WRITING DECISIONS FOR COMPLEX CASES

District Chief Judge Jennifer Gee (ret'd)

IMPORTANT SUGGESTION

Start writing the decision as soon as possible after the hearing. Make a record of your impressions about the case right after the hearing. I make notes at the end of my hearing notes. These notes should include

- any impressions or conclusions you've made about the credibility of witnesses
- any evidence that you want to compare or look at more closely
- any inconsistencies in the testimony or evidence that you spotted during the hearing
- any issues you think need more investigation
- any issue that you think may be a key to making your decisions
- any legal issues you decided need more research

These notes are invaluable if it will be a while before you can start writing the decision.

Know the audience who is reading your decision. It makes a difference whether the reader is someone who never finished high school or whether the reader is an engineer. However, keep in mind that you may need to educate an appellate judge who knows nothing about the subject matter.

I. General Preparation

- Preparation for a decision begins when you are first assigned the case. You should analyze the case; identify any procedural problems; and identify those substantive issues that are critical to the case. It is especially important to identify the evidence that will be necessary to reach a decision because the parties may forget to offer evidence or testimony that you need for your decision, and you have to make sure they provide it.
- **RESEARCH!** You must know the statutes, rules and regulations and case law applicable to a particular case. That includes the procedural and jurisdictional aspects as well as the substantive issues. No judge wants to do all the work only to find out that there was a jurisdictional issue or

procedural defect that should have been caught at the beginning and would have eliminated the need for a decision on the merits.

- Unless the hearing you are conducting is a jurisdictional one, make sure that all procedural and jurisdictional issues have been resolved before the hearing starts.
- Make notes before and during the hearing to remind you of evidence or testimony you need for your decision that you want to make sure get covered at the hearing. I have a pad of post-it notes handy so that I can make a note of questions or a point I want more information about. I leave the post-it on the bench next to *the* laptop I am using so I'll see them before the hearing ends.
- Find out if your agency has a format for the decisions that are issued. If it doesn't have one, consider developing a format for the decisions issued by your agency. While no rigid structure can be prescribed for all written decisions, some uniformity in the basic outline is customary and useful to those who must regularly review the decisions. Your agency may have different types of captions for different types of cases or for different types of parties.
- A decision is not a data dump. It is a document where we tell the parties the outcome of the case and how we arrived at that outcome.

II. Parts of the Decision

A. Basic Information
B. Introduction
C. Procedural Background (optional)
D. Statement of Issues
E. Findings of Fact
F. Discussion or Analysis
G. Conclusions of Law
H. Order or Recommendation
I. Statement of Appeal Rights
J. Judge's Signature and Date of Signing

III. What Goes into the Parts of a Decision?

Use headings and subheadings to separate the different parts of your decision. Use headings such as "Procedural Background or History," "Findings of Fact," and "Discussion and Analysis" for the major sections of the decision. Use subheadings

within the large sections to break up the discussion – either by issue, subject matter, date, or whatever is appropriate for that part of your decision.

A. Basic Information

This identifies the case – it is the case caption. It includes the name of the agency, commission or board issuing the decision, the names of the parties in the case, the date of the decision, the file or docket number, and the type of decision (initial decision, recommended decision, etc.). Below the caption, depending on your agency's policy, you may list the parties who appeared and your name as the judge.

B. Introduction

This is a brief introduction of the case. It describes the type of case being decided, what the case is all about (whether it is an appeal of a personnel action, claim for benefits, or appeal of a penalty assessment, etc.), and the jurisdictional basis for the proceeding.

Regardless of what you do, at the end of your introduction, I suggest including one sentence paragraph telling the parties your decision, e.g. "For the reasons set forth below, the agency's action is AFFIRMED/REVERSED/MODIFIED/MITIGATED." That's why the parties are reading your decision.

C. Procedural Background (not necessary in all cases)

This section explains the key procedural events in the case. You don't need to include everything that happened in the case, just anything unusual or significant. Your agency may require you to routinely include a procedural discussion.

The procedural background may not be necessary if the case is a simple one. If it is a single issue case, you may want to just include this information in your introduction. It is basically where you tell the reader how the case got to you and anything unusual that happened in the case, including a late hearing request, a bifurcation ruling, unusual delays in the case processing, any claims, allegations or defenses that were added or dropped, and significant prehearing motions, rulings or sanctions. It should include where the hearing was held (if appropriate), when the hearing was held, who appeared at the hearing, when the record closed, what happened to the exhibits, etc..

Include in this section a description of how the exhibits were handled and how they will be referenced in the decision. For example:. "At the

hearing, Claimant's exhibits ("CX") 1 through 6, and 9 and Employer's exhibits ("EX") A through M were admitted into evidence. Claimant's exhibits 7 and 8 were excluded." Make sure there is a reference to how every exhibit was handled. If there were missing exhibits, state that so the reader knows that the exhibits were not overlooked. If this section is not included in the decision, then include the exhibit information in the Introduction section. If there was an exhibit that was overlooked at the hearing, then the exhibit needs to be admitted either in the decision or in a separate order before the decision is issued.

If the parties entered into any factual stipulations, they should be incorporated into the decision and can go in this section. If the stipulations were agreed to at the hearing, you should cite to the location in the transcript. Before adopting the stipulations as part of your findings in your decision, make sure any stipulations entered into by the parties are unambiguous.

If there are a lot of stipulations, you may want to include a separate section with a heading "Stipulations."

D. Statement of Issues

This is a statement of the issues in the case. It is a road map of the decision so the reader knows what is being decided. It can be done in a narrative form if the case has just one or two issues, or it can be in list form. It is also a good cross-check for you to make sure you covered everything. If there are multiple issues, you can also use the listed issues as the basis for the subheadings in your decision. Obviously, it is not necessary if this is a single issue case and the issue is already identified in the introduction.

Note: The issues should have been reviewed with the parties either during a prehearing conference and/or at the beginning of the hearing so that there is no doubt on anyone's part as to what is going to be decided when the decision is issued.

E. Findings of Fact

This, with the Discussion Section, is one the most important parts of the decision. These are statements of what the judge decides is true. They must be understandable and supported by the evidence. The findings of fact can be in a narrative or numbered format. Whether the findings are numbered or in a narrative format depends on your preference or your agency's requirements. There should be enough

factual findings to support the legal conclusions you are required to make. This is **not** a regurgitation of all the testimony or a statement of the parties' contentions. Unless prohibited by your agency, identify the evidence relied on for the finding of fact.

F. Discussion or Analysis

This part of the decision explains how the findings of fact were made, the basis for the credibility determinations, how the conclusions were reached, and how any conflicts in the evidence and case law were handled. This is also where you discuss the parties' contentions and how they were resolved. This section explains how all the findings were applied to the applicable case law.

It can be organized a number of ways. There could be one section that discusses the credibility of the witnesses followed by another section that discusses the basis for the findings in the case. The credibility discussion can also be folded into the discussion instead of making it a separate section.

G. Conclusions of Law

These are the legal conclusions you're reached based on your findings of fact. The conclusions of law must be supported by findings of fact contained in the decision. They should also be explained. Include in this section of your decision any legal or statutory authority that support the conclusions you've reached.

H. Order or Recommendation

The order or recommendation disposes of the case and tells the parties the final result. The order should be very short, i.e. "The agency's reconsideration decision is AFFIRMED/REVERSED/MODIFIED." If there is more than one order for future action, make each one a separate numbered paragraph. If you are remanding a case, be specific about what is to be accomplished on remand. For emphasis, I suggest putting the actual disposition, "AFFIRMED," "REVERSED," etc. in capital letters. If you are ordering a party to take some type of action, be sure to identify the party who is to complete the task and include a completion date, either generally, such as "within 35 days of the date of this decision," or, preferably, with a specific date "by March 14, 2023"

I. Statement of Appeal Rights

A statement of appeal rights must be included if there are appeal rights under the statute the decision is based on. Your agency may have boilerplate appeal language that you can just copy and paste. It may also have an addendum that is enclosed with the decision. Be sure the appeal rights language sets out the deadline for filing an appeal and explains whether the appeal is deemed filed as of the date of mailing or date of receipt. If possible, identify the deadline with a specific date, such as "September 1, 2023," instead of "within 35 days of the date of this decision."

J. Judge's signature and date of signing.

IV. Reasons for Making Findings of Fact

- Findings of fact facilitate judicial or agency review. The appellate bodies that review your decision must know what your decision means and what it is based on before they can say whether it is right or wrong.

  The need for findings of fact has been long recognized. Here are some very early court comments about the importance of findings of fact:

  "There must be evidence adequate to support pertinent and necessary findings of fact." "Findings based on the evidence must embrace the basic facts which are needed to sustain the order." *Morgan v. United States*, 298 U.S. 468, 480; 56 S. Ct. 906, 911 (1936).

  In the 1940's the United States Supreme Court stated that described what it called "a simple but fundamental rule of administrative law" and that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 462 (1943) and *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577 (1947).

  You **WILL** be taken to task if you don't make adequate findings of fact. Even experienced judges make that mistake. In an unpublished decision in April 2006, the Minnesota Court of Appeals criticized a trial court judge for failing to make findings of fact. In its decision, the Court of Appeals said "Here, the district court failed to make findings concerning the factors set out in M.S. 518.552. Without adequate findings regarding the parties' net income and reasonable expenses, effective appellate review is impossible…. Specifically, the district court made findings regarding

appellant's hourly wage, but not the number of hours per week he worked or his annual income." *Faber vs Cole,* No. F7-95-15365. The judge in question had been on the bench for 12 years, so it is not just new judges who make this mistake.

- Findings of fact prevent judicial usurpation of administrative functions. If you don't identify the findings that form the basis for your decision, the reviewing court or board will make its own findings, and its findings may not be the same ones you would have made.

  In *McGonigel's, Inc. v. Pennsylvania Liquor Control Board*, 663 A.2d 890 (Pa. 1995), the court vacated a state agency's decision where the agency gave no reasoned determination or factual conclusions as to why it was acting as it did.

  In 1995, the Ninth Circuit Court of Appeals refused to enforce a National Labor Relations Board order, stating it could not understand the basis for the backpay order. The Court said the Board did not adequately articulate the reasons for finding that the employer had violated the Labor Act. *Louisiana-Pacific Corp., W. Div. v. N.L.R.B.*, 52 F.3d 255 (9th Cir. 1995).

- Findings of fact help parties plan their cases for rehearing or for appellate review. The parties should have the satisfaction of knowing why the case was won or lost and will have a harder time preparing an appeal if they don't know why they won or lost. Keep in mind that even the winning party may not agree with your entire decision and file an appeal. Not knowing the reason for the decision won't stop the appeal. If the basis for the decision is not clearly laid out, it may give the reviewing board or court a reason to remand, reverse or modify your decision.

- Findings of fact enable the reviewing court to determine whether the agency is acting within its jurisdictional powers. *City of Yonkers v. United States*, 320 U.S. 685, 692, 64 S. Ct. 327, 331 (1944).

- Findings of fact provide the reviewing court with expertise in what is often a highly technical subject that the appellate court probably has no expertise in. Administrative hearings and decisions tend to be more technical, and courts may not know the intricacies of the area of law you're deciding. In a speech at a Federal Administrative Law Judge Conference, Judge Jane Roth for the 3rd Circuit Court of Appeals stressed that administrative law judge decisions are often so specialized that ALJs have to make sure they educate the reader in their decision. She actually said that sometimes, the

appellate decision is a reaction to what the ALJ wrote because the appellate judges didn't understand the ALJ's decision.

V. Findings of Facts

- A finding of fact is a positive statement of what the judge decides is true.
- There must be evidence in the record to support the finding or the finding must be a reasonable inference from other findings of fact.
- There must be at least one finding of fact to support each conclusion of law.
- What is NOT a finding of fact?
  - Summaries of the testimony, e.g. "John Doe testified that he saw Mary Doe enter the intersection when the traffic light was red. James Jones testified that the traffic light was yellow when Mary Doe entered the intersection." This is a very common mistake. The finding of fact is not about what John Doe or James Jones testified but rather whether the light was red or yellow.
  - Contentions of the parties, e.g. "Sam Plaintiff contends Mary Doe caused the accident." A statement of the parties' contentions is not a finding of fact and does not belong with the findings. In the *Faber vs Cole* case mentioned earlier, in addition to criticizing the judge for not making adequate findings of fact, the Minnesota Court of Appeals also said "And the district court prefaced its statements regarding appellant's cost of living and respondent's income with "he claims" and "petitioner claims." By doing so, the district court is not making true findings but merely reciting the parties' claims." You can re-state the contentions in the discussion section where you will be explaining how you arrived at the findings and how you resolved any conflicts.
  - Statements that begin "It seems…" or "It appears… ." Such statements are not a positive statement of what the finder of fact is actually finding.
  - Comments on the presence or lack of evidence, e.g. "There was no evidence that appellant turned in the travel voucher," or "The appellant presented 8 checks written in August." Such statements belong in the discussion section of the decision, usually as part of a credibility discussion.

VI. Suggestions for handling Findings of Fact:

- The findings should be organized in some way - by category, chronologically, by issue - whatever makes sense for the particular decision. Use subheadings if it will make the decision easier to read.
- The findings should provide the reader a complete picture of what is going on in this case, but try to include only those facts that you are relevant to this particular case. The parties may distract you by offering irrelevant testimony or evidence.
- Cite to the specific evidence or testimony the finding is based on. The evidence should definitely be identified if there was conflicting evidence, and you found some of the evidence more persuasive. To make this easier, if the parties submit written closing briefs, tell them they must specifically identify the evidence they rely on for their various arguments. Make sure your agency or state allows you to cite to the specific evidence. I learned that the California Office of Administrative Hearings prohibits its judges from identifying the evidence relied on for the findings of fact.
- If a party submits proposed findings of fact, never copy the proposed findings or briefs submitted by the parties word for word. If you do, you risk being accused of not being impartial in your decision.
- Avoid the temptation to deal with every shred of evidence that was admitted. Not every exhibit is necessary to your decision and needs to be discussed in detail. You should acknowledge the evidence that you deemed irrelevant so a party cannot claim on appeal that your decision would have been different if that piece of evidence had been considered.
- Don’t re-state verbatim or even paraphrase the undisputed testimony or evidence - make findings as to what the testimony or evidence shows. You can discuss or summarize the testimony later in the discussion section of your decision when it is necessary for a specific purpose, usually when a credibility determination is made.
- Make sure your particular finding of fact is complete and unambiguous, especially if it involves a reference to time. For instance, "The appellant attended the meeting in March," leaves us wondering March of what year?

VII. Handling the Discussion or Analysis Section

- If you don’t do a good enough job explaining your decision, the appellate body will criticize you. In *Special Counsel v. Eubanks*, 76 M.S.P.R. 405,

414 (1997), the Merit Systems Review Board ("MSPB"), a Federal agency that hears appeals of personnel actions involving Federal employees, criticized a judge's decision, saying:

> Our review of the record discloses that the recommended decision does not summarize all the evidence on each disputed issue, nor does it explain in detail why the ALJ found the chosen version of the facts more credible than [the Office of Special Counsel's] version of the facts." *Special Counsel v. Eubanks*, 76 M.S.P.R. 405, 414 (1997)

- The courts will also criticize you if your decision fails to explain how you reached your findings and conclusions. The Ninth Circuit criticized the Benefits Review Board, the appellate body for decisions issued by ALJs with the Department of Labor's Office of Administrative Law Judges in *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049 (9th Cir. 2009):

> The July 25, 2006, order issued by the BRB in *Christensen* simply states that "an hourly rate of $250 remains appropriate in this geographic region," citing 20 C.F.R. § 802.203(d)(4), and *Anderson*. The November 17, 2006, order on Christensen's Motion for Reconsideration similarly lacks elaboration, stating only that "the fee awarded by the Board is in compliance with the regulations at 20 C.F.RF. § 802.203(d)(4)," citing *Bell v. Clackamas County* and *Anderson*.
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> Likewise, the July 26, 2006, order issued in *Price* makes only the conclusory assertions that "[b]oth carriers object to the requested hourly rate of $275," ... . The BRB's order cites 20 C.F.R. § 802.203(d)(4) and *Anderson*, but fails to explain how this regulation and case support the BRB's conclusory findings.

In *Tocci v. Miky Transport,* ARB No. 15-029, slip op. at 13 (May 18, 2017), the Administrative Review Board for the Department of Labor, which also hears appeals of decisions by Department of Labor ALJs; stated:

> We also find that the ALJ improperly discounted certain evidence and failed to explain how she resolved conflicting evidence, making it difficult to evaluate whether substantial evidence supports her findings on contributing factor and Respondent's affirmative defense.

VIII. Suggestions for Handling the Discussion Section

- Begin the section with a summary of the law that applies to the case, the burdens of proof and the elements that have to be established for one party to win. You can then actually use those elements as headings for subsections in this part of the decision.
- In your discussion, a brief statement of each party's position on each particular issue provides a smooth transition to the actual discussion. If there are multiple issues, use sub-sections to discuss each issue and briefly summarize each party's position at the beginning of the sub-section. I suggest citing to the page or pages of the closing brief, if one was filed, where the position is laid out.
- Where a credibility issue is critical, make sure the decision explains why one witness was believed over the other. Keep in mind that credibility determinations based on personal observations of the trial judge, such as demeanor, facial expressions, etc. are very hard to overturn, but don't rely exclusively on them. These are factors that are easily influenced by implicit bias and could be the result of nervousness or cultural differences. For instance, in some cultures, it is impolite to look into the eyes of the person who is talking to you. If possible, don't rely only on your personal observations. If your credibility determination is based on inconsistent or contradictory testimony or evidence, say so, but be sure to cite to the transcript page or evidence where the contradictions are found. It strengthens your credibility determination.
- Discuss the <u>relevant</u> arguments raised by the parties and explain how you addressed those arguments. Keep in mind that not all arguments are relevant to the proceeding or your decision, and the irrelevant arguments should be given the minimal attention they deserve. It may be a good idea to at least mention the irrelevant arguments in passing so that the party does not think you overlooked the issue and makes it an issue on appeal. Don't let yourself get distracted by a party's effort to sidetrack you from the issues.
- Don't use string cites. Citing one, or at the most, two cases should be enough to support your conclusions. If there is a case that is on point to the issue you've decided, include a parenthetical to briefly describe the issue after the case cite.
- Issues that are not raised or addressed by the parties but which are presented by the record or case law should be addressed if they affect the

outcome of the case. The parties are sometimes too close to the case and will miss an obvious issue.

- Inconsistent or conflicting evidence should be acknowledged either in the decision or a footnote. Where it is acknowledged depends on how important it is. The reader needs to know which evidence was used and which evidence was rejected or given minimal weight for the findings of fact if a conflict existed. If you don't mention the conflicting evidence, you run the risk of an argument on appeal that you would have ruled differently if you had considered this evidence.
- Your discussion should explain how you handled the parties' contentions and arguments. Make sure you addressed all of them. Go back to your list of issues earlier in the decision and take a look at the parties' closing briefs or oral closing arguments.
- Don't ignore case law that is contrary or appears contrary to your findings or conclusions. If you are not following precedent, explain why. An agency's departure from past precedent must be explained. See *Citizens Awareness Network v. Nuclear Regulatory Commission*, 59 F.3d 284 (1st Cir. 1995); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 904 (D.C. Cir. 1995) (finding that agency improperly departed from the established procedure without reasonable explanation); *Salmeda v. INS*, 70 F.3d 447, 450 (7th Cir. 1995).

IX. Conclusions of Law

- A conclusion of law or legal conclusion is usually expressed in the language of a statutory standard. You may not have to reach a conclusion of law in the type of cases you hear.
- Instead of a conclusion of law, you may make what is called an "ultimate" finding, which is usually a mixture of law or policy. Examples:

  - "… the rate is reasonable."
  - "… the proposed action is in the public interest."
  - "Appellant is delinquent in the loan payment."
  - "The Claimant's medical condition is permanent and stationary."

- Ultimate findings, like conclusions of law, <u>must</u> be supported by one or more findings of fact. Example:

- Basic: The guard did not lock the cell door. The guard did not turn the key over to the relief guard. The guard did not report the prisoner's escape.
- Ultimate: The guard did not perform his duties properly.
- Conclusion of Law: The guard was negligent in the performance of his duties within the meaning of § 432.

- A conclusion of law should cite the applicable statutory or regulatory authority, e.g. "Appellant is not eligible to receive a survivor annuity under 5 U.S.C. § 8337(b)(1)."

- If you cite to a specific regulation or statutory provision, include a brief summary of what it says or include the text of the regulation or provision so the reader does not have to go searching for it. This can go in the body of the decision or in a footnote, depending on how important it is to your decision and whether it would disrupt the flow of your decision if it goes into the body.

- Make sure you explain why you reached the conclusion.

X. Tips for Writing the Decision

- Use headings and subheadings to make it easier to follow the analysis and to locate discussion about a specific issue. Break up major parts of the decision with headings such as "Procedural History," or "Background," "Burden of Proof," "Findings of Fact," "Conclusions of Law," etc. Within those headings, especially the Findings of Fact section, you may want to use specific subheadings to break up the discussion of multiple issues.

  For instance, a decision involving the appeal of a disciplinary action taken against an employee accused of tardiness, insubordination, and unsatisfactory performance could have sub-headings identifying the discussion of each of the misconduct allegations. A workers' compensation decision involving multiple injuries and care by multiple doctors could have sub-headings for each injury and then sub-headings as each doctor's records and findings are discussed.

- Write in plain English with a style that can be understood. Avoid legalese and use short, simple sentences as much as possible. This is especially important if the party is a self-represented litigant.

- Many agencies publish their decisions on the Internet. Even if it is not published on the Internet, think carefully about how much detail you want to include in the decision. With the concerns about identity theft, keep the

disclosure of unnecessary personal information to a minimum. Be cautious if your decision requires you to discuss sensitive information, whether it is personal information or information that might affect national security.

- Review the record your decision will be based on. Identify the issue(s) that your decision has to address. Discuss each issue listed earlier in your decision. Make sure there are no unresolved procedural or evidentiary issues. Double-check to make sure the evidence needed to address every relevant issue has been admitted or addressed.
- Be aware of who you are writing for - the parties, the agency, the head of your agency, the public, the appellate court, or a self-represented litigant. Your audience may affect your writing style, how technical you want to get, how detailed you want to get, etc. Also think about the educational level of your readers.
- Think through how you want to organize your decision if there are multiple issues or multiple parties. You may want to break down your decision into parts by issue or by parties. You might want to organize your decision chronologically. Choose the organization that makes the decision flow better.
- Prepare an outline or time line of your decision if that will help you. Flesh out the outline or time line with references to your notes, the record, the evidence, the parties' briefs, etc.
- Consider using boilerplate for procedural discussions or common issues that come up often in a decision, but make sure the boilerplate you use actually applies and is accurate. There is no need to re-invent the wheel every time you discuss a common issue. However, while boilerplate makes decision writing easier, be very careful when "copying and pasting" to make sure that the right boilerplate was copied and pasted. Be sure to make sure the correct pronoun(s) are used - change the pronoun from "he" to "she," etc.; change from singular or plural.
- Know the difference between findings and conclusions. When stating the conclusions, don't restate all the findings. You should, however, briefly refer to the findings you relied on for the conclusions.
- Keep the use of footnotes, charts, tables, and graphs to a minimum. Footnotes clutter decisions and detract from them. Any essential information should be in the body of the decision, not a footnote. Charts, graphs, and tables can be helpful, but only use them if they will make the decision easier to understand. They may be helpful in understanding some

findings, usually involving numbers, that would be hard to follow if kept in a narrative form. I've used them in attorney fee decisions to show how each itemized fee entry or cost was reduced or eliminated. If they're used, explain how they should be interpreted unless it's obvious.

- When you finish your draft, read it from the viewpoint of the loser and see how persuasive it is. If your decision is not persuasive and decisive, the reader will pick that up. You might want to consider having someone else read the decision before it is issued.
- After you finish the final decision, spell-check and cite check it. Proofread it carefully to make sure that the decision makes sense and that you were consistent in the terms, abbreviations, and punctuation you used. You would be amazed at how often you think a word is there as you read through it because you've worked with the draft for so long.
- Once the decision has been filed and served on the parties, relax, forget about it, and go on to your next case. Don't take an appeal personally. It is a good idea to not read the appellate briefs because they'll only raise your blood pressure.
- **There is no <u>one</u> best way to write or prepare for writing every decision.** The technique or style for a decision will vary depending on a large variety of factors, including the complexity of the case, the number of issues, whether there are legal and factual issues or only legal issues, etc., as well as what you're comfortable with.
- I suggest keeping track of each decision you write in a spreadsheet, identifying the type of case, the parties, the disposition, the issues involved, and any unique points about the case. This is helpful in tracking down a unique issue that you addressed in the past so that you don't to have to research the issue all over again.

XI. <u>Drafting Suggestions</u>

- Decide whether you want to write in the first or third person, e.g. "the court finds" or "I find" – this depends on your comfort level and your agency's policy. Some judges prefer to refer to the decision as being made by "the court," and some prefer to identify themselves as being the decision maker.
- Findings of fact should be stated in clear, concise sentences written in language that is understandable to a lay person.

- Make sure your decision conforms to whatever style manual or guidelines your agency or board uses in legal opinions, e.g. when to use numerals or commas, when to capitalize, how to cite cases, etc. You agency may also have its own preference for citations to cases.
- Use short, simple words. Sometimes a longer word or phrase is merely a short word lengthened unnecessarily. A classic example is the use of "utilize" for "use." Here are a few other examples:

Long	Short
along the lines of	like
at the present time	now
concur	agree
have duly noted the contents of	have read
in reference to	about
in the event of	if
preplan, plan ahead, plan in advance	plan
prior to	before
regardless of the fact that	although
residence	home
stipulate	agree
subsequent to	after

- Avoid phrases with redundant words such as "null and void", "alter, change or modify."
- Use short sentences instead of longer sentences with "connectors" like "however." For example: "He was driving only 30 miles per hour, however, this was too fast." can be written "He was driving only 30 miles per hour. This was too fast."
- Avoid the passive voice when possible. Active voice is often clearer and shorter. For example: "The claimant did not file a response to the employer's motion." reads better than "No response to the employer's motion was received from the Claimant." However, be careful when putting a sentence into active voice. Make sure the change doesn't change the meaning of the sentence. For instance, in the example just given, if the procedural rules say that a document is "filed" upon mailing, it may not be accurate to say a response was not "filed" because it might have been mailed and lost or delayed in the mail.

- Keep the paragraphs short. Large blocks of print put off the reader. No paragraph should be a half a page long, and even that may be too long. It is hard on the eyes and the reader's concentration.
- Use gender neutral language when possible. Where a reference to gender is needed use the pronoun associated with sexual preference for the party and/or witness.
- Be consistent in your references to men and women. If you refer to men by their last names or first names, do the same for women. If you use Esquire on a service sheet for attorneys, use it for all lawyers, regard less of their sex.
- Explain acronyms. Government agencies are notorious for using acronyms. Explain an acronym the first time you use it. For example: "The appellant was employed by the Naval Criminal Investigative Service ("NCIS")."
- When you want to indicate that you are using a shortened name or term in the decision, you don't need to insert "hereinafter." Just set out the full phrase the first time, followed by parentheses with the abbreviated name or initials to be used later set off in quotes. For example, use "Environmental Protection Agency ("EPA")" instead of "Environmental Protection Agency (hereinafter "EPA").".
- Avoid technical terms. If they are unavoidable, explain their meaning either in the body of the decision or in a footnote. Remember that if your decision is appealed to a court, the appellate court probably does not have the expertise you have in the subject matter of your decision.
- DO NOT USE LATIN and avoid legalese. No reader, especially lay readers, should have to scramble for a Latin dictionary or Black's Law Dictionary to figure out the meaning of expressions such as "*sua sponte*" or "as was discussed *ante*." It is why many courts have abandoned the use of "*pro* se" and now use the longer expression "self-represented litigant." Some expressions, however, "*supra*," or "*id.*," in relation to case citations are unavoidable.
- Avoid inflammatory adjectives and adverbs, for example, "The agency's action was an outrageous, unfair, and blatant violation of due process." There may come a day when use of such an adjective or adverb is necessary but save it for that occasion. Such words are inflammatory and are tantamount to waving a red flag at the party it is refers to and could provide a basis for challenging your impartiality. The decision should be neutral

and should not reflect a bias towards one party. If you feel very strongly that a party or a party's position is outrageous and need to vent – put the language in your first draft and then tone it down or delete it in your final draft. Have someone else read your language after you tone it down to see if it needs more softening.

- Make sure the findings are not ambiguous. That can be confusing and embarrassing. Examples: "The company has patented a bulletproof helmet for police officers made of plastic" or "Polly Ester asked for protection from attack from the police." "The company has patented a plastic bulletproof helmet for police officers" or "Polly Ester asked the police for protection from attack" reads better but won't generate a chuckle from the reader. There are more examples in the PowerPoint slides for this presentation.

XII. CONCLUSION

There is no magic formula or any one way to writing a good decision. The ideas included in this handout are suggestions. They don't all have to be followed, and sometimes they shouldn't be followed. If it was possible to come up with a formula to generate a decision, decisions would be generated by a computer. We would be entering the essential facts into the computer and letting the computer fit the facts into a formula decision. Every decision you write will be different. Write a thorough, persuasive decision that you are comfortable with. It can be organized any way you want, as long as you provide all the information needed to support your decision. Do the best you can. Be objective. Don't stress out over the decision. If you get stuck, take a break, and then go back to it. If you get stuck, sometimes it helps to go discuss it with a colleague – just talking about the issue may help you to resolve it.