

**Prepared for the National Association of Hearing Officials  
2016 Annual Professional Development Conference  
Portland, Oregon**

**Put It in Writing: Written Communications Skills for Hearing Officers**  
*Paul Keeper, Texas State Office of Administrative Hearings (retired)*

Topic: Improving the communications skills of hearing officials in the creation of documents other than final decisions and proposals for decision

- I. Why does a hearing officer communicate with the parties before issuing a final decision or proposal for decision?
  - A. To establish control over the hearing process
  - B. To resolve conflicts that arise during the hearing process
  - C. To memorialize decisions made during the hearing process
  - D. To ensure the credibility and fairness of the hearing process
  
- II. Formal written orders
  - A. Definition: “A direction issued by a hearing officer requiring someone to act or to refrain from acting.”
  - B. When is the use of an order appropriate?
    1. To instruct the parties about schedules, policies, or procedures
      - prehearing scheduling orders or orders advising the parties about a change in filing procedures
    2. To inform the parties about actions that the hearing officer is about to take
      - an order that a hearing date will be rescheduled unless the parties request another date by a deadline
    3. To respond to a party’s written motion
      - an order denying a motion for sanctions
    4. To memorialize decisions the hearing officer made in a hearing

- at a prehearing conference, one party orally makes a contested motion to postpone a hearing; the hearing officer orally denies the motion; later, the hearing officer issues a written order confirming the ruling.

5. To confirm agreements reached or representations made by the parties

- at a prehearing conference, the parties agree to forego a hearing on the merits and present their case by documents only; in a written order, the hearing officer confirms the terms of the agreement.

III. Letter orders—when is the use of a letter order appropriate?

- A. Letter orders are usually a substitute for a formal written order, usually on a limited issue or in anticipation of some further action by the parties.
- B. Letter orders have the same legal effect as a formal written order.
- C. Examples in which a letter order may be appropriate

*Example #1:*

A party not represented by an attorney sends the ALJ a written request for additional time to hire a lawyer. The request includes nothing to prove that the party sent a copy to the opposing party. Rather than issue a formal order, the ALJ may issue a letter to both parties identifying the problem, including a copy of the letter, and informing the parties that the rules require that a copy of any communications with the ALJ also be sent to the opposing party.

*Example #2:*

You have been assigned to handle the cases of a fellow ALJ who is unexpectedly out for health reasons. You send a letter order to the parties in those cases, informing the attorneys to address all motions to you until notified otherwise.

IV. Letters—when is the use of a letter appropriate in a contested case matter? Typically, letters are used for the transmittal of limited types of documents or information, including:

- A final administrative decision or proposal for decision
  - Hearing documents, like exhibits or other materials part of an administrative record
  - Communications with a referring court
- V. Email exchanges: when is the use of an email appropriate in a contested case matter?
- When permitted by your rules.
- VI. Why bother to put it in writing?
- A. The procedural rules may require the issuance of a written order
  - B. Putting your orders in writing focuses your attention on the details of what you are ordering
  - C. You want the parties to follow your clearly written instructions
  - D. You want the parties to be able to find your clearly written instructions
  - E. You want to be able to find your clearly written instructions
  - F. When a dispute arises about whether one party timely filed a document, you want to be able to refer to your clearly written instructions about timely filings
  - G. When you retire and your cases are assumed by the person sitting next to you, he or she will want to be able to find your clearly written instructions
  - H. When the state auditors ask for copies of all orders prepared in compliance with the statute requiring written orders, you will want to be able to produce them
  - I. When one of the parties fires its third set of attorneys and files a Fifth Amended Motion for Continuance, you will want to be able to point to the written order that states, “No further continuances will be granted in this matter, including motions based on changes in counsel.”
- VII. Telephone calls: when is the use of a telephone call appropriate in a contested case matter?
- A. Telephone calls are commonly used for the conduct or preliminary hearings, prehearing conferences, and hearings.
  - B. Telephone calls may be used to deal with emergencies.

- C. But telephone calls should never be the sole means of memorializing a hearing officer’s decision.

VIII. What are the elements of a well-written order?

- A. In general terms, they are:
1. Brief
  2. Clear
  3. Complete
- B. What are your interests in issuing an order?
1. You want to be able to understand what you’ve written and have others understand it.
  2. You want others to comply with your order.
  3. You want to leave the parties with a clear understanding of what they are to do next.
  4. And if someone doesn’t comply with your order, then you want to be able to rely on the clear language of your order in determining non-compliance.
- C. How to accomplish these goals?
1. Identify the *case* by cause number and style—this is usually accomplished with a standard heading on all orders issued:

**CAUSE NO. 2016-DWR-0112**

<b>STATE WATER RESOURCES</b>	§	<b>BEFORE THE STATE</b>
<b>DEPARTMENT,</b>	§	
<b>Claimant</b>	§	
	§	
v.	§	<b>OFFICE OF</b>
	§	
<b>CHEM-STAT, A DIVISION OF</b>	§	
<b>POLYCHEM ORGANICS, INC.</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

2. Identify the order by a numbering system:
  - Prehearing Order No. 1
  - Post-hearing Order No. 5
3. Also identify the order by a title, which may include the identity of the movant, the sequence of the motion, and the ruling:

- Order Denying Staff’s Third Motion for Continuance
  - Order Granting Respondents’ First Motion for Sanctions
4. Confine the order to a ruling on a single motion or single set of similar motions:
    - Order Granting Staff’s Motion for Change of Venue
    - Order Granting in Part and Denying in Part Respondent’s Motion for Sanctions
    - Order Granting Staff’s Unopposed Motion to Withdraw as Counsel
  5. In the introductory paragraph, identify the party, the type of motion, the response, and the dates of filing:
    - “On September 1, 2016, Claimant filed a Motion for Change of Venue. On September 10, 2016, Respondent filed a response to the motion.”
  6. Identify any fundamental problems with the filing:
    - “On September 1, 2016, Claimant filed a *non-timely* Motion for Change of Venue.”
    - “On September 1, 2016, the United States Department of Energy, *a non-party to this action*, filed a Motion for Change of Venue.”
  7. If a hearing was held, identify the date of the hearing and the attorneys who participated:
    - “On June 30, 2016, the ALJ convened a hearing on Claimant’s Motion for Change of Venue. Counsel for each party participated.”
  8. Unless the time of the hearing holds some special significance, don’t mention it:
    - “At 10:15 p.m. on May 12, 2016, the day before the hearing on the merits was to convene, the ALJ The ALJ convened a telephonic hearing at Dr. Peterson’s Emergency Motion for Continuance.”
  9. If the motion is unopposed or supported by opposing counsel, mention it:
    - “On September 1, 2016, Claimant filed an unopposed Motion for Continuance.”

10. If the order is more than a few paragraphs in length, state the ruling early in the order, followed by any brief analysis: “The motion is granted [or denied.]”
11. If the order requires someone to take action, state the action required for compliance, including a deadline and any other important details: “Polar Star will provide the original documents in their original sequence to Staff by 5:00 p.m. within ten days of the date of this order at Staff’s counsel’s office.”
12. The order should include page numbers if there is more than one page, the cause number on every page, the date of signing, and your signature at the bottom.

IX. Prehearing Order No. 1—Prehearing Scheduling Order

- A. See handouts
- B. Evaluate these examples according to the elements previously discussed

X. Prehearing Order No. 2—Order on Motion to Compel Discovery

- A. See handouts
- B. Evaluate these examples according to the elements previously discussed

XI. Prehearing Order No. 3—Order on Motion for Continuance

- A. See handouts
- B. Evaluate these examples according to the elements previously discussed

XII. Posthearing Order No 1—Order Governing Submission of Briefs

- A. See handouts
- B. Evaluate these examples according to the elements previously discussed

XIII. Orders Involving Complex Issues

- A. Motions for Summary Disposition
- B. Challenges to Jurisdiction
- C. Motions for Recusal

#### XIV. Letter orders

- A. Your interest in issuing a letter order is the same as your interest in issuing an order.
- B. However, the use of this less formal type of communication suggests that the ALJ is acknowledging that some sort of unusual issue is in play. Examples might include:
  1. The parties are jointly asking for atypical action:
    - Counsel:  
You have jointly requested that I agree recuse to myself as the ALJ in this matter so that I might serve the mediator. I agree but subject to these conditions:
  2. The ALJ is notifying counsel of general schedule or personnel changes:
    - Counsel:  
My office assistant, Dan McGarrity, will be taking extended leave starting today. During his absence, you may deal with Ellen Talley, who may be reached at the same telephone number.
  3. The case has reached some sort of pause or end:
    - Counsel:  
I note that the deadline for the parties' compliance with Order No. 1 passed without action on May 1, 2015. By June 1, 2016, the parties may file a request for a new prehearing conference, file a proposed new prehearing schedule, or notify the clerk that this matter has been settled. If none of these actions are taken by the deadline, the case will be dismissed for want of prosecution.
  4. An *ex parte* contact is acknowledged:
    - Counsel:

On Thursday, April 3, 2017, I attended a charity event at which I was seated at the same table as Rebecca Highsmith, counsel for Respondent. Ms. Highsmith and I agreed to change tables. We did not discuss the case.