Manual for

Hearing Officers

in

Administrative Adjudication

The Commonwealth of Massachusetts

Your Department of
Public Welfare

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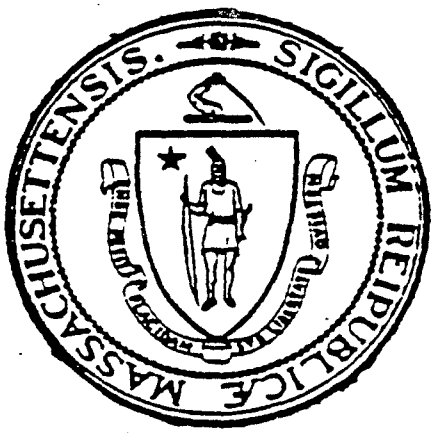

MANUAL FOR WELFARE REFEREES

INTRODUCTION

The job of the welfare appeals referee is not an easy one for which to train. Even after the referee has been trained, he or she should recognize the continuing need for training. The referee's control must be refined and his judgment must be sharpened. The referee must be adept at handling different situations which result from policies that are constantly changing.

This manual will serve as a "how to" guide for the new referee. It will help him/her to familiarize him/herself with the hearing process, to anticipate the problems involved, and to know what the various parties expect of him/her. For those who have already had experience with hearings, this manual may suggest new ideas to think about and will force them to rethink entrenched ideas.

This manual will be a resource for new and experienced referees alike. The first chapter, "The Welfare Hearing Process," puts the referee's role in the context of administrative law. It also encourages consideration of the referee's professional responsibilities. The second chapter, "The Conduct of the Welfare Hearing," explores in detail the hearing itself--from opening statements to the closing of the record. This chapter will enable referees to compare their own styles with the suggestions made. Hopefully, the suggestions made will provoke thought about improved ways of handling appeals. The third chapter is an introduction to the law of evidence. While the rules of evidence don't apply to the hearing process, familiarity with these rules will enable the referee to better evaluate evidence. The fourth chapter traces the roots of the hearing process to the concept of due process. This philosophical and legal discussion should encourage the referee to set standards of fairness in his/her mind and to conscientiously apply those standards.

The last chapter deals with the written decision, the most important aspect of the hearing process. Writing is a continuing learning process. It is hoped that this chapter will serve as a reference for that learning process. The appendix contains a variety of resource materials with which the referee should become familiar.

CHAPTER I

THE WELFARE HEARING PROCESS

A. THE NATURE OF ADMINISTRATIVE LAW

B. THE WELFARE HEARING OFFICER AS A PROFESSIONAL

C. THE ADVERSARY PROCESS VS. THE WELFARE HEARING

D. THE HEARING PROCESS AS AN ASPECT OF MANAGEMENT

A. THE NATURE OF ADMINISTRATIVE LAW

Administrative law is that section of law which deals with governmental processes (excluding criminal law). An outgrowth of what was formerly called "the law of officers," it leapt into importance in the eyes of the courts with the vast expansion of state and federal government. All facets of welfare law and the processes of welfare administration fall under the general category of administrative law. For this reason, some knowledge of administrative law is helpful to welfare hearing officers in the conduct of their duties.

Prior to the Great Depression of the 1930's, administrative law was limited largely to cases in which people went to court to compel some government official to do his/her duty, to refrain from arbitrariness, or to desist from unlawful conduct; or to have the court interpret a statute to determine whether an official or agency was conforming to the legislative intent; or to make some similar kind of claim.

As a result of government responses to the economic crisis of the country, however, many new agencies were established and older ones expanded to regulate the economy and activities of certain types of businesses, to administer relief and subsidy programs, and to introduce a public management role into what had previously been almost exclusively private sector decisions. With this expanded governmental regulation came an enormous amount of litigation. Corporations, as well as individuals, frequently tested the limits of governmental agency power. This litigation gave rise to an enormously expanded body of administrative law.

It is important to understand that this turning to

administrative agencies had important procedural significance for the parties who would be appearing in the new forums. The "administrative process" was an informal one. The decision makers were presumed to be experts, and as experts they did not need the protection from "unreliable" evidence that a jury was thought to need. Hence the rules and evidence were not required in cases which came under administrative law. Further, since the decision makers were neither trying crimes nor settling private rights, the formalities of criminal and civil procedure were not imposed upon them. Thus, even when a regulatory agency imposed a monetary fine for a violation of its regulations, the courts would not impose criminal procedural protections, claiming that the fine was merely "remedial" and not "punitive."

In addition to this relaxed procedure, these administrative agencies frequently mixed functions. They would act one day to make rules (a "quasi-legislative" function) and the next to adjudicate cases (a "quasi-judicial" function). Sometimes the agency actions were not clearly one or the other, but a mix of the two, with confusing boundaries, although presumably with different procedural protections attached to each.

The crystallization of administrative law, it should be noted, came in a setting of conflict between large institutions. The conflicts inherent in labor vs. business, governing vs. drug manufacturers, government vs. the "ruinous" motor carrier competition, and government as the allocator of broadcasting licenses, for example, set the stage for the maturing of administrative law. Individual citizens played only a small part in this maturation process. The age of welfare litigant, the discharged defense worker, the suspended high school student, the conscientious objector suing his draft board, and so forth, was yet to come.

As government continued to grow, and as the significance of government action towards individual citizens continued to expand, the courts saw in increasingly large number of cases of private persons suing government officers and agencies. Borrowing heavily from constitutional law for their theoretical bases, these cases grew in number until a broad and newly rationalized body of administrative law, which addressed the rights of the ordinary citizen confronting the apparatus of modern government, emerged in the late 1960's and early 1970's.

The same outcry for formalization and for procedural

protections that had been made by business earlier began to be raised for the ordinary citizen. The interest which these citizens were seeking to protect, however, was often not immediately clear to the courts. The clear economic loss of an airline certificate, or of the destruction of food stocks, or the mandatory disclosure of financial data had all given the courts familiar stakes--clearly recognizable "rights" and damages--about which the cases could be developed. But what about someone who was denied a government "gratuity"? If bestowing it was an act of grace, and had not in any sense been compelled by the constitution, how could removing it violate some "right"? The courts had long distinguished "privileges" from "rights" and were baffled as to the theoretical bases upon which they could proceed.

This dilemma was solved largely by ignoring it. The courts, exercising their common sense, recognized that the heart of these "little" cases was the value of the "interest," and not some historic "right." Conceptually, the solution left a bewildering number of loose ends, but in practical terms it permitted the federal courts to move to protect vast areas of socially and politically sensitive "interests" of the people. At the center of this dispute, of source, was the welfare litigation, and the crowning star to date has been the famous case of Goldberg v. Kelly.

Thus, recent years have seen the broad expansion and application of procedural protections for "the little person"--the right to a hearing before termination of crucial benefits, the right to make oral argument, the right to be represented, the right to confront and examine adverse witnesses, the right to full and timely notice, the right to an impartial decision maker, and the right to a decision based on the evidence developed at the hearing all illustrate this expansion.

Although many particular procedural protections can be identified, this summary of the history of administrative law has been made to emphasize two main points:

1. The modern administrative process was developed to handle cases too numerous or too technical for the courts. These cases were typically ones where the expertise of the decision makers would permit a considerable relaxation of judicial formalities.

2. Although a relaxed procedure may be faster, more

efficient and more reliable than judicial procedure, it still must conform to minimum standards of fairness established by agency regulations, statutes, state constitutions, or the U.S. Constitution.

At this point, then, we can see that throughout administrative law, whether it is dealing with A.T.& T. rates or a neighborhood day care center license, there is a constant balancing between efficient case processing and formalization.

A consciousness that a balancing between efficient case processing and formalization is continually occurring is crucial to the hearing officer. Many people, especially lawyers who have never had responsibility for operating a large program of grants or services, think that the more formalization that exists, the better. They are constantly pressing to turn hearing procedures into courts. Yet, the objective of the program cannot be realized without keeping the costs of administration realistic, and in the end fairness is not served by excessive judicialization.

The judicial model is an adversarial model. It presumes that both sides come with counsel prepared to do battle until the truth somehow mystically emerges. It is often difficult for some lawyers, particularly lawyers who have immersed themselves in the adversary situation, to see an alternative, but to many state agency personnel, the adversarial model appears grotesque. They do not see themselves as adversaries of the welfare claimant. They know that even today relatively few welfare claimants are represented by counsel or paralegals. They know that to pit a relatively trained bureaucrat against a nearly illiterate, unsophisticated claimant would hardly do justice or achieve fairness.

On the other hand, from the claimant's point of view the state agency may not seem sympathetic, benign, or even neutral. From the viewpoint of an impartial observer, a strong paternalism in welfare administrators may be admirable in terms of humaneness, but may appear to be susceptible to arbitrariness, to change of mood, and to irrelevant criteria.

Thus, there is an inescapable quality of adversariness in any system where the claimant wants badly, perhaps needs desperately, what the other party has the power to give or withhold.

The best solution would seem to be to recognize that this adversarial model does not exist, and to attempt to fashion a procedure that preserves the informality essential to efficient, reliable and humane administration, but at the same time maintains sufficient formalities and standards to assure fundamental fairness. Thus the model is not merely the judicial and adversarial one, nor a doctrinaire reliance on paternalism, but a search for a fair and balanced process for mass justice that recognizes but does not exaggerate the adversarial quality of the hearing.

The welfare hearing officer should constantly be sensitive to this institutional, or as Martin Luther King would say, "creative" tension in the law between efficient case processing and formalization. While there is no fixed boundary between these abstractions, the courts in reviewing these balancing exercises look for a result which amounts to "fundamental fairness." In the chapter on due process, a variety of particular aspects of fairness is discussed.

SUMMARY

At this point, we have tried to sketch out a brief outline of the history of administrative law. We have tried to show that the administrative procedures were fashioned to handle cases too complex or too voluminous for the courts to handle in an expeditious, efficient and fair manner. We have also tried to show that the informalities of the administrative process bred their own kinds of risks of unfairness, and that the courts have devoted considerable time in recent years trying to establish guidelines which would minimize arbitrariness and unfairness, while at the same time preserving the advantages of the simple hearing.

Finally, it is important to keep in mind that the administrative process was never conceived to be run by lawyers. Lawyers are not an essential ingredient for fairness or fair processes. Informed, professional but non-legal hearing officers are perfectly capable of holding fair hearings which are satisfactory to the most crucial kind of judicial scrutiny. Nevertheless, lay officers--as well as lawyers acting as hearing officers--must be conscious of the standards of fairness. The hearing officer, whether lawyer or a lay person, must be constantly watchful to avoid conduct or procedures that are unfair. This responsibility is his professional and ethical duty, and it is the most fundamental tenet of administrative law.

B. THE WELFARE HEARING OFFICER AS A PROFESSIONAL

A central concept to appreciating the integrity of the fair hearing process is that the welfare hearing officer is a professional person. The crucial impartiality required by Goldberg v. Kelly hangs upon this professionalism, which is characterized by at least three traits.

First, the hearing officer must be knowledgeable. As previously discussed, the quasi-judicial hearing function itself is delegated to the agency under administrative law only because of the assumed expertise of the agency. The hearing officer has a legal as well as a professional responsibility to be knowledgeable about the issues which might be raised at the hearing.

Second, the hearing officer must be independent. It is impossible for him/her to do his/her job under heavy, direct supervision. Like the doctor or the attorney in private practice, s/he must be allowed to control the professional relationship with the client if this is to function efficiently. It is the welfare hearing officer who must control the hearing, evaluate the testimony, apply the regulations to the facts, and write a decision. That judgment is subject to review, just as a trial judge's judgment is subject to review, but basically it is essential that the hearing officer be in control of the hearing.

To be independent, the hearing officer must be self-disciplined. Since s/he cannot be closely supervised, his/her breadth of professional freedom is substantial. This freedom may, of course, be abused. Hearing officers must respond to the professional trust given them by disciplining themselves. They must expect a full day's work of themselves. They must also recognize the limits of their responsibility. They should not ignore the limits of the legal and regulatory framework within which they work; rather, they must recognize the limits of their own jurisdiction just as good judges scrupulously observe jurisdictional limits as established by the doctrine of judicial self-restraint.

Another aspect of the hearing officer's professionalism is the delicate balance between his/her independence and his/her accountability. An independent hearing officer is not a sovereign, but rather a person who is privileged to exercise his/her professional judgment to the best of his/her ability without punishment or penalty merely because a superior's

professional judgment differs. S/he may not arbitrarily flout agency policy in case after case, or establish a pattern of obstructive or deviant professional conduct. Independence of the hearing officer which will be protected by the courts in the name of the due process is that of professional, informed objectivity. It is the independence of the neutral, rational by-stander. Such an independent officer carefully reviews the whole case as developed by all sides, applies the proper regulations and statutes, and renders a neutral judgment.

An issue is sometimes raised over whether a hearing officer can judge the regulations themselves, applying, for example, the U.S. Constitution to determine if the regulations deny equal protection. Is s/he sufficiently independent to do so? One rationale in support of this power is that the hearing officer has typically sworn to uphold the Constitution. If his/her office is bound by improper regulations and s/he has the power to avoid or invalidate such regulations, s/he should do so. But if he/she lacks such formal power, as is the case in Massachusetts, then the governmental process provides another mechanism for revising such regulations. The referee must uphold Department regulations and leave the responsibility of invalidating the regulation(s) in question to the courts. To do otherwise would violate his/her professional obligation to uphold the Constitution and the orderly testing of such issues.

The third aspect of professionalism is the hearing officer's ethical obligations. Traditionally, those people who would assume professional status are held to a higher standard of conduct than is required of others. Notions of honor, integrity, and duty are central to professionalism. A welfare hearing officer should avoid not only the corrupting act, but even the appearance of such acts, however subtle or unintended. The ex parte contact between the hearing officer and the welfare office (i.e. contact with the welfare office out of the presence of the appellant) can be corrupting. The hearing officer is required to decide the case solely on the basis of the record developed at the hearing, and should immediately stop any ex parte discussions concerning the case.

Other examples of arguably unethical behavior include: the hearing officer who intimidates witnesses, or assumes a pompous stance at the hearing; the hearing officer who probes for personal details beyond the relevant scope of the issues at the hearing; the hearing officer who decides to punish or teach a hostile Appellant a lesson by making adverse findings.

Ethics transcends conformity to the law or a sense of fairness; the heart of ethics is the cultivation of a notion of service. The high government official who breaks the law is unethical because he breached his duty of service, the same official could stay well within the law, however, and still behave unethically. It is a crucial notion that ethics centers upon one's duties to others. The ethical person is the person who scrupulously fulfills his/her duties of service to others.

C. THE ADVERSARY PROCESS VS. THE WELFARE HEARING

Welfare hearing officers often make the point that the welfare hearing is not an adversary proceeding. Theoretically, Department representatives at the hearing have no conflict of interest with the interests of the appellant. No state officer stands to benefit if the appeals hearing officer upholds the agency action. No one, they insist, is in any sense <u>against</u> the appellant.

Theory aside, it is also important to appreciate the sense in which the hearing <u>is</u> adversarial. First of all, the hearing resulted from an adverse action. The appellant has been denied a benefit to which s/he feels s/he has a right under the law. That feeling may be an uneducated hope that the law will allow the benefit, or it may be a carefully rationalized or researched claim under the regulations. But, in either case, the welfare office or other Department unit is opposing that claim. The agency often opposes the appellant's assertion of the facts, and the agency usually disputes the appellant's reading of the regulations. In effect, the agency has a case "against" the appellant.

To be fair, in many if not most cases, the atmosphere is not hostile or adverse. Typically, the Department representative feels no personal stake in the earlier finding of ineligibility. Nevertheless, courts tend to view the proceeding as essentially adversarial. The reasons for this perception explain the approach of the courts to the review of administrative decisions. If the hearing officer is to avoid reversible error, s/he must anticipate the courts' view of the proceeding.

Courts tend to project their own experiences with civil and criminal trials, and are likely to exaggerate the degree of adverseness in the welfare hearing merely because its format is an adjudicative one. The view of

courts of the fair hearing process as an opposition of interests and evidence stems partially from a historical concern in our Anglo-American common law to protect the citizen from abuses of the power of the state. The state is so powerful and can so casually and senselessly wreak the most devastating harm upon individuals, that the courts have become sensitized to the risks and disadvantage of individuals in dealing with the government.

Thus, the courts' perception of the hearing as adversarial becomes a means of balancing the relative power of the parties. Although many states insist that there be only one party (the appellant) at the hearing, judges rarely agree to such an antiseptic view of the hearing process.

From a conceptual viewpoint, too, the courts tend to perceive the hearing as adversarial in order to allocate the burden of proof. States differ over who has the burden of proof--the agency or the appellant. The argument that the client has the burden of proof is that since the client is seeking to disturb the status quo and has sought to reverse the agency finding as an error in law, the burden falls upon the client to prove by a preponderance of evidence that the agency erred. The argument that the agency has the burden of proof is that since the federal regulations require a fair hearing and since the agency action will not by upheld unless the agency can positively justify its action, whether or not the appellant introduces the evidence, the burden of proof must be said to fall upon the agency. But such disputes miss the point. The burden of proof is not a line in the air; it is a metaphysical concept that affords a good bit of room for maneuvering. The point is that the courts think in such terms and therefore are inclined to attribute adversariness to the hearings merely because of the logic of their own analytical tools. The conceptual approach of the courts must influence the way the hearing officer him/herself perceives the hearing and its requirements of fairness.

The point of this section is not to try to artificially stimulate conflict or heighten feeling between the Department and the appellants, but to emphasize that the adversarial model is relevant to the way the hearing officer conducts the hearing. It affects the necessity of the hearing officer to preserve his/her own distance and neutrality, the way s/he develops the record, the weight s/he attaches to evidence and argument, and the way s/he writes his/her opinion.

It is the hearing officer's duty to impartially conduct a fair hearing. The hearing officer must assume some conflict between the parties before him/her. However, s/he need not assume any hostility or bad feeling. S/he should, in fact, try to discourage such feelings without compromising his/her neutral role. An adversarial hearing is not an emotional term for the hearing officer; it is merely a model which the hearing officer must look beyond, but must not overlook.

D. THE HEARING PROCESS AS AN ASPECT OF MANAGEMENT

To understand his/her function, the hearing officer must see his/her office within the context of the Division of Hearings and the Department. S/he must be responsive to assignments, attend to relative productivity, and keep him/herself informed of changing regulations and Department policies, but s/he must also be sensitive to the integrity of the hearings process and the ability of the state to provide a fair hearing to the thousands of appellants.

For example, the hearing officer may be inclined to grant a rescheduling or continuance when an appellant appears at a hearing unprepared--or, for that matter, if the Department is not prepared. It may seem harsh, punitive even, not to try to arrange another hearing. Except for the most unusual and extenuating circumstances, the rescheduling or continuance of hearings will be severely disruptive of the scheduling process. Rescheduling and continuances invite abuse by appellants, especially when assistance payments must be maintained until completion of the hearing, and they invite a sloppiness and lack of preparation on the part of the Department. In summary, the practice of casual rescheduling and continuance of hearings undermines the process. The hearing officer has a professional duty to understand the system within which s/he is operating, to act in a way to make the system function fairly, and to make the process fulfill the legislative intent.

Another example of the necessity of the hearing officer understanding and reacting to the macrocosm is the recognition that the Department is part of the executive branch and was established to give effect to the legislative will. This means that to conform to the regulations, agency policy and law is not to be an "automaton as bureaucrat"; rather it is to act to fulfill one's professional obligation to execute the policies of legislative mandate consistent with the central idea of democratic government.

For example, jurisdictional issues, which are often somewhat controversial in the abstract, are more intelligible when seen as part of a systemic design. When responsibilities for certain classes of issues are defined by statute and regulation, it is not merely presumptuous for the hearing officer to act ultra vires--i.e., to go beyond his/her authority and official power to attempt to decide these issues--but is also a breach of his/her duty to the overall program of administration of which s/he is a part.

For another example, the hearing officer cannot orally direct the WSO to perform any act, whether to modify or reverse its prior decision. For a hearing officer to attempt to compel a welfare office to act by oral order, to pretend to enjoy some judicial power never conferred upon the office--such as trying to provide injunctive relief or an ordered mandamus--is neither brave nor creative. It is foolish and unprofessional.

Another example: When a Department representative insists to a hearing officer that the issue of timeliness of an appeal is beyond his/her jurisdiction, s/he is quite wrong. It is the hearing officer's responsibility to decide such an issue. To submit to the Department representatives assertion, whether through ignorance or an inappropriate desire to please the Department representative, is subversive of the system created within the state for welfare administration.

Another example: Sometimes a hearing officer attempts to persuade an appellant to withdraw or abandon his appeal because the hearing officer is convinced that it lacks merit--or sometimes because the hearing officer does not want to write an opinion. If the hearing officer sees the issues as clearcut, s/he can explain this to the appellant, and can suggest that--as of the moment--s/he sees no way in which s/he can uphold the appellant's claim. But, s/he must be extraordinarily careful that s/he does not destroy his/her appearance of neutrality. Why should s/he sometimes undertake such needless work? Because his/her obligation to the whole program of assistance administration is to make it effective, and to make it effective s/he must give it an unsullied appearance of objectivity and neutrality. The hearing officer must not only keep the appeals process above reproach, but s/he must keep its appearance above suspicion as well.

Each of these examples is an attempt to emphasize the point that the hearing officer's role should not be seen

in isolation. S/he is perceived as part of the system, and s/he must, to the best of his/her ability, make that system work effectively. That means s/he must avoid the appealing role of either a maverick or a helpless, sympathetic figure caught in the branches of a harsh regulatory jungle. It also means avoiding the appearance of being either a passive or an active conspirator with the Department representative. His/her separate status and independent function must be made clear. S/he has assumed a professional and legal responsibility to make the system work fairly and effectively.

CHAPTER II

THE CONDUCT OF THE WELFARE HEARING

A. INTRODUCTION

B. PREPARATION FOR THE HEARING: ANTICIPATING ISSUES

C. PHYSICAL ARRANGEMENTS FOR THE HEARING

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E. OPENING THE HEARING: GOING ON THE RECORD

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G. TAKING NOTES: CLARIFYING TESTIMONY FOR THE RECORD

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O. DEALING WITH COUNSEL'S MOTIONS AND OBJECTIONS

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Q. PREPARING TO CLOSE THE RECORD: LEAVING THE RECORD OPEN FOR FURTHER EVIDENCE

R. ADVISING THE CLAIMANT WHAT TO EXPECT NEXT: CLOSING THE RECORD

A. INTRODUCTION

The administrative hearing was conceived as an informal process wherein government officers, who were not lawyers but who were expert in particular matters which were subject to regulation, could offer quick, informal and reliable adjudication. The fact that lawyers might appear before them did not in any way diminish their authority over the hearing. Similarly, in welfare hearings in many states the hearing officer is not a lawyer, although s/he may frequently find him/herself presiding over cases in which lawyers appear for one or both sides. The lay hearing officer is as capable as the lawyer hearing officer in terms of substantive knowledge of regulations, common sense, and decision writing ability. Under the law, their authority is equal.

B. PREPARATIONS FOR THE HEARING: ANTICIPATING ISSUES

The hearing officer should approach the hearing much as a trial lawyer approaches his/her opening statement to the jury: by anticipating his/her summing up to the jury at the end of the trial. Similarly, the insightful hearing officer looks forward to the problem of deciding the case and of having to write the decision or proposed decision from the very moment that s/he opens the case file.

The hearing officer, upon scanning the file and identifying the issues of fact or policy in dispute, should note carefully the regulations involved. S/he should then review them quickly. S/he may be thoroughly familiar with them, but this exercise is a craftmanlike precaution that will fix in his/her mind the criteria upon which the case will turn. The hearing officer may find it a useful practice to request the Department representative to submit copies of the pertinent regulations into the record. In this way, s/he will have the opportunity to review the regulations and frame the issue in his/her mind, even though s/he may be without a copy of the policy manual. By identifying the key issues, the hearing officer will be able to keep the development of the record focused.

Furthermore, it is important that the hearing officer have a clearly defined understanding of the issues so that s/he may project an air of confidence and command of

the situation necessary to proper control of the hearing. Frequently, the appellant will not understand what is at issue. The hearing officer must be in a position to assist the appellant by eliciting relevant testimony. There may be hearings in which there is considerable animosity between the appellant and the Department representative. Additionally, there may be instances in which the appellant will attempt to take control of the hearing for the purpose of sounding off. The hearing officer must be prepared for all possibilities by taking firm control of the hearing at the very beginning.

Sometimes new issues emerge during the hearing. When this happens, the hearing officer must make a judgment as to whether the parties are adequately prepared to deal with unexpected issues. The hearing officer may have to decide fairly quickly if the hearing should proceed or if it should be continued to allow for adequate preparation. The hearing officers's experience in framing, defining and narrowing issues in preparation for hearings is the best training for those occasions when s/he must act quickly and decisively if the hearing and record are not to become confused as to make reliable adjudication impossible.

C. PHYSICAL ARRANGEMENTS FOR THE HEARING

The hearing officer typically does not choose the place of the hearing. On the other hand, s/he is responsible for the quality of the hearing, and should request a relatively quiet and private place so that the recording can be made, in order that confidentially can be preserved, and so that the full attention of the parties can be maintained. These concerns must, however, be offset by the realistic options available.

A typical arrangement for the hearing itself is around a conference table with the hearing officer at the end and the parties on opposite sides of the table. The table is helpful since it 1) provides space for papers, 2) places the parties in reasonable proximity but with a buffer space, 3) enables those present to talk easily to one another, and 4) puts them within easy pick-up distance of the recorder's microphone.

The hearing officer should not sit away from the parties, expecting them to address him/her in a formal manner. The characteristics of a court or a legislative hearing are inappropriate for the intimate, informal and

counselling atmosphere sought in the welfare hearing. However, as the complexity of or number of parties to a hearing increases, it is to the advantage of the hearing officer to increase the formality of the proceeding.

Finally, special attention must often be paid to the physical characteristics of the appellants. Many will be aged, infirm, crippled, or with children. The hearing officer must try to make them relatively comfortable, but in a position where they can be fully involved. It is their hearing. The hearing is not a display for them; it was set up to hear their case. Thus, for the exceptional client, exceptional care must be taken.

D. INITIAL CONTACT WITH THE CLIENT AND THE CLIENT'S REPRESENTATIVE

The hearing officer can put the client at ease at the very outset by introducing himself, the WSO representative, and the Department attorney, if one is present. This introduction should be relaxed and friendly. The conscientious hearing officer should avoid being either too stuffy or too familiar. A calm, neutral, businesslike attitude should be adopted. In these initial moments the hearing officer should begin to anticipate the personalities of those who are present, and the extent his/her assistance will be needed in presenting the case by either the claimant or the Department representative.

Since the claimant may be anxious and apprehensive about the hearing, it is helpful to explain at this point that, since the hearing is official and on the record, it is necessary to swear in anyone who will testify. It is sometimes simpler, and more reassuring to witnesses, if everyone simply takes the oath at once after the hearing is opened. The administration of the oath to the group is useful since the appellant's representative may inadvertently begin to testify during the hearing, or may decide initially that s/he will only make arguments, but later decides s/he will testify. Having already sworn him/her in avoids further complication. (However, if the hearing officer anticipates the possibility of the outcome of the hearing turning on the credibility of the witnesses, it may be desirable to swear the witness individually just prior to his/her testifying. In this way, the serious nature of the proceeding is emphasized at a moment critical to each witness.)

E. OPENING THE HEARING: GOING ON THE RECORD

The hearing officer should ask if there are any informal questions before opening the record. If not, s/he should turn on the recorder, identify him/herself, his/her title, the case name and number to be heard, and the date and site of the hearing. S/he should ask each person present to identify him/herself for the record. S/he should advise the appellant of the possibility of an immediate ruling on the appeal, of the amount of time it will take to render a written decision, and of the right to judicial review. The hearing officer should explain the right to assistance pending the decision and the circumstances under which such aid will be ordered to be terminated immediately.

A brief statement of the order in which the hearing officer anticipates hearing the witnesses and representatives and the order in which s/he intends to hear testimony and argument on specific issues, if these are not heard together, is usually helpful in preparing the parties present for the way in which the hearing will develop. This step is also crucial to the initial establishment of the hearing officer's authority in the conduct of the hearing.

At this point, it is necessary to swear in all persons present who will testify or may testify. An affirmation procedure may be used as an alternative for those who object to swearing oaths.

F. GUIDELINES FOR HEARINGS CONDUCTED USING AN INTERPRETER

The hearing officer needs to be prepared to deal with a hearing involving an appellant who is not fluent in English. As one judge has written in a decision invalidating a trial where there was inadequate interpretation for the non-English speaking party, a proceeding in English is like "a babble of voices" for a non-English speaking participant.

The hearing officer should encourage appellants who are not fluent in English to agree to have the hearing conducted through interpretation, either with a Department-provided interpreter or their own interpreter. However, the presence alone of a bilingual person to interpret does not ensure that adequate interpretation will occur. It is essential that the hearing officer

instruct the interpreter and the other participants in the hearing about the rules for properly conducting the hearing through interpretation.

In Massachusetts, the Supreme Judicial Court has noted (in the case of Commonwealth v. Festa) that problems of distortion and confusion may arise when an interpreter is placed between the witness and the person responsible for deciding the case. To avoid distortion and confusion and to give appellants who are not fluent in English as fair a hearing as English-speaking appellants, the following guidelines need to be observed:

1. At the opening of the hearing, the referee shall inquire whether the appellant is fluent in English.[1] Regardless of whether an appellant is fluent in English, any appellant who prefers that the hearing be conducted through an interpreter, and who has brought an interpreter to the hearing, shall be permitted to proceed through the interpreter.

2. If the referee believes that the appellant is not fluent in English yet the appellant has not brought an interpreter to the hearing, or if the appellant indicates at any point during the hearing that he or she is not fluent in English, then the referee shall, on the tape recorded record, attempt to explain to the appellant that he or she has the right to stay the hearing in order to allow time for the appellant to obtain an interpreter or to request a Department-provided interpreter, where available. Further, the referee shall, on the tape-recorded record, attempt to explain that: (a) it is very important that the appellant be able to understand fully everything said at the hearing, (b) it is very important that the appellant be able to communicate fully his or her statements at the hearing, and (c) this hearing is likely to be the only opportunity, under the law, that the appellant will have to give evidence of his or her side of the case.

3. If, after beginning the hearing without an

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[1]. The parties mean by fluency in a language the ability to speak and understand that language and to communicate in that language. The referee should proceed as if the appellant is not fluent if the referee is unsure of the appellant's fluency.

interpreter, the appellant indicates that he or she is not comfortable continuing in English or the referee determines that the appellant is not able to understand English fully or is not able to communicate fully in English, the referee shall offer the appellant an opportunity to stay the hearing to enable the appellant to obtain an interpreter or to request a Department-provided interpreter, where available.

4. The interpreter's oath set forth in Appendix No. A shall be administered by the referee to interpreter. If the interpreter is also to give testimony, the witness oath shall also be administered.

5. The referee, on the record, but before taking evidence, shall explain the interpreter's role to all parties, witnesses, agents or representatives of any party, and the interpreter, as follows:

   a. The interpreter is to fully translate every statement, including, but not limited to, opening remarks, questions, testimony, objections, and closing statements, made in English by the referee, any party witness, and any agent or representative of any party into the language in which the appellant is fluent.

   b. The interpreter is to fully translate each such statement and is not to summarize, condense, or make any changes such as from the first person to the third person. The interpreter is not to act as an advocate.

   c. Any person questioning an appellant or other witness through the interpreter should address the question to the appellant in the second person, and not to the interpreter.

   d. The interpreter should then fully translate the answer or any other statement made on the record by the appellant or other witness in the first person, neither editing nor adding to the appellant's or witnesses words. Even if the answer is non-responsive, the interpreter should give it and allow the referee or the questioner to request a more responsive answer. The interpreter's sole function is to interpret.

e. The interpreter is to alert the referee at any point during the hearing when the interpreter is unable to fully translate for any reason, such as due to the failure of the person speaking to pause sufficiently frequently or due to inability to hear or understand the person speaking.

f. The interpreter should ask for and get clarification about the meaning of words or expressions of which he or she is unsure. For example, the referee or a witness may need to rephrase technical or legal terminology or terminology peculiar to the Welfare Department.

g. The interpreter shall keep confidential any communications intended to be confidential between the appellant and his or her representative.

6. The referee shall instruct the parties and the witnesses to pause as frequently as necessary to enable the interpreter to fully translate all statements made in English.

7. The referee shall intervene if anyone present at the hearing begins to fail to comply with the instructions and procedures necessary to ensure full and accurate translation. For example, if a witness fails to pause, the referee shall instruct the witness to stop to enable the interpreter to translate. The referee shall play back the tape recording of any portion of the witness testimony as necessary for the interpreter to translate.

8. The referee shall make every effort to ensure that all of the normal procedures for the examination of exhibits and witnesses are followed.

9. Any attempt by the appellant at the hearing to communicate in English or to respond to a statement made or question asked in English without interpretation shall be permitted, but shall not constitute a waiver of the right to resume the use of full interpretation if the appellant so desires.

10. If any bilingual participant in the hearing disagrees with the interpretation, he or she

should be asked to explain the disagreement to the referee who shall decide whether the disagreement can be resolved or whether a more qualified interpreter is needed.

G. TAKING NOTES: CLARIFYING TESTIMONY FOR THE RECORD

The hearing officer should take a careful set of notes in chronological order. This not only helps him/her keep the hearing effectively organized, but it also permits him/her to reliably leave and later return to a given point. A good set of notes is enormously helpful in attempting to make use of the recording later in preparing a decision. However, in regard to note-taking, the hearing officer must not let the note-taking function give him/her the appearance of being passive in the hearing. It is important that the parties feel at all times that the hearing officer is in control of the hearing and developing it purposefully.

Testimony with uneducated claimants and witnesses will often be diffused and irrelevant. The hearing officer should attend to such testimony carefully, and help the party bring out the useful and relevant information. The hearing officer should avoid taking over from the witness and turning the hearing into an interrogation. The questions that the hearing officer would ask might overlook crucial information; in addition, the witness may be intimidated or withdraw. What the claimant volunteers may often be decisive. The Department intake and processing may have missed crucial information that the claimant himself has never appreciated. It is important, therefore, to encourage the witness to tell his/her own story in his/her own words. Brief and encouraging questions may help him/her tell his/her story. Extensive or hostile questioning is almost certain to intimidate him/her.

H. THE PLACE OF THE DEPARTMENT NOTICE IN THE HEARING

Early in the hearing, and usually immediately after the opening of the record, introduction of parties, etc., the hearing officer should read into the record the notice to the appellant of the Department action. If the notice is inadequate, and a fair hearing is impossible, the hearing must be postponed. If the notice can be

rehabilitated by having the Department explain what is at issue, why, what was done, and what the appeals process means, the hearing can proceed. If there is a question in the mind of the hearing officer as to the adequacy of the notice, s/he should take sufficient testimony of the claimant to enable him/her to make reasoned decision later.

Adequacy of notice is sometimes a controversial issue. The crucial test is whether the appellant has been harmed and whether a fair hearing can proceed, and not the desirability of more adequate notice, or even the clear inadequacy of notice given. The presence of the claimant, prepared to develop his/her case on the issues, satisfied due process.

I. ORDER OF WITNESSES: CONTROLLING THE DEVELOPING RECORD

The normal hearing procedure is to permit the Department representative to first develop the background of the case, state the issues and then state the evidence upon which the administrative action was based.

This procedure can be varied. The hearing officer should exercise his/her judgment as to what is the most efficient, fair and reliable way to organize the case. While reviewing the file in anticipation of the hearing, or at the outset, after opening the hearing, s/he may decide to break the hearing sequence into parts, where distinct issues can be heard sequentially rather than collectively. This will produce a more focused record, and should make it easier for the appellant to develop his case.

While the Department representative is developing his/her case, the appellant may attempt to interrupt. Such interruptions may have to be tolerated for two reasons. Unless the appellant can respond immediately, s/he may not be able to make his/her best case. Unlike attorneys or highly educated person, an appellant may have no coherent sense of the merits and the essentials of his/her own case. For this reason, a responsive argument may be necessary. A second reason is that the appellant may be worried that s/he will forget his/her arguments and the issues. If this is the problem, the hearing officer, by noting the gist of the argument the claimant is trying to make, can assure him/her that s/he will be heard on that point later. The hearing officer

should carefully flag that notation with a star or an arrow so that later in the hearing s/he can explicitly ask, for example, "now what about your objection to the Department's finding?....What you started to say was this....What do you want to say about that now?"

Interruptions may also be a nuisance and may be intolerable. The hearing officer should simply explain that the claimant's turn will come and that for the official record it is necessary to let the WSO representative tell his/her whole story.

J. HOW ACTIVE SHOULD THE HEARING OFFICER BE?

The extent to which the hearing officer actively participates in the hearing--by asking questions, explaining points, and making comments--will vary radically from personality to personality. The hearing officer should control the hearing, but s/he should not so dominate it as to intimidate the parties or misdirect the developing testimony.

The hearing is not an adversarial trial in which the judge sits somewhat passively. Because of his/her expertise, the hearing officer's participation is often crucial if the full potential testimony and argument of the WSO and claimant are to be developed.

The hearing officer must use his/her questioning power with great care to develop the positions of the respective parties and not a hypothetical position which s/he presumes is at issue. For example, by asking leading questions or by nodding sympathetically, the hearing officer may inadvertently suggest to the unsophisticated appellant that a particular line of argument or evidence is decisive. The appellant may become obsessed with proving an issue that is insignificant, or one that might be better seen in balance against testimony s/he neglects in response to the leading of the hearing officer. The power of the hearing officer should be constructive and not directive.

K. WHEN COUNSEL BEGINS TO TESTIFY

It is perfectly proper for a lawyer, paralegal, or other representative of an appellant to testify (there are, however, ethical implications for lawyers who testify to their clients' cases). S/he must take the

oath or affirmation. If the oath or affirmation has been administered to all at the outset, this is not a problem. However, the representative may begin to testify intentionally or inadvertently and thereby speak to issues of which s/he actually has less knowledge than the appellant or of which s/he has no direct knowledge. If facts are in dispute, such testimony is an unacceptable substitute for the direct testimony of the appellant. Under these circumstances, the hearing officer should require the testimony of the witness for who the representative is testifying.

L. HANDLING DISRUPTIONS OF THE HEARING

The vast majority of cases will move smoothly. In some rare cases, however, parties will become angry, lose their tempers, behave in a disturbingly neurotic fashion, interrupt persistently, or even attack the other parties. Although in such a tense situation the Department representative may need to be reminded that the hearing must be orderly, the typical problem in such cases will be the appellant or persons accompanying the appellant.

The first thing the hearing officer should do when s/he recognizes the mounting tension is to him/herself adopt a calculated outward manner of calmness, even if s/he is frustrated and angry. The hearing is not a situation in which fairness and justice can be achieved with everyone venting hostilities or anxieties. The hearing officer should have established his/her authority at the beginning of the hearing and should begin to assert it with increasing firmness as required by the circumstances. The hearing officer should caution the parties that order must be preserved and then remind the appellant that although s/he is entitled to a fair hearing, the appellant can forfeit that right by making it impossible to continue the hearing or by making it impossible for him/her to present his/her best case.

If it would be helpful, the hearing officer may close the hearing for a recess to give the parties time to cool down. This procedure is particularly helpful when a representative is there who can calm the claimant, or vice versa.

It is important to make two things clear: First, the hearing officer is not present to negotiate, but to make findings of fact and conclusions of law. Blustering and rhetoric at the hearing tend to create the impression that the appellant is conceding that s/he has no case on

the merits. Second, the hearing officer must be determined to preserve an orderly record or close the hearing. S/he should make this point in a calm manner to indicate his/her firmness and his/her own lack of emotional involvement. S/he should emphasize his/her determination to be fair and neutral, but s/he should not let him/her be pressed or infuriated by the offensive conduct. These comments and warnings should be made on the record, and the particular persons who are disrupting the hearing should be identified.

M. GOING OFF THE RECORD

From time to time the hearing officer may find it helpful to go off the record to discuss some point that has been misunderstood or some procedural request, or to clarify in advance the development of testimony and evidence in regard to a particularly complex issue. In such a case, the hearing officer should indicate why s/he is going off the record before turning off the recorder. When the recording is resumed, the hearing officer should note what happened in the interim and, if the parties reached an understanding or agreement relevant to the record, that agreement should be summarized in the record and the results assented to for the record by each party affected.

As a rule, however, the hearing officer should avoid going off the record because it gives an appearance of impropriety. An alternative procedure is to announce that discussion will be off the record and then to leave the recorder going.

N. WHEN EVIDENTIARY PROBLEMS ARISE

From time to time, even in the informal procedures of an administrative hearing, where all the rules of evidence are not applicable, an issue of evidence will arise. Typically this will not be one of admissibility, but of the weight to be attached to such testimony. The hearing officer should hear out fully any objections or comments sought to be made in reference to the evidence. Later, s/he can reflect on the specific point, request memoranda as to the possible reasons for weighting the evidence in one direction or another, and consult treatises, if necessary. The law of evidence is useful, even for informal processes, in that it represents a set of judicial conventions as to what the probabilities of

truth or reliability may be in a particular instance.

A more difficult issue arises when the witness objects on the basis of a constitutional or statutory privilege involving criminal matters, as may arise out of alleged fraud. It may become necessary to warn the appellant, his/her representative or other witness that criminal issues are developing and that what may be said on the record may be used against him/her in a criminal prosecution.

When a privilege against testifying or the introduction of evidence by others has been made, the hearing officer, if s/he is unsure of his/her ground, need not rule upon the matter immediately. S/he may take evidence, and then explicitly disavow reliance upon it later, as is discussed in the next section under objections.

To illustrate, the issue of the appellant's failure to rebut an agency's allegation of fraud should be handled in the following manner: The hearing officer would advise the agency that they must prove fraud, if that is the basis for the adverse action. The appellant would not be compelled to testify. The appellant's failure to testify, further, cannot itself be a basis for findings of fraud in the absence of substantial evidence by the agency.

The general rule as to evidence in administrative hearings is that admission standards are extremely broad. But what may be admitted is not necessarily substantial and may not be relied upon merely because it was "admissible." Even when exclusions are thought to be justified, it may be better to admit the evidence for the record, and then make a decision on it later, pointing out in the decision that evidence about which motions to exclude were made was not relied upon.

O. DEALING WITH COUNSEL'S MOTIONS AND OBJECTIONS

The first rule in regard to motions and objections in the administrative process in that the hearing officer should make certain that s/he understands the essentials of the argument being made. Often evidence is objected to as not "competent, relevant or material," which is a stock objection of lawyers. The hearing officer should not hesitate to ask the attorney or party objecting to explain the grounds of the objection in non-technical terms. S/he should keep in mind, too, that the general

appellant.

Similarly, the illiterate, uneducated, or psychologically disturbed appellant may require special care and patience. The hearing officer must be especially careful not to show impatience or irritation and must make compensation in the conduct of the hearing for any such impairments.

Q. WITHDRAWALS

Oftentimes, people appeal because they don't understand the agency action and they want an explanation. If they are satisfied by the explanations that may be presented at the hearing, they may be willing to withdraw the appeal. Likewise, appellants may also be willing to withdraw their appeal if there is agreement among the parties that a mistake should be corrected or that there was no mistake. The hearing officer should be careful not to pressure the appellant to withdraw. Rather, s/he should merely suggest withdrawing as an option to the appellant who appears to be no longer interested in pursing the appeal. If the appellant agrees to withdraw, the hearing officer should draft a withdrawal statement which states that the appeal (identified by appeal number) of a stated Department action or inaction is being withdrawn by signing the statement and should require the Department representative to do likewise. Each party should retain a copy of the withdrawal.

R. PREPARING TO CLOSE THE RECORD: LEAVING THE RECORD OPEN FOR FURTHER EVIDENCE

Prior to closing the record, the hearing officer should give the parties a final opportunity to submit evidence and to make arguments. If evidence that should be in the record is not available, the hearing officer may indicate that s/he will leave the record open for such evidence. If the evidence is likely to be controverted, however, s/he should make sure that copies are available to the parties to the hearing, with an opportunity to submit written comments upon it or to make objections to it. If the evidence is of a controversial nature or is critical to the outcome of the hearing and if memoranda are an adequate means of supporting or challenging such evidence, it may be necessary to continue to reopen the hearing.

S. ADVISING THE CLAIMANT WHAT TO EXPECT NEXT: CLOSING THE RECORD

Prior to closing, the hearing officer should remind the client that s/he will make his/her decision in the future when s/he has had an opportunity to study his/her notes and to review the taped record. S/he should indicate that the client will receive the decision by mail, or via his/her representative by mail, and the delay which can be expected prior to the issuance of the decision. S/he should, as appropriate, advise the appellant that payments will continue until the decision is rendered, that assistance pending the hearing will be discontinued immediately, or that recoupment will follow. The hearing officer should then declare the hearing closed and turn off the recorder.

CHAPTER III

DUE PROCESS

A. FAIRNESS:

If a single word had to be chosen to signify what we may by "due process", that work would be fairness. We try, as individuals and as a society, to insure that everyone is treated fairly. In any conflict, fairness means that there must be some kind of balance between the parties, and it means that the conflict must be governed by rules which are known and equally applicable to all parties. If the parties are of unequal ability to resolve the conflict, then the rules must work to compensate for the disadvantage of the less able party. It follows that in a welfare hearing, a welfare appellant is potentially at a disadvantage because s/he must face a trained social worker or supervisor who knows the welfare regulations and the in house procedures of the agency. Due process, among other things, allows the welfare recipient to be accompanied in the hearing by an attorney who can offset the imbalance between appellant and Department.

B. "ARBITRARY AND CAPRICIOUS"

The greatest balancing or compensating factor which works to achieve fairness between the government and the individual is the law. Without the law, the power of the government is comparable to the power of a tyrant or dictator, however benevolent; it has the power to act "arbitrarily and capriciously." By having a government which must act according to laws, we gain two benefits: (1) we can generally predict how it will behave towards us; and (2) we can say with some assurance when it is wrong and require it to abide by the law. The law helps to provide a balance in any conflict between the government and an individual, and as a result the outcome is more apt to be based on 'right," rather than "might".

C. THE CONSTITUTION

The 5th Amendment of the Constitution states that an

individual may not be "deprived of life, liberty, or property without due process of law."

In two welfare court cases, Goldberg v. Kelly, 397 U.S. 254 (1970) and Wheeler v. Montgomery, 397 U.S. 280 (1970), the Supreme Court decided that certain elements of constitutional due process apply to the procedure whereby States seek to terminate the benefits of welfare recipients. The Court concluded that a recipient's welfare assistance represented the very basis of survival of the recipient. When balanced against the interests of efficient government, this basis of survival, the court concluded, should take precedence and should be protected by some of the procedural requirements of due process.

D. REQUIREMENTS FOR A "FAIR" HEARING

The requirements for a fair hearing were identified in Goldberg:

1. timely and adequate notice in writing;
2. detailed reasons for the contemplated termination;
3. opportunity to confront and cross examine adverse witnesses;
4. opportunity to present friendly witnesses and to argue orally;
5. opportunity to retain counsel;
6. reasoned opinion in writing based solely on evidence presented at the hearing;
7. impartial decision-maker.

The social worker is primarily responsible for the second element of due process. Without a detailed explanation of the reason for the Department action (termination, reduction, denial, etc.) the appellant or recipient is not in a good position to decide whether or not to appeal, or to prepare for the hearing. In many cases, the applicant/recipient who appeals is only looking for some reason behind the agency action because s/he has not received an adequate explanation in the notice of agency action. By providing a meaningful explanation for some planned Department action, the social worker can help to educate the client about the Department's regulations; the worker can contribute to good client/social worker relations; and the worker can prevent unnecessary appeals, thereby saving time and expense for both the appellant and the Department.

In short, it is important for all who participate in

fair hearings to remember the requirements of due process and the influence of due process on the structure of the hearing. Though there are some people who exploit the due process protections, the concept and the established rules of due process work to insure fairness for the great majority of people who go through the appeals process.

CHAPTER IV

DECISION WRITING

A. INTRODUCTION

" ...the decision maker's conclusion as to the recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing...To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on... though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential." Goldberg v. Kelly, 397 U.S. 254, (1970).

Goldberg entitles the welfare appellant to a reasoned decision based on the law and evidence on the hearing record. Though it does not specifically require a written decison, it is difficult to imagine how any other transmission of a decision could meet the requirements of Goldberg and be readily subject to judicial review. Without a written decision, how would the appellant be able to intelligently consider whether or not to seek judicial review? If the appellant did not seek legal counsel until a hearing decision had been rendered, how would the attorney be able to evaluate the hearing officer's decision before accepting the appellant as a client? How could the hearing officer effectively establish that his/her decision was reasoned and not arbitrary and capricious unless it were rendered in writing? It is clear that there is effectively little choice for the hearing official but to render his/her decision in writing. Furthermore, for the hearing officer to protect the integrity of his/her decision and take full advantage of his/her position as the fact finder, it appears necessary for him/her to make formal findings of fact and conclusions of law notwithstanding the suggestion to the contrary by the Goldberg court.

It is the policy of the Division of Hearings, therefore, that all hearing decisions be rendered in writing and that they uniformally contain the same elements. The decision not only constitutes the official resolution of the disputes under appeal, but also serves as an educational device which will theoretically enlighten the parties to the hearing and enable them to

better participate in the welfare system. Finally, the written decision also provides means for the Director to maintain the accountability of the hearing officers to performance standards for decision making.

B. APPROACHES TO WRITING A DECISION

1. Formulating the Decision

The hearing officer should conduct the hearing with the decision in mind. First, s/he should identify the issue(s) as narrowly as possible. The hearing in some cases will become a process of narrowing and of building a record which will support the ultimate resolution of the issues. Second, s/he should begin to formulate possible decisions for the questions embodied in the issues. Having done these two things, the hearing officer should at some point during or immediately after the hearing include them in his/her written notes. The more complicated the hearing, the more important it is to commit to paper the possible issue and decisions, as well as the positions of the adverse parties, the stipulated facts, and the facts in dispute. This exercise, performed during or immediately after the hearing - whether the hearing officer is firmly convinced, undecided or confused - will make the task of writing the final decision immeasurably easier. It will also eliminate the necessity of time consuming review of tape recording

2. Tone and Style

The decision is an official statement of an impartial officer of the Division of Hearings. Therefore, it should be devoid of personal emotions or commentary. The decision is a vehicle to declare the rights of the parties and to settle disputes. It should not be used to lecture or reprimand anyone.

Technical words and phrases which have meaning only to specialists in a particular field or expertise should be defined in the decision. Avoid the unnecessary use of legal expressions if at all possible. Never use imprecise words or phrases such as "is likely to," "apparently," "seems to," and "appears to be" in the "findings of fact" or "conclusions of law."

3. Clarity

The language in the decision should be simple,

concise, and precise. Lack of precision is usually a sign that the writer is trying to ignore or circumvent a fact or an issue.

C. THE ELEMENTS OF A DECISION

1. Jurisdiction

An issue for every hearing is whether there is jurisdiction for the hearing officer to hear and decide the appeal. It is the first consideration of the hearing officer and should be addressed first in the decision. The possible issues include the following: Is this a proper appellant? Is this complaint grounds for appeal? Has this appeal been filed in accordance with the time limits set by regulation? Has this appellant shown good cause for the failure to appear at previously scheduled hearings? If the jurisdictional issues are resolved in favor of the appellant, the hearing officer should then proceed with a decision on the merits. If jurisdiction is not found, the decision should be complete in the necessary respects so that it will withstand judicial review, i.e., there should be findings of fact and conclusions of law, though they need not be separately indicated as long as they are clearly discernible.

2. Action by the Department

Simply state the agency action or inaction which has given rise to the appeal.

3. Issue

The next elements of the decision format used by the Division of Hearings is the statement of the issues. Narrowly defining the substantive issue may be the most difficult step in the decision-making process, but it is crucial to the direction taken during the hearing, as well as to the development of the written decision.

The issue can usually be stated both broadly and narrowly. The broad statement of the issue is generally whether or not the action is proper (that is, in accordance with regulations). The narrower form of the issue, theoretically, should be apparent from the explanation including in the notification letter. It is typically the factual basis as opposed to the legal basis for the action. For example, the broad issue may be, "Was the termination proper?" while the narrower statement of the issue would be "Did the appellant submit

a medical report?"

4. Summary of Evidence

After defining the issue, the hearing officer should summarize the evidence. The summary need not recount the substance of the hearing in detail. That is the purpose of the transcript. Rather, it should briefly review the evidence and arguments of the parties (with appropriate references to the salient exhibits). The hearing officer should indicate matters which were stipulated by the parties and those which remain in dispute.

5. Findings of Fact

Fact finding is the most important function of the hearing officer. It is the process by which the hearing officer determines the factual truth which will serve as the foundation for his ultimate legal conclusions. It is important because it is protected by a higher standard of review than the legal conclusions of the hearing officer. In Massachusetts, the findings of fact must be upheld at judicial review if they are based on "substantial evidence". As a practical matter, some courts on review may develop a working definition of substantial evidence which justifies their routine intrusion into the fact finding responsibilities of the hearing officer. Legally, however, they are constrained to accord due respect to the fact finder's determination. The hearing officer, therefore, should take advantage of this respect by making clear and well reasoned findings which will survive the substantial evidence test.

A second consideration for the hearing officer in making findings of fact is raised in the above Goldberg quotation: "...the decision making should state the reasons for his determination and indicate the evidence he relied on..." The facts should be found in the context of a discussion of the evidence and reference to appropriate exhibits, thereby making clear the evidentiary foundation for the findings. Such discussion should dispel any appearance of arbitrariness, should serve to enlighten the parties (an often underestimated function of a written decision), and should make it more difficult for a reviewing judge to undo the findings.

The hearing officer should adopt facts to which the parties stipulated and should resolve factual disputes. While this formula for the findings appears simple on the surface, oftentimes hearing officers have problems determining exactly which facts it is necessary to find in a particular case. Should you find the universe of

facts in that case or should you find only the most salient facts? The best approach is to find the material facts. Material facts are those facts which go to make up a prima facie case. In the context of a welfare hearing, the hearing officer must look to the regulations which will serve as the basis for his conclusions to determine the facts necessary to support those conclusions. Those facts constitute the material facts which should be found in any case.

The last generalization to be made about the findings of fact deals with the problem that many people have making the distinction between law and fact. There is no easy way to explain the difference. However, a refined appreciation should develop with experience.

I have used the following rule of thumb to explain the distinction to lay hearing officers. A fact is a discrete object, event or relationship to which the decision maker must attribute some legal significance. For example, if there were a law which required all married couples to go to church on Sundays, you might find as fact in Case A that Joe and Jane Couple are married and that they did not go to a church on Sunday. Those are the facts to which you must give legal significance in your conclusion of law. In Case B, Dave and Diane deny that they are married. You would not find as fact in this case that the couple is married nor would you find that they are married at common law. You should find the facts necessary to the legal conclusion you will have to make that a common law marriage exists (as well as the other facts necessary to your legal conclusions) and then proceed to make a legal determination as to the application of the law requiring church attendance.

If the above explanation has not muddied the waters completely, there is one last dimension to the law/fact distinction problem which should be addressed. From time to time I have seen written decisions of hearing officers and administrative law judges which find as fact the regulations which they will be applying. In my opinion, it is wholly inappropriate to find as fact the law to be applied. In a judicial or quasi-judicial setting, the decision maker deals with a universe composed of two different elements - law and fact. Each has a special status in the judicial scheme of things. One is applied to the other. It is not necessary to establish the law in a case by finding it as fact, unless the law which a party is relying on is not judicially noticeable by the presiding forum.

6. <u>Conclusions of Law</u>

The conclusions of law is the final determination of the issue(s) presented. It should contain the hearing officers conclusions as to the proper application of the regulations or other appropriate law to the facts of the case. As with the findings of fact, the conclusions of law should state the reasons for the hearing officer's determination. The reasoning should contain three elements - a statement (and if appropriate discussion) of the law which governs the issue(s), a reference to the facts which have been found, and the application of the law to those facts. The conclusions should answer all of the questions raised by the issue(s).

Besides serving the purposes previously discussed, a well articulated statement of the reasons for the hearing officer's determination will indicate to the hearing officer that his decision is sound. All too often decision makers will try to make a result-oriented decision which is insupportable. If the hearing officer conscientiously tries to state the reasons for the decision, it should become clear to him that the decision is unsound and that s/he should try another approach or alter the decision. Such reevaluation most likely would not take place if the reasoning were not articulate.

7. <u>The Order</u>

The last element of the decision is the order to the Department or "action for Department." The order must specifically state how the hearing officer wishes the Department to proceed. If the appellant has prevailed, the hearing officer should clearly order the means by which the Department should remedy the situation. If the decision is to uphold the Department action, the hearing officer should indicate to the Department that it need take no further action, that it should proceed with the proposed action, or that it should take some other appropriate action.

Particular care must be taken to state the order precisely because the findings and conclusions are binding upon the parties. For example, a statement that the Department should "reinstate assistance and continue thereafter" could be construed to preclude a reexamination of eligibility in the future, and such result would be inappropriate in nearly all cases. In this respect, the order is no different than the findings and conclusions. They must be stated carefully with an awareness of the impact that decision will have on the appellant's participation and on the administration of the appellant's case.

D. CONCLUSIONS

The purpose of this decision writing chapter has been to encourage the careful consideration of the legal and practical purposes of the written decision. The most important purpose of the decision is to provide to the parties an explanation which will enable them to understand how it was reached. Especially when an appellant is contesting an agency action which s/he believes to be arbitrary and capricious, it is important that the appeal decision not also be subject to the same criticism.

APPENDIX A

INTERPRETER'S OATH

"Do you solemnly swear or affirm that you will truthfully translate from English into (language in which the appellant is fluent) the statements made and questions asked in English, and that you will truthfully translate from (appellant's native or language in which the appellant is fluent) into English the statements made and questions asked in (appellant's native language in which the appellant is fluent) throughout this hearing to the best of your ability."

APPENDIX B

OATHS AND AFFIRMATIONS

"Do you solemnly swear (or affirm) that the testimony you will give at the cause now in hearing will be the truth, the whole truth, and nothing but the truth (so help you God)?"

APPENDIX C

REFEREE CHECKLIST

- ¤ Turn on the tape recorder: Write on the cassette your name, the hearing site and the date. On a separate piece of paper list the names and numbers of the appellants for whom you conduct a hearing.

- ¤ Make an introductory statement. See attachment for example. Introduce yourself.

- ¤ Ask persons present to state their names for the record.

- ¤ Administer the oath/affirmation to those persons who will testify.

- ¤ Focus the hearing. Identify the Food Stamp notification letter as Exhibit 1 or A and sequentially label subsequent documents taken into evidence. State the action proposed (reduction or termination) and read the summary of evidence and the manual citation. Read the appellant's statement on the reverse side of the notification letter. State whether or not the appeal was timely and aid was continued pending the appeal. Confirm your conclusion with the appellant.

- ¤ Explain hearing and decision rendering procedures. (See attachment for sample statement).

- ¤ Ask the Department representative to review the figures used in the computation and to review the computation itself. Review the computation as you go along.

- ¤ Take the worksheet into evidence.

- ¤ Ask the appellant if s/he disputes the figures used. If there is dispute take the relevant documents into evidence. Then ask the appellant if (a) he disputes the computation and, if so, specifically what. If there is a "live," issue it will surface at this

point. Ask the Department representative to respond and introduce into evidence relevant documents and regulations. Review the regulation at the hearing so you will be sure to ask the right questions to elicit necessary facts. If it is clear that the computation is the only issue, you will be in a position to announce your decision - the computation is either correct or incorrect. If the computation is correct and the Department action is to be upheld, issue an interim order in those cases with aid pending (see form enclosed).

- Close the hearing.

APPENDIX D

SAMPLE INTRODUCTION

THIS IS THE FAIR HEARING FOR_____NAME_____OF_____ADDRESS_____. TODAY'S DATE IS_____. THIS HEARING IS BEING CONDUCTED AT_____SITE.

I CALL YOUR ATTENTION TO THE FACT THAT THE HEARING IS BEING RECORDED, IN ACCORDANCE WITH THE LAW.

THIS HEARING IS BEING CONDUCTED IN ACCORDANCE WITH 106 CMR 343 AND 367 (TITLE 106 OF THE CODE OF MASSACHUSETTS REGULATIONS, CHAPTER 367) AND CHAPTER 30A OF THE MASSACHUSETTS GENERAL LAWS.

MY NAME IS_____. I AM YOUR APPEALS REFEREE.

SAMPLE EXPLANATION OF PROCEDURES

I WILL FIRST ASK_____, THE DEPARTMENT REPRESENTATIVE, TO REVIEW THE REASONS FOR THE DEPARTMENT ACTION IN YOUR CASE (EITHER TERMINATION OR REDUCTION). YOU WILL THEN HAVE THE OPPORTUNITY TO EXPLAIN TO ME WHAT YOU THINK IS WRONG OR UNFAIR. MY DECISION MUST BE MADE IN ACCORDANCE WITH MASSACHUSETTS FOOD STAMP REGULATIONS. YOU WILL RECEIVE THE DECISION IN THE MAIL IN THE NEXT TWO TO FOUR WEEKS. IF YOU ARE DISSATISFIED WITH THE DECISION, YOU HAVE THE RIGHT TO JUDICIAL REVIEW. THIS RIGHT WILL BE FURTHER EXPLAINED TO YOU IN THE LETTER ACCOMPANYING MY DECISION. IF, AT THE END OF THIS HEARING, I AM IN A POSITION TO CONCLUDE THAT THE DEPARTMENT ACTION WILL BE UPHELD AND THE APPEAL DENIED, I WILL ORDER YOUR FOOD STAMP OFFICE TO GO FORWARD WITH THE CHANGE AS SOON AS POSSIBLE.

APPENDIX E

RECOMMENDED DECISION CONTENT

Jurisdiction

a. Address all pertinent jurisdictional issues including

1. Notice - Was there notice of Department action? Cite and reason summary? Date? Exhibits? Is the appellant entitled to aid pending?

2. Filing - When was the appeal filed? Exhibit? What does the appeal allege? Is it grounds for appeal? Was it dismissed? Is it CJR remand?

3. Good Cause - If there is a required showing of good cause, what is the evidence and testimony with regard to this issue?

b. Indicate material findings of fact and legal conclusions necessary to find or decline jurisdiction.

Action: What Department action or inaction has precipitated this appeal?

Issues(s): What are the issues (stated as narrowly as possible)?

Summary of Evidence:

a. Department's Evidence (refer to exhibits)

b. Department's Arguments

c. Appellant's Evidence (refer to exhibits)

d. Appellant's Arguments

Findings of Fact:

What are the facts necessary to the conclusions of law. Find facts in context of a discussion of the evidence. When facts are in dispute, clearly indicate supporting evidence and weighting.

Conclusions of Law:

Apply the relevant law to the facts found and articulate the legal conclusions.

Order (Action for WSO/CSA):

Clearly and specifically articulate the instructions for the Department to implement the decision.