

ET Handbook No. 382  
Third Edition  
March 2011

HANDBOOK  
FOR  
MEASURING  
UNEMPLOYMENT INSURANCE  
LOWER AUTHORITY APPEALS  
QUALITY

U.S. DEPARTMENT OF LABOR  
EMPLOYMENT AND TRAINING ADMINISTRATION  
OFFICE OF UNEMPLOYMENT INSURANCE

## CRITERIA FOR UI LOWER AUTHORITY APPEALS HEARINGS

### **CRITERION 1: PRE-HEARING/PRE-TESTIMONY EXPLANATION.**

**PURPOSE** - At the start of the hearing, the hearing officer should clearly explain the procedures to be followed. The elements shall be covered in the recorded prehearing explanation or opening statement. The explanation must be clearly stated and delivered in an understandable manner.

#### **SCORING SEGMENT**

- Good (6): After recording began and before testimony was taken, the hearing officer clearly explained the hearing procedures. This explanation included: (a) the order of testimony, (b) the right to question witnesses, and (c) an opportunity for each of the parties to ask questions about the hearing process or procedures.
- Fair (3): The hearing officer allowed an opportunity to ask questions about the hearing process or procedures, but did not explain all of the elements (a) through (c).
- Unsatisfactory (0): The hearing officer did not explain the procedures or did not allow an opportunity to ask questions about the hearing process or procedures.
- Did not occur (6): A "Did Not Occur" score should be given if it is clear from the record that the parties and/or their representatives were fully familiar with the UI hearing process and the hearing officer omitted the explanation for this reason.

#### **REFERENCE NOTES - CRITERION 1.**

The intent of this criterion is to ensure that the parties understand how the hearing will be conducted, the rights and opportunities they will have to participate in the hearing, and to allow the parties to ask questions about the process or procedures before taking testimony. The explanation should be on the record since this minimizes the possibility of a remand if a party on further appeal asserts lack of understanding of the hearing process to explain the failure to fully present his/her case.

A "Good" score is achieved when the recording contains an explanation of the hearing procedures which includes an explanation of the order of testimony and the right to cross examination, and provides the parties an opportunity to ask questions about the hearing procedures. To achieve a "good" score in cases where only one party appears and there are no witnesses for that party, the hearing officer should explain the hearing process and ask if there are any questions before proceeding with the hearing. No deduction will be made when the hearing officer explained the procedures off record but obtains the parties assent on record that the procedures were explained consistent with (a) through (c).

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A "Fair" score is given when the hearing officer employs an opening statement in such a way that makes it difficult for the parties to understand or assimilate, such as a rapid or "machine gun" statement, or when the hearing officer explained the procedures off record and only obtains the parties assent on record only that the procedures "were explained," but does not obtain acknowledgement that items (a) through (d) were explained and that the parties had no further questions about the hearing procedures.

An "Unsatisfactory" score will be given if the hearing officer did not identify all the procedure elements or if the explanation is not on the record.

**CRITERION 2: OPENING STATEMENT.**

**PURPOSE** - The opening statement should include the identification of the parties, those participating in the hearing, the date, the place of hearing, and the hearing officer. The hearing officer should also verify the parties' mailing addresses.

**SCORING SEGMENT**

- Good (6):                Before taking testimony the hearing officer identified: (a) himself or herself, (b) the parties and/or representatives participating in the hearing, (c) verification of the parties' address, (d) date of the hearing and place (or that it was a telephone hearing), (e) the determination appealed and the issues that would be considered, and (f) if the parties had any additional witnesses or representation not already identified.
- Fair (3):                The hearing officer omitted one or two of the elements (a) through (f).
- Unsatisfactory (0):    The hearing officer omitted three or more of the elements (a) through (f).
- Did Not Occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 2.**

The intent of this criterion is to ensure that the hearing officer establishes a complete record of the hearing including identification of the hearing officer, the parties and their witnesses, attorneys or representatives, and verification of their addresses to ensure they receive a copy of the decision issued in the appeal. The hearing officer must identify the issues to be considered at the hearing. The hearing officer should explicitly state whether the hearing is being conducted in person or by telephone. The hearing officer should ask whether any one else will be participating in the hearing, other than the parties, to verify on the record that the parties are proceeding without additional witnesses or representation.

A "Good" score is achieved when the hearing officer provided and obtained the information to satisfy (a) through (f).

A "Fair" score is given if the hearing officer omitted or failed to provide or obtain one or two of the items listed in (a) through (f).

An "Unsatisfactory" score is warranted when the hearing officer omits three or more of the items listed in (a) through (f).

Criteria 1 & 2 are closely related and it is permissible for the hearing officer to intermingle the elements of the two criteria, if all necessary elements of both are present.

**CRITERION 3: EXHIBITS.**

**PURPOSE** - The hearing officer should handle exhibits correctly by properly identifying the exhibits for the record, manage any objections, and rule on any document admissibility concerns.

**SCORING SEGMENT**

- Good (6):           The hearing officer correctly handled exhibits in that s/he:
- (a) described and marked all exhibits;
  - (b) presented parties with an opportunity to review the exhibits and offer objections;
  - (c) authenticated evidentiary exhibits (to the extent possible) where questionable or challenged;
  - (d) received all competent, relevant and reasonably available exhibits;
  - (e) ruled on the admissibility of any documents offered as exhibits and gave an explanation if s/he denied admission.
- Fair (3):            The hearing officer received all competent relevant and reasonably available exhibits but failed to satisfy two of the requirements from (a) through (e) to achieve a “Good” score.
- Unsatisfactory (0):   The hearing officer failed to satisfy three or more of the requirements from (a) through (e) to achieve a “Good” score.
- Did not occur (6):    There were no exhibits tendered, marked or introduced, or no documents made reference to in statements or testimony that should have been marked or introduced.

**REFERENCE NOTES - CRITERION 3.**

An exhibit is a document, record, or other object which is made a part of the record or is formally introduced as evidence. Overall, the intent of this criterion is to ensure that the hearing officer builds as complete a record as possible including all competent, relevant, and material exhibits that are available; that these exhibits are properly described, authenticated, marked and entered into the record; and that the parties are made aware of their contents and provided with the opportunity to object, explain, or rebut.

Difficulty in scoring this category stems from variations in state practice regarding which documents are required, or permitted, to be made a part of the record of an appeal. Some state procedures require that the entire agency file be made part of the record as part of the opening of the hearing, some state procedures require that only the jurisdictional documents be marked as an exhibit; and some state procedures require exhibits to be marked and identified only when a party offers them as evidence or if the hearing officer intends to rely on them as part of the decision.

In reviewing a case, the scorer should make a distinction between jurisdictional documents marked for identification at the beginning of a hearing and documentary or other evidence that a party offers to prove its case or that the hearing officer may rely upon in making his or her decision. Identification and jurisdictional

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documents (such as the benefits determination appealed, the request for hearing and the notice of hearing) are not marked as evidence to prove the case but to establish the record of appeal. As such, marking these documents does not require the technicalities required for admission of documentary evidence.

When a hearing is conducted by telephone, the hearing officer must confirm that an exhibit has been received by the party against whom it is offered. If the exhibit has not been received, the hearing officer must use good judgment in evaluating whether a continuance should be offered. If the exhibit is a party's only evidence on a particular point, and that point will be crucial in the ultimate decision to be made, it is recommended that a continuance be offered depending on the reason why the party did not send the document, or why it was not received. However, if the item is merely cumulative of other evidence, or not crucial to the ultimate decision that will be reached, there is no need to continue the hearing. Additionally, a party may waive his/her right to see the exhibit and allow the hearing officer to read its content or describe it.

All exhibits should be clearly described on the record and marked with an exhibit number or otherwise identified. Depending on the evidence code of a state, a document may need to be authenticated by a witness. The party against whom an exhibit is offered should be permitted the opportunity to ask questions about an exhibit and to object to its introduction as evidence. Of course, the hearing officer should explain, before marking an exhibit that both parties will be given an opportunity, at the appropriate time, to testify about any exhibit. An exhibit should be marked and given its appropriate weight under the state evidence code, if it is offered by a party on a relevant or material issue(s) of the appeal. If a party objects to an exhibit, the hearing officer must rule upon the objection.

In order to simplify scoring of this criterion, the difference between "Good," "Fair," and "Unsatisfactory" is based upon the number of elements the hearing officer meets to achieve a "Good" score.

**CRITERION 4: WITNESSES.**

**PURPOSE** - Parties and witnesses should be called and sworn, and the evidence developed, in logical order.

**SCORING SEGMENT**

- Good (6):           The order of taking testimony was reasonable and flexible depending on the circumstances of each case. As a general rule, the party likely to have the most information should be called to testify first. In most cases, and consistent with many states' laws, this means that the party with the burden of proof should testify first. In a voluntary quit case, the claimant usually testifies first. In a discharge case, the employer and its witnesses usually testify first.
- Fair (3):            The hearing officer permitted the introduction of some testimony in illogical sequence, but it did not substantially jeopardize the organization of the hearing and the presentation of evidence.
- Unsatisfactory (0):   The hearing officer did not swear in a material witness, and/or did not take evidence in a logical order.
- Did not occur (6):    The evidence was submitted without witnesses or sworn testimony.

**REFERENCE NOTES - CRITERION 4.**

A key distinction between an adjudicatory interview and an appeal hearing is that witnesses offer sworn testimony in a recorded setting. The intent of this criterion is to confirm that witnesses were sworn in on the record and that the hearing was conducted in a logical and orderly manner, although the hearing officer is permitted to exercise reasonable discretion and may be flexible dependent upon the particular circumstances of each case.

A "Good" score is achieved when the hearing officer followed a logical order of testimony. The hearing officer appeared to take into consideration which party bears the burden of proof and/or who possesses first hand information in determining the order of testimony. The order produced an easy flow of information and fact finding without the hearing officer resorting to aimless jumping back and forth between witnesses. A brief question to a party not currently testifying, to clarify an issue or to determine whether further foundation or explanation was necessary, will not result in point deduction. Additionally, if some special circumstance requires a witness' testimony be taken out of order, no point deduction is made.

A "Fair" rating should be scored when the hearing officer failed to meet the criteria for "Good" in some instances, but in a manner which did not seriously affect the fact-finding process. However, for the most part, the hearing officer adhered to a logical sequence of testimony.

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An "Unsatisfactory" rating should be scored when the hearing officer did not swear in a material witness or lacked sound judgment in the order of testimony, thereby prolonging the hearing unnecessarily, or when testimony jumped back and forth between witnesses and/or issues. A material witness is defined as an individual whose testimony is relevant to the issue(s) being heard and possesses direct knowledge of the issue(s) under consideration.



**CRITERION 5: ORDER OF TESTIMONY FROM EACH WITNESSES.**

**PURPOSE** - The evidence from each witness should be developed in a logical order.

**SCORING SEGMENT**

Good (3): As each witness testified, the available evidence was developed in a logical and orderly manner, although the hearing officer was flexible as required by the circumstances.

Fair (1): The hearing officer permitted the introduction of some evidence in illogical sequence but this did not substantially jeopardize the organization of the hearing and/or the presentation of evidence. The hearing officer generally completed one line of inquiry before moving on.

Unsatisfactory (0): The hearing officer did not take the evidence in logical order and sequence.

Did Not Occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 5.**

The intent of this criterion is to move the testimony of each witness to a conclusion in a logical and orderly manner. The hearing officer must exercise responsibility and good judgment in managing the testimony of each witness. The goal is to obtain relevant information, under time constraints, with sufficient detail pertaining to the final incident of the issue(s) in order to render a quality decision once the hearing is closed.

A "Good" is achieved when the hearing officer exercised reasonable discretion in determining the order and sequence of the testimony. The hearing officer directed and controlled the testimony of a witness to obtaining material information and did not allow the witness, or a representative, to illicit information in a manner that confuses the record. The order should produce an easy flow of information and fact finding such that it is clear as to the specific event or incidents for which the witness is testifying.

A "Fair" rating should be scored when the hearing officer failed to direct or control the testimony of a witness such that the witness provided information on immaterial points or an in a illogical order, or when the hearing officer did not make sufficient efforts to direct or control the testimony provided and allowed the witness to ramble on or allowed a representative to ask questions that were immaterial or unnecessarily prolonged the hearing.

An "Unsatisfactory" rating should be scored when the hearing officer failed to swear in a witness, or failed to direct or control the testimony of a witness such that it was difficult or impossible to know whether the information the witness provided was relevant and material to the issues involved in the case.

**CRITERION 6: OPPORTUNITY TO QUESTION OWN WITNESS(ES).**

**PURPOSE** - The hearing officer must provide parties and representatives with a timely opportunity to question their own witnesses.

**SCORING SEGMENT**

- Good (9): The hearing officer informed the parties that they, or their representatives, could question witnesses on the party's own behalf. When necessary, the hearing officer assisted such party or representative in framing questions, and cautioned him or her not to make statements or arguments.
- Fair (3): Although the parties were advised that they could question their own witnesses, the hearing officer failed to assist when appropriate; or the hearing officer did not allow the parties to question their own witnesses in a timely manner.
- Unsatisfactory (0): The hearing officer failed to provide the parties the opportunity to question their own witnesses.
- Did not occur (9): The parties did not have witnesses to question or it was not necessary to inform them of this right, e.g., a party was represented by counsel or an experienced representative.

**REFERENCE NOTES - CRITERION 6.**

The intent of this criterion is to ensure that the hearing officer has provided the parties or their representatives the right to question their own witnesses in a timely manner, as some parties may be unaware of this right. A timely manner means before the hearing officer moves on to take testimony from other witnesses or the opposing party.

It is the responsibility of the hearing officer to provide the parties with assistance, as needed, and to question witnesses in a timely and proper manner. The hearing officer must be impartial when assisting a party in forming questions, and should avoid appearing to be an advocate for that party.

A "Good" score is achieved when the hearing officer informed the party, or their representative, of the right to ask questions of their witnesses and allowed them to do so. When assistance was clearly needed, the hearing officer provided it in an impartial manner.

A "Fair" score is given when the hearing officer informed a party, or its representative, of the right to ask questions of its witnesses, and allowed the questioning but either did not offer sufficient instructions about proper questioning techniques or failed to prevent a party from testifying during the questioning opportunity.

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An "Unsatisfactory" rating should be scored when the hearing offer either failed to inform the party, or representative, of the right to ask questions of its witness, or failed to provide him or her an opportunity to do so, or did not provide meaningful assistance when it was clear the party was unable to do so in a proper manner.

**CRITERION 7: CLEAR LANGUAGE.**

**PURPOSE** - Throughout the hearing, the hearing officer should use language that is clear and understandable, avoiding unnecessary legal phrases and technical language.

**SCORING SEGMENT**

- Good (6):                   The hearing officer's language was clear and understandable at all times, with the possible exception of inconsequential instances. There was no unnecessary use of legal phrases or technical language.
- Fair (3):                    There were minor instances when the hearing officer's language was not clear and understandable, or legal phrases or technical language was used. "Minor instances" would be confined to those that would not have a significant bearing on the outcome of the case.
- Unsatisfactory (0):       The hearing officer's language was not clear and understandable in significant and critical areas or unnecessary legal phrases and technical language was used at critical points in the hearing
- Did Not Occur (X):       Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 7.**

The intent of this criterion is to ensure that the hearing and all discussion with parties is clear and understandable, and that the parties are not confused by legal phrases or technical language.

When it appears a party or witness does not understand what is being communicated or asked, the hearing officer has the responsibility to tactfully ask the party or witness if he or she understands, and rephrase statements or questions, if necessary.

References to form numbers and agency jargon should be avoided.

A "Good" score is achieved when the hearing officer used clear and understandable language and avoided references to technical terms or unnecessary legal phrases.

A "Fair" score is given when the hearing officer used some language that would not be easily understood by the average person but overall the language employed was understandable and during the minor occasions when technical terminology was used it did not appear to confuse or intimidate the parties.

An "Unsatisfactory" rating should be scored when the hearing officer corrupted the hearing record by employing language that was not easy to understand, or relied on such formal technical, or legal terms or phrases such that the parties were confused or intimidated.

**CRITERION 8: SINGLE POINT QUESTIONS.**

**PURPOSE** - Each question by the hearing officer should express only one point.

**SCORING SEGMENT**

Good (6): Each of the hearing officer's questions expressed only one point and, if more than one point was initially expressed, it was corrected.

Fair (3): Occasionally, the hearing officer asked a question with more than one point, but it did not interfere with the development of the testimony and/or did not result in the evidence being unclear on any dispositive element.

Unsatisfactory (0): The hearing officer repeatedly asked questions containing two or more points that confused the witnesses or resulted in answers responsive to only one point.

Did Not Occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 8.**

Ideally, the hearing officer should begin all questioning with a neutral technique. In this respect, questions should be in the form of "who, what, where, when, how or why" questions to elicit the specific information about the single point. See Criterion 9 for specific examples. Compound questions should never be asked if the answer relates to the substantive issues and the ultimate outcome.

A compound question is a question that asks more than one question, each of which requires a separate answer. Questions should relate to one point only so that neither the question nor the answer will be misunderstood. For example, a compound question such as "Didn't your supervisor, John Doe, discharge you?" would be unlikely to produce a clear answer. If the claimant answered "no," it would be unclear if "no" was in response to the discharge, or that John Doe was not the claimant's supervisor.

The hearing officer should not permit the parties, or their representatives, to ask compound questions without making a reasonable attempt to clarify the question or the response so the question and answer express one point only. The hearing officer may ask follow-up questions on any other point(s); as appropriate.

There are exceptions to this guideline. Compound questions, along with leading questions, see Criterion 13, are permissible for obtaining background information in order to move the hearing along.

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A "Good" score is achieved when the hearing officer asks mostly single point questions.

A "Fair" score is given when the hearing officer asked numerous questions that were not single point in nature but these did not hinder development of the record or result in unclear testimony.

An "Unsatisfactory" rating should be scored when the hearing officer asked numerous questions that were not single point in nature, and these questions seriously hindered development of the record, or resulted in unclear testimony of material and important issues in the case.

**CRITERION 9: CLARIFICATION OF STATEMENTS WHICH INCLUDE CONCLUSIONS.**

**PURPOSE** - The hearing officer should attempt to clarify statements which include conclusions, opinions, and ambiguous or unclear testimony.

**SCORING SEGMENT**

- Good (6):            When a witness responded with an opinion or conclusion, the hearing officer made a reasonable effort to develop the factual basis for the opinion or conclusion. When the testimony was not entirely clear or was ambiguous, the hearing officer questioned the witness(es) in an effort to get specific, clear responses.
- Fair (3):             The hearing officer attempted to develop the facts of a witness's statement, and/or asked sufficient questions in an attempt to clarify ambiguous or unclear testimony.
- Unsatisfactory (0):    The hearing officer's questioning of the witnesses demonstrated little or no effort to establish the factual basis for testimony that contained opinions or conclusions, or failed to clarify ambiguous or unclear testimony on material points in the case.
- Did not occur (6):    There were no statements which included conclusions or opinions and the testimony was clear and unambiguous and did not need clarification.

**REFERENCE NOTES - CRITERION 9.**

The intent of this criterion is to ensure that the hearing officer fulfills his or her obligation to require witnesses to testify to evidentiary facts, as distinguished from conclusions. It is essential that the hearing officer establish the factual basis for all testimony offered to determine if the witness is testifying from personal knowledge or otherwise competent evidence. All witnesses expressing opinions should be subjected to further questioning to establish the factual basis for the opinions whenever the testimony will be relied upon by the hearing officer in the decision.

For example, if the witness says that the claimant was warned about certain behavior the hearing officer must clarify the statement with appropriate open-ended questions. Who warned the claimant? How was the claimant warned? If the warning was in writing, do you have a copy of the document? If the claimant was verbally warned, who issued the verbal warning? Was the witness present during the warning? What specifically was said that constituted the verbal warning? What did the claimant say in response to the warning?

All of these additional questions are necessary to clarify the statement that the claimant was warned and to ascertain whether the witness is testifying from personal knowledge about the warning. The hearing officer must not accept general statements without developing the record to ensure the record contains sufficient information upon which to base the decision.

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Similarly, when the claimant testifies he quit because he did not get a raise, additional questions need to be asked. Who hired you? What was said to you regarding your pay? What about possible raises during your employment? What specifically led you to expect a raise? Did you discuss your dissatisfaction with anyone? With whom did you discuss it? What specifically did you say? Did you ever tell anyone you would leave employment if your concerns were not addressed? These additional questions are necessary to ascertain whether the claimant's opinion that he should have received a raise does or does not support a finding that he had good cause to quit under state law.

Testimony by expert witnesses is admissible to provide additional information related to the facts in the record based on the expert's education, background, experience, training and study. This permits the expert to express an opinion on questions of fact relating to his or her particular expertise. For example, a qualified employment service representative can offer expert witness testimony on labor market conditions when the appropriate questions are asked to establish his/her status as a subject matter expert. The hearing officer should ask, on the record, questions about the expert witness's background and qualifications as an expert.

A "Good" score is achieved when the hearing officer actively asks specific questions to determine whether the witness is testifying from personal knowledge, and when opinion or conclusions are offered by a witness that the hearing officer asks enough questions to establish the factual basis, if any, for those opinions or conclusions, and when the hearing officer clarified, or attempted to clarify, ambiguous or unclear testimony on all material issues in the case.

A "Fair" score is given when the hearing officer asked questions about opinion or conclusory testimony but did not consistently do so for all witnesses, or for all opinions or conclusions offered, and/or the hearing officer occasionally allowed ambiguous or unclear testimony but not about testimony related to material issues of the case.

An "Unsatisfactory" rating should be scored when the hearing officer passively accepted opinions or conclusions of witnesses without asking additional questions to determine the personal knowledge of a witness or the factual basis for the opinion or conclusion, or failed to clarify ambiguous or unclear testimony on evidence related to significant material issues in the case.



**CRITERION 10: CONFRONTATION.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - There must be an opportunity for confrontation of all opposing witnesses to conduct a fair hearing.

**SCORING SEGMENT**

Good (9): Each party had the opportunity to be present during all testimony or present during the appeal (use of telephone hearings where all parties have the opportunity to participate and hear the witness(es) satisfies the confrontation requirement).

Fair (X): Not applicable - Do not use.

Unsatisfactory (0): The hearing officer denied the opportunity for confrontation.

Did not occur (9): There were no opposing witnesses.

**REFERENCE NOTES - CRITERION 10.**

The intent of this criterion is to ensure both parties are present and have an opportunity to hear and have knowledge of the evidence presented during the appeal.

A party must be present for all evidence. Excluding witnesses while others testify does not conflict with this criterion unless the witness is an "interested party" (claimant or employer).

A "Good" score is achieved when the hearing officer provided an opportunity for confrontation including the right to be present during all testimony, the opportunity to see all documents the hearing officer possesses that make up the record, and the opportunity to see all documents the opposing party presents unless the party waives the right to do so.

In a remand case, this criterion is satisfied if the absent party is mailed a copy of the recording of the previous hearing and acknowledges on the record receipt thereof.

A "Fair" score is given when the hearing officer accepts documents or testimony when one party is not present but the documents or testimony was on a point not material to the case and/or was not initiated by the hearing officer.

An "Unsatisfactory" rating should be scored when the hearing officer affirmatively obtains testimony or evidence without both parties being present on material points in the case, or failed to afford an absent party an opportunity to review the additional testimony or evidence obtained on a material issue before issuing a decision in the case.

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If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements of this evaluation process.

Confrontation is distinguished from cross-examination which is discussed in Criterion 11.

## **CRITERION 11: CROSS-EXAMINATION.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must afford a timely (before testimony from another witness) opportunity to cross-examine, properly control cross-examination, and provide appropriate assistance where necessary.

### **SCORING SEGMENT**

Good (9): The hearing officer provided the parties their right to timely cross-examine the opposing witnesses, and limited cross-examination to permissible bounds, and provided assistance in framing questions as necessary.

Fair (3): The hearing officer informed the parties of their right to cross-examination, but did not offer it in a timely manner, or did not effectively control it, or did not provide assistance, when needed, but these failures did not corrupt the hearing record.

Unsatisfactory (0): The hearing officer failed to afford the parties their right to cross-examination, or made no attempt to properly control the process to the point that cross-examination negatively affected the hearing record, or did not provide assistance when it was obvious a party was unable to form questions and was unable to proceed.

Did not occur (9): There were no opposing witnesses.

### **REFERENCE NOTES - CRITERION 11.**

The intent of this criterion is to ensure that all parties are afforded a timely opportunity to cross-examine opposing witnesses. The opportunity to cross-examination is a fundamental right and not a mere privilege. The purpose of cross examination is to permit a party to bring out, through questioning of the opposing party or witnesses, any contradictions and improbabilities or to raise doubts about the testimony or evidence presented by the opposing party.

The right to cross-examine is not diminished by reason of the fact that the parties are unrepresented by counsel. However, because the party may not be legally trained, the hearing officer may offer some assistance such as when a party appears to want to ask a question but makes a statement instead. The hearing officer may turn a statement into a question to demonstrate how one can ask questions of the opposing party.

The right to cross-examine should be offered immediately after a witness testifies and should not be delayed until all the witnesses for one side have concluded their direct testimony.

The right to cross-examine may be restricted, for example, when questions become unduly repetitious or when the cross-examiner harasses, argues with, or badgers the witness. Additionally, the cross examiner must not be permitted to testify during the cross examination.

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A "Good" score is achieved when the hearing officer offers the timely opportunity to cross-examine each witness, assists an unrepresented party who has difficulty framing questions, and effectively controls cross-examination by not allowing a party to testify during cross-examination or badger or harass opposing witnesses.

A "Fair" score is given if the hearing officer allows cross-examination but does not effectively control it by allowing the party to make statements during cross examination that "badger" the opposing witnesses without admonishment or fails to provide meaningful assistance to lay persons, as appropriate. A "Fair" score should be given if the cross-examination did not occur immediately after the witness testified.

An "Unsatisfactory" rating should be scored when the hearing officer fails to provide an opportunity for cross-examination, or makes no attempt to keep the questioner from badgering the witness to the extent that the failure to act negatively impacts the hearing record, or the hearing officer does not provide assistance during cross-examination when it was clearly needed and it can be said that the hearing officer effectively denied the party the right to cross examine.

If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

**CRITERION 12: REPETITIVE AND/OR IRRELEVANT TESTIMONY.**

**PURPOSE** - The hearing officer should control repetitive or irrelevant testimony to keep the hearing moving toward a conclusion.

**SCORING SEGMENT**

- Good (3):                The hearing officer diplomatically informed persons testifying that repetitious and irrelevant testimony was not necessary and added nothing to the hearing. The hearing officer did not question witnesses excessively or permit undue repetition or extensions of testimony by witnesses, or duplication of testimony from multiple witnesses, and testimony was limited to the issues.
- Fair (1):                The hearing officer asked repetitive or irrelevant questions, or allowed testimony that was repetitious or irrelevant, but doing so did not burden the record and did not affect the final decision.
- Unsatisfactory (0):    The hearing officer permitted frequent repetition of testimony, prolonged testimony, or irrelevant testimony; the hearing officer frequently asked repetitious or irrelevant questions of the witness(es).
- Did Not Occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 12.**

This criterion is intended to keep hearings moving forward. The hearing officer should not ask, or allow any party to ask, questions that are repetitive or that address irrelevant matters, and should keep the witness(es) from providing irrelevant, immaterial, and/or unduly repetitious testimony.

The hearing officer should also ensure that answers given are responsive to the questions asked. For example, when a witness is unresponsive to a question from the hearing officer or a party, and the question is rephrased, the hearing officer should move on from that line of questioning if the witness is still unresponsive. The hearing officer should give the appropriate weight to the unresponsive testimony and should inform the person testifying of the consequences of continued nonresponsive or evasive answers.

A "Good Score" is achieved when the hearing officer properly controlled the hearing by not allowing repetitive or irrelevant testimony to be presented. A "Fair Score" is given when the hearing officer allowed some repetitive or irrelevant testimony to be presented but this did not burden the hearing record. This score may be given on those occasions when it is clear that the hearing officer permitted a party to "ramble on" because that party would undoubtedly have perceived that s/he had been denied the opportunity to fully state his/her position. An "Unsatisfactory" rating should be scored when the hearing officer allowed repetitive or irrelevant testimony that burdened the record, or consistently failed to require a witness to be responsive in testimony on material issues in the case.

**CRITERION 13: LEADING QUESTIONS.**

**PURPOSE** - The Hearing Officer should not ask, or allow others to ask improper leading questions on material issues upon direct examination.

**SCORING SEGMENT**

- Good (6):                The hearing officer did not ask, or permit a party to ask, improper leading questions about important facts.
- Fair (3):                The hearing officer asked, or permitted a party to ask, some improper leading questions but they did not inhibit the fair presentation of the evidence because the points on which they were asked were not material to the ultimate decision in the case.
- Unsatisfactory (0):    The hearing officer asked, or permitted the parties to ask, without admonishment, improper leading questions on material factual matters in the case.
- Did Not Occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 13.**

The intent of this criterion is to ensure that the hearing officer did not ask, or permit the parties to ask, improper leading questions upon direct examination. A leading question is one which suggests the answer. An improper leading question is one which is asked during direct examination and is suggestive of the answer regarding a fact which bears on a material issue in the case.

For example, an employer representative's question to the employer that asks "Over the last week he was employed, Mr. Smith was always late to work, and that's why you fired him, isn't it?" suggests the answer, and precludes an explanation of what happened.

Upon direct examination, the hearing officer or parties should not ask improper leading questions to witnesses on factual matters which are material to the case and which the questioner intends to suggest a specific answer to the witness. If improper leading questions are asked by others, the hearing officer should curtail them and/or tell the questioner that answers to such questions will be given less weight in the consideration of the evidence.

Not all leading questions are impermissible. A hearing officer may use leading questions to expedite the hearing by obtaining background information on matters such as the name, address, and social security number of the party or witness, and similar information which is not a material point of dispute in the case. The hearing officer may ask leading questions on direct examination, if necessary, to develop the evidence as long as the questions do not inhibit the fair presentation of the facts. Additionally, leading questions of opposing witnesses are permissible during cross examination.

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An exception relating to leading questions being permissible is when the witness is hostile, biased, or unwilling to cooperate. In this situation, the hearing officer must decide if any one of these conditions exists and proceed accordingly.

Further, if a witness cannot recall dates, names, places, times, etc., leading questions may be asked in order to refresh his/her memory.

A "Good" score is achieved when the hearing officer did not ask, or permit any party to ask, improper leading questions. No reduction in score is made when the hearing officer asks some leading questions that were not improper, usually those about background information.

A "Fair" score is given when the hearing officer asked some improper leading questions on points that were not in dispute, or on points which were not material to the outcome of the decision.

An "Unsatisfactory" rating should be scored when the hearing officer frequently asked, or allowed others to ask, improper leading questions that suggested answers on material points in the case.

**CRITERION 14: CONTROL OF INTERRUPTIONS.**

**PURPOSE** - The hearing officer should effectively respond to interruption of testimony and/or disruptive individuals at the hearing. This also means the hearing officer should refrain from inappropriate and unnecessary interruptions.

**SCORING SEGMENT**

- Good (6):           The hearing officer, in as tactful a manner as possible, effectively handled interruptions and/or disruptive individuals at the hearing and did not himself or herself interrupt unnecessarily.
- Fair (3):            The hearing officer allowed some interruptions that did not disrupt the hearing.
- Unsatisfactory (0): The hearing officer's interruptions were inappropriate or s/he did not effectively control disruptions or interruptions by others.
- Did not occur (6):   There were no interruptions or disruptive individuals.

**REFERENCE NOTES - CRITERION 14.**

This criterion is intended to ensure that the hearing officer fulfills his/her obligation to prevent undue or improper interruptions during the testimony of the witness(es) and/or to control disruptive individuals. This intent also applies to the hearing officer interrupting unnecessarily.

If possible, the hearing officer should first tactfully remind participants of the hearing procedures, including a reminder that each individual will be allowed to present his or her testimony at a later time. The hearing officer must firmly prevent a disruptive individual from interrupting the flow of testimony.

The hearing officer should advise all parties that they are not permitted to comment or audibly react to the testimony of another, and should progressively warn disruptive individuals that such behavior may result in either a continuance of the hearing, or in an extreme case, exclusion from the hearing, if permitted under state law.

The hearing officer must not allow himself/herself to be interrupted during the course of the hearing. This includes taking nonemergency personal phone calls during the course of the hearing. The hearing officer should also refrain from unnecessary or inappropriate interruptions that diminish the quality of the hearing.

A "Good" score is achieved when the hearing officer effectively controlled the hearing by tactfully handling an interruption by a disruptive party, and the hearing officer did not interrupt unnecessarily or allow parties to unnecessarily.



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A "Fair" score is given when the hearing officer handled an interruption or disruptive individual but did so in a manner which was not tactful and/or allowed him or herself to occasionally interrupt unnecessarily.

An "Unsatisfactory" rating should be scored when the hearing officer failed to stop unnecessary interruptions, failed to make a reasonable effort to control disruptive individuals, or the hearing officer's interruptions were frequent, inappropriate, and/or unnecessary.

**CRITERION 15: "OFF THE RECORD".**

**PURPOSE** - The hearing officer should effectively control "off the record" situations and handle correctly "on the record" matters that occurred or were discussed "off the record."

**SCORING SEGMENT**

- Good (6):           The hearing officer handled "off the record" procedures well and granted a request to do so for good and sufficient purposes. The hearing officer allowed no one else to go "off the record" but himself/herself. On resuming the record, the hearing officer summarized the essentials of what took place and obtained the concurrence of the parties.
- Fair (3):            The hearing officer allowed parties to go "off the record" without establishing good and sufficient cause on the record, but the hearing officer did summarize for the record the "off the record" discussion and obtained concurrence from the parties of the accuracy of the summary.
- Unsatisfactory (0):   The hearing officer went "off the record" and failed to summarize and obtain concurrence from the parties "on the record" of what happened "off the record," or failed to repeat questions or testimony when the recording unexpectedly stopped or there was some other technical malfunction.
- Did not occur (6):    The hearing was not "off the record" for any reason.

**REFERENCE NOTES - CRITERION 15.**

The intent of this criterion is to build a record that is totally complete and without unexplained interruptions. Any interruption or break in the record must be covered by the hearing officer. The hearing officer may hear and grant a motion to go "off the record" from either of the parties.

If a party asks to speak briefly with counsel, or counsel with his/her client, the hearing officer should continue recording, but allow the party and counsel to step outside the hearing room for a private conversation. In this case, because the hearing officer did not go "off the record," no statement and concurrence is needed.

A "Good" score is warranted when the Hearing Officer: (a) goes "off the record" or grants a request to do so only for good and sufficient reasons; (b) allows no one to go "off the record" without his/her permission except when beyond his control, such as with machine failure; and (c) summarizes the "off the record" discussion and events and obtains the concurrence of the parties to the summary upon resuming the record.

A "Fair" score should be given if the hearing officer allows parties to go "off the record" without establishing good and sufficient reason for doing so.

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An "Unsatisfactory" score should be given if the hearing officer went "off the record" and failed to summarize on the record what happened while "off the record" or failed to get a concurrence of the parties to the hearing officer's summary of what happened while "off the record."

For hearings that are being recorded by tape:

- On turning over the tape or putting in a new tape, the hearing officer should state s/he is going "off the record" to change the tape and, when returning to the record, state that the tape has been replaced and that nothing relating to the hearing transpired in the process.
- Concurrence from both parties must be obtained.
- If the tape runs out unexpectedly, creating a gap in the record, the hearing officer should repeat or ask the last speaker to repeat any missing portions of his/her statement. In these instances, concurrence of the witness and parties is required.

**CRITERION 16: INTERPRETERS.**

**PURPOSE** - The hearing officer should instruct and monitor an interpreter to insure she or he provides accurate interpretation.

**SCORING SEGMENT**

Good (6): When necessary, the hearing officer gave clear instructions to the interpreter as to how to interpret, and administered a special interpreter's oath. When necessary, the hearing officer established "on the record" that the interpreter was fluent in both languages. The hearing officer must require literal interpretation of the testimony of the witness, to the extent possible in the native language of the witness.

Fair (3): The hearing officer did not give clear instructions to the interpreter as necessary, but administered the special interpreter's oath and gave an appropriate admonition when the interpreter did not appear to be following instructions.

Unsatisfactory (0): The hearing officer (a) did not give an interpreter's oath, or (b) failed to take reasonable steps to ensure that the interpretation accurately reflected the testimony.

Did not occur (6): An interpreter was not used.

**REFERENCE NOTES - CRITERION 16.**

The intent of this criterion is to ensure that the testimony is accurately interpreted. State practices vary regarding interpretation procedures, including whether the witness may bring a friend or family member to translate, or whether a professional interpretation provider is used. In any event, the interpretation should be conveying the original meaning to the extent possible as it was spoken in the foreign language. When scoring this criterion, the reviewer may consider that a professional interpretive service usually does not require the same extent of instruction as a friend or family member. A hearing officer should exercise caution when allowing family members or friends to translate to ensure they understand their role is to translate in first person, to convey the original meaning of what is being spoken in the foreign language, and not to change the meaning or words used by the witness.

For example, in response to a question that was asked and translated, if the interpreter says, "S/he said that s/he heard . . .," instead of "I heard," the interpreter is not providing a literal interpretation and the interpreter should be admonished to do so.

Objections to ambiguities in the interpretation need to be resolved so the record accurately reflects the interpreted testimony.

Generally, although consecutive interpretation is preferred to ensure a clear record some states have developed procedures for hearings where testimony and interpretation simultaneously occur, especially when an

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experienced interpreter is used. If the testimony and interpretation overlap but the testimony is clear and audible then the reviewer should not reduce the score. However, if the testimony and interpretation overlap and the testimony is not sufficiently audible for recording purposes or results in confusion of the record, the hearing officer must provide proper instruction to the witness and interpreter.

A "Good" score is warranted if the hearing officer gave clear instructions to the interpreter on how questions and testimony are to be interpreted, and administers an appropriate oath to the interpreter. The hearing officer also conducted the hearing in such a way as to ensure that the interpretation accurately reflected the testimony and the proceedings.

A "Fair" score should be given if the hearing officer provided instructions to the interpreter but failed to administer the special interpreter's oath, or allowed some departure from the instructions but these did not affect the accuracy of the interpretation or the quality of the hearing record.

In distinguishing between a "good" and "fair" score, the reviewer should consider whether the interpretation is responsive to the question asked. If a question is asked, and the interpreter and witness engage in a conversation, with back-and-forth discussion, the hearing officer must admonish the interpreter to translate all statements made by the witness for the record or to repeat the question again, and remind the interpreter to provide literal interpretation.

An "Unsatisfactory" score should be given if the hearing officer failed to administer the special interpreter's oath and failed to provide instructions to the interpreter, unless a professional interpreter service is used, and it is clear this service was familiar with hearing protocol and procedures. Additionally, an unsatisfactory score should be given when the hearing officer clearly permitted the translator to "testify" for the witness, or consistently failed to admonish the interpreter when the instructions were not followed and this failure materially impairs the hearing record.

**CRITERION 17: CONTINUANCES.**

**PURPOSE** - After the hearing has begun the hearing officer should use good judgment regarding continuances.

**SCORING SEGMENT**

Good (3):           The hearing officer granted a necessary continuance when requested by either party or upon his/her own motion.

Fair (1):            The hearing officer granted a continuance where the need for such action was doubtful and not fully supported by the record.

Unsatisfactory (0): The hearing officer granted a continuance for insufficient reasons or failed to order a continuance when necessary.

Did not occur (3):   A continuance was not requested or appropriate.

**REFERENCE NOTES - CRITERION 17.**

The intent of this criterion is to ensure timely disposition of cases to ensure prompt payment to individuals and the avoidance of unnecessary delay. The criterion evaluates continuances and not postponement decisions. A postponement occurs when a case is rescheduled prior to the opening of the hearing record. A continuance occurs when the hearing officer suspends the hearing record and reschedules the case for a later time and date.

Unwarranted continuances unreasonably delay the timely disposition of cases and may impose a hardship on the claimant, or an additional burden on an employer, who were prepared to proceed with the case on the date scheduled. Assuming proper notice is provided, a case should not be continued absent compelling or necessary reasons.

The hearing officer may grant a continuance for compelling and necessary reasons if the circumstances of the case warrant it. For example, new issues develop for which proper notice was not provided, or when an element of surprise is present that a party could not have reasonably anticipated and would become an issue if the case went forward. Additionally, if a material witness unexpectedly is unavailable for the hearing, the hearing may be continued in order to obtain his/her testimony. If parties to a telephone hearing are not furnished copies of exhibits, a continuance may be necessary to allow opportunity to review and object to documents. (See Criterion 3)

A "Good" score is warranted when the hearing officer granted a continuance only for good and sufficient reasons that were fully supported by the record.

A "Fair" score should be given if the hearing officer granted a continuance and the need for such action was doubtful or not adequately explained on the record.

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An "Unsatisfactory" score should be given if the hearing officer granted a continuance for reasons that were not compelling; or were frivolous in nature or not supported by the record; or when the hearing officer did not order a continuance when the need for one was supported by the record and led to a party not being able to present evidence or testimony on a matter centrally in dispute.

**CRITERION 18: CLOSING THE HEARING.**

**PURPOSE** - The hearing officer should properly conclude the hearing by ascertaining whether the parties have anything to add.

**SCORING SEGMENT**

Good (6):                      The hearing officer asked the parties prior to the end of the hearing if they had anything further to say or present.

Fair (3):                        The hearing officer made a statement that the hearing was closed unless the parties stated that they had something further to say.

Unsatisfactory (0):        The hearing officer failed to ask this question at the conclusion of the hearing.

Did Not Occur (X):        Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 18.**

The intent of this criterion is to ensure that the parties have a full and fair hearing and are afforded ample opportunity to present their case. Affording the parties an opportunity to state anything additional at the conclusion of the hearing aids all subsequent reviewers of a case in their consideration of allegations that a party was not allowed to fully present evidence. Any wording which the hearing officer chooses which clearly accomplishes this result is permissible. The criterion will not be scored down for curtailing repetitive or irrelevant statements by the parties.

A "Good" score should be given when it is clear that the hearing officer offered the parties a final chance to present testimony or evidence. A hearing officer shall not be marked down when, after numerous attempts to properly conclude the hearing, one or both parties persists in offering repetitive or irrelevant testimony, and the hearing officer closes the record.

A "Fair" score should be given when the hearing officer demonstrates he or she is soliciting a "no" answer either by the words used to ask the question or the tone of voice employed.

An "Unsatisfactory" score should be given when the hearing officer ends the hearing abruptly without affording the parties an opportunity to make additional statements.



**CRITERION 19: HEARING WITHIN SCOPE OF NOTICE.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must conduct the hearing within the scope of the issues raised by the notice of hearing, and if new issues arise during the hearing, the hearing officer must provide proper notice of them.

**SCORING SEGMENT**

Good (9):                      The hearing officer conducted the hearing within the scope of the issues stated on the notice of hearing and if a new issue arose, properly explained the parties rights under state law to either waive notice and proceed or issue a continuance of the hearing.

Fair (X):                        Not applicable - Do not use.

Unsatisfactory (0):        The hearing officer did not conduct the hearing within the scope of the issues appearing on the hearing notice or which were raised during the course of the hearing. The hearing officer based his/her decision on new issues which were not properly noticed and/or failed to obtain waiver of the notice requirement before issuing a decision on these new issues.

Did Not Occur (X):        Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 19.**

The intent of this criterion is to ensure that the hearing and decision are based on issues to which the parties received proper notice or which the parties were willing to waive proper notice and agree to be decided. If a new issue arises during the hearing, the hearing officer must inform the parties that there is a new issue which could affect entitlement to benefits and that it needs to be covered (state law will determine whether the hearing officer has jurisdiction or must remand the case). The parties must be advised of their options to proceeding which may include a party insisting on proper legal notice of the issue, waiver of the notice and proceeding with the case, or asking for a continuance to bring forward testimony or evidence as to any new issues. Any waiver of notice must be on the record.

A "Good" score is achieved when the hearing is conducted with proper notice of the issue, or, if a new issue arises, if proper notice is waived.

An "Unsatisfactory" score should be given when the hearing and decision involve issues for which there was not proper notice and for which a waiver of proper notice was not obtained by the hearing officer.

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If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

**CRITERION 20: GRATUITOUS COMMENTS.**

**PURPOSE** - The hearing officer should not interfere with the development of the case by making gratuitous comments or observations.

**SCORING SEGMENT**

- Good (6):                    The hearing officer made no unnecessary comments or uncalled for remarks.
- Fair (3):                    The hearing officer made one or two observations, not helpful or immediately pertinent to the issues, but not to the point of being objectionable.
- Unsatisfactory (0):        The hearing officer made unnecessary comments or observations that diminished the quality of the hearing.
- Did Not Occur (X):        Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 20.**

A gratuitous comment is a comment that is made which is either unnecessary or improper during the hearing. Generally speaking, it is not appropriate for the hearing officer to comment on the evidence presented. This criterion is intended to ensure that the hearing officer conducts a hearing that is both fair in appearance and in substance. It is intended to prevent the hearing officer from making uncalled for comments in an attempt to be "smart" or "funny," or making remarks that do not meet high standards of demeanor and decorum.

A "Good" score is achieved when the hearing officer refrained from engaging in gratuitous comments, and did not provide comments on the nature or quality of the evidence unless necessary to explore its admissibility. Cases should not be "scored down" for remarks which appear to have been intended to make the parties feel at ease.

A "Fair" score is given if the hearing officer did make some gratuitous comments but these were clearly not intended to offend or disrespect the parties or their evidence, or the hearing officer commented on the evidence but not in a derogatory manner.

An "Unsatisfactory" score should be given when the hearing officer made gratuitous comments which were offensive to the parties, witnesses, evidence or the decorum of the proceedings.

**CRITERION 21: ATTITUDE.**

**PURPOSE** - The hearing officer should display an attitude that allows the parties and representatives to speak freely in an orderly manner about the issues in the case.

**SCORING SEGMENT**

- Good (6):                   The parties were made to feel at ease in offering testimony and in developing their case.
- Fair (3):                    The hearing officer did not consistently make all parties feel at ease, but not to the extent that it affected the outcome.
- Unsatisfactory (0):       The hearing officer's attitude was antagonistic or indifferent.
- Did Not Occur (X):       Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 21.**

The intent of this question is to ensure that the hearing officer makes the necessary effort to put the parties and witnesses "at ease" as much as possible. It is important that the parties believe that the hearing is fair as well as for a fair hearing to be provided. The hearing officer must strive to leave the parties with the impression that a fair opportunity was provided to both parties to present testimony and evidence and that a fair decision will be rendered.

The hearing officer should exhibit care to make the parties and witnesses feel at ease with providing information and try to strike a balance between being too formal and too informal. Too much formality in mannerisms and tone of voice can be intimidating, and can give the impression that form is more important than substance. On the other hand, too little formality can lead to a loss of control of the hearing, as well as the appearance that the hearing officer is disinterested.

The hearing officer must take care to avoid demeanor that projects an attitude of dislike, boredom, lack of concern, disengaged, and the like. While this may be primarily a problem for in-person hearings, such an attitude may be discernable over the telephone, such as when the parties can hear the hearing officer typing, or speaking to someone else, or a sigh.

A "Good" score is achieved when the attitude of the hearing officer was professional, courteous, and the hearing officer attempted to allow the parties and witnesses to feel at ease in offering their information.

A "Fair" score is given when the attitude of the hearing officer was generally pleasant and professional during the hearing but there was an occasion during the hearing when the attitude of the hearing officer possibly did not make the parties feel at ease in offering testimony or evidence.

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An "Unsatisfactory" score should be given when the hearing officer displayed a bad attitude during the hearing, such as, being consistently antagonistic, indifferent, or unprofessional which clearly interfered with the presentation of the parties or the witnesses in the case.

The score for Criterion 20, Gratuitous Comments, and/or Criterion 21, Attitude, should not negatively influence the scoring of Criterion 22, Bias and Prejudice. See Criterion 22 for a discussion of bias and prejudice.

**CRITERION 22: BIAS AND PREJUDICE.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must conduct the hearing in an impartial manner.

**SCORING SEGMENT**

Good (9):           The hearing officer did not appear to demonstrate, or give the appearance of demonstrating, bias or prejudice toward any participant in the hearing. The intensity of questioning, type of questions asked, and/or the treatment of the participants, did not indicate bias or prejudice.

Fair (X):            Not applicable - Do not use.

Unsatisfactory (0):   The hearing officer appeared to blatantly demonstrate bias or prejudice toward a participant, or the hearing officer's actions were reasonably perceived as doing so.

Did Not Occur (X):   Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 22.**

The intent of this criterion is to ensure that the hearing officer conducted the hearing in a fair and impartial manner. It is not enough that the hearing officer was not biased or prejudiced. The hearing officer must also avoid the appearance of bias or prejudice.

When it appears that the hearing officer blatantly treated any party in a biased or prejudiced manner, the criterion must be scored as unsatisfactory. For example, the hearing officer displays a negative or demeaning manner directed towards a party's attitude, vocabulary, mannerisms, career field, status, beliefs, appearance, age, sex, or religious beliefs, among other characteristics.

The hearing officer must control the hearing by asking important questions, limiting irrelevant testimony or improper statements, and being persistent in clarifying or determining the truth of a statement. However, at some point the attempt to clarify seemingly contradictory or inconsistent statements can be, or appear to be, badgering. At times one party may require more assistance than the other. Maintaining control and asking questions do not excuse bullying or badgering a party or witness. By the same token, offering assistance in a way that clearly is demeaning and disparaging would result in an unsatisfactory score.

The difference between a "Good" and "Unsatisfactory" score should be obvious. If the hearing officer clearly favors one party over the other in terms of the respect shown during the hearing, the questions asked, or the amount of time allowed for a response to questioning, the case should be marked down.

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If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management to identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion.

Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

A Fair or Unsatisfactory score for Criterion 20, Gratuitous Comments, and/or Criterion 21, Attitude, should not have a negative influence on scoring Criterion 22, Bias & Prejudice. In scoring Criterion 22, Bias & Prejudice, if the hearing officer was not blatantly biased or prejudiced, then this criterion should be scored as a "Good."

**CRITERION 23: OBTAIN REASONABLY AVAILABLE EVIDENCE.**

**PURPOSE** - The hearing officer must attempt to obtain the reasonably available competent evidence necessary to resolve the issue(s) in the case.

**SCORING SEGMENT**

Good (9):                    The hearing officer obtained competent evidence, reasonably available and necessary to resolve the issue(s) in the case.

Fair (3):                    The hearing officer obtained most of the evidence necessary to resolve the issue(s) of the case and the omissions were not prejudicial to the outcome of the case.

Unsatisfactory (0):        The hearing officer did not make a sufficient record to render a decision, because s/he did not obtain sufficient competent, available evidence to resolve the issue(s) in the case.

Did Not Occur (X):        Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 23.**

The intent of this criterion is to ensure that the hearing officer functions as a “fact-finder” and all available evidence are included as part of the record.

The unemployment insurance lower authority appeals hearing is not a contest between two opposite parties, with the hearing officer sitting on the sidelines. The hearing officer is in effect a seat of inquiry, responsible for getting complete and accurate facts. It is the responsibility of the hearing officer to ensure that the burden of proof lies upon the appropriate party in UI hearings.

A hearing officer needs to preserve the appearance of neutrality of the issue(s) being discussed yet ask the necessary questions to develop the facts of the issue for the record. It is the responsibility of the hearing officer to develop all the evidence that is reasonably available and to make a decision according to the dictates of the state law. State laws differ on the hearing officer’s obligations to obtain evidence. “Reasonably available” means that evidence or testimony which is available at the hearing and which is critical to the issue(s) to be decided.

In applying this criterion, consideration must be given to the adequacy of the hearing officer's attempts to develop the evidence on each issue: Was it sufficient to secure evidence that was necessary and reasonably available? For example, when attendance is an issue, a party may offer time keeping records. If the attendance record is a matter of dispute, it is incumbent upon the hearing officer to accept this evidence.

A “Good” score is achieved when the hearing officer made sufficient efforts to obtain the available evidence to resolve the material issues of the case.



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A "Fair" score is given if the hearing officer made an effort to obtain all of the reasonably available evidence but may have failed to accept available evidence tendered which might have had a bearing on a material point.

An "Unsatisfactory" score should be given when the hearing officer does not make a sufficient attempt to obtain available evidence or affirmatively prevents a party from presenting evidence on material issues in the case.

See Criterion 17, Continuances, and Criterion 3, Exhibits, for further information on issues and evidence.

**CRITERION 24: ISSUE(S) CLEARLY STATED IN THE WRITTEN DECISION.**

**PURPOSE** - The statutory issue(s) involved should be clearly and simply stated in the written decision.

**SCORING SEGMENT**

Good (3):                The written decision included, in simple language, all the statutory issues in the case.

Fair (X):                Not applicable - Do not use

Unsatisfactory (0):    The written decision either omitted some or all of the issues, or stated them in a convoluted manner that was incomprehensible.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 24.**

The intent of the criterion is to ensure that there is a clear understanding of what issue(s) the decision addresses. The statement should communicate clearly and effectively to the interested parties and other readers exactly what the issues were. It should also establish the boundaries of the decision.

At the beginning of the decision, early in the description of the case history, or at another appropriate spot, the issue(s) to be decided should be stated in simple terms for clear understanding and should include all the elements of the applicable statutory provision(s). This statement need not be in the precise language of the statute. For example, the decision may read, "The issue in this case is whether the claimant voluntarily left his employment without good cause."

A "Good" score is achieved when the issue statement is clearly stated in the decision.

An "Unsatisfactory" score is given when the issue statement is omitted from the decision, or when the issue statement is so overly complex that the average reader would not understand what issue(s) is being decided.

**CRITERION 25: FINDINGS SUPPORTED BY SUFFICIENT EVIDENCE.**

**PURPOSE** – Accepting the hearing officer's judgment of credibility, unless it is manifestly without basis, the findings of fact must be supported by sufficient evidence in the hearing record.

**SCORING SEGMENT**

Good (9):                The written decision's findings of fact section must be supported by substantial evidence.

Fair (X):                Not applicable - Do not use.

Unsatisfactory (0):    The findings of fact stated in the written decision were not supported by substantial evidence.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 25.**

The intent of this criterion is to ensure that the findings of fact are supported by evidence in the record and this evidence is of sufficient quality to support the findings.

In scoring this criterion, the evaluator does not decide whether all the necessary findings of fact were made, but whether the findings of fact made by the hearing officer are supported by substantial evidence in the hearing record. See Criterion 26 for findings of fact.

Only evidence that is properly entered into the record and which is officially and administratively "noticed" can be considered as a basis for the findings of fact.

The weight the hearing officer gives to the testimony and evidence in the case of contradictory evidence or testimony the hearing officer's judgment of credibility, should be accepted unless it is entirely without basis or is clearly unreasonable.

There is no "Fair" score. Either the findings of fact are supported by the evidence, or they are not.

The distinction between "Good" and "Unsatisfactory" is whether or not, on matters material to the decision, the findings of fact are supported by substantial evidence to support the ultimate outcome in the case. Substantial evidence has been defined as "such evidence, or such relevant or competent evidence, as a reasonable mind might accept as adequate to support a conclusion." It means simply, accepting the hearing officers internal authority to determine credibility on material points in dispute, is the evidence sufficiently well founded in the testimony and documentary evidence accepted to support the decision.

**CRITERION 26: FINDINGS OF FACT.**

This criterion is a **CRITICAL FAIR HEARING & DUE PROCESS** element.

**PURPOSE** - The hearing officer must make all of the findings of fact necessary to resolve the issues and support the conclusions of law included in the decision.

**SCORING SEGMENT**

Good (9): The decision contained all the necessary findings of fact. The decision clearly states the findings of fact upon which the hearing officer relied in the decision for each material point in the case. The findings of fact in the decision accurately reflect the testimony and are specific, relevant, and material to all major issues. The decision does not merely recite testimony as findings of fact.

Fair (3): The decision contained most of the necessary findings of fact pertinent to the material points. However, there was some recitation of testimony, or the findings were not clearly stated, or the findings were not relevant and material to the case.

Unsatisfactory (0): The findings of fact in the decision did not accurately reflect the testimony presented or did not contain the specific, relevant, and material findings of fact necessary to resolve material issues in the case upon which the hearing officer relied in the decision.

Did not occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 26.**

The intent of this criterion is to measure how accurate, and clearly stated, the findings of facts were used by the hearing officer in making the decision. The findings of fact represent the story of what happened in the case and should be expressed in logical order (usually chronological) and in unequivocal terms. The reader should be left with no doubt about what facts the hearing officer relied upon in making the decision. The findings of fact must be made on all the elements of the issue being decided. The findings must be accurate, specific, relevant, and material to all issues in the case.

Findings of fact are sometimes referred to as evidentiary findings or material points. The hearing officer must clearly and accurately identify the specific findings of fact for the material issues in the case since they are final (in most states) if supported by sufficient, competent evidence in the record. A reviewing authority must know what specific findings of facts were identified by the hearing officer in making the decision (as distinguished from a summary of evidence).

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The findings of fact must be specific. If the hearing officer intends to document willful misbehavior based upon a prior warning, the hearing officer should specifically identify in the decision the nature of the warning. A finding that the claimant was "previously warned," by itself, is insufficient since it does not permit the reader to know whether the warning was verbal or in writing, when it was issued and by whom, on what event the person was warned, and how it bears a relationship to demonstrating willful misbehavior in relation to the incident(s) which prompt an employment separation.

Similarly, in a voluntary leaving case, the decision should contain findings of fact specific to the situation; whether the quit was verbal, in writing, or in some other manner, what reasons (if any) were provided for quitting, and any other circumstances which are relevant to making a decision about whether the claimant had good cause under the state law for the voluntary leaving.

A recitation of testimony is impermissible since it is not a finding of fact but a summary of a party's viewpoint. Findings of fact on matters irrelevant to the outcome of the case are unnecessary and should be avoided. Prior to issuing the decision, the hearing officer should review the findings to ensure the findings of fact accurately reflect the evidence, are clearly stated, material and relevant to all issues, and clearly supports the conclusion of law upon which the decision is based.

A "Good" score is warranted if the decision clearly and accurately states the facts found, and the facts found are material and relevant to all of the issues involved in the case.

A "Fair" score is warranted if the decision contains some inaccurate facts on minor points that do not affect the outcome, or contains some unclear facts, or irrelevant facts but these do not affect the reader's understanding of how the facts support the decision outcome.

An "Unsatisfactory" score should be given if the decision contains findings of fact that do not accurately reflect the hearing record, or fails to make specific, necessary findings of fact needed to resolve the issues, or where the majority of facts found constitute a recitation of testimony such that it is unclear what facts are being relied upon by the hearing officer in making the decision.

If a case receives an unsatisfactory score, this Critical Fair Hearing & Due Process element has failed. This may help management identify training issues to improve the "due process" component(s), or where a state's practice may negatively impact this criterion. Criterion 10, Confrontation; Criterion 11, Cross-Examination; Criterion 19, Within Scope of Notice; Criterion 22, Bias & Prejudice; and Criterion 26, Findings of Fact, are considered Critical Fair Hearing & Due Process elements.

**CRITERION 27: REQUIRED CONCLUSIONS.**

**PURPOSE** - The decision should contain the conclusions of law required to resolve the issue(s) in the case.

**SCORING SEGMENT**

Good (6):                The decision contains the necessary conclusions of law.

Fair (X):                Not applicable - Do not use.

Unsatisfactory (0):    The decision does not contain the necessary conclusions of law.

Did not occur (X):    Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 27.**

The intent of this criterion is to ensure that the hearing officer has indicated his/her final conclusion on each issue involved.

The conclusions of law represent the hearing officer's application of the law to the facts of the case. Following the language of the appropriate statute, it tells the parties the legal standard that will be applied to the facts of the case and that mandate the result of the case.

For example, in a misconduct issue for absence without notice, the specific provision in the law should be referred to by quoting it or by explaining it in simple terms with, when necessary, an explanation of a term such as "misconduct." The conclusion of law might be, "The claimant is disqualified since "misconduct connected with the work" includes instances when an employee who has been previously warned about attendance is absent without proper notice to the employer. This statement resolves the issue and should be supported by the hearing officer's findings that the claimant had been absent, had been warned, and had not given notice to his employer, with further appropriate details.

A "Good" score is warranted when the decision contains the conclusions of law setting forth the legal standard which applies to the material issue(s) in the case.

"Fair" is not used.

An "Unsatisfactory" score is warranted when the necessary conclusions of law are not stated in the decision, or are stated in such an unclear manner that the average reader would not understand what legal standard governs the material issues being decided.

**CRITERION 28: LOGICAL REASONING.**

**PURPOSE** - The decision should state logical reasons for the outcome that are consistent with the findings of fact and the conclusions of law.

**SCORING SEGMENT**

Good (6):           The hearing officer stated logical reasons for the decision consistent with the findings of fact and applied those facts in a logical manner to the conclusions of law.

Fair (3):            The reasoning was not fully stated or contained some inconsistencies but, when read as a whole; the decision is understandable both factually and legally.

Unsatisfactory (0):   The reasoning and rationale in the decision were not stated or did not logically follow from the findings of fact to the conclusions of law.

Did not occur (X):   Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 28.**

The intent of this criterion is to measure how well the decision is written such that a reasonable person will know upon reading the decision that it has a sound basis, in law and fact, for the outcome. The intent is not to second guess the decision of the hearing officer. Whether reasonable minds might differ in the outcome is not the standard. The reasoning in the decision cannot be inconsistent with the findings of fact or the conclusions of law applied. The explanation of the decision should be reasonably drawn from the findings of fact, be understandable, and adequately covers only the factors in the provision of the law relating to the issue.

The reasoning should be consistent with the findings of fact and the conclusions of law. The reasoning should use clear, concise, and understandable terms without unnecessary elaboration, and without reliance upon immaterial considerations. The facts should not be repeated as reasoning, nor should new facts be entered. The reasoning should include an explanation to the parties why material contentions were either accepted or rejected, and explain the basis for it.

A "Good" score is given when the reasoning of the hearing officer is clear in the decision, including that the findings of fact and conclusions of law are consistent and relevant to the material issues. Deduction will not be made when the hearing officer addresses specific legal or factual contentions raised by the parties. A "Fair" score may be given when, after consideration of all the facts and law, the reasoning is understandable and has a rational basis in law and fact even though there may be some minor inconsistencies or some incompleteness in addressing minor points.

An "Unsatisfactory" score should be given when the reasoning is not clearly stated, or when the reasoning is inconsistent with the law and facts of the case, or when there is such incompleteness in analysis or so many internal inconsistencies that it is difficult to understand the outcome.

**CRITERION 29: FORM, STYLE, AND ORGANIZATION.**

**PURPOSE** - The decision should be well organized as to form and style. It should be noted that this criterion does not address content.

**SCORING SEGMENT**

Good (3):           The decision was organized so that the issues in the case, the findings of fact, the rationale, the conclusions of law, and the ruling were clearly outlined.

Fair (1):            Although the various portions of the decision merged with one another, it was clear which statements were findings of fact and which were conclusions of law.

Unsatisfactory (0):   The decision was not organized and it was difficult to understand.

Did not occur (X):   Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 29.**

The intent of this criterion is to ensure that each segment of the decision is stated distinctly for clarity, correct administrative adjudication procedures, and compliance with legal requirements. This criterion refers to the outline or form of the decision not to the content of the decision. The content of the decision is covered in other criteria.

The written decision is of the utmost importance. It is the culmination of the hearing process, and must be adequate for judicial review. The decision should include the following elements: 1) a statement of the issue(s) being decided; 2) the findings of fact; 3) the rationale or reasoning -- based on the findings of fact and the applicable statute; 4) the conclusions of law -- based upon the findings of fact and reasons, and showing the final judgment of the hearing officer on the issue(s); 5) the "decision outcome" -- the action to be taken by the agency in accord with the decision; and 6) information on further appeal rights if a party disagrees with the written decision.

While there is no standard or prescribed order for the above listed elements and some acceptable formats may merge some of them, each element should be clearly identifiable.

A "Good" score is achieved when the decision is well organized and contains an issue statement, a statement of the findings of fact, the conclusions of law, the rationale for the outcome, a decision statement and further appeal rights.

A "Fair" score is given when the decision contains each of the above but the organization makes it unclear to the average reader which section represents each of the above.



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An "Unsatisfactory" score should be given when the organization of the decision is such that it would confuse the average reader of the issue, facts, law, reasoning or outcome of the case, or does not include all of the described elements, including further appeal rights.

**CRITERION 30: DECISION STATES LEGAL EFFECT.**

**PURPOSE** - The written decision should contain a clear and correct statement of the legal effect of each issue covered.

**SCORING SEGMENT**

- Good (3): In the decision paragraph, the hearing officer correctly identified the determination(s) appealed and stated whether the determination is affirmed, reversed, or modified. If a determination is reversed or modified, the decision explained the reversal or modification in sufficient detail to allow the parties to understand it and the administrative agency enough information to implement the decision.
- Fair (1): The decision paragraph states whether the determination(s) is affirmed, reversed, or modified. However, the decision paragraph did not specify the administrative action the agency must take to implement the outcome.
- Unsatisfactory (0): The decision paragraph did not correctly identify the determination appealed, or it did not state whether the determination was affirmed, reversed, or modified, or the decision paragraph states an improper outcome in relation to the findings of fact and conclusions of law.
- Did not occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 30.**

The decision paragraph informs the parties of the ultimate outcome of the case and directs the administrative agency to affirm, reverse, or modify a specific determination(s) which is the subject of the appeal. The hearing officer must identify the determination(s) that is being ruled upon and accurately state the result in a style and format that easily informs the reader of the outcome.

The decision paragraph should also direct the administrative agency of actions to be taken; e.g., if a disqualification is imposed, the specific date the disqualification begins and what action, under state law, the claimant must take to overcome it, and any further actions the administrative agency should investigate e.g. if a previously undetected, unrelated eligibility issue arose during the hearing that should be resolved before benefits are paid as the result of a job separation ruling that the hearing officer was unable to address during the hearing.

A "Good" score is achieved if the decision paragraph correctly identified the determination(s) appealed and stated whether it is "affirmed," "reversed," or "modified" as appropriate. If modified, the decision paragraph clearly and specifically stated the modification and informed the administrative agency of the action to take as a result of the modification. For example, "The determination dated (state date) is modified to reflect that the claimant quit without good cause and is disqualified the week of (date) and the (X) weeks immediately

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following ending on (date)". Any similar wording showing the administrative action required to implement the decision may be used.

A "Fair" rating should be given if the decision paragraph meets all of the requirements for "good" but does not specify the administrative action.

An "Unsatisfactory" score should be given if the decision paragraph fails to correctly identify the determination(s) the decision is ruling upon, fails to state whether the determination is affirmed, reversed or modified, or the decision is inconsistent with the facts and conclusions of law. An example could be the affirmed decision is noted but the facts and conclusions of law clearly reflect the hearing officer meant to reverse the determination.

**CRITERION 31: UNDERSTANDABLE DECISION.**

**PURPOSE** - The decision should be worded so that it is understandable to most claimants and employers and it should have a professional appearance.

**SCORING SEGMENT**

- Good (6): The language used in the decision contains words that are easy to understand to the average reader, avoids unnecessary legal jargon, technical verbiage or other “shop talk,” and contains no or limited grammatical, typographical or other errors. The decision is clear and concise and avoids using objectionable or abrasive words or phrases. The decision is neat and professional in appearance.
- Fair (3): The decision contains some legal jargon, or technical verbiage or some unfamiliar words, or contains some grammatical, typographical or other errors, but these did not substantially impair the average reader in understanding the decision.
- Unsatisfactory (0): The decision contains uncommon words that could not be easily understood by the average reader. The decision contained too much legal jargon, technical verbiage or “shop talk” such that the reader was left without a clear understanding of the rationale or outcome of the decision, or the decision contained such numerous grammatical, typographical or other errors that they adversely affected the coherence of the decision.
- Did not occur (X): Not applicable - Do not use.

**REFERENCE NOTES - CRITERION 31.**

The intent of this criterion is to ensure that the hearing officer issues a written decision that can be understood by the parties and the agency. The decision must be clear, concise and worded in “plain English” to the level of understanding of most people. It should be written clearly and tactfully, and should appear neat and professional.

A "Good" scored is achieved when the language used in the decision is understandable to ordinary persons, is clear, tactful and concise, and the decision is free of all but minor grammatical, typographical or other errors. A deduction will not be made when the hearing officer cites a statutory provision, or court case, if there was some attempt to explain it in terms the ordinary person will understand.

A "Fair" score should be given if the decision meets the qualifications above except that it contains some words that may be difficult for readers to understand, uses some legal jargon or technical verbiage without an attempt to explain these terms so that the average person can understand them, and/or contains some grammatical, typographical or other errors but these do not significantly impair the ability of the reader to understand the rationale or outcome of the decision.

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An "Unsatisfactory" score is warranted when the decision uses overly complex words or phrases that are not easily understood by the average person, or overly resorts to unnecessary legal jargon, technical verbiage or "shop talk" that significantly detracts from the reader's ability to understand the decision rationale or outcome, or which contains such numerous grammatical, typographical or other errors that reflect negatively on the reader's ability to have confidence in the decision. Simply put, if after reading the decision, the reader does not know who prevailed and why, the criteria should be scored "Unsatisfactory."