC as the applicable regulations governing the NPDES permit program of the State . . . .*

In this particular decision, the ALJ lists a total of seventeen Conclusions in support of the final decision. Readers must determine for themselves why each Conclusion is necessary and how or if each is connected to any particular Findings of Fact.

By simply juxtaposing one Conclusion to another, the writer of these Conclusions either assumes readers can easily see how they are interconnected or obligates readers to make the connections on their own. Depending on their patience and resourcefulness, some readers may succeed, but they will have to make a concerted effort. One way to make it easier to see a pattern within the Conclusions of Law is to use an "orientation" or "thesis" paragraph of the sort previously discussed.

b. Orientation Paragraph

Occasional use of an orientation paragraph, especially when the Conclusions of Law are lengthy or extremely technical, can make the Conclusions accessible even to readers who are unfamiliar with the legal principles involved in the decision. An orientation paragraph signals the writer's legal themes and organizational scheme. In the following example, a Public Utilities ALJ used an orientation paragraph to explain the underlying purpose of a series of applicable statutes:

> *The Missouri Legislature enacted four statutes, commonly referred to as the "anti-flip-flop" laws, which assure electric suppliers the right to continue supplying retail electric energy to structures through permanent service facilities once service has commenced, except for certain limited circumstances under which the Commission may authorize a change of supplier. (Text of first two statutes is omitted) The two remaining statutes deal with a situation such as the one in the present case, where the customer seeking a change of supplier is currently receiving service from a rural electric cooperative. The two statutes state as follows: (Text of the relevant statutes is then provided)*

This orientation paragraph concisely gives readers the context they need to read the quoted statutes meaningfully. Using only two sentences, the writer connects the statutes to one another and focuses readers' attention on the statutes' "anti-flip-flop" purpose. By placing this paragraph at the beginning of the Conclusions of Law, the judge makes it easier for readers to follow the reasoning in the decision and

to see the substantive and organizational principles that control that decision.

c. Technical and Obscure Language

Technical jargon and obscure allusions create problems in a great number of ALJ decisions. Since so many ALJ decisions require use of medical, environmental, scientific, statistical or financial language, readers may be confused by the ALJs' highly specialized vocabulary and shorthand references. For example, most reviewing courts and even agency insiders might be confused by the scientific terminology in the following Conclusions of Law from two different environmental agencies:

> *The dioxin "end-of-pipe" effluent discharge limit in International Paper's NPDES permit (27 ppq) is a scientific derivation of the human health based in-stream state water quality criteria of 1.2 ppq. As such, the 27 ppq is a water-quality based limitation. See 33 U.S.C. Section 1312.*

Or,

> *It is appropriate for OWR to allow a permittee to report non-detect or less than detection level where a parameter limit is below the method detection limit and the laboratory reports "non-detect." It is appropriate that a permittee should not be subject to an enforcement action where the sample is reported as "non-detect" or "less than the method detection limit."*

The technical nature of these cases (and others like them) requires use of specialized vocabularies and the ALJ may in fact be using terms required by statutory or regulatory language. But this language is usually difficult for non-specialists to understand. Moreover, long-term exposure to technical language frequently desensitizes ALJs to the need for explanations and definitions.

To compensate for this problem, ALJs who use specialized or professional terminologies must educate their readers even as they write their decisions. Otherwise, the only readers who will understand their decisions will be the parties in the case or other specialists.

They can educate their readers in several ways. Near the beginning of their decisions, they can explain or define the key terms. They can also remind readers of those definitions and explanations by periodically repeating them and they can paraphrase technical language where possible.[21]

A related problem occurs when ALJs refer familiarly to statutory or regulatory language without quoting or explaining the pertinent parts of the statute or regulations. The following passage, for example, may be clear to other Workers' Compensation judges within the same system, but it is unclear to readers who are unfamiliar with the referenced statutory sections because they know nothing about the individual statute provisions or the significance of particular dates. That is, they need information about the "amendment" and about the dates that were material to the decision,

> *We are called upon to decide whether the Workers' Compensation Trust Fund as most recently amended by c.398, Sec.85 of the Acts of 1991, must pay claims under Sec.37 and Sec. 37A to insurers seeking reimbursement under those sections when the date of the industrial injury is prior to December 10, 1985.*

Understandably, judges who regularly employ the same statutes or regulations must decide whether to quote extensively from routine statutory or regulatory language, (which takes more time and space), or to merely refer to the statute provisions and dates (thereby ignoring the fact that some readers may be unfamiliar with their authorities). As was the case with technical language, ALJs can make their decisions clearer

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[21] MULLINS, *supra* note 6, at 121. Professor Mullins suggests that judges should:

> 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 judge may summarize in the main text and put the technical details and computations in an appendix. *Id.*

I think that Professor Mullins' best suggestion is to summarize (or paraphrase) in the main text because footnotes, definitions sections and appendices are inconvenient for readers. Moreover, they relegate critical information to a subordinate position instead of providing that information in the text where it is needed.

to all potential readers by defining and explaining key statutory provisions near the beginning of their Conclusions. If the statute is one which is repeatedly or always used, judges can compose standardized parenthetical explanations or paraphrases ("requires applicant to show material changes to the location," "requiring assessor to apply uniform assessment to taxpayer's property" "at time of hire employer must notify employee of normal hours") to be inserted or repeated where necessary.

VI. SUMMARY AND CONCLUSION

Administrative law judges write for a great variety of audiences; litigants, lawyers, supervisors, agency heads and, occasionally, reviewing courts. The primary audiences--the litigants and their lawyers--usually have no trouble reading or understanding the decision, in part because the ruling has been made and explained from the bench. But other audiences--supervisors, agency heads, reviewing courts and others--do not share this advantage and frequently complain about the readability of administrative law decisions.

To make their decisions more readable, ALJs do not need to radically alter their present practice. However, they may need to reorganize their decisions so that critical information appears near the beginning of each important part. Placing key information in key locations provides all potential readers with the necessary context for understanding both Findings of Fact and Conclusions of Law.

At the macro level, ALJs can insert orientation and summary paragraphs in both Findings of Fact and in Conclusions of Law. These paragraphs provide the gist of the factual and legal authority the judge used to reach a decision and can serve as unifying devices for the entire decision. Judges can also consider the advisability of writing their Findings in a quasi-narrative form to take advantage of a narrative's storytelling virtues in supplying context, establishing chronology, and illustrating causal connections.

In cases where enumerated Findings are necessary, judges can use a variety of stylistic devices to emphasize relationships among the Findings and overcome the disadvantages of merely listing one Finding after another. By grouping similar or related facts and by placing short connecting phrases and clauses at the beginnings of individual

Findings, judges can help insure that readers understand the Findings more easily. And, in cases where dates, sequences, amounts, wage relationships are especially important, judges can make their Findings easier to understand by doing the necessary computations for the reader instead of leaving them implicit.

Context is just as important on the micro level as it is on the macro level. At the sentence level, judges can insure that readers know the exact nature of the disputed case by creating case- specific issue statements (precisely identifying key facts and law). Even when boilerplate or standardized issue statements are necessary, judges can rely on carefully devised templates to insure that all key information is included. To help unify both Findings and Conclusions, judges can use numbering patterns, parallel structure, and topic captions to emphasize the connections between individual Findings and Conclusions. And, when deciding highly technical and complex cases, judges can use carefully placed repetitions, paraphrases and definitions to insure that readers are not confused by scientific, medical or statistical terminology.

Of course, none of the preceding suggestions will make writing decisions easier or, in the short term, more efficient. In fact, adding these techniques to their existing writing practice will probably cost judges more time than they can easily spare. Moreover, some of the preceding suggestions may not be practical or advisable for all judges or agencies. But a heightened awareness of the kinds of problems that readers have with their writing should impel judges to improve the readability of their decisions. Like other professional writers who constantly expand their writing capacities, ALJs can selectively incorporate a few of the preceding suggestions into their decision-writing practice to test their effectiveness. If, in the interest of efficiency, judges can find time to master the intricacies of computers and word-processing, they can surely find time to master some of the time-honored writing techniques described above.