National Association of Unemployment Insurance Appeals Professionals

Navigator

Winter 2019

Announcing the 2019 NAUIAP Annual Training Conference in Indianapolis, Indiana • June 23 through 27, 2019

Stefanie Price, Director, Appeals
Indiana Department of Workforce Development

Indianapolis, the Crossroads of America, will host the 2019 NAUIAP conference. The conference will be held June 23-27, 2019. The NAUIAP Board of Governors is working hard to develop another amazing conference this year. Information regarding the agenda will become available in the near future. As always, continuing legal education credit will be available.

The conference will be held at the Crowne Plaza Indianapolis Downtown Union Station. This hotel was part of America's very first union train station opening in 1853. While staying at the Crown Plaza, you will notice ghost statues around the hotel dressed in authentic clothing from the 1920s, 1930s, and 1940s. No other hotel offers original Pullman Train Cars to stay in as guest rooms. Within walking distance, attendees can visit the Slippery Noodle Inn, Indiana's oldest bar, which was, during Prohibition, frequented by gangsters. Also, be sure to stop by St. Elmo's and try their famous shrimp cocktail, if you like a little spice. During your stay in Indianapolis, be sure to visit our many downtown neighborhoods such as Mass Ave Cultural District that offers restaurants, theaters, art galleries, and independent boutiques.

Our plans are to hold the Tuesday night outing at the Indianapolis 500 museum which will include a lap around the track with a stop at the Yard of Bricks. Additionally, there are many other attractions to visit such as the Indianapolis Children's Museum (one of the largest children's museums); Indianapolis Zoo (a zoo, aquarium, and botanical garden center); the Indianapolis Museum of Art; and the Crown Hill Cemetery (the third largest cemetery in the country, where John Dillinger, President Benjamin Harrison, and James Whitcomb Riley, among others, are buried).

Indianapolis boasts countless outdoor activities such as biking or walking the 9 mile urban cultural trail, walking or kayaking the downtown Canal, plus many outdoor patios and dining options. Indianapolis will steal your heart.

Stay tuned for registration information.
We look forward to seeing you in June!

PRESIDENT'S COLUMN

Amanda P. Hunter, Deputy General Counsel and Clerk
Florida Reemployment Assistance Appeals Commission

Before I began working as a government attorney in Florida, I worked for a private litigation firm. As part of my duties, I routinely reviewed intake questionnaires from potential clients and conducted interviews to gather information that would enable the firm to determine if it would provide representation. I prepared for each interview by identifying what I believed were the pertinent issues in each case and developing follow-up questions. Although I was very familiar with each case before the potential clients arrived at my office, after a few minutes of listening to them describe their concerns, I always gained more insight. I often observed someone on the other side of my desk who, with a quivery voice or shaky hands, truly wanted to convey to me that their livelihood had been negatively impacted by something they believed I could help remedy. Yes, I often heard the same facts that had been included in the questionnaire, but the impact of the case always became clearer during the interview. I often heard people say our meeting was their first time ever meeting with an attorney, and that they hoped I could help. In many cases, I could not provide the outcome they desired, but I always felt grateful for the opportunity to show them their concerns had been heard.

As part of my work for Florida's higher authority appeals tribunal, I have had the opportunity to engage with stakeholders of the unemployment program throughout the state. I have enjoyed these interactions because, like my experience in private litigation, I believe this has kept me mindful that the process of administering the unemployment program has a real impact on the people we serve. We are experts in the field, and I believe we are tasked with using our expertise to make this process as smooth as possible for everyone involved. There are certainly instances where a party will be disappointed or even displeased with the outcome of an appeal. That cannot be avoided. If, however, we add compassion to our practice, I believe we can make each case a little easier for everyone involved.

On a separate note, I hope you have started making plans to attend NAUIAP's 2019 Annual Training Conference in Indianapolis, Indiana, from June 23-27, 2019. The Board of Governors is working on a great line-up of plenary sessions and workshops that you won't want to miss!

WISCONSIN'S APPEALS MODERNIZATION PROJECTS

Jim Moe, Deputy Director, and Andy Rubsam, Senior Attorney, Bureau of Legal Affairs,
Unemployment Insurance Division, Wisconsin Department of Workforce Development

Wisconsin previously only accepted appeals of unemployment insurance benefit determinations by mail or fax. In October 2016, Wisconsin created, by internal development, an online appeals process for claimants by a Claimant Portal. The enhancement improved claimant ability to file appeals online, view appeal options for determinations, provide detailed information, and receive their appeal hearing number in real time.

When a claimant files an appeal with the Portal, a task is created with the corresponding appeal case details and routed to the appropriate hearing office worker queue for processing.

As of November of 2018, claimants could withdraw their appeal through the Claimant Portal.

In September of 2018, Wisconsin added a Determinations and Appeals Exchange to the State Information Data Exchange System (SIDES) to allow employers and Third-Party Administrators to appeal benefit determinations electronically. Using the SIDES E-Response with a Single Sign-On process, employers can view and appeal determinations online. Employers may add additional information, attachments and amended responses.

The SIDES Determinations and Appeals Exchange is an addition to previously-deployed exchanges including Separation Information, Monetary and Potential Charges and Earnings Verification.

Like claimants on the Claimant Portal, at the SIDES E-Response site, the employer may select a benefit determination to appeal and file the appeal electronically. Employers may add additional information and attachments. A task is created for the hearing office staff to perform.

Third Party Administrators participating in the SIDES web services exchange will be sent an electronic copy of all determinations for all UI accounts for which they have power of attorney on file.

In 2019, Wisconsin intends to add several enhancements to the online benefits appeals process. Claimants will receive real-time copies of their online appeals, appeal confirmations, hearing withdrawal requests, hearing notices, and appeal decisions. Claimants will be able to upload hearing exhibits. Unemployment Insurance staff will upload documents for review or action by claimants.

NAUIAP Brings Training to the Digital Age

ANNOUNCING UI WEBINAR TRAINING COURSES

Ed Steinmetz, NAUIAP Board of Governors, President-Elect
Assistant Chief Judge for Quality Assurance, Washington

As announced at the June 2018 Annual Training Conference in Annapolis, MD, the NAUIAP Board of Governors has decided to expand our organization's training efforts to include at least two webinar trainings each year. These webinar trainings are intended to supplement our Annual Training Conference training, and provide additional value to our NAUIAP members. We anticipate that these webinar trainings will be scheduled sometime in the spring and fall of each year, and will provide a timely platform to discuss new developments and "Hot Topics" arising in the adjudication of UI claims. It is the intent of your Board of Governors to structure these webinar trainings in a manner which is responsive to your expressed training goals. So please let us know of those topics or areas of practice where you would like to receive additional training.

On January 29, 2019, NAUIAP conducted its first ever live webinar training on the topic of Evidence for Administrative Hearings Professionals, and by all accounts the training was a success! One hundred and eighteen NAUIAP members from across the United States made time in their busy schedules to attend the webinar training provided by Judge Denise Shaffer, Director of Quality Assurance for Maryland's Office of Administrative Hearings.

Working from an excellent PowerPoint presentation, Judge Shaffer discussed a number of foundational evidentiary issues including challenges presented by hearsay evidence, video and photographic evidence, and voicemail and text messages. Judge Shaffer's expert use of factual scenarios helped to clarify the evidentiary considerations which she discussed, and place those evidentiary considerations into the context of our daily work. The webinar was interactive, with many participants offering written comments which were discussed by Judge Shaffer. The Board would like to extend our sincere thanks and appreciation to Judge Shaffer for the time and talent that she devoted to her presentation!

For those of you who were unable to attend the January 29 webinar, an audio recording of the webinar and Judge Shaffer's PowerPoint presentation are available for your review on the NAUIAP website under the heading "Training and CLE." There you will also find a guide which details the CLE "Distance Learning" requirements for each state, and which will help you to secure CLE credit for the webinar training if you should so desire.

As we move forward, we are confident that the new webinar trainings will be a valuable and worthwhile component of our strong training commitment to you, our NAUIAP membership. I would personally like to extend my sincere appreciation and thanks to Board members Amanda Hunter, John Lohuis and Dan Doherty for all of their hard work and dedication to making our first webinar training a success!

NAUIAP Board of Governors

OFFICERS

AT-LARGE MEMBERS

Spotlight

SPOTLIGHT ON SERVING ON THE NAUIAP BOARD

John Lohuis, Manager Lower Authority Appeals, Oregon

Greetings from Oregon! My name is John Lohuis, and I'm the manager of Oregon's lower authority appeals. I am proud to serve on the NAUIAP Board of Governors as a member-at-large.

My first experience with NAUIAP was likely a familiar story: I attended an Annual Training Conference, and I was struck by the quality and variety of topics presented. The knowledge that was shared and the information I learned wasn't limited to the agenda items, either – some of the most valuable time I spent was meeting other unemployment insurance appeals professionals from across the nation. I left Washington D.C. with a renewed enthusiasm and several discussion topics to take back to Oregon.

Since joining the Board of Governors, I've gotten to know an absolutely great group of like-minded people who share the common interest and dedication to improving the unemployment insurance appeals process. I find satisfaction from the fact that our organization stands for a worthwhile cause. As part of the organization, I have the opportunity to make a difference by making sure that we meet the needs of the community we serve. We strive to provide you with relevant, current, fun, and high quality Annual Training Conferences, newsletters, and training opportunities.

I'd like to ask you to consider volunteering with NAUIAP. As a board member, I attend three meetings a year. I spend up to a couple of hours a week on board-related projects. It's rewarding to have a chance to help others that are working on the goal of improving our appeals process, and have fun in the process.

Feel free to contact me, or anyone on the board, if you have any questions. See you in Indianapolis.

SPOTLIGHT ON OREGON

J. S. Cromwell, Chair
Oregon Employment Appeals Board

In Oregon, the lower authority appeals Office of Administrative Hearings and higher authority appeals Employment Appeals Board are both administratively housed within the Employment Department. All three entities maintain independent policy- and decision-making authority.

The Oregon Office of Administrative Hearings is an independent central panel of administrative law judges created by the Oregon Legislature in 1999 to provide an independent and impartial forum for citizens and businesses to dispute state agency action against them. Previously, employees of the agencies themselves heard those cases. The Office of Administrative Hearings employs 49 professional administrative law judges, who hold between 14,000 and 30,000 hearings each year for approximately 70 different state agencies, including the Oregon Department of Human Services, Oregon Driver and Motor Vehicle Services, Oregon Health Authority, Oregon Liquor Control Commission, and several agencies, boards, and commissions. The hearings range in time and complexity from brief one hour telephone hearings to multi-week, in-person hearings.

In 2018, the Office of Administrative Hearings issued approximately 13,664 unemployment insurance benefits orders. Unemployment insurance tax and benefits orders issued by administrative law judges become the Employment Department's final orders 20 days after issuance unless appealed. Unemployment insurance tax orders are appealable to the Oregon Court of Appeals. Unemployment insurance benefits orders are appealable to the Oregon Employment Appeals Board by application for review filed within 20 days by claimants, employers, or the Employment Department.

The Oregon Employment Appeals Board is a quasi-judicial agency of the Employment Department created in 1959 to review contested unemployment insurance orders in benefits appeals cases. Prior to 1959, Oregon's unemployment and workers compensation programs were administered by a three-member commission acting in dual roles as the State Industrial Accident Commission and the State Unemployment Compensation Commission. The Employment Appeals Board was created to assume responsibility over the contested unemployment insurance benefits appeals cases. The Employment Appeals Board consists of three members appointed by the governor and confirmed by the state senate, and is supported by an executive assistant, three legal staff, and a legal secretary. Each board member and all legal staff must have a law degree to qualify to work for the board.

The Employment Appeals Board routinely issues 100% of its decisions within 39 days. In 2018, the Employment Appeals Board disposed of approximately 1,237 cases. An Employment Appeals Board decision becomes the Employment Department's final order 30 days after service, unless a party petitions the Oregon Court of Appeals for judicial review. The Employment Department is the named party to any appeal of an Employment Appeals Board decision and may appeal Employment Appeals Board decisions. The Oregon Department of Justice represents the Employment Department's interests in the appellate courts. The Employment Appeals Board does not appear in any appellate cases. In 2018, the Oregon Court of Appeals reversed .08% of the Employment Appeals Board's decisions.

Special thanks to Presiding ALJ John Lohuis of Oregon's Office of Administrative Hearings for reviewing and contributing information about the Office of Administrative Hearings for use in this article.

UNEMPLOYMENT COMPENSATION, THE FIRST AMENDMENT, AND AFTER-HOURS SPEECH

Munazza Humayun, Unemployment Law Judge
Minnesota Department of Employment and Economic Development

"You're a Nazi and you're fired, it's your fault.
You're a Nazi and you're fired, it's your fault.
You were spotted in a mob, now you lost your freaking job.
You're a Nazi and you're fired, it's your fault."

Thus went the song, sung to the tune of "If you're happy and you know it, clap your hands," at one August 2017 protest against far-right extremists, who were holding a rally of their own a mile away.[1] The song was a précis of the internet's sequence of responses to seemingly emboldened white nationalists after the violent Charlottesville Unite the Right rally: doxxing (publishing a private citizen's identifying information), public shaming, and pressure on employers to fire bigoted and racist employees.

Cole White was among the first men identified as a Unite the Right participant. A Twitter user posted information about his employer, a Berkeley hot dog joint called Top Dog, next to a photo of White marching at the rally. The rally had happened on a Friday. By Monday, Top Dog, "inundated with inquiries," had announced to national newspapers that White was no longer employed there and that the restaurant did not support the actions of those in Charlottesville[2].

For unemployment insurance professionals, this and other – less dramatic but similarly motivated – discharges from employment present thorny constitutional questions if the fired employee seeks unemployment benefits. Although private employers are generally free to discharge employees so long as the termination doesn't violate civil rights and whistleblower protection laws, it has been established for more than a half-century that a state may not deny government benefits on a basis that infringes upon First Amendment rights, especially the right to freedom of speech, absent a compelling state interest[4]. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which (it) could not command directly." [5]

The constitutional issue is, of course, distinct from the question whether an employee's conduct amounts to misconduct that would otherwise disqualify her from receiving unemployment benefits under state law. Most states disqualify individuals from receiving unemployment benefits for some period if they were fired for "misconduct connected with" their employment. In the case of an employee in a non-supervisory position with little authority – say, a dishwasher at a restaurant – it is debatable whether speech that insults groups based on race, religion, national origin, or sexual orientation is sufficiently "connected with" the employment so as to be disqualifying misconduct, when the speech was uttered lawfully on a public street, away from the company premises, on the employee's own time, and without any reference to or identification of the employer by the employee. But when an employee holds a supervisory or prominent role in the organization, the employer may be able to demonstrate a sufficient adverse impact of the off-premises, after-hours speech on the employment. Many companies make it clear to their employees, through their policies and internal messaging and training, that the company places a premium on advancing diversity and building an equitable and inclusive workplace culture. Expressing hateful ideas, whether on or off the job, could violate the employer's reasonable expectation that an employee – at least one in a supervisory role – not actively work against the inclusion and equity goals to which the company attaches great importance. It is also increasingly common for employees to be fired for inappropriate activity on social media when the employee's social media profile identifies her as an employee of the company. Some "connection with" the employment may therefore be present in the sense that the employee's conduct reflects poorly on the employer and could lead to loss of existing or potential customers, particularly if the employee's role within the organization is one of some authority.

Assuming the speech is found to be disqualifying misconduct under state law, however, the constitutional question remains, and requires a balancing of the claimant's interest in exercising her right to freedom of speech and the State's interest in protecting the unemployment compensation fund by disqualifying those individuals whose unemployment is due to willful misconduct. Although no U.S. Supreme Court case has directly addressed the potential tension between these two competing interests,[6] some state courts have.[7]

THE NATURE OF THE PRIVATE INTEREST: PROTECTED SPEECH

Speech that touches upon a matter of public concern occupies the "highest rung of the hierarchy of First Amendment values," and is afforded special protection.[8] That there is no "hate speech" exception to the First Amendment is also firmly established. In addition, the Supreme Court has recognized that certain social media websites, particularly Facebook and Twitter, are analogous to traditional public fora like streets and parks for purposes of the First Amendment.[9]

An exhaustive list of all categories of speech that are protected under the First Amendment is beyond the scope of this article. But in analyzing whether First Amendment rights may be infringed, it is important to recognize speech that is not entitled to First Amendment protection. True threats,[10] "fighting words,"[11] certain defamatory speech, fraud, obscenity and child pornography, and incitement to imminent lawless action[12] have all been found to lie beyond the protection of the First Amendment. Courts have also found that employees may contractually waive certain speech rights, such as the

right to call for a strike.[13] If no protected speech is at issue in the case, the constitutional inquiry ends.

COMPELLING STATE INTEREST

Once an infringement on protected speech is shown, it must be justified by a compelling state interest to be constitutionally valid. It is important to distinguish between a private employer's interest in removing employees whose publicly expressed views may be detrimental to employee morale and harmony in the workplace, and the governmental interest in preserving the unemployment insurance trust fund for only those unemployed through no fault of their own. The latter interest is the one at issue here.

Unfortunately, there is scant case law on the sufficiency of this state interest when balanced against an employee's speech interest. One Iowa Supreme Court decision found that this governmental interest was a compelling one, [14] but cited for this proposition a U.S. Supreme Court case that only held this interest was a "legitimate" one that passed the much less stringent rational basis test of constitutionality, which is used when non-fundamental rights are at issue. [15]

A DIFFERENT TEST FOR GOVERNMENT EMPLOYEES?

Courts around the country have dealt with a different issue much more frequently: when is it constitutionally permissible for a public employer to discharge an employee for the employee's speech. The test there—first articulated in Pickering v. Bd. of Education, 391 U.S. 568 (1968) and developed further in Connick v. Myers and Garcetti v. Ceballos —is whether the state's interest, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the employee's interest in commenting upon matters of public concern as a citizen.

Some courts, when confronted with the constitutionality of denying unemployment benefits to the fired government employee in such cases, use the Pickering test for assessing the constitutionality of denying unemployment benefits. And some courts have even used that same test when deciding whether the state's denial of unemployment benefits to a discharged employee of a private employer violated the First and Fourteenth Amendments. But the Pickering test is ill-fitting, at best, for the unemployment compensation question even when a government employee is involved. The employee has already been fired; it makes little sense, then, to argue about whether the government's interest as an employer justifies firing the employee when that is no longer the issue and the only remaining issue is whether any compelling state interest justifies denial of unemployment compensation.

The use of the *Pickering* test in deciding the unemployment claim of a private company's fired employee is even more questionable, for obvious reasons.

Overall, the proposition that the state's interest in denying unemployment benefits to a private employee fired for misconduct is somehow different from the state's interest in denying those benefits to a public employee fired for misconduct seems difficult to justify. It is true that unlike private employers, governmental entities (and nonprofits) often reimburse state unemployment insurance programs instead of paying an unemployment tax. However, most public employers may elect to pay the unemployment tax just as private employers do, instead of picking the reimbursement option.

This area of law will likely see fuller development in the years to come. Until then, unemployment insurance appeals professionals would be well-advised to carefully consider the constitutional implications of their decisions in cases where protected speech is the basis for discharge from employment.

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[1] Nellie Bowles, How 'Doxxing' Became a Mainstream Tool in the Culture Wars, N.Y. Times (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html.
[2] Maura Judkis, Charlottesville white nationalist demonstrator loses job at libertarian hot dog shop, Wash. Post, (Aug. 14, 2017), https://www.washingtonpost.com/news/food/wp/2017/08/14/charlottesville-white-nationalist-demonstrator-fired-from-libertarian-hot-dog-shop/.
[3] Top Dog denied firing White, stating that he had voluntarily resigned. But when asked whether White would have been allowed to continue working had he not resigned, the restaurant declined to comment. Id.
[4] *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); Speiser v. Randall, 357 U.S. 513, 518 (1958); Perry v. Sindermann, 408 U.S. 593, 597 (1972).
[5] *Sindermann* at 597 (citations omitted).
[6] In 2016, the U.S. Supreme Court denied review in a case where the question was presented, albeit not well, by a pro se petitioner. Shirvell v. Michigan Dept. of Attorney General, 136 S.Ct. 1833 (2016) (mem.).
[7] Frigm v. Unemployment Comp. Bd. of Review, 642 A.2d 629 (Pa. Commw. 1994); Messina v. Iowa Dep't of Job Serv., 341 N.W.2d 52 (Iowa 1983); McCall v. Unemployment Comp. Bd. of Review, 717 A.2d 623 (Pa. Commw. 1998).
[8] Connick v. Myers, 461 U.S. 138, 145 (1983) (citations omitted).
[9] See Packingham v. North Carolina, 137 S.Ct. 1730, 1737 (2017).
[10] Watts v. United States, 394 U.S. 705 (1969).
[11] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[12] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[13] Messina v. Iowa Dep't of Job Serv., 341 N.W.2d 52, 60-61 (Iowa 1983).
[14] Id. at 61-62.
[15] Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 489-491 (1977).
[16] 461 U.S. 138 (1983).
[17] 547 U.S. 410 (2006).
[18] Shirvell v. Dep't. of Attorney General, 866 N.W.2d 478 (Mich. App. 2015); Wright v. Unemployment Comp. Bd. of Review, 404 A.2d 792 (Pa. Commw. 1979).
[19] Bala v. Com., Unemployment Compensation Bd. of Review, 400 A.2d 1359 (Pa. Commw. 1979).

DECISION WRITING FOR UI AUDIENCES

By J. S. Cromwell, Chair
Oregon Employment Appeals Board

Has your office ever received a call from someone asking if they won or lost their case, because even though they received and read the decision they aren't really sure? Or had a case reversed and remanded for failing to address an argument, even though you thought it clear that you addressed and resolved it? We have, and we've recently started a year-long project to look at what we're doing to communicate our decisions to all of our audiences and how we might learn to do it a bit better.

We recently did a wholly unscientific random sampling of 26 decisions issued by our office in late 2018 and early 2019. We learned that our decisions, on average, are written at or above a college grade-level. According to a 2013 study, however, 36 million adults in the United States struggle to read at a third-grade level[i]. A 2015 study revealed that only 37% of twelfth-grade students in the United States read at or above a proficient grade-appropriate level[ii]. When analyzed by race the percentages of "proficient" twelfth-graders plummeted among some populations; proficiency levels were also significantly reduced among individuals for whom English is a second language, whose parents struggled with literacy, and who have been to prison[iii].

That a significant portion of the population we intend will read and understand our decisions potentially includes individuals who struggle with basic reading comprehension suggests that our office's multi-page, densely-worded, college-level decisions are not sufficiently accessible to those we serve. At the same time, however, we also write our decisions for ourselves, unemployment insurance professionals, administrative law judges, and trial and appellate courts, and our decisions must include technical elements and citations to laws and complex legal standards.

Our year-long project is therefore to look for ways to improve the accessibility of our decisions to all of our intended audiences – doing a better job reaching individuals at all reading comprehension levels – but without neglecting our responsibility to write well-reasoned decisions, address all legal elements, and cite to relevant laws and precedent when necessary. Here are some of the factors we're reviewing.

Who is the Audience? Our preliminary research suggests that one of the most important things we can do to improve readability is know our audience. That can be challenging in an unemployment insurance setting since our audience can be so diverse. A single written decision might have to be understood by a first-time unemployment insurance claimant, an experienced UI adjudicator, and an appellate court judge, each of whom will be looking to the same decision to satisfy what might be very different needs. Other decisions might need to be understood only by a single party and an adjudicator effectuating the result and will never be subject to review.

Not every decision must be written for the same audience. Review by the Oregon Employment Appeals Board is de novo on the record; we don't hold oral arguments and never meet the parties to any of the cases we review. We think we can nevertheless improve our efforts to infer parties' familiarity and comfort with written communications, based, for example, upon how well they've complied with written notices, deadlines, and instructions about how to represent themselves. We can also consider what they've said during a hearing, the vocabulary they've used to express themselves, and what they've written on their requests for hearing, applications for review, or arguments. Given the diversity of our audience and what little we know about them it might be impossible to perfectly tailor a decision to suit everyone's needs. It should be possible for us to more effectively use what little information we do have to inform our writing, though, and consider the parties' needs as part of our standard review and writing process.

What is the Purpose and Context? There might be a number of reasons to write a decision. Sometimes we write simply to notify parties of a benefits determination. Other times we write to explain to the parties, an administrative law judge, and the agency why we're agreeing or disagreeing with a previous benefits determination. The purpose or reason for which we are writing a decision might very well affect its style and complexity.

Likewise, contextual considerations might affect the content and complexity of our decisions. For example, the drafting considerations involved in a party's appeal of an ALJ's order alleging unfairness during the hearing might be different from those involved when deciding how to draft a decision pursuant to a court of appeals remand instructing us to correct an error. The content of a decision in a case with multiple vitriolic parties actively engaged in disputing key facts might differ from that of a non-controversial, single-party case.

Something else to consider is what readers actually want to know.[iv] In the context of the lower and higher authority appeals decisions we write it's not possible to jettison all the legalese or limit our decisions only to a single phrase that states "benefits yes" or "benefits no." We're thinking we can focus better on what readers want to know, however, or at least learn not to ignore what they want to know in favor of what we want – or even need – to say.

Is it Readable? As a higher authority appeals office, the primary service we provide to the public is issuing written decisions clearly communicating the basis for unemployment insurance benefits decisions. Decisions convey very important information to the parties about whether benefits are allowed, or a party overpaid, or an employer potentially liable. Some readers note that "when they get a dense, uninviting letter[] or notice[] from the

government, they often put it in the 'read later' pile, even though they knew they should read it right away."[v] Thus we need to communicate that important information to parties in a way all readers can understand and use.

We have found that the length and complexity of the words we choose play a significant role in our intended audience's ability to understand what we write. Sentence length and paragraph length affect a document's readability, as does the amount of white-space left on the page. The federal plain writing guidelines even suggest taking "a long look at the appearance of the letter for eye-appeal," being "sure the letters does not look visually confusing," and checking "for odd shapes (the 'hourglass effect') that may have unintentionally been created as you composed the letter." [vi]

Why are we Proofreading? We have noticed a tendency toward editing tunnel-vision, meaning editing for typos to the exclusion of consistency or logic, or editing for logic or consistency to the exclusion of readability. We're exploring taking a more measured approach to our proofreading processes. For example, we might read a decision through the first time looking only for typos, clerical errors, and readability. Then, the second and third times, read it through checking for internal and external consistency, and substantial evidence and reason.

We've also noticed, though, that repeatedly reviewing the same document can result in a tendency to see what we expect to see, or read only what we intended to say, rather than what is actually written. In response, we're exploring the effect proofreading drafts in different formats might have on the quality of our proofreading processes – for example, reviewing a draft electronically while double-spaced and again while single-spaced, or reviewing the draft electronically and then printing the draft and reading a hard-copy. Our experiences suggest that mixing up the visual appearance of the draft during the review process might help us to see the draft with fresh eyes each time, and spot errors that we might otherwise have missed.

Have We Listened to Feedback? Generally speaking we know what parties want from us: a decision that clearly communicates whether or not benefits are allowed. We can't tell from reviewing case records whether our decisions adequately did that, but we can listen to the feedback parties provide when they call or write after receiving a decision to complain or ask questions that weren't answered by the decision itself. Also, every one of our decisions is issued with a link to a customer service survey. We can be more responsive to the feedback we receive if we track the substantive complaints and comments, analyze them for consistent themes, and consider whether we could have done a better job at communicating the outcomes of or bases for those decisions. In other words, we can learn from the feedback and incorporate it into our processes so our future decisions are clearer.

This is the beginning of a year-long project, and I'm sure there will be some trial and error along the way. We're hopeful, though, that by incorporating these and other considerations into our writing and proofreading processes we'll find ways to improve our decisions, ultimately making them more accessible to our customers and clearer to those reviewing our work.

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[i] *See* OECD, "Time for the US to Reskill?: What the Survey of Adult Skills Says," OECD Skills Studies, OECD Publishing, 2013. Another 63 million adults in the United States can perform only basic literacy activities. See Council for Advancement of Adult Literacy, "Report of the National Commission on Adult Literacy," 2008, citing NCES, "National Assessment of Adult Literacy," NAAL 2003, U.S. Department of Education 2005.

[ii] NCES, "The Nation's Report Card: 2015 Mathematics and Reading at Grade 12," NCES Online Report, 2016.

[iii] That study showed that 49% of Asian students, 46% of white students, and 45% of students reporting two or more races tested at "proficient" levels, while only 28% of American Indian/Alaska Native students, 25% of Hispanic students, and 17% of Black students tested at "proficient" levels. Id.

[iv] See https://plainlanguage.gov/guidelines/audience/

[v] See https://plainlanguage.gov/guidelines/design/

[vi] *Id.*