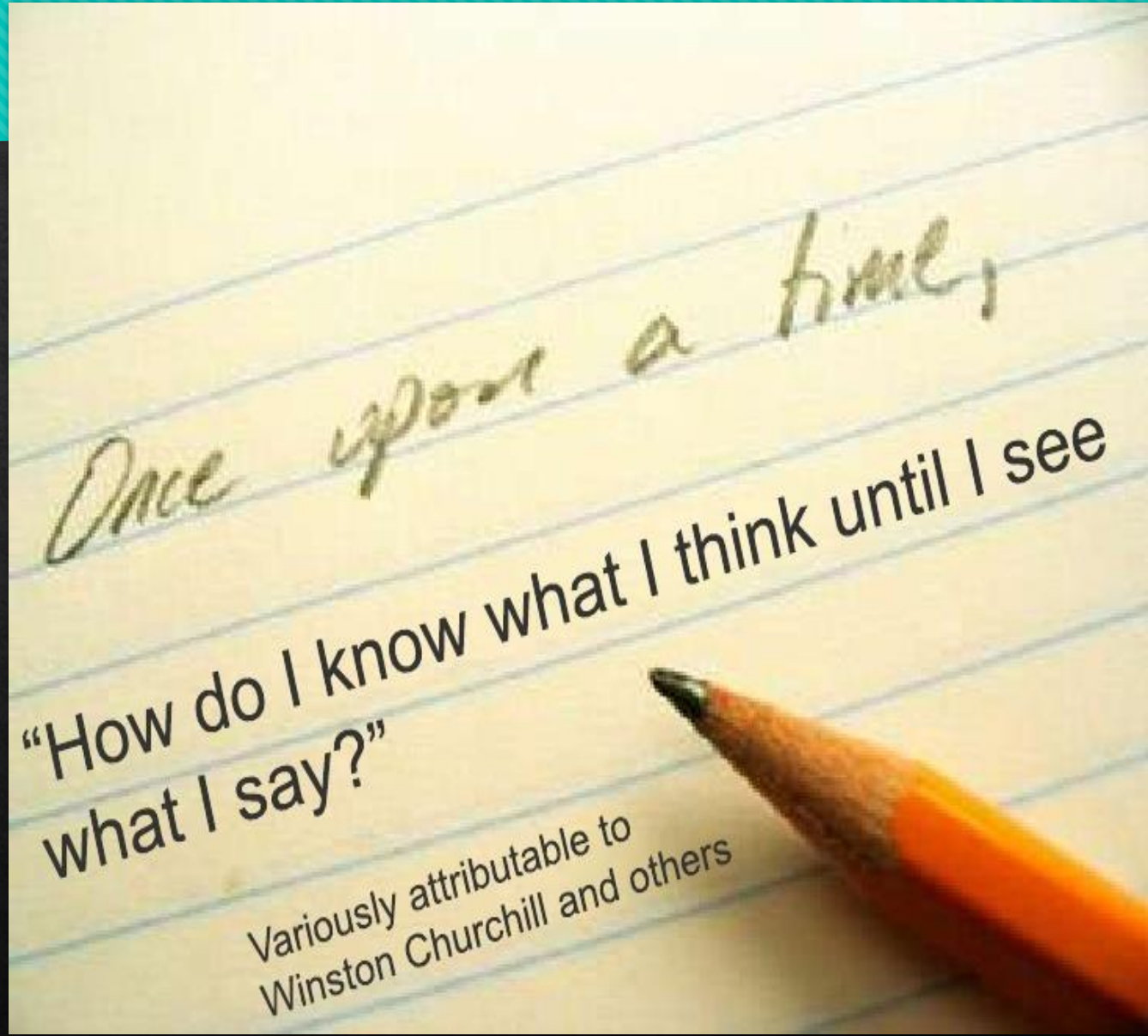


WRITING DECISIONS

A Matter of Judgment

Introduction

There is an art to both *making* and *writing* an administrative decision. As a decision-maker, you must strive to deliver well-reasoned, clear, and reader-friendly decisions to the public. Being able to articulate the reasons for a decision in clear, concise language is a skill nobody is born with, *but it can be learned*.

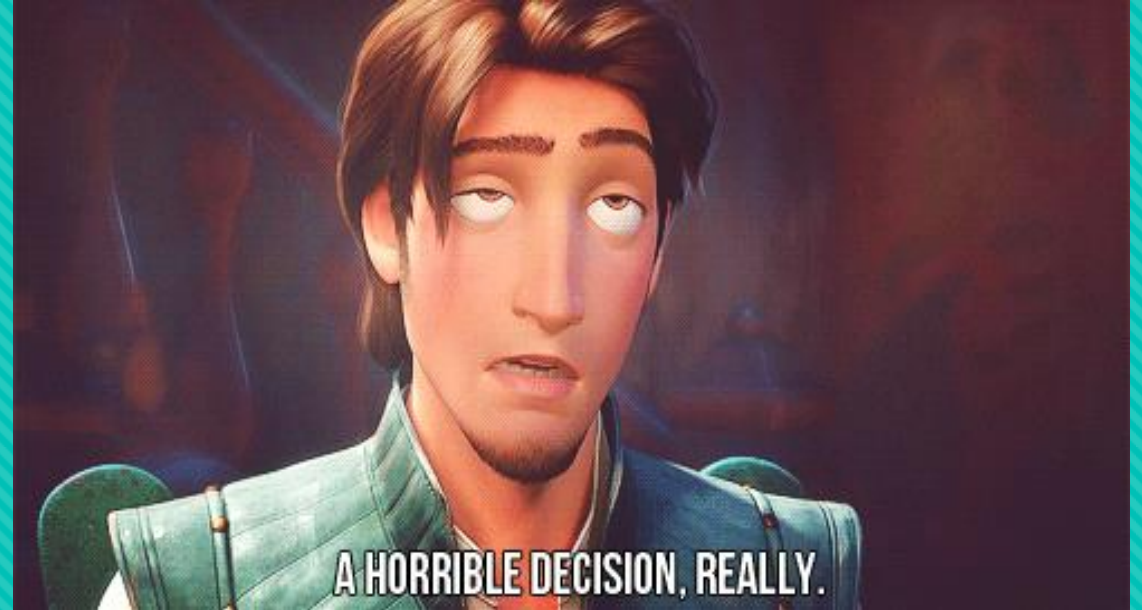


What is Your Responsibility? ...



The Decision:

Title IX Regulatory Requirements....



Following the hearing, the decision maker(s) must issue a written
“**determination regarding responsibility.**”

- YES
- NO
- MAYBE
- SO



Knowing the law is not enough.

A Title IX decision maker must be able to organize the issues, find facts and apply the law to the facts in order to resolve the issues and, it must be done in language ordinary people can understand.

Primary Challenge. . .

**The written
decision
must include
the following
“key”
elements:**

1. The allegations that could constitute sexual harassment;
2. A description of the procedural steps undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings;
3. Findings of fact that support the determination regarding responsibility;
4. Conclusions about the application of the institution’s code of conduct to the facts;
5. An explanation regarding the result of each allegation, with a determination regarding responsibility, any disciplinary actions against the respondent, and whether any remedies will be provided to the complainant; and
6. Procedures and bases for appeal.

Title

BEFORE THE STATE OF UTAH CAREER SERVICE REVIEW OFFICE

<p>[REDACTED]</p> <p>Grievant,</p> <p style="text-align: center;">v.</p> <p>UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY,</p> <p>Agency.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER</p> <p>Case No. 2010 CSRO/HO 147 Hearing Officer Geoffrey Leonard</p>
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Introduction

Setting the

Stage

Who?
 What?
 When?
 Witnesses?
 Exhibits?

Career Service Review Office Hearing Officer Geoffrey Leonard (Hearing Officer) held a Step 4 evidentiary hearing in this case on July 17-19, September 10-12, and September 20, 2018. Agency Utah Department of Environmental Quality (Agency) was represented by Assistant Attorneys General Daniel Widdison and Alain Balmanno. Grievant [REDACTED] appeared *pro se*. A certified court reporter made a verbatim record of the proceedings. Witnesses¹ were placed under oath and examined, and testimony and documentary exhibits² were received into the record. At the conclusion of the hearing, the Hearing Officer directed the parties to make

Agency's witnesses included [REDACTED]
 [REDACTED]
 [REDACTED] For reasons set out herein, Grievant did not testify at the Step 4 hearing.

² The Hearing Officer admitted as evidence Agency exhibits: A-1, A-1, A-2, A-5, A-6, A-7, A-8, A-9, A-10, A-11, A-12, A-13, A-16, A-18, A-23, A-24, A-31, A-32, A-33, A-34, A-35, A-36, A-37, A-39, A-40, A-41, A-42, and A-43. The Hearing Officer admitted Grievant exhibits: G-112, G-113, G-114, G-117, G-118, G-119, G-123, G-128, G-130, G-131, G-133, G-136, G-139 G-141, G-146, G-147, G-149, G-154, G-158, G-175, G-255, 272, G-319, G-343, G-348, G-364, G-376 (first page only), G-380, G- 389, G-419 (pages 4, 7, and 13 only), G-422 (demonstrative purposes only), G-430, G-461 (first three pages only), G-467, G-486, G-489, and G-493.

MEMORANDUM-CONFIDENTIAL

TO: [REDACTED]

FROM: Grievance Hearing Panel
[REDACTED]

CC: [REDACTED]
Vice President – Finance and Administration
[REDACTED]
Associate Vice President – Human Resources

DATE: March 5, 2018

SUBJECT: Review Panel Final Recommendation



Another
Option

This letter follows the grievance hearing that was held on February 28, 2018 on [REDACTED] regarding Mr. [REDACTED] termination [REDACTED]

1. The majority of the panel agrees that the decision to discipline [REDACTED] was not made arbitrarily nor capriciously. We recommend this decision be upheld without modification based on the following:

INTRODUCTION

Pursuant to negotiated district policy and the Utah Public Education Human Resource Management Act ("PEHRMA") (Utah Code Ann. 53G-11-501 et. seq.), ***the Hearing Officer herein was appointed and adjudicated this matter between the parties involved in an employment termination appeal.*** The Appellant requested a fair hearing according to statute and policy and the Hearing Officer was appointed by the School District (District). ***Pursuant to District Policy, the commission of the Hearing Officer was to make "factual findings" and to provide an advisory recommendation to the District Board of Education as to the resolution of this matter.*** The District Board of Education will ultimately make the final determination as to the essential issues of the case as explained further detail below.

Authority

**The written
decision
must include
the following
“key”
elements:**

“Statement of the Issues”

=

1. The allegations that could constitute sexual harassment;

Case Scenario #2

“A problem well stated is a problem half solved”

Example 2

Example 1

1. Did Respondent touch Complainant inappropriately?
2. Did Respondent make numerous sexual comments to Complainant?
3. Did Complainant welcome or consent to any of Respondent's comments or touching?

1. Did Respondent make comments about the size of Complainant's breasts ?
2. Did Respondent look down Complainants pants or her blouse?
3. Did Respondent tell Complainant about any sexual dreams?
4. Did Respondent slap Complainant's buttocks?
5. Did Respondent tell Complainant that she wanted to fondle her breasts?
6. If so, did Complainant welcome or consent to any of Respondent's comments or touching?

Statement of Issues –

“The allegations that could constitute sexual harassment”

**The written
decision
must include
the following
“key”
elements:**

“Procedural Matters”

=

2. A description of the procedural steps undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings;

Procedural Matters

Regulations expressly require:

“A description of the procedural steps undertaken, including notifications to parties, interviews and site visits, methods used to gather evidence, and hearings.”

- Example 1: Appellant filed an objection to some documents submitted by the Respondent and filed a pre-hearing Motion in Limine to exclude some of those documents. The Appellant filed his Motion in Limine on July 24, 2019, two days before the scheduled hearing. The Hearing Officer conducted a pre-hearing telephonic conference with legal counsel in order to adjudicate the Appellant's Motion in Limine on July 25, 2019. Ultimately, the Hearing Officer ruled against the Appellant's Motion in Limine in a written decision on July 25, 2019. As such, all of the Respondent's proffered pre-hearing documents were allowed to be introduced and entered into evidence. The Appellant's Motion in Limine and the Hearing Officer's written ruling on this motion are included in the record as Exhibit P.

Appendix Style

Example 2:

Appendix A: [REDACTED] Grievance Hearing Procedural Matters

The Hearing Panel made a number of rulings with regard to the procedure to be followed during the [REDACTED] Grievance Hearing. Those rulings are:

Response to objections of [REDACTED]

1. Opening the hearing to the public and press.
 - a. Denied. Policy provides for a closed hearing.
2. Compelling witnesses to attend.
 - a. Denied as to non-employees. [REDACTED] has no subpoena power.
 - b. Employees will be compelled to attend. In particular, if [REDACTED] has relevant testimony he will be compelled to attend either by phone or the hearing will be continued to receive his testimony.
3. Production of disciplinary records.
 - a. Denied. Discovery is not provided for by the Policy and is not a due process right. However, this will be ameliorated because [REDACTED] stated that it will provide testimony about comparable discipline. [REDACTED] will be allowed to question those witnesses about other Police Department employees who were accused of receiving ammunition and what discipline they were assessed.
4. Excluding the testimony of [REDACTED] about discipline of other employees (and to the extent applicable [REDACTED]).
 - a. The testimony is initially going to be admitted. Notably, the testimony and cross-examination will hopefully cure the complaint about a lack of production of disciplinary records. Mr. [REDACTED] initially will be limited to testifying about discipline assessed to other [REDACTED] Department employees involved in [REDACTED]. He will be required to testify about specific discipline assessed to specific employees as this is public information, see Utah Code 63G-2-301(3)(o) ("The following records are normally public ... (o) records that would disclose information relating to formal charges or disciplinary actions against a past or present governmental entity employee if: (i) the disciplinary action has been completed and all time periods for administrative appeal have expired; and (ii) the charges on which the disciplinary action was based were sustained"). Consistency with employees terminated outside of the [REDACTED] Department may be allowed depending on the nature of the testimony and its relevance to [REDACTED] situation.

BEST PRACTICES – What Else to Include:

Beyond what the Title IX Regulations require, you may want to include a summary of any significant procedural decisions that could have a substantive impact on the outcome. These could include:

- limits on amount of time for hearing;
- order of testimony;
- any significant evidentiary rulings, particularly if you don't allow certain evidence in or certain witnesses to testify.

EXAMPLE:

At his originally scheduled testimony in his case in chief, Grievant brought a binder of notes and documents to the witness table to use in testifying. The Hearing Officer asked Grievant to not use the documents in the binder while testifying. After explanation and discussion, Grievant allowed the Hearing Officer to inspect his notes *in camera*. The Hearing Officer determined that the notes were Grievant's notes and work product, intended to guide Grievant's testimony, with the exception of copies of several documents. The Hearing Officer directed Grievant to remove those documents, or identify, or provide copies of those documents to Agency, before testifying. Grievant refused. The Hearing Officer explained to Grievant the consequences of his refusal; Grievant reiterated his refusal and did not testify.

**The written
decision
must include
the following
“key”
elements:**

“Findings of Fact”

=

3. Findings of fact that support the determination regarding responsibility;

**The written
decision
must include
the following
“key”
elements:**

“Conclusions of Law”

=

5. An explanation regarding the result of each allegation;

What Are Findings of Fact?

NO

Not to be confused with a summary of the timeline, general facts, or other information that gives context to the case.

++such information is often helpful and can be included as part of the written determination, but is not generally what is meant by the term “Findings of Fact” – also called “Findings of Fact and Conclusions of Law”

YES

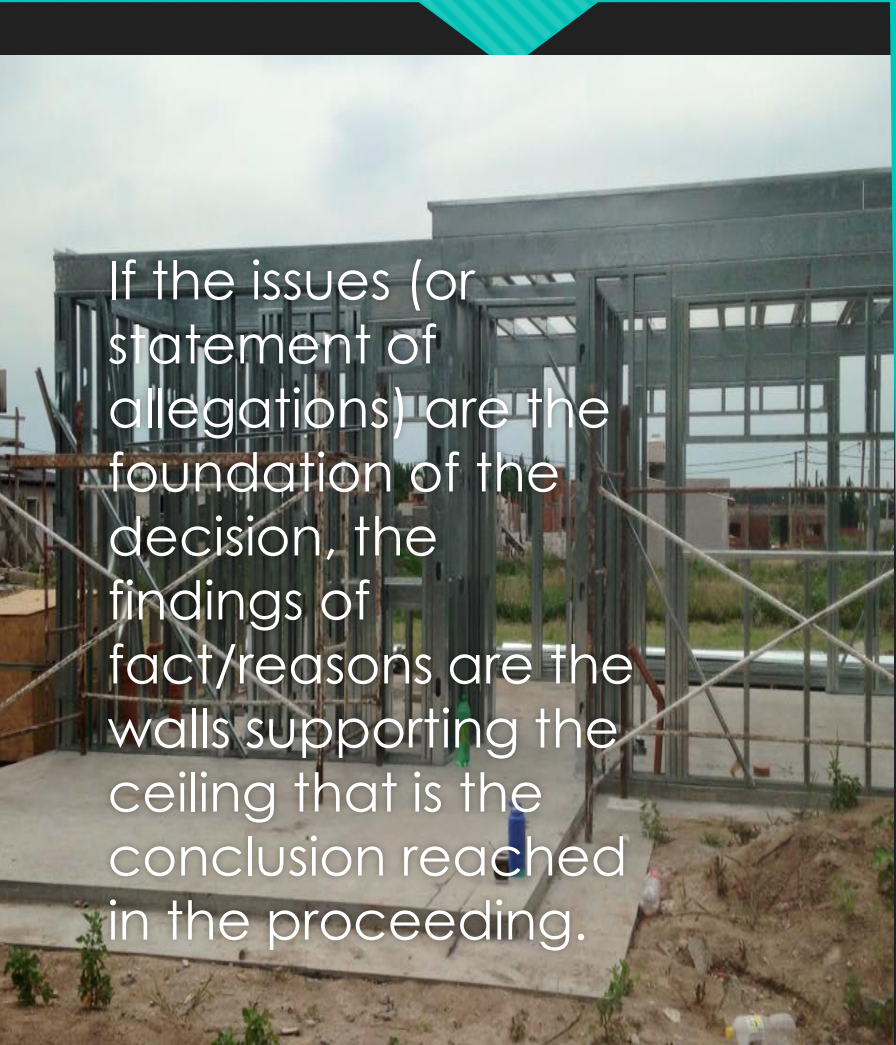
“Findings of Fact” refer to the real meat or substance of the written determination – that is, the facts that you find to be true, along with your reasons, which lead you to arrive at your decision that the respondent either was or was not responsible for sexual harassment.

++allows the parties to know how and why you reached your decision, and in some instances, whether an appeal is warranted.

“Findings of Fact” that support the determination regarding responsibility.



Analogous to Building a House:



If the issues (or statement of allegations) are the foundation of the decision, the findings of fact/reasons are the walls supporting the ceiling that is the conclusion reached in the proceeding.

Findings of fact are based upon the evidence; they are deduced or inferred from the evidence.

Evidence is "any species of proof," and may include testimony, records, documents, and exhibits that are present at the hearing and made a part of the record for purposes of reaching a decision.

The **conclusions of law or reasons** for the decision are, in turn, based on the findings of fact and to which relevant statutes, regulations and case law are applied.

The Law

- Briefly discuss the law on the subject;
- Just pick what's applicable;
- Be very very precise;

The idea is to lay down a legal standard, a benchmark to be satisfied - then juxtaposing it with facts of the case.

The Facts

Should:

- Be made based only on the evidence in the record;
- Explain why evidence has or has not been accepted;
- Include only those facts that are accepted as true and credible; and
- Address credibility issues based on quality of testimony

In all, the Findings must be factual, and not conclusory.



Justice should not only be done but seen to be done. You can't make the everyone happy, but you can ensure that each party feels heard. This makes the decision more objective.



REASONING: The written determination must contain enough information to show the reasoning process for the result reached, and to allow the parties (and any appellate decisionmaker) to understand the basis for the decision. In very simple cases less explanation is required; in more complex ones a more detailed explanation is necessary.

Explanation Regarding Each Allegation

With:

- A determination regarding responsibility,
- Any disciplinary actions against the respondent, and
- Whether any remedies will be provided to the complainant.



EXAMPLES:



**FACT or
OPINION?**

Issue or ?

Applicable Law

Was the Appellant Afforded Sufficient Procedural Due Process?

Fundamental requisites of due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision-making body the reasons for such choice. (See for example *Trinity Episcopal Corp. v. Romney*, D.C.N.Y., 387 F. Supp. 1044, 1084). Both the District Orderly Termination Policy (specifically 3.1000 et. seq.) and Utah state law (specifically 530-11- 12 et. seq.) are firm in the procedural due process that they demand in the case of contractual career employment termination. (See Exhibits L and N). In order to comply with both statutory and policy procedural due process, the District would have to show:

Findings of Fact

1. A written statement specifying the causes under which a career employee's contract may be terminated ... (53G-11-513.1.b.): The District met this requirement by adopting and publishing District Policy 3.0900.02 Causes for Dismissal or Non-Renewal. (See Exhibit L). It appears that this policy was updated on 4/14/2016 and contains a list of 23 explicit causes for dismissal.
2. Written notice of the District's intent to discontinue the employee's contract ... (53G11.513.5.a.): The District met this requirement by drafting and delivering to the Appellant its Notice of Termination for Cause in a letter dated July 16, 2018, to the Appellant. Statute and policy require that this written notice be delivered either by personal delivery or certified mail. The HR Director personally delivered this written notice to the Appellant which the which the Appellant admittedly received. (See Transcript 285:7-12).
3. Time Frames ... (53G-11-513.5.c.): The District was required to serve notice of its intent to terminate the Appellant's employment at least (emphasis added) 30 days prior to date of the proposed termination. Again, this requirement was met as the July 16, 2018, notice indicated that the Appellant's pending date of termination was August 15, 2018. Ultimately, the District effectuated its intent to terminate on September 18, 2018, when it sent its final written confirmation that the Appellant's employment was terminated. (See Exhibit 11).

CAUSE TO TERMINATE GRIEVANT'S EMPLOYMENT:

The Agency based the decision to terminate Grievant's employment in large part on the findings of **abusive conduct in the Investigation Report**. Agency also relied on the repetitive nature of Grievant's conduct including prior discipline, the likelihood that Grievant's conduct would not improve the effect of Grievant's conduct on Division morale.

The Investigative Report concluded that Allegations (i) through (iv) of Ms. X's abusive conduct complaint constituted abusive conduct under the Rule's standard and that Allegations (v) through (vii) did not constitute abusive conduct under this standard. There is substantial evidence supporting the conclusion that the conduct alleged in each of the seven individual allegations did occur.

Allegation (i) Grievant, immediately after receiving the December 16, 2016 Written Reprimand, told Ms. X that he intended to file a criminal complaint regarding the circumstances of the document's December 16th delivery. Although he did not specifically name Ms. X or Ms. Y, there is no doubt as to the intended target of this criminal complaint. Even assuming arguendo that a criminal complaint was appropriate, there was no need for Grievant to tell Ms. X of his intention. Ms. X and Ms. Y testified that Grievant's statement upset them and caused them "intimidation, humiliation or unwarranted distress." A reasonable person would react similarly. A reasonable person would also conclude that Grievant's statement was intended to cause them, and would cause them, "intimidation, humiliation, or unwarranted distress."

The conduct of Grievant here clearly constituted abusive conduct.

Allegation

Determination of Responsibility

Applicable Law

Abusive Conduct Rule:

Abusive conduct includes physical, verbal or nonverbal conduct, such as derogatory remarks, insults, or epithets made by an employee that a reasonable person would determine:

- was intended to cause intimidation, humiliation, or unwarranted distress;
- exploits a known physical or psychological disability; or
- results in substantial physical or psychological harm caused by intimidation, humiliation or unwarranted distress.

Findings of Fact

Determination of Responsibility

**The written
decision
must include
the following
“key”
elements:**

“Conclusions of Law”

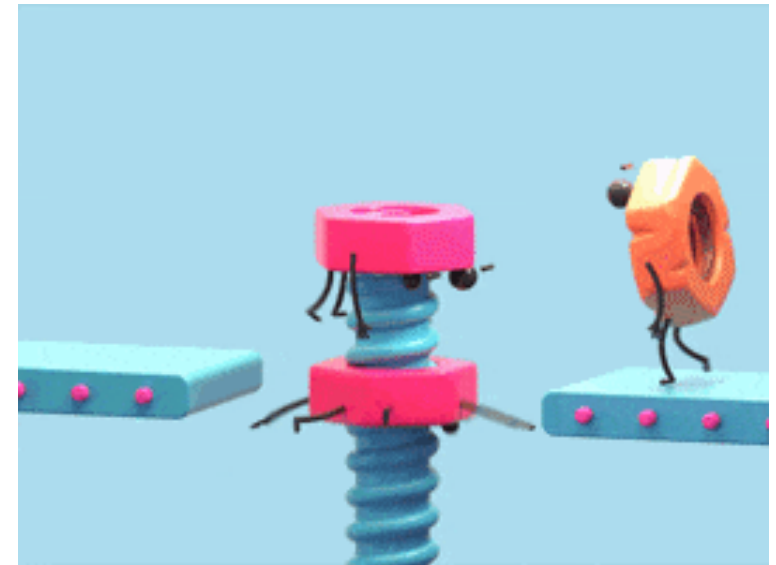
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4. Conclusions about the application of the institution’s code of conduct to the facts;

PRACTICAL CONSIDERATIONS

To assist in writing your decision.

THE NUTS & BOLTS



Write for your Audience:

- Basic rules for writing decisions are driven by the audience to whom the decision is addressed.
- Thus, the first rule of decision writing is to write for your audience.



Be Succinct: Flee Verbosity



- Why waste words?
- You can enhance readability through shorter sentences.
- Choose the simplest word that expresses the idea.

Example:

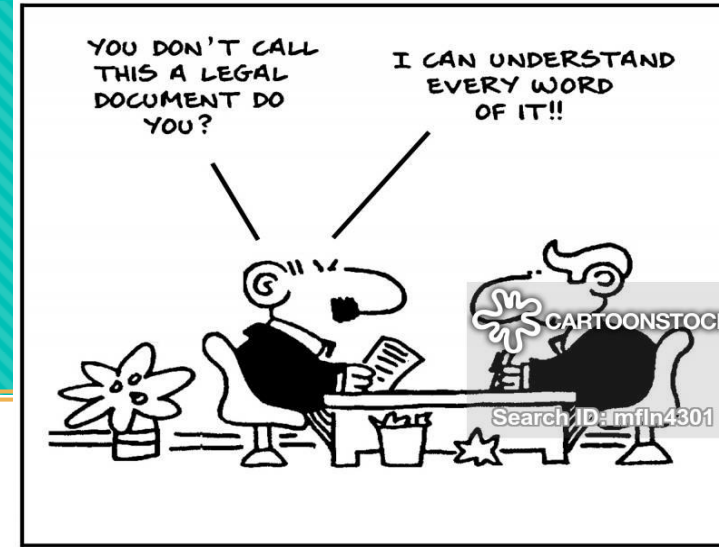
The appellant has attempted to distinguish the factual situation in this case from that in *Renfroe*. He didn't. We couldn't. Affirmed. Costs to appellee.

Denny v. Radar Industries, Inc., 184 N.W.2d 289 (Mich. App. 1970).

"Your résumé is only 8 words long!
You're hired!"

No Need for Legalese

Legal writing shouldn't be lethal reading.



Example:

Grievant's conduct throughout this proceeding demonstrates that his preferred method to address a difference of opinion is to threaten, intimidate, belittle, and otherwise attack the other party. He consistently demonstrated a lack of courtesy and respect, and other conduct, that would make collaborative interaction with others impossible. Such conduct, which is objectively intimidating to others, would also tend to adversely affect the morale of coworkers and others. In exhibiting the same conduct towards the tribunal, he demonstrated a reasonable likelihood that this conduct would also extend to supervisors and superiors. If Grievant habitually indulged in such conduct in a formal proceeding intended to determine whether or not he returns to work for Agency, it is likely that he did no less in his everyday work environment. Grievant's conduct in the hearing thus tends to corroborate the testimony of Agency witnesses as to the disruptive, morale-breaking, and intimidating nature of Grievant's conduct.

Substantial evidence supports the conclusion that Grievant's conduct adversely affected Agency customers, productivity, and morale.

“THERE IS NOTHING IN THE LAW THAT'S SO COMPLICATED THAT YOU COULDN'T MAKE IT CLEAR TO ANY LITERATE NON-LAWYER”.

RODELL ON LEGAL WRITING

Other Suggestions:

- Don't use unnecessarily long phrases or obscure words;
- Short sentences;
- Recite only those facts and legal authorities that are relevant to the issues and necessary to your ultimate decision;
- Have a strong clear structure;
- Don't use superfluous words;
- Try not to be redundant, repetitive, or duplicative unless you need to emphasize a key point;
- Be respectful; candid but not necessarily outspoken
- Have someone else proof your spelling and grammar, if possible.

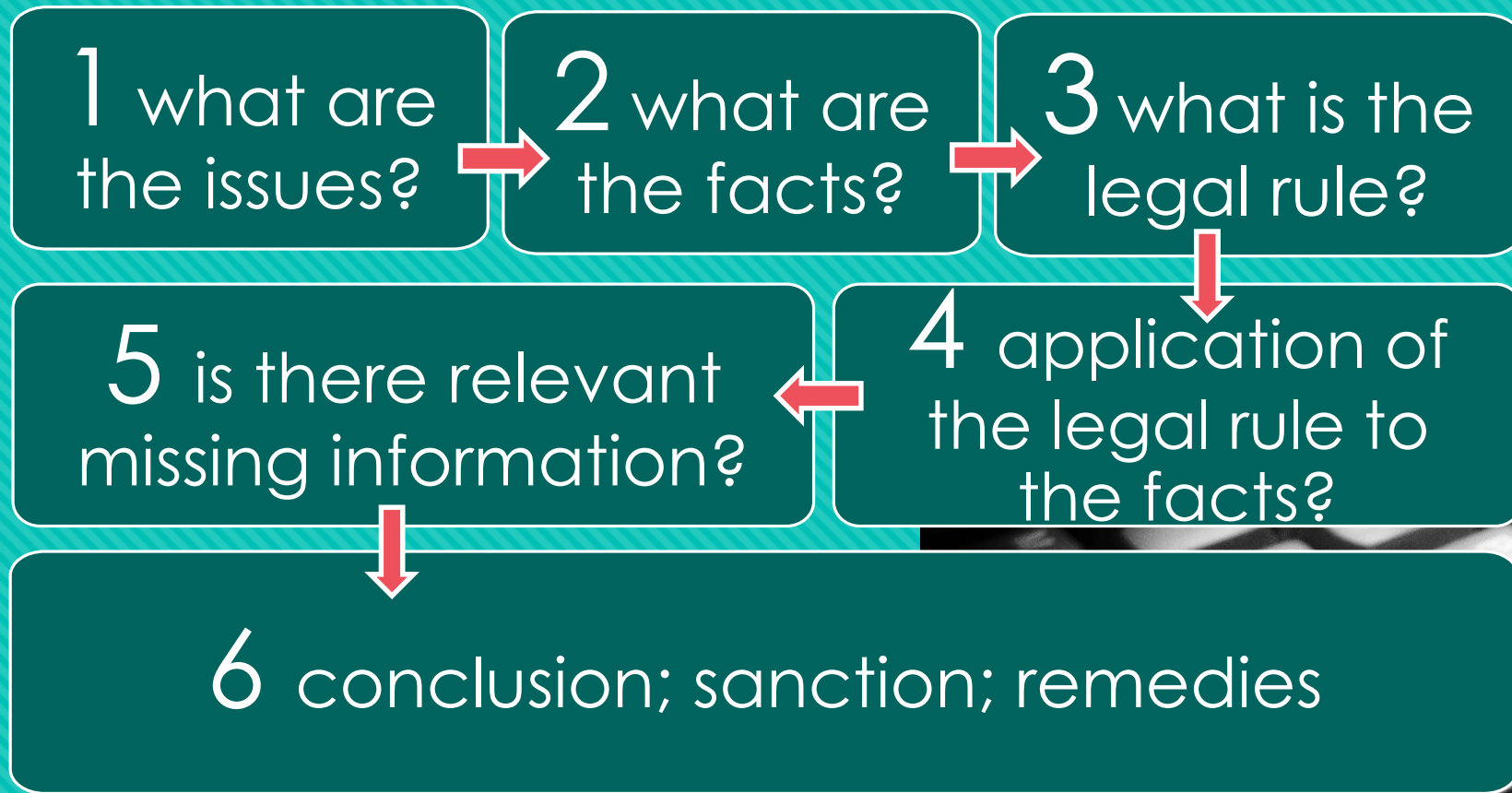


Re-examine what you write

**Always
ask
yourself:**

- Does this Written Determination provide guidance?
- Is it clear?
- Does it effectively communicate both the decision and the process leading to the decision?
- Do you have to explain it for it to be understood?





Let's Review...





**The written
decision
must include
the following
“key”
elements:**

“Appeal Rights”

=

6. Procedures and bases for appeal.

Appeals

Note: the appeal decision-maker cannot be the same person as the decision-maker below, or as the Title IX Coordinator or investigator in the case. This ensures the recipient's appeal decision reviews the underlying case independently.

Mandatory

&

Offered Equally to Both Parties

Mandatory on 3 Bases:

- Procedural irregularity;
- Newly discovered evidence;
- and
- Bias or conflict of interest.

*Recipients may offer appeals on additional grounds as long as they do so equally for both parties.

*Also, Regs expressly permit both parties to appeal a recipient's dismissal of a formal complaint (or allegations therein), whether the dismissal was mandatory or discretionary.

Appeal decision must be written.



Thank you!

Any Questions?

● **Jaqualin Friend Peterson**

● Assistant Utah Attorney General

● Litigation Division, Employment Section

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