

ADMINISTRATIVE CONTESTED CASE PROCEEDINGS IN TEXAS: A TIME FOR CLARIFICATION AND RECONFIGURATION OF A FINAL ORDER

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A Texas state agency with statewide jurisdiction that determines contested cases is subject to the provisions of the Administrative Procedure Act (APA).¹ After a contested case hearing is conducted, the state agency issues a final order that must contain findings of fact and conclusions of law, separately stated.² “Findings of fact [must] be based only on the evidence and on matters that are officially noticed.”³ Findings of fact if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.⁴

In 1991, the State Office of Administrative Agencies (SOAH) was created⁵ to serve as an independent forum for the conduct of contested cases on behalf of Texas agencies (the referring agency) for the purpose of separating “the adjudicative function from the investigative, prosecutorial and policy making functions in the executive branch in relation to hearings.”⁶ After the conducting of the hearing, the SOAH judge is mandated and empowered to issue a proposal for decision (PFD) that, identical to the agency final order, must contain findings of fact and conclusions of law, separately stated.⁷ As aforementioned, “findings of fact if set forth in statutory language, must be accompanied by a concise and explicit statement

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1. TEX. GOV'T CODE ANN. § 2001.003(7).

2. *Id.* §§ 2001.141(a)–(b).

3. *Id.* § 2001.141(c).

4. *Id.* § 2001.141(d).

5. Act of Sept. 1, 1991, 72nd Leg., R.S., ch. 591, § 1, 1991 TEX. GEN. LAWS 2127 (codified at GOV'T § 2003.021).

6. GOV'T § 2003.021(a).

7. *Id.* § 2003.042(a)(6).

of the underlying facts supporting the findings.”⁸ The SOAH judge shall then submit the PFD to the referring agency and furnish a copy to each party.⁹

The APA was also amended to provide the manner in which the referring agency rendering the final decision must defer to the findings within the PFD.¹⁰ This section allows only four bases for the state agency to modify the PFD, and it mandates that for each modification, the agency must set forth in writing in the final order the specific reason and legal basis for the change within the final order.¹¹ In a series of Austin Court of Appeals decisions, the court has made clear that failure to comply with these requirements renders the final order invalid.¹² The agency is required to explain with particularity its specific reason and legal basis for each change made.¹³ In addition, the referring agency must articulate a rational connection between an underlying agency policy and the altered finding of ultimate fact or conclusion of law.¹⁴ Finally, the APA prohibits the referring agency from modifying or adding findings of basic, underlying fact.¹⁵

Therefore, the amazing effect of these statutory changes, with the creation of SOAH and the judicial interpretations of the limitations on the modification of the PFD by the referring agency, is the PFD will become the final order of the referring agency unless the referring agency is able to modify the PFD with sufficient legal specificity and rationality based on the evidentiary record.¹⁶ In addition, by the agency being bound by the SOAH judge’s findings of basic, underlying facts as to who, did what, when, how, and why, there is significant assurance that a party receives a fair and impartial hearing consistent with the applicable law.

This Article will analyze the effect of these holdings on the formation of the final order. This will necessitate critiquing the current form of the PFD and final order, and it will be established there is a more logical, legally

8. *Id.* § 2001.141(d).

9. 1 TEX. ADMIN. CODE § 155.507(a) (2020) (State Off. of Admin. Hearing, Proposals for Decision; Exceptions and Replies); *see also* GOV’T § 2003.051(b).

10. Act of Sept. 1, 1993, 73rd Leg., R.S., ch. 268, § 1, 1993 amended by Act of Sept. 1, 1997, 75th Leg., R.S., ch. 1167, §§ 3–4, 1997 TEX. GEN. LAWS 4405 (codified at GOV’T § 2001.141).

11. GOV’T § 2001.058(e).

12. *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831, 837 (Tex. App.—Austin 2019, no pet.); *Garcia v. Tex. Real Estate Comm’n*, No. 03-14-00349-CV, LEXIS 5638, at *6–7 (Tex. App.—Austin 2016, no pet.); *Granek v. Tex. State Bd. of Med. Exam’rs*, 172 S.W.3d 761, 781–82 (Tex. App.—Austin 2005, no pet.); *Levy v. Tex. State Bd. of Med. Exam’rs*, 966 S.W.2d 813, 815 (Tex. App.—Austin 1998, no pet.); *Emps’. Ret. Sys. of Tex. v. McKillip*, 956 S.W.2d 795, 800 (Tex. App.—Austin 1997, no pet.).

13. *Hyundai*, 581 S.W.3d at 837; *Sanchez v. Tex. State Bd. of Med. Exam’rs*, 229 S.W.3d 498, 515 (Tex. App.—Austin 2007, no pet.); *Pierce v. Tex. Racing Comm’n*, 212 S.W.3d 745, 755 (Tex. App.—Austin 2006, no pet.); *Granek*, 172 S.W.3d at 780–81.

14. *Hyundai*, 581 S.W.3d at 837; *Oncor Elec. Delivery Co. L.L.C. v. Pub. Util. Comm’n of Tex.*, 406 S.W.3d 253, 268–69 (Tex. App.—Austin 2013, no pet.); *Sanchez*, 229 S.W.3d at 515–16; *Levy*, 966 S.W.2d at 815.

15. *Hyundai*, 581 S.W.3d at 838.

16. *See id.* at 837–38; *Sanchez*, 229 S.W.3d at 515–16; *Levy*, 966 S.W.2d at 815.

correct presentation of the findings in the respective orders which will enhance the understanding of the parties, the SOAH judge, and the Agency members as to exactly what has or has not been established during the contested case hearing.

I. THE CONTESTED CASE HEARING

There is only one type of hearing provided in the APA and that is a “contested case,” defined as “a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.”¹⁷ The APA lacks any express coverage section and therefore, a statute other than the APA, normally the agency’s enabling legislation, must require such a hearing to be held.¹⁸

Simply put, as the Texas Supreme Court has held, a contested case hearing is a trial.¹⁹ Complete *ex parte* prohibitions apply.²⁰ Full discovery is provided for in the APA.²¹ It is a record hearing,²² and a party has a right to counsel.²³ As a party in the contested case, the referring agency, may only exercise its advocacy rights in the same manner as any other party.²⁴ The Texas Rules of Evidence apply in contested cases.²⁵ A party has the right to swear witnesses and take their testimony under oath, conduct direct and cross examination, submit and object to the submission of testimonial, present documentary or real evidence, and if need be, issue a subpoena(s) to obtain the necessary witness(es), document(s) and other relevant objects.²⁶ The burden of proof is that a fact cannot be found to exist by less than a preponderance of the evidence, but the burden may be heavier if required by law.²⁷

17. GOV’T § 2001.003(1).

18. *Tex. Comm’n on Env’t Quality v. City of Waco*, 413 S.W.3d 409, 417 (Tex. 2013); *Bacon v. Tex. Hist. Comm’n*, 411 S.W.3d 161, 169 (Tex. App.—Austin 2013, no pet.); *see also Ramirez v. Tex. State Bd. of Med. Exam’rs*, 927 S.W.2d 770, 772–73 (Tex. App.—Austin 1996, no writ); *Madden v. Tex. Bd. of Chiropractic Exam’rs*, 663 S.W.2d 622, 624 (Tex. App.—Austin 1983, writ ref’d n.r.e.).

19. *Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm’n of Tex.*, 798 S.W.2d 560, 564 (Tex. 1990).

20. GOV’T § 2001.061.

21. GOV’T §§ 2001.092–.103; *see also* 1 TEX. ADMIN. CODE §§ 155.251–.259 (2017).

22. GOV’T §§ 2001.060, 2001.141(c).

23. *Id.* § 2001.053(a).

24. *Id.* § 2003.051(a).

25. *Id.* § 2001.081.

26. *Id.* §§ 2001.081–.089.

27. *Sw. Pub. Serv. Co. v. Pub. Util. Comm’n of Tex.*, 962 S.W.2d 207, 213 (Tex. App.—Austin 1998, pet. denied); *Pro. Mobile Home Transp. v. R.R. Comm’n*, 733 S.W.2d 892, 899 (Tex. App.—Austin 1987, writ ref’d n.r.e.); *Beaver Express Serv., Inc. v. R.R. Comm’n*, 727 S.W.2d 768, 775 n.3 (Tex. App.—Austin 1987, writ denied).

The referring agency shall provide a written statement of applicable agency rules or policies for the SOAH judge to consider.²⁸ However, consistent with the ex parte provisions, the referring agency may neither supervise the SOAH judge nor attempt to influence the findings of fact or law except by proper evidence and legal argument as a party.²⁹

Thus, to say it more succinctly, a contested case is a bench trial, almost identical to that held in a constitutional district court. The Texas Supreme Court has held a party to a contested case proceeding does not have a constitutional right to a jury trial.³⁰ The Constitution, Article V, § 10 guarantee of a right to a jury trial is restricted to causes of action in the district court.³¹ As to the Article I, § 15 guarantee, the Court held it only applies to causes of action then-existing in 1876 or an analogous cause of action.³² The Court found that the administrative process and specific administrative causes of action simply did not exist at that time and are not analogous to any cause of action recognized at that time.³³

Therefore, the contested case as defined in the APA is exactly correct. An “adjudicative hearing” is in fact conducted with all the procedural and evidentiary protections and rights to fully and adequately challenge the evidence against a party and to present one’s own evidence in a succinct and clear manner.³⁴ Subject to a preponderance of the evidence burden of proof, the PFD and final order must be based exclusively and solely on the evidence in the record and on matters that are officially noticed.³⁵ A contested case proceeding is clearly a competent trial lawyer’s dream.

II. PREPARATION OF AND SETTING FORTH THE FINDINGS IN THE PROPOSAL FOR DECISION (PFD) AND THE AGENCY FINAL ORDER

After the parties rest in the contested case proceeding, the SOAH judge also retires to their chambers and at some point prepares the PFD in the case. Logically, they will first set out the controlling law as to the issues in the case and set forth the material elements of the cause(s) of action that must be proven in order to prevail and the same for any affirmative defenses, if they are applicable.³⁶ If it was not decided in a pre-trial motion, the SOAH judge must resolve any ambiguities in the law consistent with what they believe to

28. GOV’T §§ 2001.058(b)–(c).

29. *Id.* § 2001.058(d).

30. *Tex. Dep’t of Protective & Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

31. U.S. CONST. art. V, § 10.

32. *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 635–36 (Tex. 1996); *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 450 n.19 (Tex. 1993).

33. *Barshop*, 925 S.W.2d at 635–36; *Tex. Ass’n of Bus.*, 852 S.W.2d at 450 n.19.

34. TEX. GOV’T CODE ANN. § 2001.058.

35. *See id.* §§ 2001.060, .141(b).

36. *See id.* § 2001.058.

be the legislative intent.³⁷ These determinations by the SOAH judge are legal conclusions for they are “[a] statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result.”³⁸ In other words, a pure conclusion of law.

Second, the SOAH judge will take off his or her “judicial hat” and substitute it with a “jury hat.” The amazing aspect of a bench trial or a contested case proceeding is that the parties have a jury of one. They will “instruct” him or herself that a fact does not exist unless, viewing the record as a whole, the evidence preponderates in favor of its existence.³⁹ The courts label these findings as “basic facts” or underlying facts that are simply “factual determinations made by the agency in terms which are purely descriptive or predictive.”⁴⁰ “They are true fact findings which ‘must be based exclusively on the evidence and on matters officially noticed.’”⁴¹ “They do not purport to be [a] declaration[] of norms [or] standards which are generally applicable in all similar contested cases conducted before the agency”; rather, they are the facts of the particular case.⁴² These findings determine who did what, when, how, why, and with what motive or intent. These are the same determinations made by a jury.⁴³

The last finding is the one that causes at least “intellectual” confusion if not actual confusion in preparing the PFD. The final finding is labeled an “ultimate fact finding” which, long ago, was precisely defined by now retired Justice John Powers of the Austin Court of Appeals:

Ultimate facts are the most general factual determinations the agency is called upon to make when it exercises its quasi-judicial power While obviously phrased in factual language, these broad postulates are easily seen as conclusions relative to legal standards, for they purport to apply in a specific case legal norms or “criteria” which are applicable in all similar cases. Such “findings” should justify the agency’s final decision in the specific case [The ultimate facts] are nothing more than inferences or deductions that the agency has drawn from the basic facts⁴⁴

These are also the same findings as made by a jury.⁴⁵

37. See generally Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 363–64 (2012).

38. *Legal Conclusion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

39. See *supra* note 27 and accompanying text (stating that Texas Rules of Evidence apply).

40. *Charter Med.-Dall., Inc. v. Tex. Health Facilities Comm’n*, 656 S.W.2d 928, 935 (Tex. App.—Austin 1983), *rev’d on other grounds*, *Tex. Health Facilities Comm’n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446 (Tex. 1984).

41. *Id.*

42. *Id.*

43. *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831, 838 (Tex. App.—Austin 2019, no writ); *Flores v. Emps. Ret. Sys.*, 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. denied).

44. *Charter Med.-Dall., Inc.*, 656 S.W.2d at 934.

45. *Id.* at 934–35.

However, some courts have called such a finding a “conclusion of law” or a “mixed question of law and fact.”⁴⁶ To demonstrate why it most assuredly should not be called a conclusion of law, take a very common hypothetical trial understood by all lawyers and even many laypersons. A car accident occurs. One or both drivers assert the other was negligent. At the end of the trial, the court reads and gives to the jury a verdict form that tells them what the applicable law is and defines legal terms, such as certain duties, negligence, causation, and damages. These are the determinations or conclusions of law made by the judge. The jury is instructed to first determine what happened or did not happen by applying a burden of proof of preponderance of the evidence. Obviously, these are basic or underlying fact findings of who did what, where, when, how, and why.

Is the jury’s job now complete? No! We know the law and understand what happened or did not happen. However, we need an answer to liability, which means applying the law to the facts; specifically, were any of the drivers negligent, and if so, did their negligence cause the harm, and finally, what amount of damages are recoverable? The jury, not the judge, makes these determinations by applying the law given to them by the judge to the basic facts they found to exist.⁴⁷ These are the ultimate *FACT* findings made by the jury!⁴⁸ These are **not** conclusions of law rendered by the judge.⁴⁹ When it is a bench trial or contested case proceeding, the judge sets forth these findings *but they still have on the “jury hat,” not the “judge hat.”*⁵⁰ As Justice Powers stated, one is applying legal norms or criteria that are applicable in all similar cases, but the findings in fact justify the agency’s final decision in the specific case.⁵¹ To label these findings as conclusions of law is simply wrong. As set forth above, determinations or conclusions of law simply lay out what the law requires.⁵² In addition, legal questions are answered by judges, not juries, but the *application of the law to the basic facts* is a jury question, as Justice Powers explained.⁵³ Even in a bench trial or a contested case proceeding in which the judge is the fact finder, the findings themselves are considered and reviewed as findings of fact, and should be set forth in the PFD or the final order as fact findings.⁵⁴ To include factual findings within a section labeled “conclusions of law” is simply incorrect, misleading, and confusing.

46. *Hyundai Motor Am.*, 581 S.W.3d at 838.

47. *See Charter Med.-Dall., Inc.*, 656 S.W.2d at 934–35.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.*

52. *See supra* note 38 and accompanying text (explaining that conclusions of law express a legal duty or result).

53. *See Charter Med.-Dall., Inc.*, 656 S.W.2d at 934.

54. TEX. GOV’T CODE ANN. §§ 2001.060(5), .141(d).

The APA codifies this analysis that findings of fact are not conclusions of law. The Act states: “Findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.”⁵⁵ Why? First, why would statutory language couch a finding of fact? Just like the common law example, the questions of negligence and causation are key legal terms in the right to recovery.⁵⁶ In contested cases, the Austin Court of Appeals recently held that when the ultimate finding utilizes the language of a statute, a finding of ultimate fact occurs when the tribunal determines a fact is “reasonable” in a ratemaking case or “inadequate” in a common carrier’s case.⁵⁷ Likewise, if an agency is enforcing a deceptive trade practices act, then the law is not common law, but that set forth in the statute.⁵⁸ So, when an agency determines that the defendant’s conduct, documents, or both are deceptive, the fact finder is determining that fact, but the decision of fact is set forth in statutory language.⁵⁹

Second, since an ultimate fact finding is based on basic facts with the application of a legal standard, the legislature demanded that agencies and judges immediately notify the parties involved of the basic findings they relied upon.⁶⁰ As Justice Powers stated, the ultimate facts “are nothing more than inferences or deductions . . . drawn from the basic facts.”⁶¹ Third, and most importantly, the legislature expressly acknowledged that even if it is a finding set forth in statutory language, it is a *FACT* finding.⁶² Therefore, the legislature recognized and codified, for contested cases, the same characterizations of the three sets of findings used at district court trial: conclusions of law, basic fact, and ultimate fact.⁶³ That is why the Texas Supreme Court stated that a contested case proceeding is a trial and therefore, the same terminology should be used.⁶⁴ That is exactly what the legislature was establishing in this statutory provision.

Unfortunately, in modern times, a theoretical analysis of factual findings has crept into the Austin Court of Appeals legal language that tends to confuse all. In 2002, the Austin Court of Appeals relied on a law review article and an administrative law treatise to rename ultimate findings as

55. *Id.* § 2001.141(d).

56. *Bostic v. Georgia-Pac. Corp.*, 439 S.W.3d 332, 343 n.42 (Tex. 2014).

57. *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831, 838 (Tex. App.—Austin 2019, no pet.).

58. *See generally id.*

59. *See generally id.*

60. *See Charter Med.-Dall., Inc. v. Tex. Health Facilities Comm’n*, 656 S.W.2d 928, 936–37 (Tex. App.—Austin 1983), *rev’d*, 665 S.W.2d 446 (Tex. 1984).

61. *Id.* at 935.

62. TEX. GOV’T CODE ANN. § 2001.141(d).

63. *See id.*

64. *See id.*

“legislative facts.”⁶⁵ These scholars and the court held that basic facts should be called “adjudicative facts” and ultimate facts should be called “legislative facts.”⁶⁶ They defined the latter as facts that “do not usually concern the immediate parties but are general facts that help the tribunal decide questions of law and policy.”⁶⁷

There is no problem with labeling basic facts as “adjudicative facts,” for clearly they are determined based on the adjudication of a contested case proceeding. Yet, trial lawyers do not use such language. However, with all due respect to the scholars, the label of “legislative facts” simply makes no sense at all. Yes, statutes are created by the legislature, but that body has no part in the contested case process, except that its law defines what constitutes liability.⁶⁸ To call an ultimate fact to be a legislative fact will make any judge, justice, or trial lawyer, as well as their client, to spin around and say, the SOAH judge did what? The agency did what in the final order? Or, can one imagine in the constitutional court system when the jury finds a party was negligent, the judge talks to them after rendering about their legislative finding? That language has no place in a trial.

Most importantly, the definition is simply wrong. The scholars assert an ultimate fact finding *does not usually concern the immediate parties*.⁶⁹ As it has been discussed, and which any competent trial lawyer knows, *the ultimate fact findings determine the legal liability*, if any, in the case!⁷⁰ How could it not concern the immediate parties? Further, those findings simply have nothing to do with determining questions of law.⁷¹ There are *NO* further questions of law to be made *AFTER* the ultimate fact findings!⁷² The simple reason is the ultimate fact finding applied the already determined law to the basic facts and that is considered a fact finding—an ultimate fact finding.⁷³

In all due respect to the panels in the Austin court and the scholars, courts should eradicate this language from use in describing the types of findings of fact for it is simply nonsensical and confusing. If courts must use anything to get what seems to be their point across, two decisions of the

65. *Flores v. Emps. Ret. Sys. of Tex.*, 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. filed); see also F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an ALJ?*, 51 BAYLOR L. REV. 63, 68–69 (1999); 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.5, at 55 (3d ed. 1999); see also *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831, 838 (Tex. App.—Austin 2019, pet. filed).

66. *Flores*, 74 S.W.3d at 539.

67. *Id.*

68. *Id.*

69. See generally McCown & Leo, *supra* note 65, at 69–70.

70. See TEX. GOV'T CODE ANN. §§ 2001.060, .141(b).

71. See generally McCown & Leo, *supra* note 65.

72. See *id.*

73. *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831, 838 (Tex. App.—Austin 2019, no pet.); *Flores*, 74 S.W.3d at 539.

Austin court utilized the label of a mixed application of law to fact finding.⁷⁴ That description acknowledges the interplay between fact and law and is not confusing one for that is exactly what the jury, SOAH judge, or agency board will be doing in determining the ultimate fact.⁷⁵ If the SOAH judges and agencies prefer the longer label as more descriptive and thus clearer than “ultimate facts,” no harm or confusion would occur if they use it consistently in the PFDs and final orders.

Now that it is clear what findings the SOAH judge needs to determine and exactly what they mean, it is time to put them together in a sensible format so that the agency and parties will understand exactly what the SOAH judge has determined. Obviously, the first requirement is for the SOAH judge to comply with the APA.⁷⁶ The cryptic order of the legislature, beyond the issue already discussed on when factual findings are set forth in statutory language, is that the final decision or order “must include findings of fact and conclusions of law, separately stated.”⁷⁷

It is important to note that the APA does not mandate a certain order of presentation, nor does it state that all facts must be set forth together and all legal conclusions must be set forth together.⁷⁸ The APA merely does not want findings of fact and conclusions of law to be intermingled.⁷⁹ It appears the legislature desired that the final order be as clear as possible to the reader, particularly the layperson, so that they could understand what each finding was in relation to the final determination.⁸⁰

Since the adoption of the APA, the standard format for all agency hearing officers’ and SOAH judges’ PFDs and for all agencies’ of statewide jurisdiction final orders has been: (1) an analysis and conclusion(s) as to subject matter jurisdiction; (2) the same for standing, if relevant; (3) a two-to-fifty-page summation of the testimony; (4) a section labeled “Fact Findings,” which includes all basic or underlying fact findings; and (5) a section labeled “Conclusions of Law,” which includes, very often with like-kind not grouped together, conclusions or determinations of law and ultimate findings of fact or mixed application of law to fact findings.⁸¹

74. *Hyundai Motor Am.*, 581 S.W.3d at 838; *Hunter Indus. Facilities, Inc., v. Tex. Nat. Res. Conservation Comm’n*, 910 S.W.2d 96, 104 (Tex. App.—Austin 1995, writ denied).

75. *Hyundai Motor Am.*, 581 S.W.3d at 838; *Hunter Indus. Facilities, Inc.*, 910 S.W.2d at 104.

76. TEX. GOV’T CODE ANN. § 2001.

77. *Id.* § 2001.141(b).

78. *Id.* § 2001.

79. *Id.* § 2001.141.

80. *Id.*

81. See, e.g., Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudicators in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 119, 138–39 (2005). This Author has taught and practiced administrative law for over thirty-seven years in Texas and has read thousands of PFDs and final orders. The format described in the text has never varied, particularly as to the two important sections of Findings of Fact and Conclusions of Law.

This clearly means that all of these documents are stylistically inconsistent with the APA. As has been stated above, the APA mandates that there be a section on findings of fact and a section on conclusions of law, and *they must be separately stated*.⁸² By placing determinations or conclusions of law and ultimate fact findings in the same section, not grouped together, violates the clear and unambiguous language of the APA and creates total confusion as to exactly what is being held by the SOAH judge or the agency board.⁸³ In addition, by placing the basic findings of fact first and the conclusions of law second, the reader is clueless as to what findings of fact are critical if they are wholly unaware of what the issues of law are in the controversy for which a contested case was held.⁸⁴

It is therefore strongly asserted that the typical format for a PFD or final order should begin with a section on conclusions or determinations of law. As discussed above, a conclusion of law is a statement that expresses a legal duty but omits the facts that give rise to that duty.⁸⁵ To say it another way, the judge sets forth the naked language of the applicable statute(s).⁸⁶ Therefore, the SOAH judge sets forth the applicable law based on the petition, the information provided by the referring agency on the applicable laws, rules and policies, the briefs and arguments of counsel in a pre-hearing motion, if any, and the judge's own research.⁸⁷ If based on arguments of counsel or the judge's determination on their own that there is an ambiguity, the judge would set forth in this section their statutory construction analysis of how the ambiguity will be resolved.⁸⁸ It is strongly urged that the statute(s) be broken down to its material elements of what is required to be proven, but that would be at the discretion of the judge. Doing so would inform readers what issues are important in determining the controversy.

By taking this first step, the reader is informed of the issues involved in the case and what is necessary to be proven by the proponent in the proceeding.⁸⁹ The counsel to the hearing are clearly informed as to what the judge determined the law to be and how and in what manner any and all ambiguities were resolved.⁹⁰ Since the PFD will soon be in the hands of the agency members and agency legal counsel, they will be told concisely and without confusion, due to the lack of intermingled ultimate findings of fact, as to whether the SOAH judge and board are in agreement as to the applicable

82. GOV'T § 2001.141(b).

83. *See id.*

84. *See id.*

85. *See* Beal, *supra* note 37, at 373–74.

86. *See id.*

87. *Id.*

88. *See id.* at 423.

89. *See* Charter Med.-Dall., Inc. v. Tex. Health Facilities Comm'n, 656 S.W.2d 928, 936–37 (Tex. App.—Austin 1983), *rev'd*, 665 S.W.2d 446 (Tex. 1984).

90. *See supra* notes 48–52 and accompanying text (explaining that the judge provides fact findings by applying the law to the basic facts).

law and as to its specific meaning.⁹¹ This allows the board to directly confront any disagreement with the SOAH judge and to know exactly the legal basis for the judge's determination; thus, they can respond in like kind in the final order.⁹²

The next step is for the SOAH judge to set forth the basic or underlying facts that were established by a preponderance of the evidence.⁹³ Thus, the section labeled as "finding of facts" will determine and set forth who did what, when, where, how, and even why.⁹⁴ It is urged that the judge place together like-kind of fact findings as they relate to the material elements of the cause of action. However, there is not necessarily any magic to the method of presentation, and a judge should make their own call as to what makes the most sense for the reader of the PFD.

It is asserted that the judge clearly has the power to have three labeled sections. The APA demands fact and law be separated and most importantly, as set forth above, the APA's language clearly indicates the legislature understood the difference between a basic or underlying fact and an ultimate fact finding.⁹⁵ Thus, there can be as many sections as the judge desires as long as the fact and law are separate.⁹⁶ This is buttressed by the fact that the APA does not require "sections," but simply, there must be separate statements of findings of fact and conclusions of law.⁹⁷ "Separate" is defined as "individual; distinct; particular; disconnected," so as long as they are not intermingled, the APA requirement has been fulfilled.⁹⁸

After the basic fact findings, there should be a third section of "Ultimate Holdings." It would seem less confusing to label it ultimate *fact* holdings, for as has been established, judges, lawyers, and lay people alike have great confusion when you tell them it is not a conclusion of law, but one of ultimate fact.⁹⁹ A viable alternative is to use the more descriptive label sometimes used by the Austin Court of Appeals "[M]ixed [Application] of [L]aw [to] [F]act

91. See TEX. GOV'T CODE ANN. § 2001.141(b).

92. See *supra* notes 36–38 and accompanying text (demonstrating that the SOAH judge sets out the controlling law and resolves ambiguities in legislative intent to provide their fact findings).

93. See *supra* notes 60–64 and accompanying text (explaining that establishing the basic facts is the next appropriate step towards making the final decision).

94. See *supra* note 43 and accompanying text (illustrating that the facts of the case provide details of who did what, when, how, and why with motive or intent).

95. See *supra* notes 36–45 and accompanying text (explaining that in setting forth the finding, the SOAH judge must follow three separate steps beginning with providing the applicable law then diving into the basic facts to finally arrive at the ultimate fact finding).

96. See cases cited *supra* note 43 (referencing courts' analyses of the APA requirements and compliance therewith).

97. TEX. GOV'T CODE ANN. § 2001.141(b).

98. *Separate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

99. See *supra* notes 44–45, 47–50 and accompanying text (discussing the practical difference between conclusions of law and applying findings of fact to the law).

[Findings].”¹⁰⁰ Or should it end the phrase with holdings? At least, the PFD with this label would be informing the reader and the agency board members of exactly what is going on in this section. Those who need to see “law” in the label would get their way in that regard. Either way would serve the purpose of making it clear that these findings are not just fact and not just law, but a combination of the two that ultimately determines the rights, duties, obligations, privileges, and liabilities, if any, of the parties.¹⁰¹

In addition, this final section allows the SOAH judge to literally bring the law and fact together. As has been discussed, the APA demands that a fact set forth in statutory language must be accompanied by a concise and explicit statement of the underlying basic fact findings that support the ultimate fact finding.¹⁰² Since all regulatory causes of action are statutory, all or most of the ultimate fact findings will be set forth in statutory language.¹⁰³ Thus, this final section combines the substance of the first two sections together so the reader will understand the legal outcome.¹⁰⁴

The most critical modification that must occur is to separate the conclusions of law and the ultimate fact findings. It is clear that confusion reigns supreme as to the difference between the two, but if they are utilized properly and physically separated from each other in the PFD, over time all should come to understand and appreciate the clarity of this new approach.

This new approach should tremendously aid the agency members—many of whom are not lawyers—in understanding exactly what the SOAH judge decided and to be able to clearly “react” to such determinations in the final order. By setting forth the conclusions of law first, and using this section for what it was intended, to set forth the controlling law of the case (and the strong suggestion of even breaking it down to the material elements of the cause of action), all can understand each and every fact that the law requires that must be proven to satisfy the material elements. If the agency disagrees with the SOAH judge’s interpretation in this section of the final order, it can add in its interpretation and set forth why the SOAH judge misinterpreted the law. As the Austin Court of Appeals has held, the board must set forth why the SOAH judge was incorrect.¹⁰⁵

In addition, by the SOAH judge telling them what is ambiguous and how it should be resolved, again, the issues of law are right in their face, which will aid them in their understanding of their legal counsel’s advice as

100. *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831, 838 (Tex. App.—Austin 2019, no writ) (quoting *Hunter Indus. Facilities, Inc. v. Tex. Nat. Res. Conservation Comm’n*, 910 S.W.2d 96, 104 (Tex. App.—Austin 2015, no writ)).

101. See *supra* notes 44–45, 47–50 and accompanying text (explaining the effect and purpose of this final section); see also GOV’T § 2001.003(1).

102. GOV’T § 2001.141(d).

103. See *Beal*, *supra* note 27, at 418.

104. See *Hyundai Motor Am.*, 581 S.W.3d at 838; *Flores v. Emps. Ret. Sys.*, 74 S.W.3d 532, 539 (Tex. App.—Austin 2002, pet. denied).

105. *Hyundai Motor Am.*, 581 S.W.3d at 843.

to alternative interpretations and how they believe the board should resolve the issue.¹⁰⁶ This is critical since the APA and the Austin court's interpretation thereof, requires the board "to explain with particularity its specific reason and legal basis for each change made."¹⁰⁷ That is so, for the court has held that in order "[t]o meet this requirement, the agency must 'articulate a rational connection between an underlying agency policy and the altered . . . conclusion of law.'"¹⁰⁸ This results in the agency having to point to the specific interpretation of the SOAH judge, state why it was misinterpreted or incorrect, and how the board reached a different conclusion.¹⁰⁹

As to the section on basic or underlying facts, there is simply nothing to do in almost all situations. The APA simply forbids the agency from changing such fact findings and substituting its own.¹¹⁰ Yet, since they appear in isolation from all other findings and hopefully, if the board studies the conclusions of law first, they will be able to immediately comprehend the significance of the SOAH judge's findings.

There are two scenarios that have not been raised in judicial appeals that could necessitate the agency board modifying basic fact findings. First, as indicated, if the agency board does not have a specific reason and legal basis to make a finding to the PFD, the agency board must adopt the PFD.¹¹¹ If the agency order is appealed to the constitutional court system, the basic findings of fact will be subject to a substantial evidence challenge and judicial scope of review.¹¹² The substantial evidence test requires a minimum of evidence that constitutes more than a scintilla of evidence upon which an agency could have reasonably relied to support a basic finding of fact.¹¹³ It would be absurd to hold that a board could not reverse the basic finding of fact if it lacked sufficient evidence in the record upon which a reasonable person could so rely. This is particularly evident since the agency would be required to defend this defective finding in the constitutional courts.¹¹⁴

The significant impact of the new standard is that it will be a rare case in which a finding will lack such evidentiary support, and more likely, the agency board will disagree with the SOAH judge on the weight of the

106. See generally Beal, *supra* note 81.

107. *Hyundai Motor Am.*, 581 S.W.3d at 837 (quoting *Sanchez v. Tex. State Bd. of Med. Exam'rs*, 229 S.W.3d 498, 515 (Tex. App.—Austin 2007, no pet.)).

108. *Id.* (quoting *Sanchez*, 229 S.W.3d at 515).

109. *Id.* at 840.

110. *Id.* at 841–42 (citing *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000)).

111. See *id.* at 837.

112. TEX. GOV'T CODE ANN. § 2001.174(2)(E).

113. *Tex. Health Facilities Comm'n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 452–53 (Tex. 1984).

114. *Id.* at 451.

evidence in the record. However, it is clear the legislature forbids the agency board from substituting judgment as to the relative weight of the evidence.¹¹⁵

The second scenario, which also has not arisen in a reported decision of the constitutional courts, is when the SOAH judge wholly fails to make a finding of basic fact that is relevant and material to the issues presented in the case, and there is undisputed evidence in the record as to its existence.¹¹⁶ Once again, to force an agency to adopt the PFD without such a finding and be subject to judicial review, which would require them to defend the lack of the material finding of basic fact, is simply absurd. Due to the lack of such issues arising in a reported decision, it is clear the SOAH judges' comprehensive review of the agency record is the norm.¹¹⁷

As to the last section, addressing ultimate holdings or mixed application of law to fact findings, the greatest benefit will be to remove the confusion of having them interspersed with conclusions of law. The reader was first told the law, and second, hopefully read and understood the basic or underlying facts. Now is the time to apply the law to those facts and determine the outcome of the dispute. If the board disagrees with the SOAH judge's application of the law to the facts, similar requirements are placed on the board to modify them as required by the APA and the Austin court's interpretation thereof.¹¹⁸

The board must explain with particularity its specific reason and legal basis for each change made.¹¹⁹ To fulfill this, the agency must articulate a rational connection between an underlying agency policy and the altered finding of ultimate fact.¹²⁰ The court's inquiry of a change of ultimate fact is limited to the inquiry of whether the agency's findings of basic fact reasonably support its findings of ultimate fact.¹²¹ That is so for a finding of ultimate fact to be reached by an inference from basic facts.¹²² Mere conclusory statements that the SOAH judge was wrong will not suffice and there is the obvious requirement of setting forth "why" the SOAH judge was wrong.¹²³

115. *Id.* at 452.

116. *See generally* Ron Beal, *From Proposal for Decision to Final Decision: What Happens in Between?*, 15 TEX. TECH ADMIN. L.J. 113, 130–32 (2013).

117. *See id.* at 113.

118. TEX. GOV'T CODE ANN. § 2001.174; *see* *Hyundai Motor Am. v. New World Car Nissan, Inc.*, 581 S.W.3d 831, 837 (Tex. App.—Austin 2019, no pet.).

119. *See Hyundai Motor Am.*, 581 S.W.3d at 839.

120. *Id.*

121. *Id.* at 838 (citing *Pro. Mobile Home Transp. v. R.R. Comm'n*, 733 S.W.2d 892, 899 (Tex. App.—Austin 1987, writ ref'd n.r.e.)).

122. *Id.* at 839.

123. *Id.* at 839–43.

III. CONCLUSION

Just because PFDs and final orders have followed the same format for untold years is not a reason in itself to continue the same practice. That is particularly true when that very format has been inconsistent with the mandate of the APA since its adoption.¹²⁴ Most importantly, that inconsistency is the root of the problem of citizens, agency board members, and even lawyers in misunderstanding exactly what was held and determined by the agency.¹²⁵ As the Texas Supreme Court correctly held that a contested case proceeding is a trial,¹²⁶ it should be treated as such by utilizing the well accepted concepts of the trial process when it comes to differentiating between the three types of determinations made in deciding the final outcome of a controversy.¹²⁷

124. See *supra* Part 0 (discussing the inconsistencies between the APA and agency hearing officer's and judge's PFDs).

125. See *supra* Part 0 (emphasizing the confusion created when PFDs are formatted to include "conclusions of law" compared to utilizing the format that uses the terminology "ultimate fact finding").

126. See *Coal. of Cities for Affordable Util. Rates v. Pub. Util. Comm'n*, 798 S.W.2d 560, 564 (Tex. 1990).

127. *Id.*