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PFD to Agency Order: Best Practices

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*The views expressed are those of the presenter, do not constitute legal advice,
and are not official opinions of the Office of the Attorney General of Texas.

What is a “PFD” ?

The acronym stands for Proposal for Decision.

Ideally, a PFD should contain

- background
- issues
- positions of the parties and
- analysis and decision

What must a PFD contain?

- a statement of the reason for the proposed decision
- state each finding of fact and conclusion of law necessary to the proposed decision
- be prepared by the person who conducted the hearing or by someone who has read the record

~ Tex. Gov't Code § 2001.062(c).

Do you have to have a PFD?

Yes, if ...

- it's a contested case and
- the majority of the state agency officials have
 - ❖ Not heard the case or
 - ❖ Read the record

~ Tex. Gov't Code § 2001.062(a).

But do you really have to have a PFD?

The parties can waive this requirement by written stipulation.

~ Tex. Gov't Code § 2001.062(e).

What happens now the PFD is written?

- it must be served on each party
and
- an opportunity given to allow each adversely affected party to file exceptions and briefs
 - ❖ if exceptions or briefs are filed, other parties can file replies
 - ❖ based on the exceptions, briefs, and replies, a PFD can be amended
- it is then presented to the agency officials making the decision
 - ~ Tex. Gov't Code § 2001.062(a), (b), (d).

We've Arrived: The Order

What is required?

- it must be in writing
- it must be signed by a person authorized by the agency to sign the agency decision or order
- it must include findings of fact and conclusions of law
 - ❖ must be separately stated
 - ❖ can adopt the findings and conclusions in the PFD

~ Tex. Gov't Code § 2001.141(a), (b).

Requirements for Findings of Fact

- based only on evidence and matters officially noticed
- if stated in statutory language, they must be accompanied by
 - ❖ a concise
 - ❖ and explicit statement of underlying facts

~Tex. Gov't Code § 2001.141(d).

Wait, so there are two kinds of findings of fact?

Yes!

Ultimate Findings – those set out in statutory language

And

Underlying Findings – facts that support ultimate findings

Why do we have underlying findings?

- 1) To ensure the agency gives full consideration of the evidence and a serious appraisal of facts before rendering a decision
- 2) To inform complaining parties of the facts found so they can intelligently prepare a motion for rehearing or appeal
- 3) To assist the courts improperly exercising the function of judicial review

Gibson v. Tex. Mun. Ret. Sys.,
683 S.W.2d 882 (Tex.App.—Austin, 1985, no writ).

What do underlying findings look like?

- no precise form
- courts don't perform a "hyper-technical" review

But

- findings must inform the parties and the court of the basis of the agency's decision
 - ❖ the parties may intelligently prepare an appeal
 - and
 - ❖ the courts may perform their review function

Goeke v. Houston Lighting and Power Co.,
797 S.W.2d 12 (Tex. 1990).

What if parties submit findings?

- section 2001.141(e) requires the order to include a ruling on each proposed finding and conclusion submitted by a party under a state agency rule

But

- this only applies if the agency has a rule allowing parties to submit proposed findings and conclusions

Meador-Brady Mgmt. Co. v. Tex. Motor Vehicle Comm'n,
833 S.W.2d 683 (Tex.App.—Austin 1992),
rev'd on other grounds, 866 S.W.2d 593 (Tex. 1993).

Emergencies

- If an order must be immediately effective, it must incorporate a statement of the factual and legal basis establishing imminent peril to public health, safety, or welfare.

~ Tex. Gov't Code § 2001.144(a)(3).

Can an agency change findings?

Yes, but

Can an agency change findings?

- an agency can change an ALJ's finding or conclusion ONLY if the agency determines,
 - ❖ the ALJ did not properly apply or interpret
 - Applicable law
 - Agency rules
 - Written policies or
 - Prior administrative orders

~Tex. Gov't Code § 2001.058(e).

Can an agency change findings?

The agency must state in writing the specific reason and legal basis for a change.

~Tex. Gov't Code § 2001.058(e).

Do all agencies have to follow section 2001.058?

No

- PUC Tex. Gov't Code § 2003.049
- TCEQ Tex. Gov't Code § 2003.047
- TxDOT Tex. Transp. Code § 201.112

Public Utility Commission

Tex. Gov't Code § 2003.049(g).

- Notwithstanding section 2001.058, the PUC may change a finding of fact or conclusion of law

- ❖ ALJ misinterpreted or misapplied the applicable law

or

- ❖ issued a finding not supported by a preponderance of the evidence

Texas Commission on Environmental Quality

Tex. Gov't Code § 2003.047(m).

- TCEQ may amend a PFD, including a finding, based solely on the record before the ALJ
 - ❖ Provide “an explanation of the basis of the amendment”

Tex. Gov't Code § 2003.047(n)

- Chapter 200I applies “to extent not inconsistent with this section”

Texas Department of Transportation

State v. Mid-South Pavers, Inc.,
246 S.W.3d 711 (Tex.App.—2007, pet. denied).

- Transportation Code supercedes section 2001.058(e)
 - ❖ “notwithstanding any law to the contrary”
 - ❖ Written statement of reason and legal basis required
- Agency’s statement inadequate because it switched witness credibility without independent evidence

What have courts recently told us?

Texas Supreme Court

- *Davis v. Morath*, 624 S.W.3d 215 (Tex. 2021).

What have courts recently told us?

Texas Courts of Appeal

- *TJFA, L.P. v. Tex. Comm'n on Env'tl. Quality*,
632 S.W.3d 660 (Tex.App.—Austin 2021, no pet. h.).
- *Tex. Comm'n on Env'tl. Quality v. Barua*,
632 S.W.3d 726 (Tex.App.—El Paso 2021, pet. filed).
- *Lowry v. Tex. Med. Bd.*,
No. 03-19-00770-CV, 2021 WL 2386005 (Tex.App.—Austin, June 11, 2021, no pet.)
(mem. op.).
- *Christie v. Tex. Real Estate Comm'n*,
No. 01-19-00029-CV, 2020 WL 3393068 (Tex.App.—Houston [1st Dist.] June 19,
2020, no pet.) (mem. op.).
- *Tex. Real Estate Comm'n v. Riekers*,
No. 14-18-00287-CV, 2020 WL 1026478 (Tex.App.—Houston [14th Dist.] Mar. 3,
2020, no pet.) (mem. op.).
- *GS Tex. Ventures, LLC v. Pub. Util. Comm'n*,
No. 03-18-00533-CV, 2020 WL 217179 (Tex.App.—Austin, Jan. 15, 2020, no pet.)
(mem. op.).

What best practices should we use?

- When changing a finding of fact or conclusion of law
 - ❖ Identify which applicable law was misinterpreted
 - ❖ Explain why that was incorrect
 - ❖ Explain how the agency reached the opposite conclusion
 - ❖ Support changes with citations to record evidence

Happy Holidays

Thank you!

Happy Drafting
and
Happy Holiday Season!