

## TABLE OF CONTENTS

Page numbers reflect the chapter and the page within the chapter (Chapter)-(Page)

### Introduction

1	Introduction	<a href="#">1-1</a>
1.1	Purpose of the hearing	<a href="#">1-1</a>
1.2	Hearings in representation cases are considered investigatory and not adversary	<a href="#">1-1</a>
2	Hearing Officer's responsibilities	<a href="#">2-1</a>
2.1	Accomplishment of primary duty	<a href="#">2-1</a>
2.2	Other duties	<a href="#">2-2</a>
2.3	Ethical considerations	<a href="#">2-2</a>
2.3.1	General	<a href="#">2-2</a>
2.3.2	Caution	<a href="#">2-3</a>
2.3.3	Ex parte communications	<a href="#">2-3</a>

### Prehearing Matters

3	Prehearing preparation	<a href="#">3-1</a>
4	Preparing materials for hearing	<a href="#">4-1</a>
4.1	Formal papers	<a href="#">4-1</a>
4.2	Case file	<a href="#">4-2</a>
4.3	FLRA Form 50, Appearance sheet	<a href="#">4-2</a>
4.4	FLRA Form 56, Exhibits introduced in evidence	<a href="#">4-2</a>
4.5	Publications	<a href="#">4-2</a>
4.6	Other blank forms	<a href="#">4-2</a>
4.7	Subpoenas	<a href="#">4-2</a>
4.8	Hearing Officer's script	<a href="#">4-3</a>
5	Witnesses' appearance	<a href="#">5-1</a>
6	Official time for witnesses and reimbursement for travel	<a href="#">6-1</a>
6.1	Policy	<a href="#">6-1</a>
6.2	Official time for witnesses	<a href="#">6-1</a>
6.3	Travel and Per Diem	<a href="#">6-1</a>
6.4	Employee representatives	<a href="#">6-1</a>
7	Prehearing exchange of exhibits	<a href="#">7-1</a>

8	.....	Prehearing conference	<a href="#">8-1</a>
	8.1	..... General policy	<a href="#">8-1</a>
	8.2	..... Areas to cover (not necessarily in the following order)	<a href="#">8-2</a>
	8.3	Circumstances arising at the prehearing conference which generally require cleara	
9	.....	Stipulations in lieu of hearings	<a href="#">9-1</a>
10	.....	Pre-opening preparations	<a href="#">10-1</a>
	10.1	..... To do on your own	<a href="#">10-1</a>
	10.2	..... Immediately prior to the opening of the hearing	<a href="#">10-1</a>
	10.2.1	..... Complete appearance sheet, FLRA Form 50	<a href="#">10-1</a>
	10.2.2	If updated since the prehearing conference, re-examine the formal papers	<a href="#">10-2</a>
	10.2.3	..... Order of witnesses	<a href="#">10-2</a>
	10.2.4	..... Check again into possibilities for stipulations, election agreement .....or resolution of other issues	<a href="#">10-3</a>
11		Things for the Hearing Officer to keep in mind as the hearing opens	<a href="#">11-1</a>
	11.1	..... Recesses for breaks, lunch, etc.	<a href="#">11-1</a>
	11.2	..... Smoking	<a href="#">11-1</a>
	11.3	..... Decorum of parties and witnesses	<a href="#">11-1</a>
	11.4	..... Things to discuss with the court reporter	<a href="#">11-1</a>
	11.5	..... Hearing Officer's demeanor towards parties	<a href="#">11-1</a>
	11.6	..... Hearing Officer's demeanor towards witnesses	<a href="#">11-2</a>
	11.7	..... Off the record remarks	<a href="#">11-2</a>
	11.8	..... When the parties elect to allow the Hearing Officer to act as the primary examiner	<a href="#">11-2</a>
	11.9	..... When the Hearing Officer is uncertain on how to proceed	<a href="#">11-2</a>

**Evidentiary Matters**

12	.....	Evidentiary and procedural matters	<a href="#">12-1</a>
13	.....	Considerations in developing evidence	<a href="#">13-1</a>
	13.1	..... Best evidence rule	<a href="#">13-1</a>
	13.1.1	..... Testimony	<a href="#">13-1</a>
	13.1.2	..... Introduction of documents	<a href="#">13-1</a>
	13.2	..... Ruling on the admissibility of evidence	<a href="#">13-1</a>
	13.2.1	..... Foundation	<a href="#">13-1</a>
	13.2.2	..... Relevancy	<a href="#">13-2</a>
	13.2.2.1	..... Evidentiary considerations - unit	<a href="#">13-2</a>
	13.2.2.2	..... Evidentiary considerations-employee eligibility	<a href="#">13-2</a>
	13.2.3	..... Materiality	<a href="#">13-2</a>

13.2.4	Hearsay and admissions	<a href="#">13-2</a>
13.2.5	Leading questions	<a href="#">13-3</a>
13.2.6	Oral evidence that contradicts written evidence	<a href="#">13-3</a>
13.2.7	Cumulative evidence	<a href="#">13-3</a>
13.2.8	Opinion evidence	<a href="#">13-3</a>
13.2.9	Judicial notice	<a href="#">13-3</a>
13.2.10	Official notice	<a href="#">13-4</a>
13.2.11	Administrative notice	<a href="#">13-4</a>
13.3	Theories of res judicata	<a href="#">13-4</a>
13.3.1	Doctrine of claim preclusion	<a href="#">13-4</a>
13.3.2	Doctrine of issue preclusion	<a href="#">13-4</a>
14	Scope of cross examination	<a href="#">14-1</a>
15	Exhibits:	<a href="#">15-1</a>
15.1	General overview	<a href="#">15-1</a>
15.2	Marking exhibits for identification	<a href="#">15-1</a>
15.3	Marking Authority exhibits	<a href="#">15-2</a>
15.4	Authenticating the exhibit	<a href="#">15-2</a>
15.5	Offering the exhibit in evidence	<a href="#">15-2</a>
15.6	Voir dire	<a href="#">15-2</a>
15.7	Ruling by the Hearing Officer	<a href="#">15-3</a>
15.8	Rejected exhibit file	<a href="#">15-3</a>
15.9	Bulky exhibits	<a href="#">15-3</a>
15.10	Joint exhibits	<a href="#">15-4</a>
15.11	Documentary evidence that the parties refuse to provide to all parties	<a href="#">15-4</a>
15.12	Summary exhibits	<a href="#">15-5</a>
15.13	Custody of exhibits	<a href="#">15-5</a>
15.14	Request to withdraw original copy of exhibit	<a href="#">15-5</a>
15.15	Receipt of exhibit after conclusion of hearing	<a href="#">15-5</a>

### Motions

16	Motions	<a href="#">16-1</a>
16.1	Purpose of a motion	<a href="#">16-1</a>
16.2	Service of motion	<a href="#">16-1</a>
16.2.1	Basic rule	<a href="#">16-1</a>
16.2.2	Specific rule	<a href="#">16-1</a>
17	Processing prehearing motions	<a href="#">17-1</a>
17.1	Generally	<a href="#">17-1</a>

17.2	Prehearing motion to postpone	<a href="#">17-1</a>
17.2.1	Policy on granting prehearing motions to postpone	<a href="#">17-1</a>
17.2.2	Granting the motion to postpone	<a href="#">17-1</a>
17.2.3	Denying the motion to postpone	<a href="#">17-2</a>
17.2.4	Indefinite postponement	<a href="#">17-2</a>
17.2.5	Resumption of indefinitely postponed hearing	<a href="#">17-2</a>
17.3	Prehearing motions (requests) to intervene, cross-petition, challenges to the validity	
17.4	Motions to intervene received too late for the region to process prior to the opening	
17.4.1	Reviewing motions to intervene received too late for the region to process prior to	
17.4.2	Considerations when reviewing the showing of interest accompanying requests	
17.4.3	Ruling on motions to intervene prior to the opening of the hearing	<a href="#">17-6</a>
17.4.3.1	Granting a motion to intervene	<a href="#">17-6</a>
17.4.3.2	Referring a motion to intervene to the Regional Director	<a href="#">17-6</a>
17.4.4	Conditional intervention	<a href="#">17-7</a>
17.4.5	Handling conditional motions to intervene on the record	<a href="#">17-8</a>
17.5	Prehearing motions to dismiss	<a href="#">17-9</a>
17.6	Prehearing motions to withdraw	<a href="#">17-9</a>
17.7	Other prehearing motions	<a href="#">17-9</a>
17.8	Orders	<a href="#">17-9</a>
18	Motions made during the hearing	<a href="#">18-1</a>
18.1	Generally	<a href="#">18-1</a>
18.2	Procedural requirements	<a href="#">18-1</a>
18.3	Motions to dismiss made during the hearing	<a href="#">18-2</a>
18.4	Motions to intervene made during the hearing	<a href="#">18-2</a>
18.5	Motions to participate as amicus curiae	<a href="#">18-3</a>
18.6	Motions to sequester witnesses	<a href="#">18-3</a>
18.7	Motion to amend the petition	<a href="#">18-4</a>
18.7.1	General	<a href="#">18-4</a>
18.7.2	Considerations on amending petitions	<a href="#">18-4</a>
18.7.3	Motion to amend the unit made during the hearing	<a href="#">18-5</a>
18.7.4	Obtaining complete description of amended unit	<a href="#">18-5</a>
18.7.5	Ruling on a motion to amend the unit that does not change the scope of the unit	<a href="#">18-6</a>
18.7.6	Ruling on a motion to amend the unit that changes the scope of the unit	<a href="#">18-6</a>
18.8	Motion to strike or expunge testimony	<a href="#">18-7</a>
18.9	Motion for continuance made during the hearing	<a href="#">18-8</a>
18.9.1	Grounds for continuance	<a href="#">18-8</a>
18.9.2	Hearing rescheduled	<a href="#">18-9</a>
19	Motions to withdraw	<a href="#">19-1</a>
19.1	Prehearing motions to withdraw	<a href="#">19-1</a>
19.1.1	Petitioner requests to withdraw	<a href="#">19-1</a>

19.1.2	Intervenor requests to withdraw	<a href="#">19-1</a>
19.2	Motions to withdraw made during the hearing	<a href="#">19-2</a>
19.2.1	Petitioner requests to withdraw	<a href="#">19-2</a>
19.2.2	Intervenor requests to withdraw	<a href="#">19-2</a>
19.3	Motions to withdraw made post-hearing	<a href="#">19-2</a>
19.4	Withdrawal with prejudice	<a href="#">19-3</a>
20	Post-hearing motions	<a href="#">20-1</a>
21	Motions to correct transcript	<a href="#">21-1</a>

**Procedural Matters**

22	Disclaimers	<a href="#">22-1</a>
23	Filing a cross-petition	<a href="#">23-1</a>
23.1	Filing requirements	<a href="#">23-1</a>
23.2	Processing cross-petitions received too late for the region to process prior to the opening of the hearing	<a href="#">23-1</a>
23.2.1	Handling cross-petitions received too late for the region to process prior to the opening of the hearing	<a href="#">23-1</a>
23.2.2	Ruling on cross-petitions that are received too late for the region to process prior to the opening of the hearing	<a href="#">23-2</a>
23.3	Cross-petitions filed after the hearing opens	<a href="#">23-3</a>
23.4	If the Regional Director does not permit participation by the cross-petitioner	<a href="#">23-4</a>
23.5	Cross-petitions filed immediately prior to the opening of the hearing or after the hearing opens that challenge the status of a petitioning or intervening labor organization on the basis that it is subject to corrupt or anti-democratic influences pursuant to 5 U.S.C. 7111(f)(1)	<a href="#">23-4</a>
24	Challenges to the validity of the showing of interest and challenges to the status of a labor organization	<a href="#">24-1</a>
24.1	When to file	<a href="#">24-1</a>
24.2	Challenges to the validity of the showing of interest	<a href="#">24-1</a>
24.3	Challenges to the status of a labor organization	<a href="#">24-1</a>
25	Intervening circumstances which can change scope of hearing, status of the parties or the issues	<a href="#">25-1</a>
26	Stipulations	<a href="#">26-1</a>
26.1	Requirements	<a href="#">26-1</a>

26.2	Preparing a stipulation	<a href="#">26-1</a>
26.3	Receiving stipulation in evidence	<a href="#">26-2</a>
26.4	Content of stipulations	<a href="#">26-2</a>
26.5	Stipulations obviating the need to continue the hearing	<a href="#">26-2</a>
26.6	Special circumstances that may arise during a hearing	<a href="#">26-3</a>
26.6.1	Attempt to withdraw from a stipulation already received in evidence	<a href="#">26-3</a>
26.6.2	Stipulations involving determinative challenged ballots	<a href="#">26-3</a>
27	Subpoenas	<a href="#">27-1</a>
27.1	General	<a href="#">27-1</a>
27.2	Application for subpoena	<a href="#">27-1</a>
27.3	Preparation of subpoena	<a href="#">27-1</a>
27.4	Issuance and control of subpoenas	<a href="#">27-1</a>
27.5	Issuance of subpoena during the hearing	<a href="#">27-2</a>
27.6	Service of subpoena	<a href="#">27-2</a>
27.7	Witness fees	<a href="#">27-2</a>
27.8	Petition to revoke subpoena	<a href="#">27-2</a>
27.9	Enforcement of subpoena	<a href="#">27-3</a>
27.10	Delays for enforcement	<a href="#">27-3</a>
28	Evidentiary and procedural objections	<a href="#">28-1</a>
28.1	General	<a href="#">28-1</a>
28.2	Stating basis for objection	<a href="#">28-1</a>
28.3	Arguing the objection	<a href="#">28-1</a>
28.4	Stating the ruling	<a href="#">28-1</a>
28.5	Interjection by Hearing Officer	<a href="#">28-1</a>
28.6	Objection to questioning by Hearing Officer	<a href="#">28-2</a>
28.7	Decide all objections	<a href="#">28-2</a>
29	Offer of proof:	<a href="#">29-1</a>
30	Appeals from adverse rulings by the Hearing Officer	<a href="#">30-1</a>
31	Obtaining an election agreement preceding or during the hearing	<a href="#">31-1</a>
31.1	General	<a href="#">31-1</a>
31.2	Prehearing election agreements	<a href="#">31-1</a>
31.2.1	Election agreement obtained	<a href="#">31-1</a>
31.2.2	Procedure upon approval of agreement	<a href="#">31-2</a>
31.2.3	Withdrawal of notice of hearing	<a href="#">31-2</a>
31.3	Election agreement obtained during the hearing	<a href="#">31-2</a>
31.4	Refusal by parties to sign election agreements	<a href="#">31-3</a>
31.4.1	Prehearing	<a href="#">31-3</a>
31.4.2	During the hearing	<a href="#">31-3</a>

## Conducting the Hearing

32	.....	Conducting the hearing	<a href="#">32-1</a>
	32.1	..... An overview	<a href="#">32-1</a>
	32.2	..... Appearance sheets	<a href="#">32-1</a>
	32.3	..... Calling the hearing to order	<a href="#">32-1</a>
	32.4	..... Formal papers	<a href="#">32-1</a>
	32.5	..... Ascertaining correct names of parties	<a href="#">32-2</a>
	32.6	..... Motions to amend the petition	<a href="#">32-2</a>
	32.7	..... Intervention	<a href="#">32-2</a>
	32.8	..... Other prehearing motions or motions presented by the parties upon opening the hearing	<a href="#">32-2</a>
	32.9	..... Outlining <u>the issues presented by the petition(s)</u>	<a href="#">32-2</a>
	32.10	..... Timeliness issues	<a href="#">32-2</a>
	32.11	..... Alternative unit(s)	<a href="#">32-2</a>
	32.12	..... Receiving stipulations	<a href="#">32-3</a>
	32.13	..... Outlining <u>the issues to address at the hearing</u>	<a href="#">32-3</a>
	32.14	..... Summarizing the parties' positions	<a href="#">32-3</a>
	32.15	..... Evidence	<a href="#">32-3</a>
	32.16	..... Examination by the Hearing Officer	<a href="#">32-5</a>
	32.17	..... Recommendations on the record	<a href="#">32-6</a>
	32.18	..... Before closing the record	<a href="#">32-7</a>
	32.19	..... Change of party position	<a href="#">32-7</a>
	32.20	..... Closing argument	<a href="#">32-8</a>
	32.21	..... Closing the hearing	<a href="#">32-8</a>
33	.....	Special admissibility matters	<a href="#">33-1</a>
	33.1	..... Attempt to litigate adequacy of showing of interest	<a href="#">33-1</a>
	33.2	..... Attempt to litigate validity of showing of interest	<a href="#">33-1</a>
	33.3	..... Attempt to litigate challenge to status of labor organization	<a href="#">33-3</a>
	33.4	..... Attempt to litigate noncompliance with 5 U.S.C. 7111(e)	<a href="#">33-5</a>
	33.5	..... Attempt to litigate noncompliance with 5 U.S.C. 7120	<a href="#">33-5</a>
	33.6	..... Attempt to litigate unfair labor practices	<a href="#">33-6</a>
	33.7	..... Attempt to litigate supervisory assistance	<a href="#">33-6</a>
	33.8	..... Attempt to litigate petitioner's unit eligibility	<a href="#">33-6</a>
	33.9	..... Evidence with respect to the appropriateness of potential appropriate units other than those which may be identified in the petition	<a href="#">33-6</a>
34	.....	Hearing Officer's Report	<a href="#">34-1</a>
	34.1	..... Purpose	<a href="#">34-1</a>
	34.2	..... Submission	<a href="#">34-1</a>

34.3.....	s Report	<a href="#">34-1</a>
34.4.....	Contents of Report	<a href="#">34-1</a>

### Sample Script

35.....	Script	<a href="#">35-1</a>
35.1.....	Appearances and opening statement	<a href="#">35-1</a>
35.2.....	Receiving formal papers in evidence	<a href="#">35-2</a>
35.3.....	Ascertaining correct names of parties	<a href="#">35-3</a>
35.4.....	Other motions to amend the petition	<a href="#">35-4</a>
35.5.....	Intervention and cross-petition	<a href="#">35-4</a>
35.6.....	Other prehearing motions presented by the parties upon opening the hearing	<a href="#">35-5</a>
35.7.....	Outlining the issues presented by the petition	<a href="#">35-6</a>
35.7.1.....	Appropriate unit	<a href="#">35-6</a>
35.7.2.....	Eligibility	<a href="#">35-6</a>
35.7.3.....	Matters relating to representation (e.g., reorganization, accretion, successorship, Montrose)	<a href="#">35-8</a>
35.7.4.....	Unit consolidations	<a href="#">35-8</a>
35.7.5.....	Determinative challenged ballots	<a href="#">35-1</a>
35.7.6.....	Timeliness issues	<a href="#">35-1</a>
35.8.....	Alternative unit(s)	<a href="#">35-1</a>
35.9.....	Receiving stipulations	<a href="#">35-1</a>
35.10.....	Outlining issues to explore at the hearing	<a href="#">35-1</a>
35.11.....	Summarizing the parties' positions	<a href="#">35-1</a>
35.12.....	Presentation of evidence	<a href="#">35-1</a>
35.13.....	Recommendations on the record	<a href="#">35-1</a>
35.14.....	Before closing the record	<a href="#">35-1</a>
35.15.....	Change of party position	<a href="#">35-1</a>
35.16.....	Additional matters	<a href="#">35-1</a>
35.17.....	Closing remarks	<a href="#">35-1</a>

### Hearing on Objections

36.....	Hearings on election objections	<a href="#">36-1</a>
36.1.....	General	<a href="#">36-1</a>
36.2.....	When hearings on election objections are appropriate	<a href="#">36-1</a>
36.3.....	Nature and objective	<a href="#">36-1</a>
36.4.....	Participating Authority personnel	<a href="#">36-1</a>
36.5.....	Hearing Officer	<a href="#">36-1</a>
36.6.....	Functions and duties of the Hearing Officer	<a href="#">36-2</a>
36.7.....	Counsel for the Regional Office, functions and duties	<a href="#">36-2</a>
36.8.....	Credibility issues in election objections cases	<a href="#">36-3</a>

36.8.1 ..... When the Regional Director determines prior to a hearing that a credibility determination is dispositive of an objection.....

[36-3](#)

### **Evidentiary Issues**

37 .....	Appropriate unit determinations	<a href="#">37-1</a>
A. ....	Standard	<a href="#">37-1</a>
B. ....	Community of Interest	<a href="#">37-1</a>
C. ....	Effective Dealings and Efficiency of Operations	<a href="#">37-2</a>
D. ....	Impact of the Concept of Fragmentation on Unit Determinations	<a href="#">37-4</a>
E. ....	Relevant Information	<a href="#">37-4</a>
38 .....	Scope of unit	<a href="#">38-1</a>
39	Effect of changes in the character and scope of a unit due to a reorganization or realignment	
A.	Purpose and Standards for Resolving Issues Arising from Reorganizations.	<a href="#">39-1</a>
B. ....	Successorship.	<a href="#">39-6</a>
C. ....	Accretion	<a href="#">39-1</a>
D. ....	Competing Claims of Successorship and Accretion.	<a href="#">39-1</a>
E. ....	Consolidated Units	<a href="#">39-1</a>
40	Issues related to the majority status of the currently recognized or certified labor organization	
41 .....	(Reserved)	<a href="#">41-2</a>
42 .....	Dues allotment	<a href="#">42-1</a>
43 .....	Changes in the name of the certified or recognized exclusive representative	<a href="#">43-1</a>
A. ....	Technical or nominal changes	<a href="#">43-1</a>
B. ....	Montrose	<a href="#">43-1</a>
C. ....	Impact of Trusteeships on Reaffiliation Petitions	<a href="#">43-4</a>
44 .....	Schism	<a href="#">44-1</a>
45 .....	Severance	<a href="#">45-1</a>
46 .....	Status of a labor organization	<a href="#">46-1</a>
A. ....	Compliance with section 7103(a)(4) of the Statute	<a href="#">46-1</a>
B. ....	Claims made pursuant to section 7111(f)(1) of the Statute	<a href="#">46-2</a>
47 .....	(Reserved)	<a href="#">47-1</a>
48 .....	Timeliness of election petitions	<a href="#">48-1</a>

49 .....	Unit consolidation	<a href="#">49-1</a>
50 .....	Units including supervisors	<a href="#">50-1</a>
<b>Employee Categories</b>		
51 .....	General considerations	<a href="#">51-1</a>
52 .....	Employee within the meaning of the Statute	<a href="#">52-1</a>
53 .....	Internal audit / investigation function	<a href="#">53-1</a>
54 .....	Administering a labor relations statute	<a href="#">54-1</a>
55 .....	Confidential employee	<a href="#">55-1</a>
56 .....	Employees engaged in personnel work	<a href="#">56-1</a>
57 .....	General attorneys	<a href="#">57-1</a>
58 .....	Management official	<a href="#">58-1</a>
59 .....	Professional employee	<a href="#">59-1</a>
60 .....	Schedule C positions	<a href="#">60-1</a>
61 .....	Security work	<a href="#">61-1</a>
62 .....	Supervisors	<a href="#">62-1</a>
63 .....	Firefighters and nurses	<a href="#">63-1</a>
64 .....	Temporary employees	<a href="#">64-1</a>

Figure 34.4

<b>S REPORT</b> .....	<a href="#">A-1</a>
-----------------------	---------------------

Figure 35

<b>HEARING OFFICER'S SCRIPT</b> .....	<a href="#">B-1</a>
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Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

Figure 37.1

**REPRESENTATION OUTLINE I** ..... [C-1](#)

Figure 37.2

**REPRESENTATION OUTLINE II** ..... [D-1](#)

Figure 37.3

**REPRESENTATION OUTLINE III** ..... [E-1](#)

**TABLE OF AUTHORITIES** ..... [T/A-1](#)



## **INTRODUCTION**

### **HOG 1 and HOG 2**

#### **1 Introduction:**

**1.1 Purpose of the hearing:** The representation case hearing is a formal proceeding conducted in accordance with Part 2422 of the Authority's regulations. It is part of the investigation in a representation case. Its purpose is to inquire into any matter about which a material issue of fact exists, and any time there is reasonable cause to believe a question exists regarding unit appropriateness.

**1.2 Hearings in representation cases are considered investigatory and not adversary.** The purpose of representation hearings is to develop a full and complete factual record. The rules of relevancy and materiality are paramount. There is no burden of proof, except in cases involving objections to the procedural conduct of an election or to conduct which may have improperly affected the outcome of an election.





**Hearing Officer's responsibilities:** The representation hearing is conducted by a Hearing Officer whose primary duty is to ascertain and inquire into the respective positions of the parties and obtain a full, complete factual record regarding all matters at issue so that the Regional Director may make a reasoned decision.

**2.1 Accomplishment of primary duty:** In carrying out this duty, the Hearing Officer requires all parties to participate in a prehearing conference for the purpose of fully discussing, narrowing and, if possible, resolving the issues set forth in the notice of hearing (see § 2422.17 of the regulations). At the hearing, the Hearing Officer has discretion to:

- a) call and question witnesses.
- b) question witnesses called by the parties.

The Hearing Officer does not normally conduct the lead questioning of all witnesses. Although the Hearing Officer is responsible for ensuring the record is complete, the Hearing Officer, if he or she prepares the parties properly, normally asks follow-up questions to fill in gaps in witness testimony - listening to testimony and obtaining testimony on areas not covered. However, the Hearing Officer recognizes that it is his/her responsibility to call necessary witnesses for testimony, if for some reason the parties do not, since the Hearing Officer is responsible for the development of a complete record. If there is some reason why a necessary witness does not testify, the Hearing Officer ensures that the reason is in the record. See also *HOG 11.8*.

- c) call for and introduce appropriate documentary evidence, limited only by the relevance of the evidence to the issues.

These actions may be necessary to explore matters not raised by the parties. In the interest of keeping the record as short as possible, the Hearing Officer has the authority to:

- d) seek stipulations,
- e) confine the taking of evidence to relevant disputed issues, and
- f) exclude irrelevant and cumulative material.

## 2.2

**Other duties:** A Hearing Officer also has the authority to:

- a) grant requests for subpoenas pursuant to § 2429.7 of the regulations (see *HOG 27*);
- b) rule upon offers of proof;
- c) take or cause depositions or interrogatories to be taken when appropriate;
- d) regulate the course of the hearing and, if appropriate, exclude from the hearing persons who engage in misconduct;
- e) note on the record when witnesses are selective when answering pertinent questions and encourage their cooperation in answering all questions;
- f) dispose of procedural requests, motions or similar matters on the record, including motions referred to the Hearing Officer by the Regional Director, and motions to amend petitions;
- g) have the parties state on the record, at any time during the hearing, their respective positions concerning any issue in the case or theory in support thereof;
- h) continue the hearing from day to day or adjourn it to a later date or to a different place by announcement thereof at the hearing or by other appropriate notice;
- i) at the discretion of the Regional Director, make recommendations on the record; and
- j) take any other action necessary not prohibited by the regulations.

## 2.3

**Ethical considerations:**

### 2.3.1

**General:** As noted in chapters 1 and 23 of the Representation Case Handling Manual (*CHM 1 and 23*), the Regional Director is responsible for identifying and defining the underlying issues presented by the filing of a representation petition. Often many of these issues can be narrowed or resolved completely by the Hearing Officer and the parties prior to, or during, the hearing. To the extent the Hearing Officer utilizes alternative

dispute resolution techniques to discuss, narrow and if possible, resolve these issues, the Hearing Officer cannot usurp the Authority's responsibility under the Statute to establish appropriate bargaining units and provide an opportunity for eligible employees to be exclusively represented by a labor organization. The Hearing Officer recognizes at all times that any narrowing or resolution of such issues must be consistent with the Statutory requirements for appropriate units and unit eligibility.

**2.3.2 Caution:** The Hearing Officer ensures that his/her actions described in *HOG 2.1 and 2.2* do not lead to an appearance of undue assistance to a party. The Hearing Officer cannot forget that to the parties s/he is the Authority's representative and that the parties expect objective consideration of their interests and positions. The services of the Hearing Officer are equally available to all parties to the proceeding in the development of the evidence.

**2.3.3 Ex parte communications:** Prior to the start of the hearing, it is appropriate for the Hearing Officer to engage in separate discussions with the parties regarding the status of the case including case issues, evidence, relevant law, and general evidentiary procedures. During these discussions, the Hearing Officer avoids the appearance that s/he is advocating a particular position, favoring a party or assisting a party in developing its position for the case.

Once the record opens, however, the Hearing Officer refrains from such separate discussions to avoid the appearance of providing undue assistance to a party. Generally, any discussion about any facet of the proceeding at this stage is held in the presence of all parties. See also § 2414 of the regulations.





**PREHEARING MATTERS**  
**HOG 3 through HOG 11**

- 3**     **Prehearing preparation:** To prepare for the hearing, the Hearing Officer:
- 3.1**    Meets with the agent initially assigned to the case and/or the Regional Director to discuss issues raised by the petition, unusual circumstances that may have come up during the case and the Region’s efforts to define and narrow issues through contacts with the parties pursuant to § 2422.13 of the regulations.
- 3.2**    Reviews the case file to ensure proper processing has occurred (e.g. showing of interest, if required, has been checked, etc.) and to understand the case by becoming familiar with issues, parties and prior case contacts.
- 3.3**    Ensures that all parties affected by issues raised in the petition were served with a copy of the petition (see § 2422.6 of the regulations) and that any incumbents or employing agencies have responded.
- 3.4**    Ensures that the designated representatives of all known parties have been served with a copy of the Notice of Representation Hearing and all attachments. (*CHM 29.3*)
- 3.5**    Reviews relevant case law including any prior or pending related cases involving the same parties. This includes a review of Authority decisions in representation cases raising similar issues. The purpose of these reviews is to make the Hearing Officer aware of the type of evidence considered to be determinative of specific issues. This knowledge assists the Hearing Officer in his/her duty to obtain a complete and full factual record upon which the Regional Director bases a decision.
- 3.6**    Reviews certification files to obtain background information on the unit structure within the activity or the agency.
- 3.7**    Confirms that the letter and attachments accompanying the notice of hearing:
- a)       establish the time, date and location of the prehearing conference;
  - b)       describe known issues raised by the petition;

- c) address prehearing and hearing procedures and evidentiary requirements;
- d) request the parties to furnish the Hearing Officer and each other with a list of prospective witnesses by a date certain, normally not less than five (5) days prior to the start of the hearing;
- e) include an outline or checklist of the information necessary to adequately address the issues raised by the petition and to ensure a full and complete record (see *HOG 37 through 64* for assistance in preparing these outlines and *RCL 1 through 28* for a substantive discussion about these topics);
- f) include a copy of the petition and amended petition; and
- g) include a copy of FLRA Doc. 1014.

**3.8** Contacts the parties to confirm the teleconference or an on-site prehearing conference. During this conversation, the Hearing Officer also:

- a) reviews his/her understanding of the known issues of the case, obtaining clarification as necessary;
- b) discusses general prehearing and hearing procedures, evidentiary requirements, potential exhibits and witnesses, possibilities of evidentiary stipulations;
- c) ensures the names and addresses of parties are correct; and
- d) confirms the site of and arrangements for a hearing room (see *CHM 29.5*).

**3.9** Conducts exploratory telephone conferences/meetings to further clarify and narrow the issues, and explores possibilities for an election agreement, stipulation or other appropriate resolution in lieu of hearing [see § 2422.13(b) and 2422.17(c) of the regulations].

**3.10** Confirms that the arrangements for the court reporter have been made (*CHM 29.5*);

- 3.11** Ensures that prehearing motions have been acted upon unless such motions have been referred by the Regional Director to the Hearing Officer for action at the hearing. See *HOG 17* concerning processing prehearing motions; and
- 3.12** Discusses, if appropriate, and obtains authorization from the Regional Director to make recommendations on the record. The Regional Director specifies the issues on which the Hearing Officer makes recommendations (*HOG 32.17*).



**4** **Preparing materials for hearing:**

**4.1** **Formal papers:** The Hearing Officer is responsible for the hearing's formal papers which include, as applicable:

- a) petition (with any attachments including service sheet);
- b) amended petition (with any attachments including service sheet);
- c) notice of representation hearing (with attachments described in *CHM 29.3* and a service sheet);
- d) order consolidating cases (with any attachments including service sheet);
- e) order rescheduling hearing (with any attachments including service sheet);
- f) order severing cases (with any attachments including service sheet); and
- g) any other prehearing orders, motions, responses to motions (and any motions not acted upon by the Regional Director prior to the opening of the hearing).
- h) correspondence related to notifying parties who have been identified as affected by issues raised and responses from them if they fail to appear/participate at the hearing. If the party fails to respond at all to the notification letter, the Hearing Officer states on the record who was identified and who failed to respond or declined to participate (see *HOG Script 35*).
- i) if issues surface during the hearing that change the status of a party(ies), the party(ies) are notified and given an opportunity to participate, or in the case of an incumbent, disclaim interest. These documents are added as Authority exhibits (not part of the formal exhibits) See e.g., U.S. Department of the Interior, National Park Service, 55 FLRA 466 (1999) where the Authority found that the Regional Director committed prejudicial error when during the course of the hearing he

found that the employees from each of the affected units constituted a separate appropriate unit, but did not properly notify the former incumbents of their rights with respect to the successorship issue. See *HOG 25*.

The Hearing Officer normally serves the formal papers on the parties at the prehearing conference, but not later than just prior to the start of the hearing. These papers are numbered Authority Exhibits 1a through 1... . Formal papers added during the hearing and are given consecutive numbers. The Hearing Officer is required to prepare two (2) copies of the formal papers for the court reporter and one copy for each party to the proceeding. Each set of formal papers includes an index. One additional copy is prepared for personal use during the proceeding.

The original of the formal papers is maintained in the case file at all times.

- 4.2** **Case file:** The Hearing Officer takes the case file to the hearing for reference. In election cases, the file includes the showing of interest which is secured during the hearing.
- 4.3** **FLRA Form 50, Appearance sheet:** The information on the top of this form is prepared prior to the hearing. An original and a copy are required for the record; the original is retained in the file and a copy is given to the court reporter.
- 4.4** **FLRA Form 56, Exhibits introduced in evidence:** This form(s) is included with the materials for the hearing. The form is designed to enable the Hearing Officer to track the status of exhibits from the point of being marked for identification to disposition by being received in evidence, rejected or withdrawn. These forms are retained in the case file.
- 4.5** **Publications:** The Hearing Officer takes copies of the Statute, the regulations, pertinent sections of the Representation Case Handling Manual (*REP CHM*) and the complete Hearing Officer Guide (*HOG*) to the hearing.
- 4.6** **Other blank forms:** The Hearing Officer also has a supply of petitions, election agreement forms, withdrawal requests, requests

to proceed, extra copies of the Statement of Standard Procedures (FLRA Doc. 1014), subpoenas ad testificandum and duces tecum, and appearance sheets.

- 4.7 Subpoenas:** If necessary, prior to the opening of the hearing, the Hearing Officer prepares subpoenas for the Regional Director's signature pursuant to § 2429.7 of the regulations (see *HOG 27*).

**4.8** **Hearing Officer's script:** The Hearing Officer carries out his/her responsibility to ensure a complete factual record by preparing carefully prior to the start of the hearing. The Hearing Officer becomes:

- a) thoroughly familiar with the case file and the issues presented by the petition,
- b) thoroughly familiar with the hearing procedures described in this guide,
- c) knowledgeable of applicable case law,
- d) understands the concepts behind the Authority's or other applicable decisions and the relevant evidence considered to be determinative of specific issues,

and shares such information with all parties.

In addition to drafting the outline discussed at *HOG 3.7e*, the Hearing Officer drafts a script that outlines the hearing's purpose and lays the foundation for the matters to develop for the record. It also enables him/her and the parties to focus on:

- a) the nature of the hearing,
- b) the issues to address, and
- c) the evidentiary process used to develop the record from which those issues are decided.

The Hearing Officer often drafts this script before the prehearing conference because it provides a starting point at the conference, helps the parties focus on the issues and can very well lead to the resolution of those issues during the conference. See *HOG 35* for a draft script (also Figure 35). Any change in the issues, either the deletion of one and the addition of others, are explained on the

record.



**5**      **Witnesses' appearance:** It is expected that most of the evidence adduced at the hearing is provided through witnesses who have first hand knowledge about the specific matters involved. Therefore, the Hearing Officer is responsible for ensuring that the witnesses who can provide such information are present at the hearing to testify. Getting the parties to focus on who would be the best witness for the issues raised by the petition begins during the first contacts with the parties after the Notice of Hearing has been issued. This can take several forms:

- a)      discussing, during the initial telephone conversation and follow-up conversations, which individuals can best provide information pertinent to the issues, based on their first hand knowledge;
- b)      requesting the parties to provide the Hearing Officer and each other with a list of witnesses and the general parameters of their testimony in advance of the prehearing conference;
- c)      ensuring that once the witness lists are received, the individuals identified on those lists will provide collectively sufficient and relevant testimony to cover all issues raised at the hearing in a non-cumulative manner; and/or
- d)      reviewing the witness list and the parameters of their testimony at the prehearing conference to confirm that all issues raised by the petition are addressed at the hearing.

If the Hearing Officer learns that known witnesses must be subpoenaed in order to testify, see § 2429.7 of the regulations and *HOG 27*. If the Hearing Officer finds during the hearing that additional witnesses are necessary, see *HOG 27.5*.



**6 Official time for witnesses and reimbursement for travel:**

**6.1 Policy:** 5 U.S.C. 7131(c) provides:

Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

**6.2 Official time for witnesses:** Pursuant to § 2429.13 of the regulations, if the participation of any employee is deemed necessary by the Regi

s regular work hours and when the employee would otherwise be in a work or paid leave status. See also *ULP CHM 3E-3*.

**6.3 Travel and Per Diem:** Pursuant to § 2429.14 of the regulations, witnesses (whether appearing voluntarily, or under subpoena) who are deemed necessary at the hearing, shall be paid the same fee and mileage allowances which are paid to subpoenaed witnesses in the Courts of the United States pursuant to 28 U.S.C. 1821, by the party at whose instance the witnesses appear, except that any witness who is employed by the Federal Government shall not be entitled to receive witness fees where such witness is on official time pursuant to § 2429.13 of the regulations. The Authority has said that 5 U.S.C. 7131(c), either by itself, or through 5 C.F.R. § 2429.13, does not authorize the Authority to require an Agency to pay a testifying employee's travel and per diem expenses. *Federal Aviation Administration, Northwest Mountain Region, Renton, Washington*, 51 FLRA 986 (1996) citing *Sacramento Air Logistics Center, McClellan AFB, California v. FLRA*, 877 F.2d 1036 (D.C. Cir. 1989). Thus, the Authority stated that whoever calls a witness pays any necessary travel and per diem.

**6.4** ***Employee representatives:*** The Regional Office may determine that participation by employees as representatives for labor organizations is necessary pursuant to 5 U.S.C. 7131(c). However, the Office of the General Counsel's interpretation of this Statutory provision, as applied to employee representatives, is that such representatives are entitled to official time, but not travel and *per diem*, to participate in representation hearing proceedings. Accordingly, the Hearing Officer makes arrangements with the agency for the release of the employee representatives on official time in accordance with the guidance in *HOG 6.2*.

**7** ***Prehearing exchange of exhibits:*** FLRA Document 1014 states that any party intending to introduce documentary exhibits at the hearing is expected to furnish a copy of each proposed exhibit to the other parties at least five (5) days prior to the hearing in order to facilitate the expeditious development of a full record for decision by the Regional Director. The parties are normally expected to exchange exhibits at the prehearing conference. The Hearing Officer also provides a copy of the formal exhibits at this conference.

Although parties are encouraged to comply with this prehearing practice, parties are not precluded from introducing additional exhibits at the hearing. Where a copy of the exhibit is not tendered to the other parties because it was not contemplated as an exhibit prior to the hearing, a copy of the exhibit is furnished to the other parties at the time it is offered in evidence at the hearing. The parties' exhibits are not numbered prior to their introduction at the hearing.



- 8** **Prehearing conference:** This section pertains to prehearing conferences and:
- a. addresses the purpose and objectives of the conference,
  - b. suggests areas to cover, and
  - c. describes circumstances which may arise that generally require clearance from the Regional Office.

- 8.1** **General policy:** Section 2422.17(c) states:  
A prehearing conference will be conducted by the Hearing Officer, either by meeting or teleconference. All parties must participate in a prehearing conference and be prepared to fully discuss, narrow and resolve the issues set forth in the notification of the prehearing conference.

There can be any number of "prehearing" teleconferences or meetings. They may be held weeks before the hearing and/or immediately before the hearing. However, in some cases, due to resource limitations, an onsite prehearing meeting may not be practical until the day before the hearing opens.

The Office of the General Counsel reads § 2422.17(c) of the regulations in conjunction with § 2422.13(b). This section provides that a Regional Director may require all affected parties to meet to narrow and resolve the issues raised in the petition. In this regard, the Hearing Officer makes every effort in appropriate cases to actively pursue resolution of the issues raised by the petition through the use of one or more meetings with the parties pursuant to § 2422.13(b) of the regulations. Note that while at least one prehearing conference is required for every case, not every case lends itself to the type of meeting envisioned in § 2422.13(b) (for example, objections cases).

**For more information concerning preparing for and conducting meetings held pursuant to § 2422.13(b), see section CHM 25.**

***NOTE: Preparing for the prehearing conference is crucial to obtaining an adequate and concise, but complete record. It is important that the Hearing Officer establish standards or requirements for the parties to prepare properly for the prehearing conference.***

**8.2 Areas to cover (not necessarily in the following order):**

- a) A review of the issues raised by the petition or otherwise identified by the Regional Director;
- b) Interests and positions of the parties on those issues;
- c) A review of the outline and evidence required to obtain a full, complete factual record regarding all matters at issue (HOG 3.7);
- d) A discussion of evidence that the parties have accumulated to coincide with the outlines and issues;
- e) A review and exchange of exhibits and witnesses including correlating discussion about and entry of exhibits to specific witnesses;
- f) When several employees whose eligibility is in dispute have the same title, series and grade (i.e., same job), the parties discuss obtaining testimony from one employee whose testimony is representative of others in the same positions. Details concerning representative testimony or aggregate testimony are resolved prior to the opening of the hearing.

Representative testimony is taken from only one witness (unless there is a stipulation that aggregation of testimony

of identified witnesses is representative of a group of employees" testimony). **NOTE: only one decision is made based on aggregate testimony. If testimony appears to conflict, Hearing Officer decides whether aggregate testimony is inconclusive and additional testimony is required.**

- g) Details relating to taking testimony over the telephone or by video transmission are discussed when the parties have witnesses scattered across the country.
- h) A review of and distribution of relevant Authority case law to determine whether any issues have not been identified and to ensure all relevant evidence is placed on the record through documents or testimony.
- i) An examination and exchange of formal papers (*HOG 4.1 and 10.2.2*);

- j) Possible stipulations to shorten the record or in lieu of the hearing [see 5 U.S.C. 7111(g), *HOG 9 and 26*];
- k) A discussion of hearing procedures including a review of:
  - (i) FLRA Document 1014 including proper procedures for marking, authenticating and entering exhibits; entering joint exhibits; calling witnesses; objections and motions; and
  - (ii) the Hearing Officer's script, if written, to familiarize the parties with the hearing process.
- l) Order of witnesses (*HOG 10.2.3*);
- m) Possible execution of an election agreement or other appropriate resolution in lieu of the hearing [see 5 U.S.C. 7111(g) and *HOG 31*]; and
- n) Arrangements for the hearing room.

**8.3 *Circumstances arising at the prehearing conference which generally require clearance from the Regional Office:***

- a) Parties are willing to stipulate in lieu of hearing (see *HOG 9, CHM 27.10 and 28.11.3*);
- b) Parties are willing to enter into an election agreement or other resolution in lieu of hearing (see *HOG 31 and CHM 28*);
- c) Requests for subpoenas (see *HOG 27*);
- d) Motions to intervene or requests to cross petition (see *HOG 17.3 and 17.4* for prehearing motions to intervene and *HOG 23* for cross-petitions; *CHM 17* for processing requests for intervention and cross-petitions filed prior to the opening of the hearing);

- e) Requests to withdraw intervention or petition (see *HOG 19*);
- f) A party files a challenge to the validity of the showing of interest or a challenge to the status of a labor organization [see *HOG 24* (discusses both types of challenges), *CHM 18.19* (challenges to the validity of the showing of interest) and *HOG 46*, *RCL 10* and *CHM 19* (concerning challenges to the status of a labor organization)]; and
- g) The petitioner requests to amend the petition and the amendment changes the character and scope of the unit (see *HOG 18.7 and 25* and *CHM 13.9, 13.10, and 13.11*).



**9** ***Stipulations in lieu of hearings:*** Stipulations in lieu of hearings are permissible and encouraged in most representation matters. Section 2422.30(b) of the regulations states that when the Regional Director has reasonable cause to believe a question exists regarding unit appropriateness, the Regional Director issues a notice of hearing. In accordance with 5 U.S.C. 7111(g), the parties may waive a hearing by entering into a stipulation for the purpose of a consent election, i.e., enter into an election agreement. However, 5 U.S.C. 7111(g) is balanced against 5 U.S.C. 7112(a) which requires that the Authority determine the appropriateness of any unit.

Thus, in cases involving questions regarding unit appropriateness, a hearing may be waived by the parties upon their agreement to an election; however, the Regional Director may approve such agreement only if the unit meets the appropriate unit criteria set forth in 5 U.S.C. 7112(a). See United States Army Safeguard Logistics Command, Huntsville, Alabama, 2 A/SLMR 582 (1972); Department of Transportation, National Highway Traffic Safety Administration, 2 A/SLMR 433 (1972); citing Army and Air Force Exchange Service, White Sands Missile Range Exchange, White Sands Missile Range, New Mexico, 1 A/SLMR 147 (1971). See CHM 27. The OGC interprets 5 U.S.C. 7111(g) to permit the parties to enter into a stipulation addressing all appropriate unit issues in lieu of a hearing, so long as the stipulation includes a waiver of the parties' right to a hearing.

For information about preparing stipulations, see *HOG 26*.



**10** **Pre-opening preparations:** This section addresses actions to be taken by the Hearing Officer during the time period following the conclusion of the prehearing conference and prior to the opening of the hearing.

**10.1 To do on your own:**

- a) Draft or revise script as discussed in *HOG 4.8*;
- b) Update outline discussed in *HOG 3.7* and if not already completed, add key factors from Authority decisions that relate to the issues;
- c) Read carefully and thoroughly potential exhibits to ensure relevancy to issues raised by the petition (see *HOG 15*); and
- d) Review research materials and prepare copies to take to the hearing (*HOG 8.2f*).

**10.2 Immediately prior to the opening of the hearing:**

**10.2.1 Complete appearance sheet, FLRA Form 50:**

Prior to the opening of the hearing, the Hearing Officer circulates the original and a copy of the Appearance Sheet among the parties. The Hearing Officer reminds the parties to comp

plete the appearance sheet prior to the hearing. Accuracy and legibility of the entries is also important since the court reporter uses this information when entering the parties' appearances on the record. Any representative for any party arriving late completes the appearance sheet promptly upon arrival.

A representative for a party enters his/her appearance on the line designating the "Main Representative." Any additional appearances are entered on the following lines. However, the name of any individual whom a party intends to use solely as a witness is not entered on the appearance sheet.

After all parties have entered their appearance, the Hearing Officer collects the forms and inspects them for completeness, legibility, etc. The Hearing Officer retains the original appearance sheet at the conclusion of the hearing. A copy is provided to the court reporter at the beginning of the hearing to assist the court reporter when spelling names and addresses of parties whose appearance is entered into the record.

**10.2.2 *If updated since the prehearing conference, re-examine the formal papers:***

Prior to the opening of the hearing, each of the parties is afforded the opportunity to examine any updated formal papers which will be offered in evidence as Authority exhibits (see *HOG 4.1*). Additional exhibits may have been added to the formal papers since the prehearing conference. Copies are also provided to the parties. This is generally done after the parties have completed the Appearance Sheet. Showing the exhibits to the parties before the hearing begins can save the time which would otherwise be required for the examination during the hearing. If any party attempts to raise any objection during the prehearing examination regarding the admissibility of an exhibit, the Hearing Officer instructs the party to reserve the objection until the appropriate time during the hearing.

Once the hearing opens, when the Hearing Officer offers the formal papers in evidence, the Hearing Officer states that the formal papers were shown to parties prior to the opening of the hearing. Like any exhibit offered in evidence, the parties have the right to examine the formal papers and to raise any objections (see *HOG script 35.2* for a discussion on handling objections to the introduction of the formal papers). Any objection made during a hearing regarding the admissibility of any of the formal papers is, after being heard, overruled (see *HOG script 35.2*).

**10.2.3 *Order of witnesses:***

Prior to the opening of the hearing, the parties discuss the order in which the parties will proceed with their witnesses. The activity or

agency normally proceeds first with its witnesses to achieve an orderly development of the record. This is particularly important where the appropriateness of the unit is in issue and the activity's witnesses are usually more knowledgeable about the activity's mission, organization, operations, bargaining history, etc. than the union's witnesses.

The Hearing Officer is not bound by the preference or agreement of the parties regarding the order of witnesses, particularly where the Hearing Officer determines that the development of the record or the testimony of certain witnesses requires proceeding in a different manner than that desired by the parties. In all instances, however, the Hearing Officer encourages all parties to cooperate.

**10.2.4 Check again into possibilities for stipulations, election agreement or resolution of other issues (see HOG 26 and 31 as appropriate);**

**10.2.5 Arrange hearing room:**

When the hearing is not being held in a Regional Office hearing room or other courtroom, the room being used for the hearing contains appropriate furniture that can be arranged in a manner suitable for an administrative proceeding. The arrangement provides for designated adjacent areas/seating for each party's representative(s), the testifying witness, the court reporter and the Hearing Officer. Separate seating within the room (or in a suitable nearby room) is also made available as a witnesses' waiting area. Once these needs have been accommodated, a spectator seating area is provided if space permits.

**11 Things for the Hearing Officer to keep in mind as the hearing opens:**

**11.1 Recesses for breaks, lunch, etc.:** The Hearing Officer provides the parties with recesses for breaks, lunch, etc., when necessary, consistent with the requirement to develop a full and complete record as expeditiously as possible. The Hearing Officer decides the number and length of any break.

**11.2 Smoking:** Rules on smoking at the hearing are consistent with the smoking policy of the building where the hearing is held. Otherwise, the smoking policy is within the discretion of the Hearing Officer.

**11.3 Decorum of parties and witnesses:** Parties and witnesses are expected to conduct themselves appropriately at all times and to cooperate with the Hearing Officer. If any party behaves inappropriately or fails to cooperate, the Hearing Officer promptly and firmly instructs the offending individual(s) that this behavior is not tolerated. If the misconduct or lack of cooperation continues, the Hearing Officer recesses the hearing and contacts his/her supervisor for guidance. Sanctions may be imposed dependent on the offensive individual's role at the hearing. [See § 2422.15 of the regulations, HOG 2.2(e), and CHM 22, 25.10 and 25.11].

**11.4 *Things to discuss with the court reporter:*** The Hearing Officer knows in advance of the hearing the required forms and takes them with him/her. At the hearing, the Hearing Officer checks with the court reporter to ascertain what forms to complete for the court reporting service. If the Hearing Officer wants to conduct part of the hearing outside normal business hours, the Hearing Officer ascertains the court reporter's availability and checks the court reporting contract.

**11.5 *Hearing Officer's demeanor towards parties:*** The Hearing Officer is keenly aware that the representation hearing is a formal proceeding and that the Hearing Officer represents the FLRA. The Hearing Officer's demeanor sets the tone for the hearing. By dressing and conducting himself/herself in a manner consistent with the formality of the proceeding, the Hearing Officer lends credibility to the hearing process. The parties' representatives are treated with courtesy and respect. They are addressed by their surnames at all times while on the record. At all times, the Hearing Officer avoids making inappropriate or "off the cuff" remarks - such as accusing a party rep of "playing games;" allowing a witness to testify about an issue the Hearing Officer believes is irrelevant but states "put it on for whatever its worth."

**11.6 *Hearing Officer's demeanor towards witnesses:*** Normally, the witnesses' participation in representation hearings is voluntary. They are:

- a) treated with courtesy and respect;
- b) if necessary, offered assistance in taking the witness stand;
- c) if requested, provided with an explanation of hearing procedures; and
- d) always thanked upon completion of their testimony.

**11.7 *Off the record remarks:*** Off-the-record discussions may prove

useful in narrowing or resolving issues. The Hearing Officer ensures that pertinent off-the-record discussions are summarized on the record to:

- a) document the progression of the hearing,
- b) prevent abuse of the hearing process, and
- c) permit a resolution of the issues consistent with the Statute

When appropriate, the Hearing Officer asks the parties' representatives to restate for the record their interests and/or positions expressed while off the record.

**11.8 *When the parties elect to allow the Hearing Officer to act as the primary examiner:*** In very rare circumstances, the parties may ask the Hearing Officer to act as the primary examiner of the witnesses. In effect, the parties are allowing the Hearing Officer to "make the record." This role is discouraged and only used when the parties are so inexperienced that the record would be lengthy, cumbersome and inadequate without the Hearing Officer's involvement. The Hearing Officer obtains approval from the Regional Director prior to assuming this role and ensures the record reflects that the parties agreed to the Hearing Officer assuming the lead questioning and have no objection to it.

**11.9 *When the Hearing Officer is uncertain on how to proceed:*** If at any point during the hearing, the Hearing Officer is uncertain on how to proceed, s/he recesses the hearing and contacts the supervisor. It is never wrong to "call home."

## **EVIDENTIARY MATTERS** **HOG 12 through HOG 15**

**12**     **Evidentiary and procedural matters:** Representation hearings are considered investigatory and not adversarial in nature. At the same time, such hearings are formal proceedings. Their purpose is to develop a full and complete factual record upon which the Regional Director may base a decision. The rules of relevancy and materiality are paramount. There is no burden of proof except in objections cases (see *HOG 36* for Hearings on Election Objections). The technical rules of evidence are followed only to maintain the formality of the proceedings. They are not used for the purpose of excluding evidence. *HOG 12 through 31* are designed to address evidentiary and procedural considerations which the Hearing Officer may confront at any time during the course of the hearing process.

**13**     **Considerations in developing evidence:**

**13.1**    **Best evidence rule:** Generally, the two most common methods of developing record evidence are through witness testimony and the introduction of documents.

**13.1.1** **Testimony:** The best evidence obtained from witnesses is testimony provided by those with first hand knowledge of the matters under examination.

**13.1.2** **Introduction of documents:** To prove the contents of a document, the best evidence is the document itself. Production of the document prevents fraud or error as to the exact words of the document. While oral testimony regarding the content of a document is permissible, the Hearing Officer makes every effort to secure the document in order to complete the record. The Hearing Officer is responsible for ensuring the document is relevant to the proceeding. Any inconsistencies and ambiguities in the document itself and as compared to other documents and testimony are clarified in the record. Any codes or abbreviations are explained on the record.

**13.2**    **Ruling on the admissibility of evidence:** The following issues

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

may arise as to the admissibility of evidence:

**13.2.1 Foundation:**

- a) The foundation for a witness' testimony is demonstrated by establishing a basis for the witness' knowledge regarding the matter about which s/he will be questioned. The common phrase is "qualifying a witness." Asking a witness to state his/her name, title, position and to describe his/her position is basic information required. In addition, *when, where, what time, and who was present* are the types of preliminary fact questions which are asked to establish the witness' ability to testify. Foundation questions also help determine if the witness' testimony is going to be relevant.
  
- b) The foundation for the admission of documents is established by authenticating those documents. This is accomplished by showing the document to the witness through whom it is being offered in evidence and asking the witness to describe it. The witness, based upon firsthand knowledge, describes the nature and content of the document. In most instances, this completes the identification and authentication of the document.

**13.2.2 Relevancy:** Relevancy concerns whether the evidence offered is going to help decide the matters under consideration. If not, the Hearing Officer considers excluding it, regardless of whether any party objects. Relevancy is a factor not only in oral testimony, but also in documentary evidence (see *HOG 15.9* for a discussion applying the concept of "relevancy" to bulky exhibits).

**13.2.2.1 Evidentiary considerations - unit:** Decisions regarding unit determinations reflect the conditions of employment that exist at the time of the hearing rather than what may exist at the time in the future unless there are definite and imminent changes planned by the agency. Defense Logistics Agency, Defense Contract Management Command, Defense Contract Management District,

North Central, Defense Plant Representative Office-Thiokol, Brigham City, Utah (*DPRO-Thiokol*), 41 FLRA 316 (1991). See also *RCL 1* and *HOG 37*.

**13.2.2.2 Evidentiary considerations-employee eligibility:**

Determinations of an employee's unit eligibility are based on testimony as to an employee's actual duties at the time of the hearing, rather than on duties that may exist in the future. See *Department of Housing and Urban Development, Washington, D.C.*, 35 FLRA 1249, 1256-1257 (1990); : Materiality is related to relevance, but is not identical. Materiality concerns the degree of importance of the evidence. If the evidence is relevant but of minuscule importance, it may be excluded (see also *HOG 13.2.7* regarding cumulative evidence).

**13.2.5 Hearsay and admissions:** Hearsay is evidence not based upon the personal knowledge of the witness but on what the witness has heard others say. It is secondhand evidence as distinguished from original evidence (e.g., "Bill told me that Joe quit the union," rather than "Joe said he quit the union."). Hearsay is distinguishable from admissions made by a party opponent. What a *party or its agents* say or do in the presence of a party opponent or its agents is not hearsay but an admission (e.g., "My supervisor told me that he told Bill to quit the union or be fired."). This is an admission by an agent of a party and is not hearsay. Such testimony can be received to prove the truth of the matter asserted.

While hearsay is received into evidence at the discretion of the Hearing Officer, it is of little evidentiary value. The Hearing Officer insists that parties produce other witnesses or evidence that is more probative of the point.

**13.2.6 Leading questions:** A leading question is one in which the question suggests an answer to the witness; a leading question calls for a yes or no answer. In effect, the party's representative is doing the testifying by using leading questions.

On direct examination, leading questions are acceptable in preliminary areas (e.g., "You are employed by...?" or "You're the Personnel Officer of the Activity?"). They are not permitted in

critical areas (e.g., "Isn't it true that the mission of the activity is...?" or "Isn't it true that you type labor relations documents?"). Leading questions asked by the questioner on direct examination are permitted initially when a witness appears intimidated by the process, hostile, identifies with the opposing party, surprises the questioner with his/her responses, is mentally impaired, or otherwise uncooperative. On objection, or on the Hearing Officer's own motion, the questioner of a "friendly" witness is cautioned not to use leading questions in critical areas. The Hearing Officer assists the parties by illustrating the proper phrasing of non-leading questions. The Hearing Officer is not permitted to ask leading questions (see *HOG 32.16*, examination by Hearing Officer).

During cross-examination, that is, questioning by representatives of the other parties, leading questions are permissible.

- 13.2.7 Oral evidence that contradicts written evidence:** Oral evidence that appears to contradict written evidence is not excluded if it is necessary to complete the record. Otherwise, it can be excluded if it is not probative.
- 13.2.8 Cumulative evidence:** Cumulative evidence is repetitive evidence on a point that has already been fully established. Such evidence burdens the record and is excluded.
- 13.2.9 Opinion evidence:** Opinion evidence is what the witness thinks or believes in regard to the matter in dispute as distinguished from personal knowledge of the facts themselves. Generally, opinion evidence is not relied on in lieu of fact.
- 13.2.10 Judicial notice:** Judicial notice allows a Hearing Officer to shortcut the taking of the testimony regarding matters that are common knowledge (e.g., "The U.S. Department of Labor is an agency of the Federal government."). An objecting party is normally permitted to show the contrary by competent evidence (see also *HOG 29, Offer of Proof*).
- 13.2.11 Official notice:** Official notice allows an agency to recognize its own proceedings and decisions (e.g., recognizing the relevant facts in a related Authority decision). The matter of which official notice is taken may or may not be dispositive of the current issue. For

example, earlier jurisdictional facts are brought up to date, etc. The Hearing Officer takes such notice at the request of a party or on his/her own motion, after notifying the parties of the ruling. (e.g., “The Authority decided in 6 FLRA 52 that it will not generally clarify the bargaining unit status of vacant positions.”) An objecting party is normally permitted to show the contrary by competent evidence. (See also HOG 29, *Offer of Proof*).

**13.2.12 Administrative notice:** Administrative notice allows a Hearing Officer to recognize information obtained from a commonly recognized source for that information. [see U.S. Department of Defense, National Guard Bureau, New York National Guard, Latham, New York, 46 FLRA 1468 at 1474 (1993) where administrative notice was taken to OPM’s publication “Union Recognition in the Federal Government.”] An objecting party is normally permitted to show the contrary by competent evidence. (See also HOG 29, *Offer of Proof*).

**13.3 Theories of res judicata:** A party may raise the argument in a case that there is controlling precedent and the precedential case “is res judicata in the instant case.” : The doctrine of claim preclusion bars a subsequent suit between the same parties on the same cause of action where there has been a final judgment on the merits of that cause of action. *NMB*, 54 FLRA 1474 (1998) citing Stein, Mitchell and Mezines, *Administrative Law*, 40.01 at 40-2. See also United States Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas and American Federation of Government Employees, AFL-CIO, National Border Patrol Council, 41 FLRA 259, 263 (1991).

**13.3.3 Doctrine of issue preclusion:** The doctrine of issue preclusion “prevents a second litigation of the same issues of fact or law even in connection with a different claim or cause of action.” *NMB* quoting U.S. Department of the Air Force, Scott Air Force Base, Illinois, and National Association of Government Employees, 35 FLRA 978, 982 (1990). The Authority stated in *NMB* that this doctrine does not apply, however, where there is a question of whether the underlying legal doctrines at issue remain valid and cited *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591,

599-600 (1948); *Western Oil and Gas v. U.S. Environmental Protection Agency*, 633 F.2d 803 (9<sup>th</sup> Cir. 1980). Further, the Authority found that the doctrine of issue preclusion is not intended to prevent an adjudicatory body, such as the Authority, from reexamining applicable legal principles where necessary.

**14** **Scope of cross examination:** In adversarial proceedings, cross examination is normally limited to matters raised on direct examination and/or matters going to the witness' credibility. This has no application in representation hearings. A cross-examiner who wants to question a witness regarding relevant matters is permitted to do so irrespective of whether the subject was raised on direct examination.

The Hearing Officer is obligated to control cross examination regarding materiality, relevancy and necessity. If a party's cross examination is repetitive of matters already on the record or enters into irrelevant areas, the Hearing Officer instructs the party to move to another area of examination. If the party fails to follow these instructions, the Hearing Officer normally disallows the line of questioning.

**15** **Exhibits:**

**15.1** **General overview:** Exhibits are introduced either through a witness, by stipulation, or as a joint exhibit of the parties. A party seeking to have an exhibit admitted in evidence through a witness adheres to specific procedural steps:

- a) **Mark for identification:** the party representative has the document marked for identification by the court reporter (see *HOG 15.2* for a discussion on marking exhibits).
- b) **Show to other parties:** the document is shown to the other party's representative before it is offered to the witness.
- c) **Authenticate by witness:** the witness is then given the document and asked if s/he can authenticate it by identifying it. The witness is examined on any relevant

details (see *HOG 13.2.1*).

- d) **Offer into evidence:** if the document is offered into evidence, the other parties have the right to conduct a *voir dire* examination and/or object (see *HOG 15.6* for a discussion of *voir dire* examinations).
- e) **Ruling by Hearing Officer:** after allowing the parties to state their positions regarding any objection, the Hearing Officer rules on the objection and on the admission of the exhibit by either receiving or rejecting the exhibit (see *HOG 15.8* for a discussion of the Rejected Exhibit File).

This process usually takes very little time. The Hearing Officer ensures that the parties do not take testimony on the exhibit until after it is offered and received into the record.

**15.2 *Marking exhibits for identification:*** An exhibit is marked for identification by designating the party; i.e., Petitioner, Activity, Intervenor or the Authority and the exhibit number on the face or cover sheet of the document. Exhibits for each party are numbered consecutively. For example, each of three exhibits offered in evidence by the petitioner is marked Petitioner 1, Petitioner 2 and Petitioner 3.

Generally, the party offering the exhibit hands the document to the reporter, asking that

s Exhibit 4,” etc. The reporter either stamps the document with a special exhibit stamp, showing various entries, including a place for the designation of the party and the number identifying the exhibit, or simply writes the name and number on the face of the exhibit. When the exhibit is marked for identification, two copies of all exhibits are submitted to the Hearing Officer and a copy to all other parties [§ 2422.20(b) of the regulations]. The document is then returned to the party. The Hearing Officer enters the exhibit number and description on FLRA Form 56. In any hearing involving more than one intervenor, the identity of each intervenor is reflected on the respective exhibits; e.g., Intervenor

AFGE 1; Intervenor NFFE 3; etc.

- 15.3 *Marking Authority exhibits:*** HOG 4.1 describes the manner in which the Authority's formal documents are marked. These documents are marked differently than other exhibits. However, Authority exhibits other than the formal exhibits are numbered consecutively beginning with Authority 2.
- 15.4 *Authenticating the exhibit:*** (see HOG 13.2.1). The Hearing Officer permits parties to raise questions with respect to information contained in exhibits at the hearing. The Hearing Officer gives both parties an opportunity to address the exhibits with appropriate questions before they are entered and with substantive questions to the appropriate witness after they are entered.
- 15.5 *Offering the exhibit in evidence:*** After an exhibit is identified and authenticated, the party offers it into evidence. The Hearing Officer then asks if there are any objections to the receipt in evidence of the proposed exhibit. If a party decides not to offer an exhibit into evidence, the exhibit is withdrawn; the exhibit is not left "dangling" on the record.
- 15.5.1 *Objection to exhibit:*** If a party attempts to enter an exhibit through a witness who cannot testify to its authenticity and the parties object, it is a better practice to ask the party trying to enter the exhibit to hold off until a witness who can authenticate it can testify, rather than rejecting it outright. Formality is important, but not as important as a good clean record that makes sense.
- 15.5.2 *Handling exhibits that the parties do not want to enter:*** There may be occasions when a party does not want to enter an exhibit, but the Hearing Officer considers the document critical for the record. The Hearing Officer then introduces it as his/her own exhibit and marks it as an Authority exhibit.
- 15.6 *Voir dire:*** Technically, in nonadversary proceedings, there is no need for *voir dire* examination. Occasionally, however, a party may request permission to examine the witness on *voir dire*, which is defined as the preliminary examination of a witness where an objection is made on the basis of the witness's competency or interest. Since this type of examination is preliminary to possible objections being raised by the party, the Hearing Officer permits such

questioning for this limited purpose.

For example, assume that the parties are in dispute as to whether a certain letter bearing the signature of the Director of Labor Relations, deceased, was, in fact, signed by the latter. The witness on the stand, through whom the activity is seeking to introduce the letter into evidence, is questioned by another party on *voir dire* regarding the circumstances under which the witness purportedly saw the letter being signed by the former Director of Labor Relations.

- 15.7 *Ruling by the Hearing Officer:*** Every exhibit that is offered into evidence is ruled on by the Hearing Officer as to its admissibility. Objections by one or more of the parties, including any renewed objections by a party after completing its examination of a witness on *voir dire*, is considered. The Hearing Officer allows the parties to state their positions regarding any objection before ruling on the admissibility of the exhibit. If the Hearing Officer is satisfied as to its relevancy and materiality, the objection, if any, is overruled and the exhibit is received into evidence. If the exhibit is deemed inadmissible, the objection is sustained and the exhibit is placed in the Rejected Exhibit File, if not withdrawn by the offering party. The Hearing Officer makes the appropriate mark on the FLRA Form 56 regarding the final disposition of the exhibit. The Hearing Officer does not state a reason for receiving or rejecting an exhibit in response to an objection. See *HOG 28.4*.
- 15.8 *Rejected exhibit file:*** An exhibit which has been ruled upon as being inadmissible is either withdrawn or placed in the Rejected Exhibit File at the option of the offering party. By retaining the exhibit in the rejected file, the party preserves the right to seek a reversal of the ruling by the Regional Director (or the Authority, if the Decision is appealed) and have the exhibit considered as evidence. On the other hand, if the party elects to withdraw the rejected exhibit, such post-hearing arguments cannot be raised.
- 15.9 *Bulky exhibits:*** The Hearing Officer does not permit a party to offer into evidence any voluminous exhibit, such as a manual of personnel policies and practices, detailed job descriptions, payroll records, etc. unless the particular pages, section, paragraphs, etc.

for which it is being offered are specified. In addition, the offering party explains the relevancy of such material:

- a) to allow the parties to consider whether they wish to object to its admissibility, and
- b) to provide the Hearing Officer with an informed basis upon which to make a ruling.

Where necessary, a recess is granted, either upon a party's request or upon motion by the Hearing Officer, to allow the offering party to delineate the desired portion(s). A recess also allows the Hearing Officer and parties to review the exhibit to assess the relevancy and materiality of the particular document. If necessary, the parties and/or the Hearing Officer may request that the remainder of the exhibit be admitted on to the record.

**15.10 *Joint exhibits:*** A joint exhibit is an exhibit that is offered into evidence by all of the parties (with the exception of the Hearing Officer). It is usually a document that has been prepared for the hearing by the parties or is an official document of the agency. If the parties enter joint exhibits, they:

- a) mark them for identification as "Joint Exhibit 1 ...,"
- b) stipulate to its authenticity, and
- c) offer it into the record.

The parties have the option of selecting a witness to introduce the joint exhibit or may enter it by stipulation. Either way, the parties ensure that the witness or the stipulation describes the document's relevance when authenticating it. It is important that a witness, mutually selected by the parties, tie the joint exhibits to the issues of the case unless the parties do it in a stipulation. In short, the Hearing Officer exercises judgement and ensures the record is complete as to the relevance of the joint exhibits.

**15.11 *Documentary evidence that the parties refuse to provide to all***

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

**parties:** The Hearing Officer does not normally agree to review documentary evidence that a party refuses to provide to all parties. In other words, there is usually no claim of privilege in a representation hearing.

However, there are some exceptions such as petitions involving 5 U.S.C. 7112(b)(6) or (7) eligibility issues (security work and investigation and audit functions). The Activity representative in these types of cases may request the Hearing Officer to review certain documentation in-camera. The Hearing Officer is required to adequately and accurately describe the content of the memorandum or other documentation so as to provide meaningful direct and cross-examination. (Note as reflected in the expression “in camera,” the document is not put on the record.) See also Part 2, Chapter J of the Litigation Manual.

If issues arise at hearing concerning “in camera” inspections of exhibits, the Hearing Officer “calls home” for advice.

**15.12 Summary exhibits:** Voluminous documents may be reduced to summary form for better understanding. Upon request, the opposing party is given the opportunity to examine the underlying documentation on which the summary is based. This examination is often done at periods of time outside of the normal hearing hours. The summary is typically received into evidence with the understanding that the opposing party may object to the summary exhibit after completing review of the entire document.

**15.13 Custody of exhibits:** All exhibits which are received into evidence or placed in the rejected file are retained in the possession of the court reporter. During the proceedings, both sets of exhibits provided for the record are held by the reporter when not being used for some purpose relevant to the hearing by the Hearing Officer or by any of the parties. Similarly, during the period of adjournment to a specific date, the reporter retains the exhibits. In the latter instance, the Hearing Officer reminds the reporter of the obligation to return to the hearing with the exhibits or to arrange with the reporting company to transfer the exhibits to the reporter who will be at the hearing when it resumes. However, where the hearing is postponed or adjourned for an indefinite period, the

reporter usually forwards the exhibits to the Regional Office pending resumption, if any, of the hearing.

After the close of the hearing, the original and duplicate set of the transcript and exhibits are sent to the Regional Director by the court reporter.

**15.14 *Request to withdraw original copy of exhibit:*** After the original exhibit has been received into evidence, the offering party may request leave of the Hearing Officer to withdraw it for the purpose of substituting a copy. When this request is granted, the Hearing Officer reminds the party withdrawing the original of his/her responsibility for making the copy(ies) and returning the original as soon as possible to the court reporter. The Hearing Officer cannot assume responsibility for holding the copy or transmitting it to the court reporter on behalf of the borrowing party.

**15.15 *Receipt of exhibit after conclusion of hearing:*** An exhibit that a party is unable to introduce during the hearing or an exhibit that the Hearing Officer has determined is necessary, may be offered after the hearing has ended (but not closed). Under these circumstances, the parties enter into a stipulation at the hearing that they have no objection to the exhibit being received into evidence after the hearing has concluded. The Hearing Officer then states on the record that the record will remain open until a specified date for the sole purpose of receiving the document into the record, and that upon receipt of the particular exhibit, the hearing will be closed.

Alternatively, the Hearing Officer is permitted to rule that the hearing will remain open, upon completion of all other testimony, for the limited purpose of permitting the party to offer the named exhibit by a designated date. The ruling also includes a statement that the party entering the document will serve all other parties with a copy of the proposed exhibit and that the positions of the parties regarding the exhibit are due in the Regional Office not later than a specified date. After receiving the exhibit, the Hearing Officer issues a written order setting forth the ruling on the proffered exhibit as well as formally closing the record.

In view of the delay resulting from this procedure, the Hearing Officer considers carefully the materiality of the proposed exhibit when deciding whether to permit a party to submit an exhibit after the hearing has been concluded.

If the exhibit is not received by the date specified or is not legible, the Hearing Officer consults with the Regional Director, and thereafter either closes the record or grants additional time to submit a usable document. Consideration is given to the relevance and significance of the document to the issues to be decided. See *CHM 59* for a discussion of Orders and Figures C59.2 and C59.3.

## **MOTIONS**

### **HOG 16 through HOG 21**

#### **16 Motions:**

- 16.1 Purpose of a motion:** Section 2422.19(a) of the regulations states: "Subsequent to the issuance of a Notice of Hearing in a representation proceeding, a party seeking a ruling, order, or relief must do so by filing or raising a motion stating the order or relief sought and the grounds therefor. Challenges and other filings referenced in other sections of this subpart may, at the discretion of the Regional Director or Hearing Officer, be treated as a motion."
- 16.2 Service of motion:** Motions are served according to §§ 2422.4 and 2429.24 through § 2429.27 of the regulations.
- 16.2.1 Basic rule:** The regulations require that every petition, motion, brief, request, challenge, written objection, or application for review is served on all parties affected by issues raised in the filing. The service includes all documentation in support thereof, with the exception of a showing of interest, evidence supporting challenges to the validity of a showing of interest, and evidence supporting objections to an election. The filer is required to submit a written statement of service to the Regional Director. (See § 2422.4 of the regulations and *CHM 6* and *CHM 7*)
- 16.2.2 Specific rule:** An original and four (4) copies of any motion are filed with the Regional Director or the Hearing Officer by the party

filing the motion (§ 2429.25 of the regulations). Copies are served by the filing party on all other parties to the proceeding. A statement of service accompanies the original motion.

- 17 Processing prehearing motions:** This section provides general information about processing motions that are filed after the Notice of Representation Hearing issues, but before the hearing opens.
- 17.1 Generally:** Motions are filed at any time prior to the opening of the hearing. All motions made prior to a hearing and any responses are made in writing and filed with the Regional Director. Responses to such motions are filed within five (5) days after service of the motion [see § 2422.19(b)]. Copies are served on all parties. A statement of such service accompanies the original. If the Hearing Officer receives a motion from a party prior to the opening of the hearing, s/he gives the motion to the Regional Director for action. Regional Directors have the option of ruling on all motions filed with them prior to the hearing or they may refer such motions to the Hearing Officer for ruling at the hearing with certain exceptions noted herein (see *HOG 17.4, 17.5 and 23*). When a motion is referred to the Hearing Officer, all parties are notified that the motion has been referred to the Hearing Officer. A prehearing ruling made by the Regional Director is in writing and served on the parties (see § 2422.19(b) of the regulations). All prehearing motions, any responses thereto, and any rulings by the Regional Director are made part of the record as Authority exhibits.
- 17.2 Prehearing motion to postpone:** A motion for postponement of the hearing is filed with the Regional Director and a copy served on each of the other parties. The request is required to be specific as to the reason(s) for the desired postponement, and sets forth the suggested date(s) for rescheduling the hearing. The moving party is also required to ascertain in advance and set forth in the request, the respective positions of the parties regarding the request (See FLRA Document 1014 and *CHM 29.7.4*).
- 17.2.1 Policy on granting prehearing motions to postpone:** Cases set for hearing are heard on the day set, and postponements are granted only for good cause shown.

- 17.2.2 Granting the motion to postpone:** When the Regional Director grants a motion to postpone a representation hearing, the Regional Office notifies the reporting service immediately. A FLRA Form 48, Order Rescheduling Hearing, is also issued and served on all the parties. The following sentence is inserted immediately below the title, namely, “After due consideration of the request by the (activity) (petitioner) (intervenor) . . . .” When completing the remainder of the form, the date to which the hearing is being rescheduled is inserted. The time and place is restated in the Order even if unchanged.
- 17.2.3 Denying the motion to postpone:** If the Regional Director denies a motion to postpone a representation hearing, the parties are notified immediately by telephone, followed by an Order Denying Motion to Postpone (see *CHM 59* for a discussion about preparing Orders).
- 17.2.4 Indefinite postponement:** In appropriate circumstances, a Regional Director has discretion to postpone a hearing indefinitely by issuing an Order Postponing Hearing Indefinitely (see *CHM 59*). A Regional Director may order an indefinite postponement upon receipt of a motion from a party(ies) or on his/her own.
- 17.2.5 Resumption of indefinitely postponed hearing:** An Order Rescheduling Hearing as shown in Figure C29.7C is issued and served on all parties and the reporting service where a hearing that has been postponed indefinitely is scheduled to resume.
- 17.3 Prehearing motions (requests) to intervene, cross-petition, challenges to the validity of the showing of interest and challenges to the status of a labor organization:** The regulations provide that a motion to intervene, cross-petition, challenge to the validity of the showing of interest or challenge to the status of a labor organization may be filed at any time prior to the opening of a hearing (see §§§ 2422.8, 2422.10, and 2422.11 of the regulations), unless good cause is shown for granting an extension. If no hearing is held, a request to intervene, cross-petition, challenge the validity of a showing of interest or the status of a labor organization must be filed prior to action being taken pursuant to § 2422.30. This subsection provides an overview of these procedures. For specific guidance, see referenced chapters

in the *REP CHM* or the *HOG*.

- a) *Prehearing cross-petitions or motions to intervene* are normally processed in the Regional Office in accordance with *CHM 17* as soon as they are received. Cross-petitions or motions to intervene that are received too close to the hearing to process are referred to the Hearing Officer and processed in accordance with *HOG 17.4*, *HOG 23* and *CHM 17.3*. See also *HOG script 35.5*. Cross-petitions or motions to intervene filed during the hearing are processed according to *HOG 18.4*.
- b) *Challenges to the validity of the showing of interest* are not referred to the Hearing Officer, but are handled administratively in accordance with *CHM 18.19* (challenges to the validity of the showing of interest). Challenges to the validity of the showing of interest that are submitted to the Hearing Officer prior to the opening of the hearing or after the hearing opens are referred to the Regional Director (see *HOG 24* and *33.2*). These challenges raise threshold issues that are investigated and decided prior to issuing the Decision and Order.
- c) *Challenges to the status of a labor organization* are normally processed in the Regional Office in accordance with *CHM 19*.
- (i) *Timeliness*: If the challenge is filed too late to investigate and decide prior to the hearing, the Regional Director refers it to the Hearing Officer. The Hearing Officer treats such challenges to the status of a labor organization as a threshold issue about which evidence is taken before proceeding with the remainder of the hearing.
- (ii) *Procedures*: The Hearing Officer discusses the issues and procedures for handling the status challenge with the Regional Director prior to opening the hearing. All supporting evidence is required to be submitted with the

challenge. If the Regional Director gives the Hearing Officer permission to make a recommendation on the record regarding the challenge, the Hearing Officer takes evidence on and makes his/her recommendation in accordance with *HOG 35.13* before proceeding with the rest of the hearing. If the Regional Director does not give permission to the Hearing Officer to make a recommendation, the Hearing Officer still takes evidence on the status challenge before proceeding with the other issues (see *HOG 24.3 and 33.3*).

(iii) Decision: Ultimately, in either situation, the Regional Director decides the status issue as part of his/her Decision and Order, or in an election petition, may exercise the option of deferring his/her decision by issuing a Direction of Election. Status challenges that are filed after the hearing opens are untimely unless the challenging party can establish good cause for granting an extension. *HOG 24.3* provide guidance for considering status challenges filed during the hearing.

(iv) Challenges based on claims made pursuant to section 7111(f)(1) of the Statute: *HOG 24.3, RCL 10B, HOG 46B, CHM 19, CHM 20.1.8 and CHM 23.9.3* provide guidance on investigating and processing status challenges based on claims that a labor organization is subject to corrupt influences or influences opposed to democratic principles pursuant to section 7111(f) of the Statute. Challenges raised pursuant to 7111(f)(1) of the Statute do not appear to be subject to any timeliness requirements. See *U.S. Information Agency, Washington, D.C. and American Federation of Government Employees, Local 1812, AFL-CIO, (USIA), 53 FLRA 999 (1997)* *U.S. Information Agency, Washington, D.C. and American Federation of Government Employees, Local 1812, AFL-CIO, (USIA), 53 FLRA 999 (1997)*

***NOTE: Regional Directors rule on all cross-petitions,***

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

**interventions, and challenges including those received too late to process prior to the hearing. Thus, Regional Directors (or their designees) are required to be available to respond to situations that arise immediately prior to or during the hearing.**

**17.4 Motions to intervene received too late for the region to process prior to the opening of the hearing:** In accordance with § 2422.8 of the regulations, requests to intervene must be in writing and/or filed and submitted to the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension of time to file a request to intervene or cross-petition.

**NOTE: CHM 17.3.1 discusses grounds for granting extensions and procedures for processing untimely intervention requests under such circumstances. In the event that a request to intervene is filed untimely, i.e., after the hearing opens, refer to HOG 18.4 for processing guidelines.**

**17.4.1 Reviewing motions to intervene received too late for the region to process prior to the opening of the hearing:** Prior to opening the record, the Hearing Officer reviews a request to intervene to determine whether the request complies with § 2422.8 of the regulations. For instance, if the petition seeks an election, the intervention request must be accompanied by a showing of interest or other form of evidence as described in § 2422.8(c) unless the intervenor claims to be the incumbent [§ 2422.8(d)]. If the petition seeks to clarify or amend a matter relating to representation, a party proffers appropriate evidence of interest to support its intervention request. See generally, *CHM 17*. If necessary, the Hearing Officer delays the opening of the hearing to review the request to intervene. See also *HOG 17.4.3* and *17.4.4* for processing procedures and exceptions.

**17.4.2 Considerations when reviewing the showing of interest accompanying requests to intervene or cross-petition in election proceedings that are received too late for the region to process prior to the opening of the hearing:**

- a) A showing of interest is required to support any intervention request or cross-petition that is filed immediately prior to the opening of the hearing. If no evidence is proffered, the intervening party or cross-petitioner cannot participate and the hearing is not delayed (CHM 18.8).
- b) Where a request to intervene or cross-petition is based on evidence of interest made immediately prior to the opening of the hearing, the showing of interest is not examined by any other party to the proceeding and is never introduced or received into the record. Argument on the adequacy of interest is inappropriate and the Regional Director's eventual ruling on the request is based on the investigation of interest made by the Hearing Officer. The parties are reminded that adequacy of a showing of interest is an administrative matter made by the Regional Director which is not subject to collateral attack by the parties [see § 2422.9(b) of the regulations].
- c) Where requests to intervene or cross-petition are received immediately prior to the opening of a hearing, any accompanying showing of interest is checked on the spot unless the showing is voluminous and the Hearing Officer decides that it would unduly delay the hearing (see *CHM 18.13.6*). If it appears sufficient on its face, the Regional Director instructs the Hearing Officer to grant the motion to intervene, "subject to a subsequent check of the sufficiency of interest" (see *HOG 17.4.4* guidelines relating to granting "conditional intervention"). The check is usually made between sessions using the activity/agency list furnished in response to the opening letter. The Hearing Officer is

authorized to announce the Regional Director's subsequent ruling on the intervention/cross-petition. If the hearing record closes before the Hearing Officer has an opportunity to check the showing of interest, the Hearing Officer [see *HOG 34.4(c)*] reports the results in the Hearing Officer's Report and an amended showing of interest report, FLRA Form 52 (see *CHM 18.15*).

- d) If the Hearing Officer's check of the showing of interest reflects that the showing is inadequate and the scope and size of the unit is not an issue in the proceeding, the Hearing Officer refers the request to intervene or cross-petition to the Regional Director. The party attempting to intervene or cross-petition is not given additional time to obtain sufficient showing of interest. The hearing is not delayed and the party requesting status as an intervenor or cross-petitioner does not participate in the hearing.
- e) If the size or scope of the unit is an issue at the hearing and the decision could affect the intervenor's or cross-petitioner's request, then the Regional Director permits the intervenor or cross-petitioner to "conditionally intervene" and participate in the proceedings. See *HOG 17.4.4*.

**See also *HOG 23* for a discussion of cross-petitions filed immediately prior to the opening of the hearing.**

**17.4.3 *Ruling on motions to intervene prior to the opening of the hearing:*** The Hearing Officer does not have the authority to grant or deny an intervention request made immediately prior to the opening of the hearing. Only the Regional Director grants or denies an intervention request. Once the Hearing Officer reviews the intervention request or cross-petition, s/he contacts the Regional Director for a decision. The Regional Director has three options: 1) grant the request; 2) deny the request; and 3) grant conditional intervention which allows the party to participate in the

hearing, but reserves the Director's ruling for the Decision and Order.

**17.4.3.1 Granting a motion to intervene:** If the intervention request is simple and meets the requirements for intervention, the Hearing Officer obtains permission to name the party as an intervenor prior to opening the record. If the Regional Director grants the intervention request, the Hearing Officer allows the intervenor to enter his/her appearance on the record. See *HOG script 35.5*.

**17.4.3.2 Referring a motion to intervene to the Regional Director:** If the motion to intervene is unsupported by appropriate evidence, the Regional Director instructs the Hearing Officer to refer the motion to the Regional Director for action in accordance with § 2422.30 of the regulations. The Hearing Officer acknowledges receipt of the request to intervene or cross-petition after opening the record and then refers the motion to the Regional Director on the record with supporting statements. Absent unusual circumstances, the hearing is not postponed and the party requesting intervention is not permitted to participate in the hearing. (See *HOG Script 35.5*).

**17.4.4 Conditional intervention:** If the intervention request is complicated or there is a question of timeliness, the Regional Director may consider an intervention request received too late for the region to process prior to the opening of the hearing as an issue for the hearing. The Regional Director grants a party "conditional intervention" only in exceptional circumstances. Factors to consider include:

- a) The showing of interest is voluminous, but the intervention is timely and otherwise appears valid.
- b) The petition is amended prior to the opening of the hearing or at the hearing and the amendment changes the scope of the unit. As a result, issues are raised relating to identifying parties affected by issues raised by the amended petition pursuant to § 2422.6 of the regulations. See *Utah Army National Guard, U.S. Department of the Army, Draper, Utah*, an unnumbered Authority Decision denying an

application for review in Case No. DE-RP-80021, (1999)Utah Army National Guard, U.S. Department of the Army, Draper, Utah, an unnumbered Authority Decision denying an application for review in Case No. DE-RP-80021, (1999). See *CHM 17.13*.

By allowing conditional intervention in these extraordinary circumstances, the hearing is not delayed and the intervening party is given an opportunity to participate in the proceedings conditioned on the party satisfactorily complying with the requirements for intervention or status as an interested party. Ultimately, the Regional Director decides the intervenor's status in the Decision and Order. If the other parties object to handling an intervention request in this manner, their objections become part of the record. Specific instructions follow:

**17.4.4.1** As part of the opening statement and after ascertaining the correct names of the known parties to the proceeding, the Hearing Officer calls attention to any prehearing motions to intervene which were received too late for the region to process prior to the opening of the hearing. The Hearing Officer also calls attention to any motions to intervene that have been filed after the hearing opens that argue that good cause has been shown for granting an extension to intervene (see *HOG script 35.5*).

**17.4.4.2** If the motion to intervene is based on an existing or recently expired agreement or other documentation, a copy of the agreement or other documentation is placed into the record at the time the motion is made. If the motion is based on evidence of interest presented to the Regional Office or the Hearing Officer, the fact is noted on the record, but the numerical showing of interest is not introduced or received into evidence. Argument on the adequacy of the showing of interest is not allowed.

**17.4.4.3** The Hearing Officer makes certain that the full and precise name of any intervenor or potential intervenor is placed on the record and that the record is clear regarding whether the intervenor

is the local, the parent labor organization or both. Similarly, the full name of an agency or activity intervenor is also ascertained. Additionally, the Hearing Officer ensures that the intervenor places its position on the record and the basis for the intervention.

**17.4.4.4** The Hearing Officer asks all other parties for their positions.

**17.4.5 Handling conditional motions to intervene on the record:**

**17.4.5.1** If the motion to intervene was filed timely and appears sufficient or justified under the circumstances discussed in *HOG 17.4.4*, then the Hearing Officer states that the Regional Director is granting the motion, "subject to a subsequent check of the sufficiency of the showing of interest," where necessary, or if showing of interest was not the basis for the intervention, "subject to the evidence adduced during the hearing."

**17.4.5.2** If the Hearing Officer has any doubt regarding the propriety of permitting intervention in any instance, s/he recesses the hearing for a time sufficient to enable him/her to resolve the doubt by contacting the Regional Director or by other appropriate means. The Regional Director grants conditional intervention only in exceptional circumstances. If the Regional Director decides to allow conditional intervention, the Director instructs the Hearing Officer to make it clear, however, that although "conditional intervention" is granted, the final decision is being reserved for the Regional Director in his/her Decision and Order.

**17.5 Prehearing motions to dismiss:** Prehearing motions to dismiss are ruled on by the Regional Director and are not referred to the Hearing Officer. Normally such motions are deferred for ruling until such time as the Regional Director issues the Decision and Order following the hearing. If the Regional Director grants a motion to dismiss a petition in a Decision and Order, the petitioner may file an application for review with the Authority. If the Regional Director denies a motion to dismiss, the decision is not subject to appeal unless it is made part of the Decision and Order.

- 17.6** *Prehearing motions to withdraw:* See *HOG 19*.
- 17.7** *Other prehearing motions:* Other motions, such as motions to change the location of the hearing, are processed in accordance with *HOG 17.1*.
- 17.8** *Orders:* If the notice of hearing was issued without a time or location or is amended, an appropriate Order is issued by the Regional Director (see Figure C29.7B). See also *CHM 59* for general guidance in preparing orders.





**18 Motions made during the hearing:**

**18.1 Generally:** During the hearing, motions are made to the Hearing Officer and may be made orally on the record, unless a written submission is otherwise required in this section. Responses may also be made orally on the record or in writing, but, absent permission of the Hearing Officer, are provided in writing before the hearing closes. When appropriate, the Hearing Officer rules on motions made at the hearing or referred to the Hearing Officer by the Regional Director [see § 2422.19(c)]. (See also *HOG 30* that provides for automatic exceptions to all adverse rulings.)

**18.2 Procedural requirements:** A party seeking to make a motion during the hearing adheres to the following specific procedural steps:

- a) Motions are generally made orally on the record. A written motion, if desired, may be filed with the Hearing Officer;
- b) The reason for the motion, if not self-evident, is given. For example, motions to strike certain testimony, dismiss a petition, postpone the hearing, etc., are supported with specific reasons, whereas a motion to amend the petition by the petitioner need not be justified.

After the motion is made, the party affected by the motion is permitted to state its position on the motion. Thereafter:

- a) All motions are ruled on by the Hearing Officer with the exception of a motion to dismiss a petition. A ruling is stated in terms of a motion being denied or granted;
- b) The basis for the ruling is not explained (see *HOG 28.4*);
- c) A party is not granted a postponement during the hearing to appeal an adverse ruling by the Hearing Officer to the Regional Director. In view of the automatic exception afforded a party to any adverse ruling, the Regional Director considers the matter when reviewing the record;

- d) Parties are limited to a reasonable length of time to argue their positions; and
- e) All matters spoken in relation to the motion are made on the record.

**18.3 *Motions to dismiss made during the hearing:*** The Hearing Officer has no authority to rule on a motion to dismiss a petition. Generally, when such a motion is made, the moving party is informed that the Hearing Officer has no authority to make a ruling and that the motion is referred to the Regional Director for ruling at such time as the record is considered by the Regional Director. There are limited circumstances where a motion to dismiss warrants the immediate consideration of the Regional Director. In such cases, the Hearing Officer refers the motion to the Regional Director in the following manner:

- a) The Hearing Officer recesses the hearing for the purpose of contacting the Regional Director;
- b) The Regional Director is fully apprized of the relevant evidence or the actions of the parties bearing upon the motion to dismiss, including any objections to the motion;
- c) If the Regional Director intends to grant the motion to dismiss the petition, the Hearing Officer goes back on the record and states: “the motion to dismiss the petition is being referred to the Regional Director for ruling.” Normally, no more evidence is taken on any issue.
- d) The Hearing Officer cannot state, on or off the record, that the latter intends to grant the motion to dismiss, unless specifically authorized by the Regional Director;
- e) The hearing is then adjourned indefinitely; and
- f) If the Regional Director does not intend to rule on the

motion immediately, the Hearing Officer informs the parties of the Director's preliminary decision on the record. The Hearing Officer then completes the record and refers the motion to dismiss the petition to the Regional Director who acts upon it when s/he considers the entire record.

**18.4 Motions to intervene made during the hearing:** Motions to intervene made during the hearing are generally untimely unless the intervening party shows good cause for granting the intervention [§ 2422.8(b)]. The Hearing Officer asks the party requesting intervention for the grounds for the request and the reasons for the delay in filing. The Hearing Officer then goes off the record and contacts the Regional Director to discuss the intervention request. As discussed in *HOG 17.4*, the Regional Director has discretion to give permission to the Hearing Officer to grant "conditional intervention" under the limited circumstances discussed in *HOG 17.4.4* or instruct the Hearing Officer to refer the intervention request to the Regional Director for consideration. If the Regional Director grants the party "conditional" intervention, the Hearing Officer announces the Regional Director's decision and follows the procedures in *HOG 17.4.4*.

- a) If the Regional Director instructs the Hearing Officer to refer the request to him/her for consideration, the Hearing Officer goes back on the record and announces that the request is being referred to the Regional Director for action. The party requesting to intervene is not permitted to participate in the hearing and the hearing continues.
- b) If the Regional Director decides that good cause has been shown for granting the intervention, the party may be permitted to participate in the hearing if it is still open. If the record is closed, the record is reopened for the limited purpose of allowing the intervenor to supplement the record with its position and evidence in support of its position. The other parties are permitted to participate fully.

**18.5** **Motions to participate as amicus curiae:** For good cause and with the permission of the Regional Director, the Hearing Officer may grant a party's request to participate in the hearing as an *amicus curiae*. Long Beach Veterans Administration Medical Center, Long Beach, California, 7 FLRA 434 (1981). See also § 2429.9 of the regulations.

**18.6** **Motions to sequester witnesses:**

**18.6.1** A motion for sequestration is made by a party in order to seek the exclusion of potential witnesses from the hearing room. The purpose is to ensure that they are not influenced when giving their testimony by the testimony of the preceding witness or witnesses. The Hearing Officer obtains the positions of all parties on the motion for sequestration.

Motions to sequester witnesses at a representation hearing normally are not granted by the Hearing Officer unless credibility questions are at issue in objections cases (see HOG 36).

**18.6.2** The request is made at the start of the hearing so that it applies to all witnesses and parties equally. If the request is made during the hearing, the Hearing Officer considers reasons for the delay in filing the motion and the parties' positions when making his/her decision.

**18.6.3** If the Hearing Officer grants a sequestration request, s/he cautions witnesses not to discuss their testimony with anyone, or read the transcript testimony of other witnesses. The sequestered witness(es) then leaves the hearing room until called to testify.

**18.6.4** Irrespective of the Hearing Officer's ruling to grant sequestration, a party is normally allowed to have an advisor present in the hearing room to assist the representative of record during the hearing, even if that advisor later testifies.

**18.7** **Motion to amend the petition:**

**18.7.1** **General:** During the course of a hearing, a petitioner may seek to amend its petition. This is done by means of a request, or motion to amend, and if necessary, a supporting statement. The Hearing Officer, after soliciting the positions of the other parties and

argument, grants the request unless the Regional Director gives approval to deny the request. **NOTE: it is very unusual to deny a petitioner's request to amend its petition.**

**18.7.2 Considerations on amending petitions:** The Hearing Officer considers any consequences of an amendment of the petition at hearing:

**18.7.2.1** Although the amendment does not have to be explicit, it may be necessary for the Hearing Officer to clarify what the petitioner seeks and solicit a clearer amendment. See e.g.,

**18.7.2.2** *U.S. Department of the Interior, National Park Service, Washington, DC*, 55 FLRA 311 (1999): A motion to amend the unit may be made only by the petitioner. If any party, other than the petitioner, makes a “motion to amend the unit,” it is regarded as being, at most, a statement of position or contention of what the unit should be, and no ruling is made on such a “motion.”

However, if the Hearing Officer believes that the record would be better served by clarifying the unit description through the inclusion or exclusion of particular classifications, a suggestion to this effect is made to the petitioner. Off the record discussion regarding a possible amendment of the unit is permitted, but takes place in the presence of all parties. The Hearing Officer summarizes the off the record discussions on the record (see *HOG 11.7*).

**18.7.5 Obtaining complete description of amended unit:** When a motion to amend the unit is made by the petitioner, the entire unit is set forth on the record. It is not acceptable for the petitioner to state, for example, that it moves to amend the unit by “changing the unit only with respect to . . .” or “keeping the inclusions but adding the classification of . . . for the classification of . . .,” etc.

Irrespective of the nature or the extent of the change being made by the amendment, whether involving a minor modification of terminology, such as changing the wording from “blue collar” to “Wage Board,” or enlarging the scope of the unit substantially, the entire unit description is stated.

**18.7.6 Ruling on a motion to amend the unit that does not change the scope of the unit:** A motion to amend the unit, like any other motion, is ruled on by the Hearing Officer after the other parties are asked whether they have any objections to the motion. Irrespective of any objections raised or any contention that the motion be denied, the Hearing Officer grants the motion to amend the unit since:

- a) a petitioner has complete latitude to seek whatever unit it desires;
- b) in allowing the petitioner to amend the unit, the Hearing Officer does not, and cannot, pass upon the appropriateness or timeliness of the amended unit; and
- c) it is, therefore, left

s ruling in granting the motion to amend the unit will be reviewed, as a matter of course, by the Regional Director.

**NOTE: Best practice: use a motion to amend a petition to withdraw a position whose eligibility is no longer in dispute rather than a stipulation to withdraw the position from the case.** This is a situation in which the parties “make a deal” rather than obtain a solution since neither party seeks a ruling from the Regional Director on the position. See *CHM 25.13.1*. In addition, the Authority has previously held that a stipulation concerning the resolution of positions in dispute is “deemed a motion to amend the petition and is hereby granted.” *Pennsylvania Air National Guard, 13 FLRA 538 (1983)*.

**18.7.7 Ruling on a motion to amend the unit that changes the scope of the unit:** A motion to amend the unit, like any other motion, is ruled on by the Hearing Officer after the other parties are asked whether they have any objections to the motion. Before granting a

motion to amend the unit, the Hearing Officer takes the following actions (see also *HOG 18.7.2*):

- a) Goes off the record and assesses whether the amendment has substantially affected the scope of the unit. Changes in terminology only are distinguished from changes affecting the scope and content of the unit (see *CHM 13.9, 13.10 and 13.11*);
- b) Checks the showing of interest to determine if it is sufficient to support the proposed amendment. In any instance where additional showing of interest is required, it is submitted with the amendment. See :

**18.9.1** A motion to strike is designed to have the Regional Director disregard a particular response by a witness or testimony given to a line of questioning. The basis in support of the motion to strike may be that the answer was unresponsive to the question or that the witness answered the question notwithstanding the fact that the objection to the question was sustained by the Hearing Officer. In ruling on the motion, the Hearing Officer uses the tests for relevancy and materiality. However, note that sustaining the motion results only in the disputed testimony being disregarded by the Regional Director in r

s ruling is reversed by the Regional Director. Thus, granting such a motion does not involve a physical expunging of the testimony from the record.

**18.9.2** A motion to expunge, if sustained, results in the total eradication of the particular testimony or other matter stated, and, thus, is denied in all but the most extreme instances.

**18.10 Motion for continuance made during the hearing:** A party may request a continuance at any time during the hearing. The authority to grant such requests rests with the Hearing Officer. The Hearing Officer approves a motion for continuance upon a showing of good cause. When ruling on a continuance request, the Hearing Officer reconciles two policies: the importance of promptly processing representation cases under the Statute and the obligation to obtain a complete record (see also HOG 17.2). Absent unusual circumstances, before granting the motion for continuance, the Hearing Officer proceeds on those aspects where progress is possible. Such efforts to complete as much of the record as possible before adjourning the hearing may result in the motion being withdrawn.

**18.10.1 Grounds for continuance:**

**18.10.1.1 To bring in additional evidence:** If the ground given for a continuance is to bring in additional, relevant information, the Hearing Officer explores every alternative avenue by which the information may be elicited promptly (e.g., stipulation, adjournment to a more convenient place, etc.). If necessary, and only in rare situations, an adjournment may be avoided by arranging for the close of the hearing subject to the later introduction of an exhibit (see HOG 15.13).

**18.10.1.2 Hearing Officer adjourns hearing when evidence reflects a change in issues and/or a party(ies') status:** When evidence identifies additional issues that were not contemplated, the Hearing Officer, on his/her own motion, continues the hearing to review the record and the issues, and to notify any additional parties. See *National Park Service*, 55 FLRA 466 (1999) where the Authority found that when the Regional Director decided the issues involved successorship, the status of the former incumbents changed from that of intervenor to incumbent. Therefore, the Authority found that these parties should have been recontacted to confirm their participation in the case .  
Before adjourning a hearing when new issues arise to allow the parties to gather relevant evidence:

- a. the record is completed on any issues that were outlined in the Notice of Hearing, and
- b. the Hearing Officer explains to the parties what information is necessary for introduction upon the resumption of the hearing.

When the hearing resumes, the Hearing Officer concentrates on the additional information, but does not exclude other relevant evidence that may be offered.

**18.10.2 Hearing rescheduled:** Continuances may be to a date certain or may be indefinite. In the latter event, the hearing is rescheduled by an Order from the Regional Director to the parties. The Order is made part of the record on the resumption of the hearing. If the basis for the hearing is resolved or becomes moot, the hearing may be closed by Order of the Hearing Officer (see *CHM 59*).



**19** ***Motions to withdraw:*** A petitioner(s) may request to withdraw a petition at any time during the processing of the case. The Hearing Officer may not rule on requests to withdraw a petition(s). Intervenor or interested parties may also request to withdraw from representation proceedings at any time. The Hearing Officer may not rule on requests from intervenors to withdraw from representation proceedings.

**19.1** ***Prehearing motions to withdraw:***

**19.1.1** ***Petitioner requests to withdraw:***

- a) If a request to withdraw is received immediately prior to the opening of the hearing, the Hearing Officer asks the petitioner to put the request in writing.
- b) The Hearing Officer calls the Regional Director and advises him/her about the request to withdraw.
- c) Once the Regional Director advises the Hearing Officer that s/he intends to approve the request, the Hearing Officer:
  - (i) notifies the parties,
  - (ii) advises the petitioner of the regulations pertaining to the effects of withdrawal after a notice of hearing issues [see § 2422.14(b) and *HOG 19.4*],
  - (iii) cancels the court reporter,
  - (iv) does not open the record, and
  - (v) forwards the withdrawal request to the Regional Director.

The approval is in the form of a Withdrawal of the Notice of Hearing and Approval of Request for Withdrawal of Petition (see FLRA Form 49) with language added that the approval request is subject to the provisions in § 2422.14(b) of the regulations.

**19.1.2** ***Intervenor requests to withdraw:*** If an intervenor requests to

withdraw from the case immediately prior to the opening of the hearing, the Hearing Officer:

- a) asks the intervenor to put the request in writing,
- b) contacts the Regional Director.

Once the Regional Director advises the Hearing Officer that s/he will approve the request, the Hearing Officer notifies the parties and if necessary, reassesses the need for a hearing. Thereafter, the Regional Director approves the withdrawal request in writing.

**19.2 Motions to withdraw made during the hearing:**

**19.2.1 Petitioner requests to withdraw:** If the request to withdraw is received after the hearing has opened, the Petitioner is required to put the request on the record. The hearing is recessed while the Hearing Officer contacts the Regional Director to seek approval of the withdrawal.

Once the Regional Director states that s/he will approve the withdrawal request, the Hearing Officer:

- a) goes back on the record,
- b) notifies the parties of the approval,
- c) continues the hearing indefinitely, and
- d) forwards the withdrawal request to the Director.

Thereafter, the Regional Director issues an Order Closing the Hearing and Approving the Request to Withdraw (see *CHM 59* for guidance in preparing Orders). The same provisions concerning withdrawal with prejudice that are outlined in § 2422.14(b) apply to requests to withdraw during the hearing.

**19.2.2 Intervenor requests to withdraw:** If the request to withdraw is received after the hearing has opened, the intervenor is required to put the request on the record. The hearing is recessed while the

Hearing Officer contacts the Regional Director for approval of the withdrawal request. Once the Director states that s/he will approve the withdrawal request, the Hearing Officer goes back on the record, notifies the parties of the approval and if necessary, reassesses the need for continuing the hearing. Thereafter, the Regional Director approves the withdrawal request in writing.

**19.3** **Motions to withdraw made post-hearing:** A motion to withdraw that is received after a hearing is closed is processed similarly to one filed after the notice of hearing issues. The Regional Director issues an Order Withdrawing the Notice of Hearing and Approval of Request to Withdraw Petition subject the provisions in § 2422.14(b) of the regulations. See *HOG 19.4*.

**19.4** **Withdrawal with prejudice:** Section 2422.14(b) of the regulations provides that a petitioner who submits a withdrawal request for a petition seeking an election that is received by the Regional Director after the notice of hearing issues or after approval of an election agreement, whichever comes first, will be barred from filing another petition seeking an election for the same unit or any subdivision of the unit for six (6) months from the date of the approval of the withdrawal by the Regional Director. This statement is added to any Order approving a request to withdraw that is submitted within three days prior to the opening of the hearing or anytime after the hearing opens. This section does not apply to a request to withdraw by an intervenor unless the intervenor is an incumbent that disclaims any representational interest in a unit which is subject of an election petition (see *RCL 12*, *HOG 48* and *CHM 11.10*).



- 20**     **Post-hearing motions:** Motions filed after the close of the hearing, but prior to the issuance of the Decision and Order, are submitted to the Regional Director. The party filing the motion is required to state succinctly the order or relief sought and the reasons for the motion. A copy of each motion is served on all other parties [see § 2422.19(d) and *HOG 16.2*]. Any response to a post-hearing motion is filed with the Regional Director within five (5) days after service of the motion. The Regional Director rules on post-hearing motions, either by Order or as part of the Decision and Order. See also *CHM 31*.
- 21**     **Motions to correct transcript:** The purpose of correcting the transcript is to correct mistakes made by the reporter in taking or transcribing the record and not to afford the parties an opportunity to add new material to the record or to correct errors of omission or commission made by any of the parties during the hearing. Motions to correct the transcript are filed with the Regional Director. Copies of motions to correct the transcript are served on each of the other parties and proof of such service furnished to the Regional Office. The Regional Director rules on motions to correct the transcript, either by Order or as part of the Decision and Order. See also *CHM 31.6*.



**PROCEDURAL MATTERS**  
**HOG 22 through 31**

- 22**     **Disclaimers:** A disclaimer of interest may be filed by an incumbent exclusive representative to disclaim any representational interest in a unit that is the subject of a petition pending before the Regional Director. Any disclaimer is in writing and states clearly that the recognized or certified exclusive representative no longer wishes to represent the employees in the unit for which it is the exclusive representative. To be effective, a disclaimer is made in good faith, clear and unequivocal, and leaves no doubt that a matter relating to the incumbent's representation does not exist with respect to the bargaining unit. Department of Defense, Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 14 FLRA 76 (1984). If a labor organization that is a party to a representation hearing files a disclaimer during the hearing, the Hearing Officer recesses the hearing and calls the Regional Director for guidance (see § 2422.14(c), *CHM 5.9, 20.1.7, and 20.9* for more information on disclaimers).



- 23** **Filing a cross-petition:** Section 2422.8(a) of the regulations defines a cross-petition as a petition which involves any employees in an unit covered by a pending representation petition. Cross-petitions are filed in accordance with § 2422.8 on a form prescribed by the Authority. Cross-petitions, accompanied by any necessary supporting evidence or showing of interest, are filed and/or submitted to the Regional Director or the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension.
- 23.1** **Filing requirements:** A cross-petition is filed on a FLRA Form 21 and in accordance with the requirements set forth in *CHM 4 through 10*, concerning procedures for filing. A cross-petition is docketed as a new case and is subject to the same standards for review and sufficiency as any petition. In all respects, a cross-petition is treated as any other petition and is processed in the same manner. However, a cross-petition is distinguished from other petitions because it concerns employees in a unit covered by a pending representation petition and is filed according to the timeliness requirements for filing requests to intervene (see *CHM 17.6*).
- 23.2** **Processing cross-petitions received too late for the region to process prior to the opening of the hearing:** The Regional Director may refer a cross-petition to the Hearing Officer that has been received too late for the region to process prior to the opening of the hearing. A cross-petition may also be filed directly with the Hearing Officer before the hearing opens.
- 23.2.1** **Handling cross-petitions received too late for the region to process prior to the opening of the hearing:**
- a) Immediately upon receipt of the cross-petition, the Hearing Officer contacts the Regional Director, informs the latter of the filing, and procures a docket number. Copies of the newly filed petition are forwarded via fax to the Regional Director as soon as possible. The Hearing Officer inserts as the date of filing, the date of receipt of the petition (see *CHM 63* for docketing procedures).

- b) The Hearing Officer is responsible for reviewing the cross-petition to ensure compliance with filing requirements. A cross-petition seeking an election must be accompanied by an appropriate showing of interest which is checked for prima facie adequacy (see *HOG 17.4.2* and *CHM 18.8*).
- c) If the cross-petition appears to meet the filing requirements, the Hearing Officer obtains approval from the Regional Director to name the party as a cross-petitioner and consolidate the petitions prior to opening the record (see *CHM 17*). Once on the record, the Hearing Officer then proceeds in accordance with *HOG 23.2.2 through 23.2.4* and *script 35.5(B)(2)*. If the cross-petition request appears more complicated, the merits of the cross-petition may be considered as an issue in the hearing. Under exceptional circumstances, the Regional Director may grant the petitioner "conditional" approval to participate in the hearing. The considerations for granting a cross-petitioner permission to participate in the hearing on a "conditional basis" are the same as the factors considered in intervention requests. See *HOG 17.4.4*. That way the hearing is not delayed and the cross-petitioner is given an opportunity to participate in the proceedings conditioned on the party satisfactorily complying with the filing requirements for cross-petitions. The Regional Director ultimately decides the issue in the Decision and Order.
- d) If the Hearing Officer believes that it is appropriate to conduct the hearing on the merits of the cross-petition simultaneously with the hearing on the pending petition(s), s/he obtains the parties' positions on consolidating the petitions and the need for a continuance, if any [see *HOG script 35.5(B)(1)*].
- e) If the other parties object to handling a cross-petition in this manner, the Hearing Officer includes the party's objections

in the record.

**23.2.2 Ruling on cross-petitions that are received too late for the region to process prior to the opening of the hearing:** Upon resuming the hearing, if the Regional Director decides to consolidate the cross-petition with the pending petition(s), the Hearing Officer:

- a) announces the Regional Director's decision.
- b) introduces the new petition into the record as an Authority exhibit.
- c) If the hearing is held in the Regional Office, the Hearing Officer prepares and introduces Regional Director's Amended Notice of Hearing and Order Consolidating Cases into the record as Authority exhibits.

If the hearing is held outside of the Regional Office, the Hearing Officer states on the record the Regional Director's rulings and reserves Authority exhibit numbers for later introduction of the Amended Notice of Hearing and Order. Once the petitions are consolidated for hearing, each petitioner becomes a cross-petitioner.

**23.2.3 Evidence of interest:** If the cross-petition is based on an existing or recently expired agreement or other document, a copy of the agreement or document is placed into the record at the time the motion is made. If the cross-petition is based on evidence of interest presented to the Regional Office or presented to the Hearing Officer, the fact is noted on the record, but any showing of interest is not introduced or received into evidence. Argument on the adequacy of the showing of interest is not allowed (see *HOG 17.4.2* for a detailed discussion of handling showing of interest at a hearing).

**23.2.4 Ensuring the record is clear:** The Hearing Officer makes certain that:

- a) the full and precise name of any cross-petitioner is placed on the record.

- b) the record is clear regarding whether the cross-petitioner is the local, the parent labor organization or both.
- c) the full name of an agency or activity cross-petitioner are also ascertained.
- d) if there is any question regarding the appropriateness of consolidating the cross-petition with the original petition, the parties are given the opportunity to state their positions on the record.

The issue of the cross-petition becomes an issue in the hearing that is decided by the Regional Director in the Decision and Order.

**23.3 Cross-petitions filed after the hearing opens:** If a cross-petition is filed after the hearing opens, the Hearing Officer:

- a) asks the party filing the cross-petition to explain why the petition should be accepted as a timely filed cross-petition,
- b) obtains the other parties' positions, and
- c) then goes off the record to contact the Regional Director. The cross-petition is usually referred to the Regional Director for action (*HOG script 35.5*).

Unlike intervention requests, cross-petitions are not subject to immediate dismissal if they are otherwise filed timely (see *CHM 17.6.2*). The factors for determining whether a petitioner has shown good cause for granting an extension for filing a cross-petition are the same as those for considering intervention requests (see *CHM 17.3.1*) with the exception of petitions filed pursuant to 5 U.S.C. 7111(f)(1). See *HOG 23.5*.

- a) Like intervention requests, if the Regional Director decides that the petitioner has shown good cause for establishing that its cross-petition is timely, the cross-petitioner is

permitted to participate in the hearing on a “conditional” basis [*HOG 17.4, 17.4.4 and 23.2* (for docketing and processing procedures)]. The Hearing Officer takes evidence on the timeliness of the cross-petition during the hearing and the Regional Director considers the merits of the cross-petitioner’s argument that good cause has been shown for granting an extension in his/her Decision and Order.

- b) If the Regional Director decides that the petitioner has not established good cause for granting the extension, the petition is forwarded to the region for processing as a separate petition (*CHM 17.6.3*).

**23.4 *If the Regional Director does not permit participation by the cross-petitioner:*** If the Regional Director decides not to consolidate the petitions or allow conditional participation, the Hearing Officer states on the record that a cross-petition was filed and that the cross-petition is being referred to the Regional Director for processing.

**23.5 *Cross-petitions filed immediately prior to the opening of the hearing or after the hearing opens that challenge the status of a petitioning or intervening labor organization on the basis that it is subject to corrupt or anti-democratic influences pursuant to 5 U.S.C. 7111(f)(1):*** These cross-petitions do not appear to be subject to the timeliness provisions of the regulations and raise threshold issues that are considered prior to taking evidence on the remaining issues at a hearing. If the cross-petition is filed immediately prior to the opening of the hearing or during the hearing, the Hearing Officer follows the outline in *CHM 23.9.3*. The Hearing Officer ensures the moving party has supported the challenge or petition by asking the same questions on the record that would have been asked in an *Order to Show Cause* (*CHM 23.9.3*). Ultimately, the Regional Director decides these issues and the issues defined in the Notice of Hearing in one Decision and Order. See also *HOG 24.3* for a discussion of challenges to the status of a labor organization made at a hearing. See also *RCL 12* for substantive issues and *HOG 48* for hearing questions.

**24 Challenges to the validity of the showing of interest and challenges to the status of a labor organization:**

**24.1 When to file:** The regulations provide at §§ 2422.10 and 2422.11 that challenges to the validity of the showing of interest (i.e., procurement of the evidence of interest by fraud, forgery, supervisory involvement in the collection of the showing, etc.), and challenges to the status of a labor organization [i.e., compliance with 5 U.S.C. 7103(a)(4) or claims made pursuant to 5 U.S.C. 7111(f)(1)], respectively, may be submitted to the Regional Director or to the Hearing Officer before the hearing opens, unless good cause is shown for granting an extension. If no hearing is held, challenges to the validity of a showing of interest or the status of a labor organization should be filed prior to action being taken pursuant to § 2422.30. (Exception: a petition or challenge claiming the petitioning labor organization, intervenor or incumbent is subject to corrupt or undemocratic principles may be filed at any time.)

*HOG 24* concerns processing challenges to the validity of the showing of interest and challenges to the status of a labor organization that are received too late for the region to process prior to the opening of the hearing.

**24.2 Challenges to the validity of the showing of interest:** Any challenges to the validity of the showing of interest submitted to the Hearing Officer prior to the opening of the hearing or after the hearing opens, must be accompanied by all supporting evidence. The Hearing Officer forwards the challenge and supporting evidence to the Regional Director as soon as possible. Evidence related to these challenges is not introduced or litigated at the hearing. A challenge to the validity of a showing of interest is a threshold issue that is investigated and decided before the Regional Director issues his/her Decision and Order on the hearing matters. The hearing is not delayed by the filing of such challenges. See *HOG 33.2* and *CHM 18.19.4 and 18.19.5* for processing procedures.

**24.3 Challenges to the status of a labor organization:**

**24.3.1** Any challenges submitted to the Hearing Officer prior to the opening of the hearing must be accompanied by all supporting evidence. Challenges to the status of a labor organization are

treated as a threshold issue that are considered before proceeding with the hearing. If the challenge is filed too late to investigate and decide prior to the opening of the hearing, the Regional Director refers the challenge to the Hearing Officer. Status challenges may also be filed directly with the Hearing Officer prior to the opening of the hearing. The Hearing Officer treats challenges to the status of a labor organization as a threshold issue to consider before proceeding with the remainder of the hearing.

After a status challenge is referred to the Hearing Officer, s/he discusses the issues and procedures for handling the status challenge with the Regional Director prior to opening the hearing. The Hearing Officer takes evidence on the status challenge before proceeding with the other issues (see *HOG 23.5* for specific procedures for handling and *HOG 33.3*). The Hearing Officer does not generally make a recommendation on the record regarding a status challenge. The Regional Director decides the status issue as part of his/her Decision and Order. If, however, the Regional Director finds merit in a status challenge, the Director does not normally rule on the remaining issues (*CHM 53*).

**24.3.2** Status challenges that are filed after the hearing opens are:

**24.3.2.1** Untimely if they challenge the labor organization on the basis of 5 U.S.C. 7103(a)(4) unless good cause is shown for granting an extension. All supporting evidence is required to be submitted with the challenge or the challenge is not considered. To consider the challenge, the challenger must show that good cause exists for being granted an extension. If the challenge alleges that the labor organization does not comply with 5 U.S.C. 7103(a)(4), the challenging party must support the challenge with evidence as outlined in *RCL 10A and HOG 46A*.

**24.3.2.2** Timely if the challenge raises claims pursuant to 5 U.S.C. 7111(f)(1). The challenging party must support the challenge with evidence as outlined in *RCL 10B and HOG 46B*. The Hearing Officer follows the procedures set forth in *HOG 23.4* as

summarized below.

The factors for deciding whether the challenging party has shown good cause for being granted an extension to file the challenge are contained in *CHM 23.9.3*. The procedures for processing untimely filed status challenges are as follows:

- a) the Hearing Officer asks the challenger to state the grounds for the status challenge and the reasons for the delay in filing,
- b) the Hearing Officer contacts the Regional Director (or acting RD) to discuss the reasons for the party's delay in filing,
- c) the Hearing Officer asks the moving party to respond to questions outlined in *CHM 23.9.3.2* that would have otherwise been issued as part of an *Order to Show Cause*.

**24.3.3** The Regional Director ultimately decides the status issue as part of his/her Decision and Order. If it does not appear that the party has not shown good cause for extending the time limitations, the Regional Director instructs the Hearing Officer to refer the challenge to the Regional Director for action. See *CHM 19* and *CHM 23.9.3* for more information about processing status challenges, *RCL 10* for substantive information and *HOG 33.3 and 46* for handling such challenges at the hearing.





25

***Intervening circumstances which can change scope of hearing, status of the parties or the issues:***

Intervening circumstances may occur either prior to or during the hearing which can change the scope of the hearing (e.g., a petition presents appropriate unit issues and the parties also raise eligibility issues; a cross-petition is filed which raises new contract bar issues). These issues arise in the form of motions, amendments of the petition, requests to intervene, cross-petitions or evolve as the evidence is secured.

Whether these matters arise before the hearing or during the hearing, the Hearing Officer is responsible for ensuring that:

- a) these matters are addressed,
- b) issues are identified,
- c) parties that are affected by issues raised are notified properly, and
- c) the hearing is structured appropriately.

This includes a review of any relevant sections of this Guide (e.g., *HOG 18.7.2, 18.7.5, 23 and 33.9*). See e.g., U.S. Department of the Interior, National Park Service, 55 FLRA 466 (1999) where the Authority found that the Regional Director committed prejudicial error when, during the course of the hearing, he found that the employees from each of the affected units in a reorganization constituted a separate appropriate unit, but did not properly notify the former incumbents of their rights with respect to the successorship issue.



**26**      **Stipulations:** A stipulation is an important evidentiary device by which the parties agree upon a particular fact or set of facts which may be accepted by the Regional Director as evidence without the necessity for extensive development of the record through witnesses or exhibits. Stipulations serve to narrow the issues and shorten the record. Stipulations may be oral or in writing. For a discussion of stipulations in lieu of hearings see *HOG 9*.

**26.1**    **Requirements.** The Authority considers a stipulation as evidence when:

- a)        All parties join in the stipulation;
- b)        It includes a statement of facts in support of an issue which is a subject of the hearing;
- c)        The stipulation is expressly received in evidence by the Hearing Officer like any other offer of evidence. See *HOG 26.4*.

The parties are not required to agree on the outcome of the issue, i.e., agree that the unit is appropriate, a position is confidential, etc., just secure an agreement on the facts. The parties have opportunity to argue their position on the issue in their briefs.

**26.2**    **Preparing a stipulation:** A stipulation may be proposed by any party or by the Hearing Officer regarding any matter in issue. The discussion between the Hearing Officer and the parties in formulating the content of the stipulation are not material to the record and therefore, in most instances, such discussions are conducted off the record.

The Hearing Officer takes an active role in the discussions and offers suggested language to reflect as clearly and fully as possible the intent of the parties. The Hearing Officer apprizes the parties, where appropriate, of applicable policies and decisions of the Authority. When the language of the stipulation is agreed upon by all parties, the Hearing Officer is permitted to draft it and read it

back for their concurrence as to its accuracy. The Hearing Officer goes back on the record for the purpose of receiving the stipulation in evidence.

**26.3 Receiving stipulation in evidence:** In receiving the stipulation in evidence, the Hearing Officer states on the record as follows:  
ON THE BASIS OF AN OFF-THE-RECORD DISCUSSION,  
THE FOLLOWING STIPULATION IS PROPOSED:

IT IS STIPULATED BY THE PARTIES THAT (read entire stipulation unless it is entered in writing as a joint exhibit) . . . .

IS IT SO STIPULATED BY THE ACTIVITY?

BY THE PETITIONER?

BY THE INTERVENOR?

THE STIPULATION IS RECEIVED.

Each party, in responding to the question put by the Hearing Officer, states its agreement aloud. If a party responds by nodding in assent, the Hearing Officer requests that the response be stated for the record.

**26.4 Content of stipulations:** A stipulation which states only a conclusion without a supporting foundation of fact is not acceptable and may not be received in evidence (see *HOG script 35.9* for a sample stipulation).

An example of a stipulation of facts which the parties submitted to the Assistant Secretary for Labor-Management Services and which was later transferred to the Authority for decision is attached to USA DARCOM Materiel Readiness Support Activity (MRSA), Lexington, Kentucky, 1 FLRA 430 (1979). An example of a case involving an insufficient stipulation of facts which the Authority remanded for more evidence is Department of Justice, Washington, DC, 50 FLRA 439, at 442 (1995).

**26.5 Stipulations obviating the need to continue the hearing:** If the parties are willing to enter into a stipulation that would eliminate the

need to continue the hearing, the Hearing Officer recesses the hearing to allow the parties to draft the stipulation.

For example: the parties are willing to stipulate regarding unit appropriateness and agree to enter into an election agreement (HOG 31.3). The Hearing Officer goes off the record to draft the stipulation and obtain an election agreement. Once the Regional Director signs the agreement, the hearing is resumed for the limited purpose of the Hearing Officer stating on the record that the parties have entered into an Election Agreement. Thereafter, the hearing is adjourned indefinitely. A copy of the agreement for election is not introduced in evidence. If the Regional Director does not approve the stipulation or the Election Agreement, the Hearing Officer resumes the hearing.

**26.6 Special circumstances that may arise during a hearing:**

**26.6.1 Attempt to withdraw from a stipulation already received in evidence:**

A Hearing Officer may properly refuse to allow a party to amend or withdraw from a stipulation once the parties have agreed to it, and it has been received into evidence. In such situations, the Hearing Officer allows the party(ies) wishing to withdraw from or amend the stipulation to proffer documents and testimony to support their revised position. *Environmental Protection Agency, Region VIII, Denver, Colorado*, 15 FLRA 184 (1984).

**26.6.2 Stipulations involving determinative challenged ballots:**

During a hearing involving determinative challenged ballots, the parties may express a willingness to enter into a stipulation(s) regarding the bargaining unit eligibility of certain employees who have cast determinative challenged ballots. The Hearing Officer recesses the hearing and contacts the Regional Director to discuss potential stipulations and seek permission to entertain them. Acceptance of the stipulation is a discretionary matter with the Regional Director. *Veterans Administration Medical Center, Fayetteville, North Carolina*, 8 FLRA 651 (1982). See also *CHM 47.18* for post tally party resolution of determinative challenged ballots. When the parties are unable to resolve any or all of their

challenges pursuant to *CHM 47.18*, the Regional Director investigates and decides proceeds determinative challenged ballots pursuant to *CHM 49*. The parties cannot withdraw challenges at this point; the Regional Director decides all remaining determinative challenged ballots.



**27 Subpoenas:**

**27.1 General:** Section 2429.7 of the regulations provides that Regional Directors may issue subpoenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence. However, no subpoena shall be issued which requires disclosure of intra-management guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

A subpoena (FLRA Form 62) directs a witness to appear at a specified time and place to give oral testimony. A subpoena duces tecum (FLRA Form 61) requires a witness to appear and bring certain specified documents and to give oral testimony.

See *CHM 23.5.3* for a discussion of investigatory subpoenas. *HOG 27* concerns subpoenas issued in preparation for a hearing.

**27.2 Application for subpoena:** Where the parties are in agreement that the appearance of a witness or the production of documents at the hearing is necessary, and the witness agrees to appear, no subpoena is necessary. See § 2429.7(b).

When necessary, any subpoena requested by any person, as defined by 5 U.S.C. 7103(a)(1), shall be in writing and filed with the Regional Director, not less than ten (10) days prior to the opening of the hearing. Requests for subpoenas made less than 10 days prior to the opening of the hearing are granted on sufficient explanation of why the request was not timely filed [§ 2429.7(c)]. The Regional Director or the Hearing Officer furnishes the requester the subpoenas sought, provided the request is timely made. Requests for subpoenas may be made *ex parte*.

**27.3 Preparation of subpoena:** Completion of the specific information in the subpoena and service of the subpoena are the responsibility of the party on behalf the subpoena was issued. See § 2429.7(d) for procedures for serving a subpoena.

**27.4 Issuance and control of subpoenas:** A copy of any subpoenas issued and served by the Regional Director or the Hearing Officer

is retained in the case file.

- 27.5 Issuance of subpoena during the hearing:** If it becomes necessary during the hearing for the Hearing Officer to issue a subpoena on his/her own motion or that of any party, the Hearing Officer recesses the hearing in order to prepare the subpoena. The subpoena form is either typed or handwritten. **Service of subpoena:** Service of a subpoena is the responsibility of the requesting party. A subpoena is served by any person who is at least 18 years old and who is not a party to the proceeding. The person who served the subpoena certifies that he or she did so:
- a) By delivering it to the witness in person,
  - b) By registered or certified mail, or
  - c) By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended. The subpoena shows on its face the name and address of the party on whose behalf the subpoena was issued. (see § 2429.7 of the regulations).

A subpoena is served in sufficient time to enable the witness to make necessary arrangements and to allow the witness or a party, five (5) days after the date of service to petition to revoke the subpoena pursuant to § 2429.7(e) of the regulations.

**27.7 Witness fees:** See *HOG 6* for information on witness fees and reimbursement procedures.

**27.8 Petition to revoke subpoena:**

**27.8.1 Filing:** Any person served with a subpoena who does not intend to comply, is required to, within five (5) days after the date of service of the subpoena, petition in writing to revoke the subpoena. When a petition to revoke is made prior to hearing, the petition and a written statement of service is filed with the Regional Director for ruling. A petition to revoke a subpoena filed during the hearing shall be accompanied by a written statement of service and shall

be filed with the Hearing Officer. § 2429.7(e)(1).

**27.8.2 Service:** A copy of any petition to revoke a subpoena shall be served on the party on whose behalf the subpoena was issued. The Regional Director or the Hearing Officer, as a matter of course, serves a copy of the petition to revoke the subpoena on the party on whose behalf the subpoena was issued, but are not deemed to assume responsibility for such service. See § 2429.7(e) of the regulations for further guidance.

**27.8.3 Ruling:** The Regional Director or Hearing Officer or any other employee designated by the Authority, as appropriate, shall revoke the subpoena if the person or evidence, the production of which is required, is not material and relevant to the matters under investigation or in question in the proceedings, or the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. The Regional Director, Hearing Officer, or any other employee of the Authority designated by the Authority, as appropriate, shall state the procedural or other ground for the ruling on the petition to revoke. The petition to revoke, any answer thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling. § 2429.7(e)(2).

**27.9 Enforcement of subpoena:** Pursuant to § 2429.7(f) of the regulations, when any person fails to comply with a subpoena, the Solicitor of the Authority, upon request of the party on whose behalf the subpoena was issued, shall institute proceedings on behalf of such party in the appropriate district court for enforcement thereof, unless to do so would be inconsistent with law and the policies of the Statute. See § 2429.7(f) of the Statute and Litigation Manual, Part 2, Chapter J.

**27.10 Delays for enforcement:** If the Hearing Officer is faced with a request for adjournment so that a subpoena may be served or to enforce a subpoena not complied with, s/he reconciles the objective of resolving representation questions quickly with the objective of obtaining a full and complete record upon which the Regional Director can make a reasoned decision. The following guidance is provided:

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

- a) The Hearing Officer asks the party seeking the delay what the testimony of the witness would add, whether it is necessary, and whether there are any satisfactory substitutes.
- b) The Hearing Officer obtains the other party's(ies) position(s) and reviews the record to determine whether it contains all relevant facts and/or is otherwise complete.
- c) The Hearing Officer consults with the Regional Director.
- d) If, upon consideration, the Hearing Officer concludes that the testimony sought is relevant and necessary, s/he adjourns the hearing.
- e) If, upon consideration, the Hearing Officer concludes that the testimony sought is not relevant and necessary, s/he denies the request for the delay.



**28 Evidentiary and procedural objections:**

**28.1 General:** In the hearing process, the Hearing Officer is required to make rulings on objections involving a wide range of evidentiary and procedural matters.

**28.2 Stating basis for objection:** Statements of reasons in support of objections are specific and concise. The Hearing Officer does not infer or assume the ground upon which the party may be relying in raising the objection.

**28.3 Arguing the objection:** The parties generally are permitted to argue briefly to support their objection. However, the Hearing Officer does not permit the parties to engage in extended debate. In most instances, the issue that the Hearing Officer eventually rules on is clear by the way the particular question is framed and the basis offered in support of the objection.

**28.4 Stating the ruling:**

s statement is limited to, “Objection sustained” or “Objection overruled,” depending on whether or not the objection has merit. The Hearing Officer does not explain or volunteer the basis of the ruling. It is the ruling itself which the Regional Director reviews in determining whether the ruling was proper. The right ruling, for the wrong reason, remains a right ruling. If a party requests the reason for the ruling, the Hearing Officer refuses to do so and points out that automatic exceptions are allowed to all adverse rulings.

**28.5 Interjection by Hearing Officer:** The Hearing Officer has an obligation to control the admissibility of evidence and need not wait for the parties to object before ruling on the admissibility of certain testimony or other evidence. For example, in the course of an examination of a witness, a line of questioning may be undertaken which is totally irrelevant, or even prejudicial to one of the other parties (e.g., that the activity engaged in possible unfair labor practices). The Hearing Officer properly interjects at this point and requests that the party explain the purpose of the question. If not persuaded otherwise, the question is “disallowed” (see *HOG 2.1*). The Hearing Officer is permitted to interject and ask a follow up question when appropriate during another party’s questioning of a

witness if the Hearing Officer's question is on point and does not interrupt the flow of the hearing. The Hearing Officer avoids the perception of controlling the hearing or interfering with the parties' right to present its best evidence as long as the evidence is relevant and material. See also *HOG 11.8* and *HOG 32.16*.

- 28.6** ***Objection to questioning by Hearing Officer:*** The Hearing Officer is subject to the same requirements regarding the proper framing of questions to witnesses as are the parties. Thus, if an objection is raised by a party to a question posed by the Hearing Officer to a witness, the objection is given full consideration. If the Hearing Officer concludes that the objection has merit, the question is withdrawn or rephrased. An objection based solely on the contention that the Hearing Officer should not be engaged in any kind of questioning of a witness is without merit and is overruled.
- 28.7** ***Decide all objections:*** All objections, whether made in good faith or seemingly frivolous, are handled on the record. If not withdrawn by the objecting party, the Hearing Officer rules the objection. Objections cannot be left dangling on the record.

**Offer of proof:**

An offer of proof may be made when the Hearing Officer rules that a party may not examine a witness or offer exhibits on a topic to which an objection has been sustained. The party adversely affected by the ruling may state that it wishes to make an offer of proof. This allows the party to describe the evidence on the record so that a ruling can be reviewed. The Hearing Officer permits the party to make the offer by stating: "I will hear the offer" or "you may proceed with your offer." The offer is made in one of three ways, depending on the discretion of the Hearing Officer:

- a) Verbally by the offering party -- The party states on the record what the evidence would be if permitted to proceed.
- b) Question and answer by a witness -- The examining party has the witness answer questions on the record as in a normal examination. This is only suitable if the questioning is brief.
- c) Written statement which is included in the record as the offer of proof.

No cross-examination pertaining to the offer of proof is permitted. The Hearing Officer decides upon conclusion of the offer whether the testimony or exhibit is relevant and material to the issue involved. In ruling on the offer, the Hearing Officer states whether the previous ruling on the objection stands or is reversed. If the previous ruling sustaining the objection is reversed, the party may proceed to question the witness. If the objection is sustained, the matter is then in the record for the reviewing official to decide whether the Hearing Officer's ruling was proper. If correct, the evidence is not considered in making the ultimate decision. If, on review, the evidence is found to be relevant, then the matter may be remanded for further examination.



**30**

***Appeals from adverse rulings by the Hearing Officer:***

Automatic exceptions are afforded to all adverse rulings by the Hearing Officer. Immediate appeals to rulings by the Hearing Officer are not permitted. The Regional Director considers all rulings when reviewing the record.



**31 Obtaining an election agreement preceding or during the hearing:**

**31.1 General:** After the Notice of Representation Hearing is issued, the parties may enter into an election agreement prior to or after the hearing is opened.

**31.2 Prehearing election agreements:** During the initial telephone contact and during subsequent prehearing meetings, the Hearing Officer initiates discussions with the parties concerning entering into an election agreement. The Hearing Officer need not continue such discussions beyond the point when the parties indicate a fixed position, precluding a basis for a consent election agreement.

**31.2.1 Election agreement obtained:** Where the parties enter into an agreement for election prior to the opening of the hearing, the Regional Director is contacted promptly to determine whether the Regional Director will approve the agreement. The Hearing Officer informs the parties that holding the hearing is contingent upon approval of the agreement by the Regional Director. Therefore, the parties remain at the hearing site until the Regional Director indicates that s/he will approve or disapprove the agreement. Similarly, the court reporter is not released until the Regional Director informs the Hearing Officer that the agreement will be approved. Absent approval, the hearing proceeds.

In presenting the details of the election agreement, the Hearing Officer apprizes the Regional Director of the basis supporting the agreed upon unit. Similarly, if the parties have agreed to utilize the challenged ballot procedure with respect to certain employees whose eligibility is still in dispute, the percentage of potential challenged ballots to the total number of eligible employees is reflected in the agreement. The Regional Director cannot approve an agreement for election where the percentage of challenged ballots is more than fifteen percent (15%). Additionally, the Regional Director cannot approve an Election Agreement:

- a) if s/he does not agree that the unit is appropriate pursuant to 5 U.S.C. 7112(a); or

- b) when the petition raises a substantial question of policy requiring a hearing and decision by the Regional Director. See *CHM 28.11.3*.

For guidance and policy considerations in obtaining Election Agreements generally, see *CHM 28*.

**31.2.2 Procedure upon approval of agreement:** When the Regional Director states s/he will approve an Election Agreement, the Hearing Officer informs the parties, and the parties sign the agreement. Thereafter, the parties and the court reporter are allowed to leave.

The hearing is not opened for any purpose, such as to state on the record an election agreement has been obtained or to place a copy of the agreement in evidence.

**31.2.3 Withdrawal of notice of hearing:** No formal action is required to withdraw the notice of hearing. A provision is contained in the agreement for election, which reads as follows: "If Notice of Hearing has been issued in this case, the approval of this agreement by the Regional Director shall constitute withdrawal of the Notice of Hearing heretofore issued, provided that the hearing has not been closed."

**31.3 Election agreement obtained during the hearing:** When the parties indicate a willingness to enter into an agreement for election:

- a) Discussion regarding the details of the agreement are conducted off the record; (see *CHM 28.6* for checklist)
- b) The Hearing Officer participates in the discussion, particularly with regard to formulating the unit description. The Hearing Officer obtains the essential information regarding the criteria for determining the appropriateness of the unit agreed upon by the parties. Such information is recorded in the form of a stipulation or memorandum to the file. It is necessary to establish the basis upon which the Regional Director will approve or disapprove the

agreement for election;

- c) The appropriate election agreement form is drafted reflecting the parties' agreement on the unit and other substantive matters. The parties do not sign the agreement until the Regional Director states that the agreement will be approved;
- d) After all matters relating to the proposed election have been agreed upon, the Hearing Officer apprizes the Regional Director of the proposed agreement of the parties, particularly with regard to the essential facts bearing upon the appropriateness of the unit;
- e) If the Regional Director indicates approval, the appropriate election agreement is completed by the Hearing Officer and signed and dated by the parties. It is then faxed to the Regional Director for approval if the hearing is held outside the Regional Office; and
- f) Once the Regional Director signs the agreement, the hearing is resumed for the limited purpose of the Hearing Officer stating on the record that the parties have entered into an Election Agreement. Thereafter, the hearing is adjourned indefinitely.

Note: A copy of the agreement for election is not introduced in evidence.

**For more information on election agreements, see CHM 28.**

**31.4 Refusal by parties to sign election agreements:**

**31.4.1 Prehearing:** Prior to the opening of the hearing, the parties may state their general willingness to proceed to election. The hearing is not opened and the parties discuss the details of the election agreement. In accordance with § 2422.16(b) of the regulations, if the parties are unable to agree on procedural matters, specifically,

the eligibility period, method of election, dates, hours, or locations of the election, the Regional Director decides these election procedures and issues a Direction of Election, without prejudice to the right of a party to file objections to the procedural conduct of the election (see *CHM 28.11.1*).

If the parties are unable to agree to the unit or other nonprocedural matters, the Hearing Officer proceeds with the hearing (see *CHM 28.11.2*).

**31.4.2 *During the hearing:*** During the hearing, the parties may state their willingness to enter into an election agreement, but are unable to agree on procedural matters [§ 2422.16(b)]. The Hearing Officer:

- a) obtains a stipulation on all substantive portions of the election agreement including appropriate unit and eligibility issues;
- b) incorporates the stipulation onto an election agreement, FLRA Form 33 or 34, as appropriate;
- c) notes on the record those matters on which the parties do not agree;
- d) obtains on the record the parties' respective positions with respect to each disputed procedural matter (rather than securing the positions in writing as discussed in *CHM 28.11.1*);
- e) refers the matter to the Regional Director for review and a Direction of Election; and
- f) adjourns the hearing.

***NOTE: This subsection does not apply when the parties are unable to agree on the unit or other nonprocedural matters [§ 2422.16(c)]. If the parties are willing to enter into an Election Agreement, but are unable to agree on the unit or other***

***nonprocedural matters, the hearing continues.***



## **CONDUCTING THE HEARING** **HOG 32 through HOG 34**

**32** ***Conducting the hearing:*** The Regional Director or his/her designee are required to be available to respond to situations that arise prior to or during the hearing.

**32.1** ***An overview:*** A representation hearing follows an orderly sequence assuring that all issues are fully developed and that a complete factual record is obtained. This section includes a description of a typical hearing. It does not purport to cover all situations nor is the order given necessarily the best in every case. This outline, or some variation of it, is used by the Hearing Officer both in the preparation for and the unfolding of the hearing. A sample of an actual script can be found in *HOG script 35* and Figure 35 which is available at n:\figures\.

**32.2** ***Appearance sheets:*** Appearance sheets, FLRA Form 50, are completed by the Hearing Officer and by the parties. Each person who represents a party and who is likely to speak is introduced to the others, including the court reporter. The Hearing Officer makes sure all parties are ready (see *HOG 4.3*).

**32.3** ***Calling the hearing to order:*** The hearing is called to order. The opening statement is read, including the parties' recorded statements of appearance. All representatives who may subsequently speak are identified on the record (see *HOG script 35.1*).

***Note: The Hearing Officer has the authority to limit the number of party representatives who participate on the record to a reasonable number.***

**32.4** ***Formal papers:*** Formal papers are identified and received. Prehearing motions and rulings/referrals, where appropriate, are also identified and received as formal papers (see *HOG script 35.2 and HOG 4.1*).

**32.4.1** Objections to formal papers or lack thereof are affirmatively placed on the record. Objections are normally withdrawn after an

explanation is given. That explanation consists of a statement that the papers in question constitute a routine introduction of a hearing; that admission of the documents does not irrevocably establish the truth of any allegations therein; that any relevant evidence may be introduced irrespective of such allegations; and that in any event, the Regional Director passes on the validity of this as any other evidence.

**32.4.2** Any Request to Proceed, FLRA 44, is not part of the formal papers and does not go into the record at any point.

**32.5** ***Ascertaining correct names of parties:*** The Hearing Officer ascertains for the record the correct names of the parties. The Hearing Officer is responsible for establishing on the record the correct and complete names of all parties making an appearance (see *HOG script 35.3*). The Hearing Officer also notes the formal paper(s) that includes the correspondence relating to any other party that was notified by the Regional Director that it may be affected by issues raised by the petition and did not respond to the letter or appear at the hearing. If the party was identified as an incumbent or employing agency, then the record reflects why that party is not appearing. See *HOG 4.1, script at 35.3*.

**32.6** ***Motions to amend the petition:*** The Hearing Officer rules on any corrective motions to amend the petition (see *HOG script 35.4 and HOG 18.7*).

**32.7** ***Intervention:*** Motions to intervene or cross-petition filed immediately prior to the opening of the hearing are reviewed if necessary (see *HOG script 35.5 and HOG 17.4 and 23*).

**32.8** ***Other prehearing motions or motions presented by the parties upon opening the hearing:*** The Hearing Officer considers and rules on any other motions raised by the parties (see *HOG 17.4, 18, 23 and HOG script 35.6*).

**32.9** ***Outlining the issues presented by the petition(s):*** Based on conversations and attachments to the Notice of Hearing issued prior to the hearing, the Hearing Officer sets forth the issues addressed by the petition as well as those matters that are non-issues (e.g., where there are no eligibility issues tied to an

appropriate unit hearing). After the issues are presented, the Hearing Officer seeks a stipulation from the parties that the issues and non-issues have been described accurately (see *HOG script 35.7*, and *HOG 2 and 3.7*).

- 32.10 *Timeliness issues:*** This section pertains to petitions seeking an election. At any hearing involving a petition seeking an election, the Hearing Officer inquires whether any of the parties contend that there is a bar to the election pursuant to § 2422.12 of the regulations (see *HOG script 35.7.6* and *HOG 48; RCL 12* for a substantive discussion).
- 32.11 *Alternative unit(s):*** If appropriate to the issues, the Hearing Officer asks all parties if there are any alternative units in which they would be willing to proceed to an election (see *HOG script 35.8*). This allows the parties to explore alternatives to the positions initially taken with respect to the unit petitioned for. If necessary, the Hearing Officer reminds the petitioner, that any alternative unit must be supported by the showing of interest that has already been submitted. If the petitioner seeks to amend the petition, additional showing of interest is submitted with the amendment and the petitioner is required to be specific as to the scope of the unit. *U.S. Department of the Interior, National Park Service, Washington, DC, 55 FLRA 311 (1999). HOG 18.7.6.*
- 32.12 *Receiving stipulations:*** The Hearing Officer introduces and receives any stipulations entered into by the parties prior to the hearing. Oral stipulations are read into the record. Written stipulations are received as joint exhibits of the parties (see *HOG 26* and *HOG script 35.9*).
- 32.13 *Outlining the issues to address at the hearing:*** There may be occasions when the parties contest the relevance of issues that the Regional Director has identified as crucial to resolution of the petition. The Hearing Officer outlines these issues and reviews the issues presented by the petition(s) (see *HOG script 35.10* and *HOG 2 and 33.9*). The Hearing Officer also advises the parties whether s/he has been given discretion to make recommendations on the record.
- 32.14 *Summarizing the parties' positions:*** If not already placed into the record by this point, each party makes an opening statement

summarizing its position on each issue raised by the petition as well as any other issue outlined by the Hearing Officer. These opening statements are necessary to ensure that each party correctly understands the issues that will be addressed at the hearing. In addition, these statements assist the Hearing Officer and the reader of the record in analyzing the relevance and materiality of the evidence (see *HOG script 35.11*).

**32.15 Evidence:** Prior to the opening of the hearing, the Hearing Officer and the parties discuss who presents their evidence first. See *HOG 10.2.3*.

**32.15.1 Overview:** Evidence is received in the form of sworn testimony, exhibits or stipulations (see *HOG 12 through 31*). Each party is permitted to introduce any relevant testimony. The Hearing Officer administers the oath to every witness called to testify (see *HOG script 35.12*) and has the witness state his/her name, title and business address. Opportunity for cross examination of witnesses is accorded to all parties. Examination of each witness is allowed to continue until neither the parties nor the Hearing Officer have any further questions for the witness.

Since the decision and further proceedings are based on the record, it is important that the record is accurate. The Hearing Officer carefully listens to the record as it is being delivered and initiates efforts to correct or clarify material errors. Corrections may be made by stipulation or by motion inserted in the record as it is still in session.

**32.15.2 Issues that may arise during the hearing:**

**32.15.2.1** The Hearing Officer goes off the record to discuss possible stipulations, correct a party's behavior or review proper hearing procedures when necessary. All off the record remarks are summarized on the record. *HOG 11.7*.

**32.15.2.2** The Hearing Officer's demeanor sets the tone for the hearing. The Hearing Officer does not use inappropriate remarks, "off the cuff" comments or demeaning remarks when questioning or conversing with the party representatives or the witnesses. *HOG 11.5 and 11.6*.

**32.15.2.3** The Hearing Officer ensures that the record reflects when a party does not cooperate generally, present evidence previously requested or make an effort to obtain it. This ensures that the reader of the record has a complete picture of the hearing and any unsuccessful efforts made by the Hearing Officer to obtain a complete record. In this connection, if testimony reveals the existence of a relevant document(s), but no party indicates an intention to introduce this document(s) as an exhibit(s), the Hearing Officer is responsible for obtaining the document from the appropriate party and, if necessary, entering the document(s) into the record as an exhibit(s) on his/her own motion.

**32.15.2.4** During the prehearing conference the parties discuss representative testimony - where the testimony of one employee is representative of others in the same positions. Details and agreements reached are resolved prior to the opening of the hearing and repeated on the record. See *HOG 8.2f*.

Representative testimony is taken from only one witness (unless there is a stipulation that aggregation of testimony of identified witnesses is representative of a group of employees" testimony). NOTE: only one decision is made based on aggregate testimony. If testimony appears to conflict, Hearing Officer decides whether aggregate testimony is inconclusive and additional testimony is required.

**32.15.2.5** Details concerning taking testimony from witnesses via telephone or video transmission are resolved prior to the opening of the hearing. All details and agreements thereto are placed on the record. If these issues surface during the hearing, contact the Regional Director for guidance. *HOG 8.2g*.

- 32.15.2.6** Use of memory joggers or witness notes are discouraged and disallowed in some situations. If the memory joggers came from a personal log maintained daily, they are placed on the record. Personal notes prepared just for the hearing cannot be used.
- 32.15.2.7** A party may not introduce an affidavit into the record in lieu of witness testimony.
- 32.15.2.8** It is unacceptable to obtain adequate testimony from, for example, two of three contested employees, but nothing on the third (who is being contested for another reason). The third witness testifies as well. Regions cannot piece the record on the third witness from documentation.
- 32.15.2.9** In all representation cases, including those limited to eligibility issues, the mission, organization and agency functions are placed on the record. This information lays a foundation for the reader of the record for understanding in what context the disputed employees perform their work.
- 32.16 Examination by the Hearing Officer:** The Hearing Officer is responsible for:
- a) keeping track of the extent of the evidence in the record by whatever means s/he finds most comfortable (e.g., note taking).
  - b) conducting whatever necessary examination has been omitted by the parties that s/he considers relevant to resolving the issues. The Hearing Officer may call witnesses and/or ask for documentation to fill the gaps in the evidence, address new issues that arise during the hearing and overrule the objection of any party in doing so.
  - c) remembering that it is his/her responsibility to get the facts, while at the same time not appearing to side with any party

or lead any witness.

- d) ensuring that the record is understandable to the decision writer (see *HOG 28.5 and 28.6*). However, the Hearing Officer is not permitted to take over the hearing as the lead examiner except under exceptional circumstances. See *HOG 11.8*.

**32.17 Recommendations on the record:** Section 2422.21(a) provides that the Hearing Officer may make recommendations on the record to the Regional Director. The decision to permit a Hearing Officer to make recommendations on the record is solely within the discretion of the Regional Director. With the exception of objections cases that are discussed in *HOG 36*, the Regional Director decides prior to the opening of the hearing whether the Hearing Officer may make recommendations on the record. In granting the Hearing Officer the discretion to make recommendations on the record, the Regional Director is required to specify the issues for which the Hearing Officer may make recommendations.

If the Hearing Officer is permitted to make recommendations on the record, s/he adheres to the following guidelines: (see also *HOG 35.13*)

- a) all evidence relevant to the specific issue is placed on the record;
- b) the Hearing Officer asks the parties whether they have any further information;
- c) the Hearing Officer summarizes the evidence referencing on the record testimony and documentation so that the reader of the record may refer directly to the evidence used to support the recommendation;
- d) the Hearing Officer asks the parties again if there is any information which is relevant that the Hearing Officer may

have overlooked;

- e) the Hearing Officer goes off the record to deliberate the issues, evidence and what the recommendation will be;
- f) when the Hearing Officer goes back on the record, s/he makes his/her recommendation. It is not sufficient to state simply that: "I am prepared to recommend that Ms. Smith is not a confidential employee ... ." Any recommendation is supported by a factual summary, an analysis of the factors considered in making the recommendation and references to applicable case law, as appropriate; and
- g) a party is not permitted to respond to the recommendation on the record except during the closing argument, or after the close of the hearing, in his/her brief.

Under certain limited circumstances, the Hearing Officer may decide during the hearing to make a recommendation on the record. The Hearing Officer goes "off the record" and contacts the Regional Director for clearance to make the recommendation. If the Regional Director allows the Hearing Officer to make the recommendation, the Hearing Officer goes back on the record and states his/her reasons for making the recommendation before stating the recommendation.

**32.18 Before closing the record:** Before making any recommendation(s), or in the absence of a recommendation, prior to closing the hearing, the Hearing Officer (*HOG script 35.14*):

- a) reviews his/her notes to ensure that all issues raised prior to or during the hearing are dealt with on the record. If there are changes, the Hearing Officer notes on the record any regulatory requirements.
- b) asks the petitioner to amend the petition if the parties reached agreement on any issue on which the petitioner no longer seeks a Regional decision.

- c) reviews notes to identify whether evidence reveals that additional parties should be notified and given an opportunity to participate in the hearing.
- d) contacts the Regional Director to recommend postponement if the issues or parties change to allow for proper notification and preparation for the hearing.
- e) asks the parties to restate their positions to ascertain if any party wishes to change its position.

**32.19 *Change of party position:*** Once the evidence is presented, the Hearing Officer asks the parties to repeat their positions and whether, in light of the evidence received, they wish to make any changes to their respective positions on the issues. In addition, if applicable, the Hearing Officer also asks whether the parties will agree to proceed to an election in the proposed unit or in an alternative unit. This is done on the record (see *HOG script 35.15*). See *HOG 32.11* regarding rechecking the showing of interest, when it is appropriate to require an amended petition or obtain specificity with respect to the proposed amendment.

**32.20 *Closing argument:*** The Hearing Officer encourages each party to argue orally and/or submit a post-hearing brief. All parties that wish to argue orally are given the opportunity to do so. If any party expresses a desire to file a post-hearing brief, the Hearing Officer provides a date certain as the deadline for receipt of briefs and instructions for extending the filing date. Section 2422.20(d) of the regulations provides that an original and two (2) copies of a brief must be filed with the Regional Director within thirty (30) days from the close of the hearing. A written request for an extension of time to file a brief must be filed with and received by the Regional Director no later than five (5) days before the date the brief is due (see *HOG script 35.17*).

**32.21 *Closing the hearing:*** When the parties state they have nothing further, the Hearing Officer reads his/her closing statement and

declares the hearing closed (see *HOG script 35.17*).

**33**     **Special admissibility matters:** In addition to the normal considerations bearing on admissibility of evidence -- relevance, form, etc., -- there are a number of admissibility problems peculiar to the representation hearing.

**33.1**    **Attempt to litigate adequacy of showing of interest:** If a party attempts to raise an issue regarding the adequacy of the showing of interest by the petitioner or intervenor(s) (i.e., whether the requisite minimum thirty percent (30%) or ten percent (10%), respectively, has been submitted), the Hearing Officer reads the following statement into the record:  
MR./MS. ..., SECTION 2422.9(b) OF THE regulations PROVIDES THAT THE REGIONAL DIRECTOR SHALL DETERMINE THE ADEQUACY OF THE SHOWING OF INTEREST ADMINISTRATIVELY, AND SUCH DECISION SHALL NOT BE SUBJECT TO COLLATERAL ATTACK AT A REPRESENTATION HEARING OR ON APPEAL TO THE AUTHORITY.

For showings of interest submitted prior to the hearing, add:

THE REGIONAL DIRECTOR DETERMINED THAT THE SHOWING OF INTEREST SUPPORTING THE (PETITION) (INTERVENTION) WAS ADEQUATE.

For showings of interest submitted immediately prior to the opening of the hearing and not checked for adequacy, add:

THE SHOWING OF INTEREST WILL BE CHECKED AS SOON AS POSSIBLE AND WILL NOT BE MADE PART OF THE RECORD.

**33.2**    **Attempt to litigate validity of showing of interest:**  
a)       If a party attempts to raise an issue regarding the validity of the showing of interest by the petitioner or intervenor(s); i.e., procurement of the evidence of interest by fraud, forgery, etc. that the Regional Director has already acted on, the Hearing Officer reads the following statement into

the record:

MR./MS. ..., SECTION 2422.10 OF THE regulations PROVIDES THAT ANY PARTY CHALLENGING THE VALIDITY OF THE SHOWING OF INTEREST OF THE PETITIONER, CROSS-PETITIONER, OR AN INTERVENOR MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING.

THE CHALLENGE SHALL BE SUPPORTED WITH EVIDENCE. THE REGIONAL DIRECTOR SHALL INVESTIGATE THE CHALLENGE AND TAKE SUCH ACTION AS DEEMED APPROPRIATE. SUCH ACTION SHALL BE FINAL AND NOT SUBJECT TO REVIEW BY THE AUTHORITY, UNLESS THE PETITION IS DISMISSED OR THE INTERVENTION IS DENIED ON THE BASIS OF THE CHALLENGE.

PRIOR TO THE OPENING OF THIS HEARING, THE REGIONAL DIRECTOR ADMINISTRATIVELY DETERMINED THAT THE SHOWING OF INTEREST SUPPORTING THE (PETITION) (INTERVENTION) WAS VALID.

- b) For challenges received too late for the region to process prior to the opening of the hearing, the Hearing Officer reads the following statement into the record:

IMMEDIATELY PRIOR TO THE OPENING OF THIS HEARING, THE (name party) FILED A CHALLENGE TO THE VALIDITY OF THE (name party)'S SHOWING OF INTEREST. I AM REFERRING THE CHALLENGE AND SUPPORTING DOCUMENTATION TO THE REGIONAL DIRECTOR FOR CONSIDERATION AND DECISION PRIOR TO ISSUANCE OF THE DECISION AND ORDER PERTAINING TO THIS HEARING. THE CHALLENGE WILL NOT DELAY THE CONTINUATION OF THIS HEARING AT THIS TIME. NO EVIDENCE REGARDING THE CHALLENGE MAY BE INTRODUCED OR LITIGATED AT THIS HEARING.

- c) For challenges filed during the hearing, the Hearing Officer reads the following statement into the record:

THE (name party) FILED A CHALLENGE TO THE VALIDITY OF THE (name party)'S SHOWING OF INTEREST. MR./MS. ...., SECTION 2422.10 OF THE regulations PROVIDES THAT ANY PARTY CHALLENGING THE VALIDITY OF THE SHOWING OF INTEREST OF THE PETITIONER, CROSS-PETITIONER, OR AN INTERVENOR MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING, UNLESS GOOD CAUSE IS SHOWN FOR GRANTING AN EXTENSION. I AM REFERRING THE CHALLENGE AND SUPPORTING DOCUMENTATION TO THE REGIONAL DIRECTOR FOR CONSIDERATION ON TIMELINESS AND THE MERITS OF THE CHALLENGE. THE CHALLENGE WILL NOT DELAY THE CONTINUATION OF THIS HEARING AT THIS TIME. NO EVIDENCE REGARDING THE CHALLENGE MAY BE INTRODUCED OR LITIGATED AT THIS HEARING.

**33.3 Attempt to litigate challenge to status of labor organization:** A challenge to the status of a labor organization may be based on compliance with 5 U.S.C. 7103(a)(4) or claims that the labor organization is subject to corrupt influences or influences opposed to democratic principles pursuant to 5 U.S.C. 7111(f)(1).

- a) If a party attempts to raise an issue regarding the status of the petitioner and/or any intervenor as a labor organization within the meaning of the Statute that has been considered and decided by the Regional Director prior to the hearing, the Hearing Officer reads the following statement into record:

MR./MS. ..., SECTION 2422.11 OF THE regulations PROVIDES THAT ANY PARTY CHALLENGING THE STATUS OF A LABOR ORGANIZATION MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING.

THE REGIONAL DIRECTOR SHALL INVESTIGATE THE CHALLENGE AND TAKE SUCH ACTION AS DEEMED APPROPRIATE.

PRIOR TO THE OPENING OF THIS HEARING, THE REGIONAL DIRECTOR ISSUED A DECISION AND ORDER DETERMINING THAT THE (name) . . . . IS A LABOR ORGANIZATION WITHIN THE MEANING OF THE STATUTE.

The foregoing restrictions, of course, do not apply in any instance in which the issue of labor organization status was raised timely by challenge and which the Regional Director concluded required a hearing and issuance of a Decision and Order. In such cases, the status issue becomes a threshold issue at the hearing.

- b) For challenges filed too late to be investigated and decided by the Regional Director prior to the hearing or filed with the Hearing Officer at the hearing, the Hearing Officer

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

contacts the Regional Director to discuss the issues and procedures for handling. The challenging party is required to submit all supporting evidence with the challenge and be prepared to proceed on the issue at the hearing. The Hearing Officer takes evidence on before proceeding with the rest of the hearing. Ultimately, the status issue is decided by the Regional Director when s/he issues the Decision and Order or Direction of Election. The Hearing Officer reads the following statement into the record:

IMMEDIATELY PRIOR TO THE OPENING OF THIS HEARING, THE (name party) FILED A CHALLENGE TO THE STATUS OF THE (name party). BECAUSE THE ISSUE OF THE STATUS OF THE (name party) IS A THRESHOLD ISSUE THAT IS CONSIDERED BEFORE PROCEEDING WITH THIS HEARING, I AM PREPARED TO HEAR TESTIMONY AND TAKE EVIDENCE ON (name of challenging party)'S STATUS CHALLENGE. THE ISSUE OF THE (name party)'S STATUS AS A LABOR ORGANIZATION WILL BE DECIDED BY THE REGIONAL DIRECTOR AS PART OF THE DECISION AND ORDER OR DIRECTION OF ELECTION. At this point, the Hearing Officer states that the challenging party is required to provide evidence that the Department of Labor or other third party has found a violation of standards of conduct such that there is reasonable cause to believe that the challenged labor organization was:

- (i) was suspended or expelled from, or was otherwise sanctioned by, a parent organization, or federation of organizations with which it had been affiliated, based on its demonstrated unwillingness or inability to comply with the governing procedures set out in § 7120(a)(1) through (4); or
- (ii) is in fact subject to corrupt or anti-democratic influences. If evidence is filed, follow the procedures discussed in *CHM 19.10.2 and CHM 23.9.3*.

- c) If the challenge is filed during the hearing, the Hearing Officer asks the challenger to state the grounds for the status challenge and the reasons for the delay in filing. The Hearing Officer then contacts the Regional Director (or acting RD) to discuss the reasons for the party's delay in filing. If the Regional Director determines that the challenger has established good cause for extending the time limits, the Director instructs the Hearing Officer to take evidence on the issue.

MR./MS.... HAS JUST CHALLENGED THE STATUS OF THE (name party) AS A LABOR ORGANIZATION. SECTION 2422.11 OF THE regulations PROVIDES THAT ANY PARTY CHALLENGING THE STATUS OF A LABOR ORGANIZATION MAY FILE ITS CHALLENGE WITH THE REGIONAL DIRECTOR OR THE HEARING OFFICER PRIOR TO THE OPENING OF THE HEARING, UNLESS GOOD CAUSE IS SHOWN FOR GRANTING AN EXTENSION. MR./MS ..., YOUR CHALLENGE HAS BEEN FILED AFTER THE HEARING HAS BEEN OPENED. WHAT IS YOUR POSITION WITH RESPECT TO THE TIMELINESS OF YOUR CHALLENGE? ON WHAT BASIS DO YOU ARGUE THAT THERE IS GOOD CAUSE FOR GRANTING YOU AN EXTENSION OF TIME FOR FILING THE CHALLENGE TO THE STATUS OF THE (name party)? WHAT ARE THE GROUNDS ON WHICH YOU BASE YOUR CHALLENGE? DO YOU HAVE EVIDENCE TO SUPPORT THE CHALLENGE? [Timeliness does not apply to claims filed pursuant to 5 U.S.C. 7111(f)(1).] WHAT ARE THE POSITIONS OF THE OTHER PARTIES?

At this point, the Hearing Officer asks the challenging party the same questions asked in “(b)” above; then goes off the record to contact the Regional Director and obtain instructions on how to proceed. **See HOG 24.3 and HOG 46A [status challenges pertaining to compliance with 5 U.S.C. 7103(a)(4)] and HOG 46B [status challenges pertaining to claims made pursuant to 5 U.S.C. 7111(f)(1)]. See also RCL 10A and 10B.**

**33.4 *Attempt to litigate noncompliance with 5 U.S.C. 7111(e):***

Challenges alleging that a labor organization failed to submit the materials required by 5 U.S.C. 7111(e) may not be litigated in either an unfair labor practice proceeding or a representation proceeding. Compliance with 5 U.S.C. 7111(e) is an administrative matter determined by the Regional Director and not subject to collateral attack at a representation hearing. See U.S. Department of Transportation, U.S. Coast Guard Finance Center, Chesapeake, Virginia, 34 FLRA 946 (1990).

**33.5 *Attempt to litigate noncompliance with 5 U.S.C. 7120:*** 5 U.S.C. 7120 establishes the internal union standards of conduct applicable to labor organizations that hold exclusive representation under the Statute or seek that status. 5 U.S.C. 7120(d) commits standards of conduct issues to the exclusive jurisdiction to the Assistant Secretary of Labor, unless they are raised as part of a claim that a labor organization is subject to corrupt influences within the meaning of 5 U.S.C. 7111(f)(1). *HOG 33.3.*

If the challenging party is only alleging a violation of the Standards of Conduct described in 5 U.S.C. 7120, the Regional Director issues a letter to the challenging party referring that party to the Department of Labor (if the challenge is filed prior to the hearing). If such allegations are raised at a hearing, the Hearing Officer allows an offer of proof on the record and then sustains any objection to the admission of testimony or documentary evidence bearing on this issue. If no objection is made, the Hearing Officer on his/her own, excludes such evidence. See *American Federation of Government Employees, Local 2000, AFL-CIO*, 8 FLRA 718 (1982); *National Association of Government Employees, Local R5-66*, 17 FLRA 796 at 813

(1985) and *American Federation of Government Employees, Local 2419*, 53 FLRA 835, 841-842 (1997). See also *CHM 19.10.4.*

**33.6 *Attempt to litigate unfair labor practices:*** Evidence of unfair labor practices by any of the parties involved in the proceedings is not admissible. Any line of questioning or exhibits that seek to establish or inquire into conduct by the activity, petitioner or any

intervenor, which allegedly violated 5 U.S.C. 7116 are wholly inadmissible. The Hearing Officer is particularly alert to interject, even if there are no objections, and to disallow such questioning, including striking any such testimony, if necessary.

**33.7 *Attempt to litigate supervisory assistance:*** Evidence of conduct by a supervisor or management official with respect to soliciting or obtaining any showing of interest in support of a petition or intervention seeking an election or a determination of eligibility for dues allotment is not admissible unless it is an issue of the hearing. See United States Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas, 55 FLRA 940 (1999). Such hearings are very rare and are avoided. See *CHM 18.19*.

**33.8 *Attempt to litigate petitioner's unit eligibility:*** In an election petition requiring a showing of interest, an issue that may be litigated is whether the petitioner in a decertification case or the petitioner's representative in a representation election case is bargaining unit eligible (e.g., supervisor or management official). However, only evidence which relates to the criteria set forth in 5 U.S.C. 7103(a) and 7112(b) is relevant. Testimony is not permitted regarding any alleged conduct in obtaining any showing of interest in support of these petitions except when the issue of supervisory involvement is the issue in a hearing concerning a challenge to the validity of the showing of interest (such hearings are very rare and are avoided - See *CHM 18.19*).

**33.9 *Evidence with respect to the appropriateness of potential appropriate units other than those which may be identified in the petition:*** Pursuant to § 2422.3 of the regulations, a petitioner is only required to describe the unit(s) affected by the issues raised in the petition and provide a clear and concise statement of the issues raised by the petition and the results the petitioner seeks. Normally, in petitions that seek elections, petitioners describe the unit they seek to represent.

***NOTE: In a Decision and Order involving an appropriate unit question in an election petition, the Regional Director decides only whether the unit petitioned for in an election case or any alternative unit the petitioner has agreed to is appropriate. The Regional Director does not decide whether there is a more***

***appropriate unit or whether the Activity's proposed unit is appropriate if s/he finds that the petitioner's unit(s) are not appropriate. See Department of Transportation, Federal Aviation Administration, New England Region (FAA), 20 FLRA 224 (1985).***

However, in cases where the scope of any resulting unit is unclear (e.g., reorganizations, election versus accretion cases), the petitioner may not be able to describe the proposed unit(s) with any specificity. In such cases, the evidence taken during the hearing is broad enough to encompass all potential appropriate units, whether identified as such by the parties, the Regional Director, or the Hearing Officer. See *RCL 3* and *HOG 39*.

***NOTE: In a petition in which the parties are not sure what happened to their unit as a result of a reorganization, the Regional Director's decision is based on the facts and the issues not only defined by the petitioner but also by the facts and circumstances that resulted in the petition. CHM 1.1.***



**34** **Hearing Officer's Report:** (Not for use in an election objections case, see HOG 36 of this Guide).

**34.1** **Purpose:** The hearing officer's report is to give a summary of the issue(s) involved, the pertinent evidence presented with respect to such issue(s), any unusual or significant procedural problems affecting the proceedings, information concerning submission of briefs, and the motions on which the Regional Director rules. No recommendations are included in the report although the Hearing Officer notes the issues and recommendations for which s/he was given discretion to make.

**34.2** **Submission:** The hearing officer's report is submitted to the Regional Director, placed in the case file and provided to the reviewer of the record as soon as possible after the closing of the hearing.

**34.3** **Preparation of the Report:** Preparation of the report is based upon the events which occurred at the hearing. Notwithstanding the fact that a hearing involves extensive evidence and/or novel or complex issues, submission cannot be delayed for the purpose of checking the transcript and exhibits in the preparation of the report.

**34.4** **Contents of Report:** The hearing officer's Report. A draft of the report is located at n:\figures\H34\_4.wpd. In completing the items in the report, the following details are noted:

- a) Item 1(c)--Pleadings and Parties: Enter the name of each party as stated on the record. If amended, the name is shown as amended. Note the date(s) of the hearing and its location.
- b) Item 2--Issue(s): Summarize the matters that were in issue at the hearing and the pertinent evidence presented with respect to each issue. Any issue litigated other than those listed is checked under the heading "Other" and discussed in item 8.
- c) Item 3 --Procedure: Discuss any unusual or significant

procedural problems affecting the proceeding and/or any rulings made about which the Hearing Officer is in doubt.

- d) Item 4 --Bars to election: Include an affirmative statement concerning whether there were any bars to a petition for an election.
- e) Item 5--Showing of Interest: In addition to checking the first entry; i.e., that the completed FLRA Form 52, and any amendment(s), are attached to the report, each of the remaining three (3) items are completed by entering either a checkmark or NA (Not Applicable). Any party's showing of interest is examined to determine its adequacy in relation to any or all of the remaining three items, if relevant to the particular hearing. The adequacy or inadequacy of the showing of interest is indicated, of course, by striking out or underscoring the word "(not)."

Example 1: if the activity contends that a unit different from that sought is appropriate and examination reveals that the showing of interest is adequate, the second item is checked, the word "(not)" stricken and the arithmetic details set forth.

Example 2: where the inclusion of seasonal and part-time employees is in issue, the petitioner contending that these employees should be excluded, the l  
s showing of interest is adequate  
in the event that these categories are included in the unit  
by the Regional Director and the arithmetic details set  
forth.

In each instance, the showing of interest for any intervenor(s) is also reflected.

- f) Item 6--Stipulations: List the stipulations.

- g) Item 7--Recommendations made on the record: Review the instructions given by the Regional Director concerning making recommendations on the record. Note the issue and the recommendation made.
- h) Item 8--Other issues or problems: Summarize relevant facts regarding any issue(s) or problem(s) not covered under any of the above paragraphs; e.g., status of labor organization.
- i) Item 9--Briefs: State whether the parties intend to file briefs and the due date established for filing any brief(s).
- j) Item 10--Reporter's estimate of transcript pages: Insert the number of estimated pages.

**SAMPLE SCRIPT  
HOG 35**

**35** **Script:** The following is a basic outline for a hearing. It can be modified as necessary to fit particular circumstances (see Figure 35 at n:\figures\H35.wpd).

**35.1** **Appearances and opening statement:**

ON THE RECORD. THE HEARING WILL BE IN ORDER.

THIS IS A FORMAL HEARING IN THE MATTER  
OF....., CASE  
NUMBER.....BEFORE THE FEDERAL  
LABOR RELATIONS AUTHORITY.

Read the entire caption of the case from the notice of hearing.

THE HEARING OFFICER APPEARING FOR THE FEDERAL  
LABOR RELATIONS AUTHORITY IS .....

WILL REPRESENTATIVES FOR EACH OF THE PARTIES

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

PLEASE STATE THEIR APPEARANCE FOR THE RECORD,  
INCLUDING TITLE, ADDRESS AND ZIP CODE?

FOR THE (ACTIVITY) (AGENCY)?

FOR THE PETITIONER?

FOR THE INTERVENOR(S)?

If appearance is by an attorney, obtain full name of law firm.

Appearance by a labor organization representative reflects the  
national with whom affiliated.

I WISH TO INFORM ALL PARTIES THAT THE OFFICIAL  
REPORTER MAKES THE ONLY OFFICIAL TRANSCRIPT OF  
THESE PROCEEDINGS AND ALL CITATIONS IN BRIEFS OR  
ARGUMENTS MUST REFER TO THE OFFICIAL RECORD.  
AFTER THE CLOSE OF THE HEARING ONE OR MORE OF THE  
PARTIES MAY WISH TO HAVE CORRECTIONS MADE IN THE  
RECORD. ALL SUCH PROPOSED CORRECTIONS, EITHER BY  
AN AGREED STATEMENT, STIPULATION, OR MOTION SHALL  
BE MADE IN WRITING TO THE REGIONAL DIRECTOR.

I WISH TO STRESS THE FACT THAT ALL MATTERS SPOKEN  
IN THE HEARING ROOM ARE RECORDED BY THE OFFICIAL  
REPORTER WHILE THE HEARING IS IN SESSION. IN THE  
EVENT THAT ANY OF THE PARTIES WISHES TO MAKE OFF-  
THE-RECORD REMARKS, REQUESTS TO MAKE SUCH  
REMARKS ARE DIRECTED TO THE HEARING OFFICER AND  
NOT TO THE OFFICIAL REPORTER. STATEMENTS OF  
REASONS IN SUPPORT OF MOTIONS AND OBJECTIONS ARE  
AS CONCISE AS POSSIBLE. OBJECTIONS AND EXCEPTIONS  
MAY, UPON APPROPRIATE REQUEST, BE PERMITTED TO  
STAND TO AN ENTIRE LINE OF QUESTIONING. AUTOMATIC  
EXCEPTIONS ARE ALLOWED TO ALL ADVERSE RULINGS.

THE SOLE OBJECTIVE OF THE HEARING IS TO ASCERTAIN AND INQUIRE INTO THE RESPECTIVE POSITIONS OF THE PARTIES AND TO OBTAIN A COMPLETE AND FULL FACTUAL RECORD UPON WHICH A DECISION MAY BE BASED. IT MAY BECOME NECESSARY FOR THE HEARING OFFICER TO ASK QUESTIONS, AND TO EXAMINE WITNESSES, WITH RESPECT TO MATTERS NOT RAISED OR PARTIALLY RAISED BY THE PARTIES. THE SERVICES OF THE HEARING OFFICER ARE EQUALLY AVAILABLE TO ALL PARTIES TO THIS PROCEEDING.

AFTER THE CLOSE OF THE HEARING, THE REGIONAL DIRECTOR WILL ISSUE A DECISION AND ORDER.

**35.2 Receiving formal papers in evidence:** (see HOG 4.1, 10.2.2 and 32.4)

I NOW PROPOSE TO RECEIVE THE FORMAL PAPERS INTO THE RECORD.

THE PARTIES WERE AFFORDED THE OPPORTUNITY TO EXAMINE THE FORMAL PAPERS PRIOR TO THE OPENING OF THIS HEARING.

ARE THERE ANY OBJECTIONS TO RECEIVING IN EVIDENCE THE FORMAL PAPERS AS AUTHORITY EXHIBITS MARKED 1a THROUGH 1... FOR IDENTIFICATION?

HEARING NO OBJECTION, THEY ARE RECEIVED INTO THE RECORD.

A party is allowed to state its objections, in full, on the record. If the objection is raised as to the admissibility of an exhibit, the Hearing Officer explains that:

- a) the formal papers are necessary to the Authority's jurisdiction in the matter,

- b) receipt of the exhibits in evidence does not establish the truth of the matters contained therein,
- c) any relevant evidence may be introduced irrespective of the contents of the exhibits, and
- d) in any event, the Regional Director passes on the admissibility of such exhibits and any other evidence.

If the other party does not withdraw its objection after this explanation, the objection is overruled.

If a party seeks to raise an issue or makes a motion on any matter unrelated to the formal papers (e.g., intervention, showing of interest, etc.) before all papers are received in evidence, ruling by the Hearing Officer on that motion is deferred until disposition of the Authority exhibits is completed.

If an issue is raised regarding:

- a) the adequacy of the showing of interest, see *HOG 33.1*;
- b) the validity of the showing of interest, see *HOG 33.2*;
- c) the status of a labor organization, see *HOG 33.3*; or
- d) or motion to dismiss petition, see *HOG 18.3*.

**35.3 *Ascertaining correct names of parties:*** (see *HOG 3 and 32.5*)  
 MR./MS. ..., IS THE NAME OF THE ACTIVITY AND THE AGENCY APPEARING ON THE PETITION NAMED, .... CORRECT?

MR./MS. ..., IS THE NAME OF THE PETITIONER APPEARING  
 ON THE  
 PETITION,  
 NAMED ...  
 CORRECT?

MR./MS. ...., IS THE NAME OF THE INTERVENOR APPEARING ON THE PETITION/NOTICE OF HEARING, NAMELY, ... CORRECT?

If a party states that its name is not correct, the correct name is provided for the record, after which the Hearing Officer reads the following statement into the record:

ARE THERE ANY OBJECTIONS TO HAVING THE PETITION AND THE OTHER FORMAL PAPERS AMENDED SO THAT THE NAME OF THE (ACTIVITY, AGENCY, PETITIONER, INTERVENOR) WILL APPEAR CORRECTLY IN THE CAPTION AS .....?

The affiliation, if any, with national, international, and/or parent federation, is included in full. No abbreviation in the name of a labor organization is permitted, except in the single instance of AFL-CIO.

The correct name of a labor organization, as provided by its representative, need not be supported by documentary evidence or testimony.

**35.4 Other motions to amend the petition:** If the Hearing Officer knows in advance (as a result of prehearing discussions) that the petition will be amended, it is amended at this time (see *HOG 18.7 and 32.6* for instructions on handling amendments to petitions).

**35.5 Intervention and cross-petition:** Motions to intervene and cross-petitions that were filed immediately prior to the opening of the hearing are reviewed and, if necessary, ruled on (see *HOG 17.4, 23, 32.7 and 33*).

(A)(1) When the motion to intervene is being granted:

MR./MS. ...., YOUR MOTION TO INTERVENE, ON BEHALF OF ....., IS GRANTED.

- (2) If the Hearing Officer has any doubt as to the propriety of permitting intervention, s/he states the following:

MR./MS. ...., YOUR MOTION TO INTERVENE, ON BEHALF OF ...., IS GRANTED, CONDITIONALLY (if necessary, AND SUBJECT TO A SUBSEQUENT CHECK OF THE SUFFICIENCY OF THE SHOWING OF INTEREST). A FINAL DECISION IS BEING RESERVED FOR THE REGIONAL DIRECTOR IN THE DECISION AND ORDER.

- (B)(1) With respect to cross-petitions:

WITH RESPECT TO THE CROSS-PETITION, WHAT ARE THE POSITIONS OF THE PARTIES ON CONSOLIDATING THE CROSS-PETITION WITH THE PETITION PRESENTLY BEFORE THE HEARING OFFICER?

ON THE BASIS OF A DISCUSSION WITH THE REGIONAL DIRECTOR, THE REGIONAL DIRECTOR HAS DECIDED TO CONSOLIDATE / NOT TO CONSOLIDATE THE CROSS-PETITION WITH THE PETITION PENDING BEFORE THIS HEARING OFFICER.

If the Regional Director grants the cross-petitioner status on a “conditional basis”, the Hearing Officer adds:

MR./MS. ...., YOUR REQUEST TO CROSS-PETITION IS GRANTED, CONDITIONALLY. A FINAL DECISION IS BEING RESERVED FOR THE REGIONAL DIRECTOR IN THE DECISION AND ORDER.

- (2) If the petitions are consolidated:

I WILL NOW INTRODUCE THE CROSS-PETITION AS AUTHORITY EXHIBIT #...

ARE THERE ANY OBJECTIONS TO RECEIVING INTO

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

EVIDENCE AUTHORITY EXHIBIT # .....

HEARING NO OBJECTION, AUTHORITY EXHIBIT # ..... IS RECEIVED.

- (3) If the intervention or cross-petition is filed during the hearing: the Hearing Officer asks the party to state the grounds for the request and the reasons for the delay in filing. The Hearing Officer then contacts the Regional Director (or acting RD) to discuss the reasons for the party's delay in filing. If it appears that the party requesting intervention has shown good cause for granting an extension to the timeliness requirements, the Regional Director may allow the Hearing Officer to grant "conditional" intervention and the script in "(2)" is read into the record. If it does not appear that the party's untimely intervention warrants further consideration, the Regional Director instructs the Hearing Officer to refer the intervention request to the Regional Director for action (*HOG 17.4, and 18.4 and 23* for cross-petitions).

**35.6 Other prehearing motions presented by the parties upon opening the hearing:** Other motions are handled similarly to those discussed above (see *HOG 18, 24, 32.8 and 33*). Other parties that were notified of the petition and did not respond are listed in the record at this time. See *HOG 32.5*.

**35.7 Outlining the issues presented by the petition:** The following are examples of scripts which concern issues that are commonly raised in petitions (see *HOG 32.9, 2 and 3.7*).

**35.7.1 Appropriate unit:** (see *HOG 37* for information required for the record and *RCL 1* for substantive discussions of the issues)

This sample involves a consolidated hearing for two election petitions:

THE UNIT SOUGHT BY THE PETITIONER IN CASE NO. ...., IS DESCRIBED AS FOLLOWS IN THE AMENDED PETITION:

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

(describe proposed unit)

THE UNIT SOUGHT BY THE SAME PETITIONER IN CASE NO. ...., IS DESCRIBED AS FOLLOWS IN THE AMENDED PETITION:

(describe proposed unit)

MR./MS. ...., WHAT IS THE POSITION OF THE PETITIONER REGARDING THE APPROPRIATENESS OF THE PETITIONED-FOR UNITS?

MR./MS. ...., WHAT IS THE POSITION OF THE ACTIVITIES REGARDING THE APPROPRIATENESS OF THE PETITIONED-FOR UNITS?

ALTERNATIVE UNIT(S) (optional, see *HOG script 35.8*).

AT THIS TIME, WILL THE PETITIONER STATE FOR THE RECORD ITS POSITION AS TO WHAT UNIT(S), IF ANY, IT WOULD BE WILLING TO PROCEED TO AN ELECTION IN AS AN ALTERNATIVE TO THE UNITS SOUGHT BY THE AMENDED PETITIONS?

WHAT IS THE POSITION OF THE ACTIVITIES REGARDING ANY SUCH ALTERNATIVE UNIT(S)?

**35.7.2 Eligibility:** (see *HOG Employee Category 51 through 64 for information required for the record and RCL 15 through 28 for substantive discussions of the issues*)

This sample involves a request to clarify multiple bargaining positions.

IN THIS CASE, THE PETITIONER SEEKS TO CLARIFY THE BARGAINING UNIT DESCRIBED BELOW WHICH WAS CERTIFIED ON ..... IN CASE NO. ....:

(Describe the recognized or certified unit directly from the

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

recognition or certification; if neither document is available, the Hearing Officer relies on the unit description in the contract. If there are any discrepancies between the names of the parties to the case as opposed to the names of the parties on these documents, this is clarified on the record, either through a stipulation or testimony.)

THROUGH THIS PETITION, THE PETITIONER, ....., PROPOSES THAT THE ABOVE-DESCRIBED UNIT BE CLARIFIED BY INCLUDING THE FOLLOWING EMPLOYEE(S):

<u>TITLE</u>	<u>GRADE</u>	<u>SERIES</u>
<u>INCUMBENT</u>		

Note: When clarifying units, the petitioner is required to specify the positions held by specific individuals that it seeks to clarify. For example, a petition may seek to clarify only certain Program Analysts, GS-9. The record tracks the petition and reflects the names of the individuals who encumber the positions affected by the petition. The record in this example includes an explanation why the petitioner seeks to clarify the status of certain individuals and not others.

When a petition seeks to clarify the status of an entire classification of employees, e.g., all Program Analysts, GS-345-9, the parties prepare an exhibit that identifies the names and organizational location of the incumbents. This is a joint exhibit absent a stipulation that the petition seeks to clarify the status of all employees who encumber the specific position at issue. This example is also appropriate for selecting one individual to provide representative testimony. *HOG 32.15.2.4.*

MR./MS. ....., HAVE I CORRECTLY STATED THE PURPOSE OF THE ....'S PETITION TO CLARIFY THE UNIT?

MR./MS. ....., IS THIS .....(other party)'S UNDERSTANDING OF THE PURPOSE OF THE PETITIONER'S CLARIFICATION OF

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

UNIT PETITION?

WILL EACH OF THE PARTIES STATE ITS POSITION WITH RESPECT TO THE INCLUSION OR EXCLUSION OF (EACH OF) THE CLASSIFICATION(S) IN ISSUE, NAMELY.....?

MR./MS. ...., FOR THE PETITIONER?

MR./MS. ...., FOR THE (ACTIVITY) (AGENCY)?

MR./MS. ...., FOR THE INTERVENOR?

**35.7.3 Matters relating to representation (e.g., reorganization, accretion, successorship, Montrose):** (see HOG 37 through 50 for questions and RCL 1 through 14 for substantive discussions of the issues)

IN THIS CASE, THE PETITIONER SEEKS TO CLARIFY THE BARGAINING UNIT DESCRIBED BELOW WHICH WAS CERTIFIED ON ..... IN CASE NO. ....:

In this sample, there is only one unit being clarified as a result of a substantial change in the character and scope of the unit. The existing unit description is read into the record. On the other hand, a large reorganization may affect many units. Rather than read all of the units into the record, the parties prepare a joint exhibit setting forth descriptions of the units and the dates of recognition or certification with copies of appropriate recognitions and certifications.

THROUGH THIS PETITION, THE PETITIONER(S) SEEKS TO CLARIFY THE CERTIFIED UNIT(S) BY: [Provide a clear and concise statement of the issues raised by the petition and the results the petitioner(s) seeks.]

MR./MS. ...., HAVE I CORRECTLY STATED THE PURPOSES OF THE PETITIONER'S PETITION?

MR./MS. ...., IS THIS THE (other party)'S UNDERSTANDING OF

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

## THE PURPOSES OF THE PETITIONER'S PETITION?

The Hearing Officer confirms that all parties understand the purpose of the petition.

### **35.7.4 Unit consolidations:** (see *HOG 39* for information required for the record and *RCL 13* for substantive discussions of the issues)

This example is a request to consolidate two separate bargaining units.

THROUGH THIS PETITION, THE PETITIONER, ....., SEEKS TO CONSOLIDATE (cite number of units) TWO SEPARATE EXISTING BARGAINING UNITS WHICH IT CURRENTLY REPRESENTS. ONE OF THE UNITS IS A UNIT OF EMPLOYEES OF .....(name of Activity/Agency), WHICH AS MOST RECENTLY CERTIFIED ON .... (cite date) IN CASE NO. .... IS DESCRIBED AS FOLLOWS:

(describe current unit "A" directly from the recognition or certification; if neither document is available, the parties may stipulate that the unit described in the negotiated agreement is representative of the recognition. Any discrepancies between the names of the parties to the case as opposed to the names of the parties on the certifications or recognitions are clarified on the record, either through a stipulation or testimony, and if necessary, a designation of representative.)

THE SECOND OF THESE UNITS CURRENTLY REPRESENTED BY ..... (union) IS A UNIT OF EMPLOYEES OF..... (name of activity/agency), WHICH AS MOST RECENTLY CERTIFIED ON.....(date) IN CASE NO. .... IS DESCRIBED AS FOLLOWS:

(describe current unit "B" directly from the recognition or certification; if neither document is available, per the parties' stipulation, the Hearing Officer may rely on the unit description in the contract. Any discrepancies between the names of the parties

to the case as opposed to the names of the parties on the certifications or recognitions are clarified on the record, either through a stipulation or testimony, and if necessary, a designation of representative.)

THE DESCRIPTION OF THE UNIT SOUGHT BY THE PETITIONER TO CONSOLIDATE THE ABOVE DESCRIBED EXISTING BARGAINING UNITS IS AS FOLLOWS:

(describe proposed consolidated unit - see *CHM 28.13* that discusses conforming units to Statutory exclusions )

If there are a significant number of units to consolidate, the Hearing Officer requires the parties to prepare a joint exhibit describing each of the units sought in the consolidation, showing the date of recognition or certification and attaching copies of the recognitions and certifications, if available.

Questions when the petition is not jointly filed (tailor if petition is jointly filed):

MR./MS. ...., DOES THE ABOVE ACCURATELY DESCRIBE THE EXISTING BARGAINING UNITS WHICH ARE THE SUBJECTS OF THIS PETITION AND THE ACTIVITIES/AGENCIES' UNDERSTANDING OF THE CONSOLIDATED BARGAINING UNIT SOUGHT BY THE PETITIONER?

MR./MS. ...., DOES THE ABOVE ACCURATELY DESCRIBE THE EXISTING BARGAINING UNITS WHICH ARE THE SUBJECTS OF THIS PETITION AND THE PETITIONER'S UNDERSTANDING OF THE CONSOLIDATED BARGAINING UNIT SOUGHT BY THE PETITION?

**35.7.5 Determinative challenged ballots:** (see *CHM 49*)

This sample involves determinative challenged ballots.

THE SOLE PURPOSE OF THIS HEARING IS TO DETERMINE THE BARGAINING UNIT ELIGIBILITY STATUS OF ( ... number of employees of -name activity/agency- and whose challenged ballots are determinative) EMPLOYEES IN ORDER TO RESOLVE THEIR DETERMINATIVE CHALLENGED BALLOTS.

OF THESE DETERMINATIVE CHALLENGED BALLOTS, THOSE OF THE FOLLOWING EMPLOYEES WERE CHALLENGED BY THE (identify challenging party) BASED ON ITS CONTENTION THAT THESE EMPLOYEES ARE (e.g., supervisors, managers, etc.) WITHIN THE MEANING OF (cite applicable section of Statute):

<u>NAME</u>	<u>POSITION DESCRIPTION TITLE</u>
-------------	-----------------------------------

MR./MS. ..., HAVE I ACCURATELY IDENTIFIED THE EMPLOYEES WHOSE BALLOTS WERE CHALLENGED AND THE REASON FOR THOSE CHALLENGES .....

MR./MS. ..., DOES THIS ACCURATELY REFLECT THE (name of party) ....'S UNDERSTANDING REGARDING WHICH EMPLOYEES' BALLOTS THE ... CHALLENGED AND THE REASON FOR THOSE CHALLENGES?

THE REMAINING DETERMINATIVE CHALLENGED BALLOTS, AS CAST BY .....(name of employees), WERE CHALLENGED BY THE ..... AS FOLLOWS:

<u>NAME</u>	<u>POSITION DESCRIPTION TITLE</u>	<u>REASON FOR CHALLENGE</u>
-------------	-----------------------------------	-----------------------------

MR./MS. ...., HAVE I ACCURATELY IDENTIFIED THE EMPLOYEES WHOSE BALLOTS WERE CHALLENGED AND THE REASONS FOR THOSE CHALLENGES BY THE .....

MR./MS. ...., DOES THIS ACCURATELY REFLECT THE ....'S

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

UNDERSTANDING REGARDING WHICH EMPLOYEES' BALLOTS THE ... CHALLENGED AND THE REASONS FOR THOSE CHALLENGES?

IF THE REGIONAL DIRECTOR, OR ULTIMATELY, AS APPLICABLE, THE AUTHORITY, DETERMINES THAT FOR PURPOSES OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, ANY OF THE EMPLOYEES WHO CAST DETERMINATIVE CHALLENGED BALLOTS ARE, IN FACT, ELIGIBLE TO VOTE IN THE ELECTION HELD IN THIS CASE, THOSE ELIGIBLE EMPLOYEES' BALLOTS WILL BE OPENED AND COUNTED TOGETHER WITH THE OTHER ELIGIBLE EMPLOYEES WHO CAST BALLOTS IN THE ELECTION. A REVISED TALLY OF BALLOTS WILL THEN BE PREPARED, REFLECTING THEIR DESIRE ON THE QUESTION OF REPRESENTATION.

MR./MS. ...., DOES MY DESCRIPTION OF THE PURPOSE OF THIS HEARING ACCURATELY REFLECT THE ACTIVITY'S UNDERSTANDING OF THE MATTERS AT ISSUE IN THIS PROCEEDING?

MR./MS. ...., DOES MY DESCRIPTION OF THE PURPOSE OF THIS HEARING ACCURATELY REFLECT THE UNION'S UNDERSTANDING OF THE MATTERS AT ISSUE IN THIS PROCEEDING?

**35.7.6 *Timeliness issues:*** This issue is always addressed in a hearing involving a petition that seeks an election. Even if timeliness is not an issue in dispute, the following questions are asked so that the issue is resolved and cannot be raised later (see *HOG 32.10 and 48, RCL 12*).

DOES ANY PARTY CONTEND THAT THERE IS A BAR TO AN ELECTION IN EITHER OF THE PETITIONED-FOR UNITS IN THESE CASES BASED ON AN AGREEMENT, PRIOR ELECTION, OR CERTIFICATION?

MR./MS. ...., WHAT IS THE POSITION OF THE LABOR ORGANIZATION YOU REPRESENT ON THIS ISSUE?

MR./MS. ...., WHAT IS THE POSITION OF THE ACTIVITIES ON THIS ISSUE?

If timeliness is not an issue, it may be stipulated as a nonissue:

IT IS HEREBY STIPULATED BY ALL PARTIES THAT THERE IS NO BAR TO AN ELECTION IN THIS CASE BASED UPON AN AGREEMENT, PRIOR ELECTION OR CERTIFICATION.

If timeliness is an issue, the Hearing Officer frames the issue in the form of a stipulation of an issue to explore at the hearing (see *HOG 32.13*). The following is an example of a stipulation reached at a hearing where timeliness is the sole issue:

THE SOLE ISSUE RAISED BY THE SUBJECT PETITION FOR PURPOSES OF THIS HEARING IS WHETHER AN ELECTION IN THE PROPOSED UNIT IS BARRED BY A COLLECTIVE BARGAINING AGREEMENT. THERE ARE NO OTHER ISSUES WHICH WOULD PRECLUDE AN ELECTION BEING HELD IN THIS CASE.

- 35.8** **Alternative unit(s):** If appropriate to the issues, the Hearing Officer asks the petitioner if there are any alternative units for which the petitioner is willing to seek representation through an election. As noted in *HOG 32.11*, the Hearing Officer reminds the petitioner, that any alternative unit must be supported by the showing of interest that has already been submitted. If the petitioner seeks to amend the petition, additional showing of interest is submitted with the amendment and the petitioner must be specific as to the scope of the unit. *U.S. Department of the Interior, National Park Service, Washington, DC, 55 FLRA 311 (1999). HOG 18.7.6.* The Hearing Officer asks the parties for their positions on alternative units at both the beginning and the end of the hearing. The point is to make sure the record contains sufficient evidence

for the Regional Director to make a decision on the appropriateness of the alternative unit.

**35.9 Receiving stipulations:** (see HOG 10.2.4, 26, and 32.12)  
The following is an example of a stipulation for a non-issue:

IN AN OFF-THE-RECORD DISCUSSION, THE PARTIES AGREED TO THE FOLLOWING STIPULATION:

THE PARTIES HEREBY STIPULATE THAT NO INDIVIDUAL UNIT ELIGIBILITY MATTERS ARE AT ISSUE FOR PURPOSES OF THIS HEARING AND THAT NO INDIVIDUAL ELIGIBILITY DISPUTES STAND IN THE WAY OF PROCEEDING TO AN ELECTION SHOULD THE PETITIONED FOR UNITS SOUGHT BY THE PETITIONER IN THESE CASES, AS DESCRIBED ABOVE, BE FOUND APPROPRIATE FOR EXCLUSIVE RECOGNITION BY THE FEDERAL LABOR RELATIONS AUTHORITY.

IS IT SO STIPULATED?

Have the parties state their agreement with the stipulation.

THE STIPULATION IS RECEIVED.

The following is an example of a factual stipulation for a supervisory position:

ON THE BASIS OF AN OFF-THE-RECORD DISCUSSION, THE FOLLOWING STIPULATION IS PROPOSED:

IT IS HEREBY STIPULATED BY THE PARTIES THAT ... (name of person) IS A SUPERVISOR WITHIN THE MEANING OF SECTION 7103(a)(10) OF THE STATUTE BASED ON HIS/HER AUTHORITY TO HIRE EMPLOYEES. ON THREE OCCASIONS S/HE HAS BEEN THE SELECTING OFFICIAL FOR MERIT PROMOTION ACTIONS INCLUDING..... (identify the positions and/or promotion announcements as well as the names of those hired).

IS IT SO STIPULATED BY THE ACTIVITY?

BY THE PETITIONER?

BY THE INTERVENOR?

THE STIPULATION IS RECEIVED INTO THE RECORD.

Note that this stipulation includes a description of the legal conclusion agreed upon by the parties and a justification for that conclusion.

The following is a sample stipulation where the parties agree that the testimony of one employee holding a particular position at a particular grade is representative of all employees holding that position at that grade:

THE PARTIES STIPULATE THAT THE DUTIES PERFORMED BY (identify individual) ARE REPRESENTATIVE OF ALL ACTIVITY EMPLOYEES AT ISSUE IN THIS PETITION WHO HOLD THE POSITION OF (identify position title, series and grade). THE PARTIES FURTHER STIPULATE THAT THE DECISION REACHED BY THE REGIONAL DIRECTOR/AUTHORITY REGARDING THE BARGAINING UNIT ELIGIBILITY OF (identify same individual named in first sentence) WILL BE APPLIED TO DETERMINE THE BARGAINING UNIT ELIGIBILITY OF (identify all other employees at issue in the petition who hold the same position at the same grade). THESE EMPLOYEES ALSO HOLD THE POSITION OF (identify same position title, series, and grade name in the first sentence).

***NOTE: Using more than one employee as a “representative sample” defeats the purpose of the stipulation since the employees could contradict each other, necessitating expanding the testimony to include all employees in the disputed category.***

Office of the General Counsel  
Hearing Officer’s Guide

Revised August 2000

**35.10 *Outlining issues to explore at the hearing:*** Outline the issues to address at the hearing. These include issues identified by the Regional Director as crucial to resolution of the petition, even if the parties do not agree that they are relevant (see *HOG 2, 3.7, 32.13, and 33.9*).

I WILL NOW OUTLINE THE ISSUES TO ADDRESS AT THIS HEARING:

The Hearing Officer outlines the issues.

If the Regional Director authorizes the Hearing Officer to make recommendations on the record, the Hearing Officer states:

THE REGIONAL DIRECTOR HAS GIVEN ME DISCRETION TO MAKE RECOMMENDATIONS ON THE RECORD ON THE FOLLOWING ISSUES.

If the Hearing Officer is not authorized to make recommendations on the record, the Hearing Officer states:

I WILL NOT BE MAKING RECOMMENDATIONS ON THE RECORD IN THIS PROCEEDING.

**35.11 *Summarizing the parties' positions:*** (see *HOG 32.14*) If not already placed into the record by this point, each party makes an opening statement summarizing its position on each issue raised by the petition as well as any other issue outlined by the Hearing Officer (see *HOG 32.13*). Note that in eligibility issues, the parties state their position on each disputed position.

MR./MS. ...., WHAT IS THE POSITION OF THE PETITIONER REGARDING THE..... (state issue)?

MR./MS. ...., WHAT IS THE POSITION OF THE ACTIVITY(IES) REGARDING THE .... (state issue)?

**35.12 *Presentation of evidence:*** (see *HOG 32.15*)

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

WE ARE NOW READY FOR DISCUSSION AND EXAMINATION OF THE ISSUE(S) IN THIS CASE.

MR./MS. ...., YOU MAY PROCEED WITH YOUR FIRST WITNESS.

Usually the Activity/Agency goes first. When the witness reaches the stand, the Hearing Officer administers the oath:

DO YOU SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE WILL BE TRUE AND CORRECT TO THE BEST OF YOUR KNOWLEDGE OR BELIEF?

The Hearing Officer then asks the witness to state his/her name, position and business address (optional), and place of employment for the record. Once this information is provided, the Hearing Officer advises the Representative to proceed with the examination.

See *HOG 12 through 14*, "Evidence," which addresses leading questions, relevancy, etc.; *HOG 15* specifically concerns "Exhibits."

**35.13 *Recommendations on the record:*** (see *HOG 32.17*). If the Hearing Officer is permitted to make recommendations on the record, the following is a guideline for ensuring the record reflects the issue, the recommendation and the basis for the recommendation. The Hearing Officer states:  
I WILL NOW MAKE MY RECOMMENDATIONS WITH RESPECT TO THE FOLLOWING ISSUES: (list issues)

WITH RESPECT TO THE ISSUE OF .... , I WILL SUMMARIZE THE RELEVANT EVIDENCE:

When summarizing the evidence, the Hearing Officer references testimony and documentation so that the reader of the record is able to refer directly to the evidence used to support the

recommendation.

DO ANY OF THE PARTIES HAVE ANY FURTHER FACTS. THIS INCLUDES ANY INFORMATION WHICH IS ON THE RECORD THAT I HAVE NOT SUMMARIZED ON ANY OTHER EVIDENCE THAT THE PARTIES WOULD LIKE TO ENTER INTO THE RECORD. NO ARGUMENT IS PERMITTED AT THIS TIME.

The Hearing Officer allows the parties to reference evidence that the Hearing Officer did not summarize, but is already in the record and the party(ies) consider relevant. The Hearing Officer cannot permit the parties to place on the record new evidence without calling witnesses and/or introducing documentation. If the parties argue that the evidence cited by the Hearing Officer is incorrect, then the Hearing Officer notes the disagreement for the record, but does not engage in a discussion or argument of the merits.

I WILL NOW GO OFF THE RECORD TO PREPARE MY RECOMMENDATION(S). I ANTICIPATE THAT I WILL REQUIRE APPROXIMATELY (minutes, hours or one day) (depending on the issues) ... WE WILL RESUME AT (state time).

After hearing additional evidence, the Hearing Officer makes his/her recommendation.

I RECOMMEND THAT THE REGIONAL DIRECTOR FINDS ....

It is not sufficient to state simply that: "I am prepared to recommend that Ms. Smith is not a confidential employee... ." Any recommendation is supported by a factual summary, an analysis of the factors considered in making the recommendation and references to applicable case law, as appropriate.

A PARTY IS NOT PERMITTED TO RESPOND TO THE RECOMMENDATION ON THE RECORD EXCEPT DURING THE CLOSING ARGUMENT OR, AFTER THE CLOSE OF THE HEARING, IN HIS/HER BRIEF.

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

**35.14 Before closing the record:** Before making any recommendation(s), or in the absence of a recommendation, prior to closing the hearing, the Hearing Officer:

- a) reviews his/her notes to ensure that all issues raised prior to or during the hearing are dealt with on the record. If there are changes, the Hearing Officer notes on the record any regulatory requirements.
- b) asks the petitioner to amend the petition if the parties reached agreement on any issue on which the petitioner no longer seeks a Regional decision.
- c) reviews notes to identify whether evidence reveals that additional parties should be notified and given an opportunity to participate in the hearing.
- d) contacts the Regional Director to recommend postponement if the issues or parties change to allow for proper notification and preparation for the hearing.
- e) asks the parties to restate their positions to ascertain if any party wishes to change its position.

**35.15 Change of party position:** Once the presentation of evidence has been completed, the Hearing Officer asks the parties whether, in light of the evidence received, they wish to make any changes to their respective positions on the issues. In addition, if applicable, the Hearing Officer also asks whether the parties would now agree to proceed to an election in the proposed unit or in an alternative unit (see *HOG 32.19*).

If the petitioner states it is willing to proceed to an election in the event the Regional Director found ... unit appropriate, the Hearing Officer reminds the petitioner, that any alternative unit must be supported by the showing of interest that has already been submitted. If the petitioner seeks to amend the petition, additional

showing of interest is submitted with the amendment and the petitioner must be specific as to the scope of the unit. *U.S. Department of the Interior, National Park Service, Washington, DC, 55 FLRA 311 (1999). HOG 18.7.6 and 32.11.*

IN LIGHT OF THE EVIDENCE PRESENTED, DO ANY OF THE PARTIES WISH TO CHANGE THEIR POSITION ON ANY ISSUE?

IN LIGHT OF THE EVIDENCE PRESENTED, ARE THE PARTIES WILLING TO PROCEED TO AN ELECTION IN THE PROPOSED UNIT OR IN AN ALTERNATIVE UNIT?

**35.16 Additional matters:**

IS THERE ANYTHING FURTHER THAT EITHER OF THE PARTIES WISH TO PRESENT?

**35.17 Closing remarks:** (see *HOG 32.20 and 32.21*)

DOES EITHER OF THE PARTIES WISH TO ARGUE ORALLY AT THIS TIME?

AT THIS TIME, SINCE NEITHER OF THE PARTIES DESIRES TO PRESENT FURTHER EVIDENCE IN THE ABOVE-REFERENCED CASE, I WILL MAKE THE FOLLOWING REMARKS. A PARTY DESIRING TO FILE A BRIEF IN THIS MATTER WITH THE REGIONAL DIRECTOR, ..... (provide address of the appropriate regional office) MUST FILE THE ORIGINAL AND TWO (2) COPIES WITHIN THIRTY (30) DAYS FROM THE CLOSE OF THIS HEARING. THE DATE OF FILING SHALL BE DETERMINED BY THE DATE OF MAILING INDICATED BY THE POSTMARK DATE. IF NO POSTMARK DATE IS EVIDENT ON THE MAILING, IT SHALL BE PRESUMED TO HAVE BEEN MAILED FIVE (5) DAYS PRIOR TO RECEIPT. IF THE FILING IS BY PERSONAL DELIVERY, IT SHALL BE CONSIDERED FILED ON THE DATE IT IS RECEIVED BY THE REGIONAL DIRECTOR. COPIES OF THE BRIEF SHALL BE SERVED ON ALL PARTIES TO THE PROCEEDING.

REQUESTS FOR ADDITIONAL TIME IN WHICH TO FILE A BRIEF SHALL BE MADE TO THE REGIONAL DIRECTOR, IN WRITING, AND COPIES SHALL BE SERVED UPON THE OTHER PARTIES, AND A STATEMENT OF SUCH SERVICE SHALL BE FILED WITH THE REGIONAL DIRECTOR. REQUESTS FOR EXTENSION OF TIME SHALL BE IN WRITING AND RECEIVED NOT LATER THAN FIVE (5) DAYS BEFORE THE DATE SUCH BRIEFS ARE DUE. NO REPLY MAY BE FILED IN ANY PROCEEDING EXCEPT BY SPECIAL PERMISSION OF THE REGIONAL DIRECTOR.

DOES EITHER OF THE PARTIES INTEND TO FILE A BRIEF WITH THE REGIONAL DIRECTOR, FEDERAL LABOR RELATIONS AUTHORITY, ....REGION? IF SO, BRIEFS ARE DUE TO THE REGIONAL DIRECTOR BY CLOSE OF BUSINESS, \_\_\_\_\_. IS THERE ANYTHING FURTHER TO COME BEFORE THE HEARING OFFICER AT THIS TIME? LET THE RECORD SHOW NO RESPONSE. THE HEARING IS NOW CLOSED.



## **HEARING ON ELECTION OBJECTIONS**

### **HOG 36**

#### **36     **Hearings on election objections:****

**36.1     **General:**** To the extent they are adaptable, the procedures discussed previously also apply to hearings on objections to the procedural conduct of the election or to conduct which may have improperly affected the outcome of the election. However, there are substantial distinctions between hearings on objections and hearings on other representation matters.

**36.2     **When hearings on election objections are appropriate:****  
Hearings are conducted in election objections cases which involve material issues of fact which may have affected the results of the election or when the Regional Director determines that a hearing is a more expeditious and cost effective method to gather evidence on the objections rather than a field investigation. See also *CHM 50 and 51*.

**36.3     **Nature and objective:**** A hearing on objections is a formal proceeding designed to elicit information based on which the Regional Director makes a decision on the merits of the objections. While the objecting party bears the burden of proof pursuant to § 2422.27(b) of the regulations, the proceeding is considered investigatory and not adversary.

**36.4     **Participating Authority personnel:**** In cases where the objections involve the conduct of Authority personnel, the Regional Director has the discretion to assign an attorney, designated as Counsel for the Regional Office, to appear at the hearing.

**36.5     **Hearing Officer:**** The Hearing Officer is usually an Authority agent from the Region in which the hearing is held, except:

- a)       when an issue involves the conduct of an Authority agent and a hearing is directed by the Regional Director or the Authority;
- b)       when the hearing is directed by the Authority concerning credibility findings by the Regional Director.

There may be unusual circumstances that, in the Regional Director's judgment, warrant further exceptions to this procedure. In any event, all requests and arrangements for the procurement of a Hearing Officer from outside the region are cleared and made through the Office of the General Counsel.

**36.6 *Functions and duties of the Hearing Officer:*** The Hearing Officer's duties and responsibilities are similar to those in other representation proceedings with two significant exceptions:

- a) a Regional Director has discretion only to allow the Hearing Officer to make recommendations on credibility issues, not the objections themselves.
- b) The second exception has to do with the scope of the hearing. The scope of the hearing is normally limited to the objections raised in the objecting party's initial filing with the region. An exception is when evidence is presented by a party which appears to demonstrate procedural election misconduct that was not raised by any party as an objection. See CHM 50.10 for other exceptions.

Initial evidence to establish a prima facie case for each objection is obtained through witnesses and documentation provided by the objecting party. Thereafter, if the Hearing Officer determines that additional testimony and/or documentation regarding any objection is necessary, the Hearing Officer obtains that additional evidence.

**36.7 *Counsel for the Regional Office, functions and duties:*** The primary function of Counsel, if one is utilized, is to see that evidence adduced by the region's investigation becomes part of

the record.

Counsel may:

- a) voice objections,
- b) cross-examine,
- c) call and question witnesses, and
- d) call for and introduce appropriate documents.

If the information in the Counsel's possession warrants it, s/he is permitted to seek to impeach the testimony of witnesses called by others.

Counsel for the Regional Office does not offer new material until it is certain that the material will not be offered by one of the parties. It is important that Counsel exercises self-restraint and displays the appearance of impartiality.

**36.8 *Credibility issues in election objections cases:*** This section concerns making recommendations on the record about credibility issues that may be dispositive of objections to an election. A Hearing Officer is required to make credibility recommendations on the record to give the parties an opportunity to except to the Hearing Officer's recommendation to the Regional Director. The Hearing Officer follows the outline described in *HOG 32.17* and the *HOG script 35.13* when making a recommendation. This procedure provides the Regional Director with a complete record prior to making a decision on the merits: the evidence on the objections, the parties' positions, the Hearing Officer's recommendation on any credibility issue and the parties' responses to the credibility findings.

**36.8.1 *When the Regional Director determines prior to a hearing that a credibility determination is dispositive of an objection:***  
When the Regional Director determines prior to issuing a notice of

hearing that a credibility determination is a prerequisite for making a decision on the objection, the Regional Director issues a notice of hearing pursuant to § 2422.17 of the regulations which includes:

**36.8.1.1** the particular credibility issue which is dispositive of the objection; and

**36.8.1.2** a direction to the Hearing Officer to make recommendations on the record regarding the resolution of the credibility issue with supporting reasons.

The Notice of Hearing puts the parties on notice that a credibility issue is dispositive of one or more of the objections and also informs the parties that they may except to the ruling in their briefs to the Regional Director.

**36.8.2 *When the Regional Director is unsure that there is a credibility issue:***

**36.8.2.1** The Notice of Hearing includes a statement that in the event a credibility issue surfaces that is dispositive of one or more of the objections, the Hearing Officer will make a recommendation on the record regarding the credibility issue(s). The Notice also informs the parties of their right to except to the Hearing Officer's recommendations in their briefs to the Regional Director. This notifies the parties of how credibility issues will be handled in the event they become an issue at the hearing.

**36.8.2.2** The Regional Director has two options when preparing the Hearing Officer for a hearing involving objections to an election and is not aware that there is a credibility issue:

- a. The Regional Director may require the Hearing Officer to contact him/her if the Hearing Officer decides during a hearing that a credibility determination is dispositive of an objection. The Hearing Officer does not discuss the merits of the credibility issue with the Director.
- b. Prior to the hearing, the Regional Director may instruct the

Hearing Officer to make recommendation on credibility issues that surface during the hearing and are dispositive of the objection(s) without contacting him/her first.



**EVIDENTIARY ISSUES**  
**HOG 37 through HOG 50**

**37      *Appropriate unit determinations***

Any case that concerns a question of representation requires an appropriate unit determination prior to proceeding to other issues. Section 7112(a) of the Statute sets out the criteria for determining whether a unit is an appropriate unit for exclusive recognition:

The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under [the Statute], the appropriate unit should be established on an agency, plant, installation, functional or other basis and shall determine any unit to be an appropriate unit only if the determination ***will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with and efficiency of the operations of the agency involved.***

**A.      **Standard:**** The Authority will not find any unit to be appropriate for exclusive recognition unless the unit meets all three of the criteria set out in section 7112(a). In order for a unit to be found appropriate the evidence must show that:

- a)      the employees in the unit share a clear and identifiable community of interest;
- b)      the unit promotes effective dealings with the agency; ***and***
- c)      the unit promotes efficiency of the operations of the agency.

See United States Department of the Navy, Fleet and Industrial Supply Center, Norfolk, Virginia, (FISC, Norfolk), 52 FLRA 950 (1997) *citing* Defense Mapping Agency, Aerospace Center, St. Louis, Missouri, 46 FLRA 502 (1992).

**B. Community of Interest:**

Community of interest involves a commonality or sharing of interests between the employees in a unit. Its fundamental premise is to ensure that it is possible for the employees to deal collectively with management as a group. *Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector (Tulsa AFS)*, 3 FLRC 235, 237 (1975) *A Policy for Employee-Management Cooperation in the Federal Sector*, November 30, 1961

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42 *FISC, Norfolk*, 52 FLRA at 961.

In addition, such factors as:

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geographic proximity;

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unique conditions of employment;

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distinct local concerns;

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degree of interchange between other organizational components; and

47

functional or operational separation

may bear upon whether employees in the unit share a community of interest. See :

Effective dealings and efficiency of operations factors are considered and decided as separate factors in any case which raises appropriate unit issues. The Authority requires that each of the appropriate unit criteria be given equal weight in order to foster the goal of a more effective and efficient government. Moreover, as first clarified by the Federal Labor Relations Council (FLRC), the

Authority must affirmatively determine that any proposed unit of exclusive recognition satisfies each of the three criteria before that unit can properly found to be appropriate. *FISC, Norfolk*, 52 FLRA at 961, n. 6.

These factors, therefore, are not dependent on the community of interest criteria, but often assess the same evidence on the record from a different perspective(s). See Department of the Navy, Naval Computer and Telecommunications Area, Master Station-Atlantic, Base Level Communications Department, Regional Operations Division, Norfolk, Virginia, Base Communications Office - Mechanicsburg, 56 FLRA 228 (2000) (the Authority found that the Regional Director did not separately evaluate and make explicit findings with respect to each of the criteria).

### **Effective Dealings**

Effective dealings pertains to the relationship between management and the exclusive representative selected by unit employees in an appropriate bargaining unit. In assessing this requirement the Authority examines such factors as:

- < the efficient use of resources which might be derived from inclusion in other units;
- < the past collective bargaining experience of the parties;
- < the locus and scope of authority of the responsible personnel office administering personnel policies covering employees in the proposed unit;
- < the limitations, if any, on the negotiation of matters of critical concern to employees in the proposed unit; and
- < the level at which labor relations policy is set in the agency. See Department of Transportation, Washington, D.C. (*DOT*), 5 FLRA 646 (1981); Defense Supply Agency, Defense Contract

Administration Services Region (DCASR), San Francisco, California, et al., 4 FLRC 669 (1976); Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois (*Chicago Passport Agency*), 8 A/SLMR 946 (1978).

### **Efficiency of Operations**

Efficiency of operations concerns the benefits to be derived from a unit structure bearing a rational relationship to the operations and organizational structure of the agency. *DCASR*, 4 FLRC 669 (1976). Factors examine the effect of the proposed unit on agency operations in terms of cost, productivity and use of resources.

#### **D. Impact of the Concept of Fragmentation on Unit Determinations:**

When considering the three criteria in making appropriate unit determinations, the Authority decides appropriate unit questions consistent with the policy of preventing further fragmentation of bargaining units and reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. *Army and Air Force Exchange Service, Dallas, Texas (AAFES)*, 5 FLRA 657, 661-662 (1981):

The information needed to make appropriate unit determinations is addressed in the **three attached outlines**. The outlines are provided to assist in obtaining a complete record. **The first outline (Representation Outline I) is suitable to give to the parties to assist them in preparing for a hearing. The second (Representation Outline II) is a briefer version - THAT IS NOT GIVEN TO THE PARTIES- and is for the Hearing Officer to use to determine which areas to stress in a particular case. The third (Representation Outline III) is a very basic outline of the evidence required in cases involving appropriateness of unit; it is intended as a skeleton for use in developing a more detailed outline for a specific case.** These outlines are repeated as Figures 37.1 - 37.3 and are available on the n:\figures

subdirectory.

These generic outlines will not suit every case. For example, Representation Outline I refers to agencies and activities, while the case at issue may involve facilities within an activity, departments within an activity or other sub-components of agencies and activities. The Hearing Officer uses these materials as guidance in crafting a specific outline for the case at hand.

Although specific questions may differ from case to case, none of the topics addressed in the outlines is ignored. For example, if a petition seeks a unit at an activity level, there may be only one mission statement pertinent to the case at hearing, and there may be no interrelationship between an activity and an agency to explore on the record. The Hearing Officer still obtains for the record, the mission statement, a description of the agency's functions and testimony regarding the relationship of the agency to the activity. Similarly, in an election case involving a unit within an activity, an activity organizational chart may be relevant to reflect the organizational framework, location of employees within the organization, what each component does, etc.

The Hearing Officer errs on the side of obtaining more information than is strictly necessary, rather than risking the creation of a record which is missing a crucial fact needed to make a reasoned decision in the matter. A seemingly insignificant piece of information may be the deciding factor in the case. Such minute factors as control of parking at a military base or the price setting procedure in a retail operation may go to the heart of the inquiry as to community of interest or effective dealings. Once again, a generic outline cannot possibly address every such possible factor, but can be used as a guideline for developing an outline that goes to the specifics of a particular case.

***For detailed guidance on this topic see RCL 1.***

**REPRESENTATION OUTLINE I**  
(TO ASSIST PARTIES IN PREPARING FOR HEARING)

**1. BASIC REQUIREMENTS**

**A. Evidence**

1. **Standards.** Assertions by the parties are not evidence. Evidence is established through the testimony of witnesses, stipulations and exhibits admitted into the record.
2. **Necessity.** At the prehearing conference and during the hearing, the Hearing Officer will determine the necessity of the testimony of proposed witnesses and proposed exhibits and will identify additional witnesses whose testimony is required and additional exhibits necessary to a complete record.

**B. Witnesses**

1. **Standards.** The parties present witnesses who can testify to and answer questions concerning all facts and issues raised by the petition(s).
2. **Necessity.** All participants deemed necessary by the Hearing Officer will receive official time under section 7131 of the Statute. Any disputes over necessity of participants will be decided by the Hearing Officer.
3. **Knowledge.** Witnesses testify to and answer questions about their personal knowledge of the facts. Second-hand, third-hand or lesser

knowledge reduces the relevance of the testimony.

4. **Reference to record.** All testimony during the hearing refers to specific exhibits which have been introduced into the record.
5. **Stipulations.** All stipulations are based on fact and include information and exhibits, as necessary, establishing the facts of the matter and/or referencing exhibits already received in the record which support the factual basis of the stipulation.

**C. Testimony**

1. **Standards.** Witnesses testify to and answer questions about their personal knowledge of the facts and documents relevant to the issues of the case. When testifying about documents, the witnesses are generally those who authored or initiated the documents.
2. **Availability.** If witnesses with personal knowledge are not readily available, the parties identify those with direct knowledge and also name additional witnesses whose personal knowledge most nearly approximates the direct testimony described above.
3. **Identification.** The parties name all of their respective witnesses and the subjects about which each witness will testify prior to the prehearing conference. This allows the Hearing Officer to determine the necessity of the proposed testimony of these witnesses.

**D. Documents**

1. **Standards.** Documents may be accepted into the hearing record by joint submission, by stipulation of the parties, or by one of the parties.
2. **Identification and authentication.** Any exhibit introduced by a party is identified by and testified to by a witness or witnesses who has\have first-hand knowledge of the authenticity of the exhibit, the content of the exhibit, and factual matters concerning the exhibit.
3. **Regulations.** If a party proposes to introduce excerpts from agency regulations, the excerpts are authenticated as true and correct copies. In addition, if only a portion from a regulation is submitted, a copy of the whole regulation is available for review by the parties.

4. **Joint exhibits.** If the parties jointly introduce exhibits, all such exhibits may be referred to by witnesses and/or in briefs.
5. **Objections.** Any party objecting to the introduction of evidence should state the basis for the objection on the record. The Hearing Officer then allows the party proposing introduction of the evidence an opportunity to state a position. The Hearing Officer then rules on admissibility. Exceptions to overruled objections are automatically a part of the record. Thus, there is no need for the parties to state such exceptions.
6. **Stipulations.** Stipulations concerning the introduction of exhibits includes information demonstrating the factual basis of the stipulation and the relevance of the document.

## 2. **MISSION AND FUNCTION STATEMENTS**

- A. **Mission.** Agency statement of its basic mission. Activities' statements of basic mission(s).
- B. **Function.** Description of how each Activity functions (as needed).
  1. **Differences.** If a proposed unit involves employees of a particular Activity but a party asserts that the unit is broader or narrower, basic mission statements of all entities is entered into the record and testified to.
  2. **Mission and function.** Testimony is required from witness(es) knowledgeable about the mission and function of each Agency and Activity and the interrelationships between them.

3. **Exhibits.** Obtain for the record copies of the mission and function statements from all affected Agencies, Activities/organizational components.

### 3. ORGANIZATION

- A. **Charts.** Organizational charts of Agency and Activity(ies), updated as necessary.
- B. **Identification.** Testimony concerning which Activity(ies) employ the employees involved in the petition and where in the organization the employees are located is crucial.
- C. **Commonality.** Testimony is required concerning shared mission and functions of organizations in which employees involved in the position are employed. Testimony specifically identifies where in those organizations the employees are located.
- D. **Geographic - Physical Location.**
  - 1. **Organization.** What are the geographic locations in relation to the organization of the Activities? Do Activities have field organizations? Where?
  - 2. **Function.** Testimony matches the mission and function statements to the organizational charts, thereby showing each Activity's function and relationship to others. What is the organizational framework, beginning with the major organizational components and working down the chart? What does each component do? Similarities? Differences? Interrelationships?
  - 3. **Location.** Where are each of the employees involved in the petition physically located? How far are the separate locations from each other? Describe any interchange of work and employees between locations.

4. **Numbers.** Obtain information concerning the numbers and types of employees at each agency / activity / organizational component. This can be established by having the Agency prepare an employee listing reflecting each employee's organizational placement, job title, series and grade, and unit eligibility.

4. **DELEGATIONS OF AUTHORITY**

What authority has been delegated for bargaining, management, supervision, policy, procedure, regulation, administration, and personnel functions? At what level do these delegations exist? What is the effect of these delegations?

5. **BARGAINING HISTORY**

- A. **Incumbents.** Obtain the complete name of each exclusive representative and description of each unit at each Activity.
- B. **Units.** Obtain copies of certifications/recognitions for each unit.
- C. **Contracts.** Obtain copies of the most recent collective bargaining agreements for each unit. What is the status of each such agreement, including the status of any negotiations?
- D. **Dealings.** What is the history of former or existing recognitions, including information as to elections, certifications and contracts. Obtain copies of all certifications, letters of recognition and contracts, for the proposed unit(s) and any other existing units of the agency. When were elections held, what groups of employees were involved and how many employees were affected? Did contracts automatically renew? At what level were negotiations held, both term negotiations and impact negotiations?

6. **SUPERVISORY HIERARCHY**

- A. **Structure.** What is the supervisory structure at the Agency and at each Activity (as relevant) and the lines of supervisory authority within each Activity (and/or between

Activities), using the organizational chart(s)?

- B. **Nature.** What is the extent and nature of supervisory duties and responsibilities within or between Activities? Who reports to whom? Who is responsible for specific supervisory functions within or between Activities?
- C. **Control.** Is supervision centrally or locally controlled within the organizational structure? Are there differences in the supervisory controls between the Activities involved? Are supervisors responsible for common supervision over more than one work group?

## 7. **JOB FUNCTIONS AND SKILLS**

- A. **Positions.** Obtain copies of the position descriptions for the categories of employees involved in the petition.
- B. **Employees.** The Activity is required to compile listing(s) of all employees involved in the petition which show each employee's name, position title, classification, grade and location within the organization. Include a numerical table showing total numbers of employees by eligibility in each proposed unit.
- C. **Work.** Evidence includes the types of work performed by employees involved in the petition, including descriptions of job duties and actual work performed, the flow of work within and between Activities, and the qualifications and training necessary to perform the work.
- D. **Equipment.** Is special equipment needed to perform certain work? Where is this equipment located? Is training needed to operate the equipment? What is the availability of such training? Are opportunities for advancement and/or movement between positions affected by the availability of this equipment or training?

- E. **Differences.** How do work flow, job duties and/or necessary qualifications, equipment and training differ within and between Activities?

8. **INTEGRATION OF OPERATION AND INTERCHANGE OF EMPLOYEES**

- A. **Movement.** Testimony and documents showing personnel movement, policy and decision making flow, using organizational charts.
- B. **Commingling.** Whether and how employees and functions are commingled among different organizations within and between Activities.
- C. **Commonality.** Whether and in what ways components of the Activities have employees, supervisors and/or managers in common, identifying the individuals involved using the organizational charts, employee listings, position descriptions, etc.
- D. **Work flow.** What is the flow of work processes, duties and responsibilities in relation to the mission(s)? Is there interrelationship or interdependence between components in work flow, processes or responsibilities?
- E. **Integration.** In what ways are employees and their job functions integrated within and between Activities? Are there frequent transfers of work and/or personnel? How is this accomplished? How is the work coordinated within and between Activities? Are employees required to apply for openings to cross organizational lines?
- F. **Operations.** Is there employee contact between components in performing or transferring work? What is the relative isolation of components? Obtain a description

of mobility and interchange of employees between components. What is the extent of telephone contact or inter-component visits? What for? By whom? How often? Where to and from? How many people involved? Clearance necessary from another component to perform certain work?

- G. Interchange.** Who substitutes for employees' absences for vacation or illness? Over the prior year or so, what is the extent, purpose and duration of TDY assignments? What category/classification of employee(s) have gone on this travel and for what purpose? Within the past three years, how many permanent or temporary transfers were made laterally or by promotion? What category/classification of employee(s) were transferred and for what reason? Have the numbers of transfers increased or decreased ? If so, why?

**9. PERSONNEL POLICIES AND PRACTICES**

- A. Pay systems.** Description of the pay systems applicable to all of the employees involved (GS, WG, Excepted Service, NAF, etc.), including descriptions of the differences between pay systems.
- B. Payroll office.** Location of servicing payroll office? Placement within the organizational structure?

## C. Administrative Services

1. **Personnel services.** Location of servicing personnel office? How is the personnel office staffed? Placement within the organizational structure? Who handles personnel management? Where does personnel management fit within the organizational structure? If there is more than one personnel office, are there differences in authority between personnel offices?
2. **Personnel actions.** Are personnel actions done centrally or locally? Who decides on hiring, firing, promotion, transfer, layoff, and recall of employees? How are these actions accomplished and these actions processed? Where do the entities performing these functions fit within the organizational structure?
3. **Employment and classification authority.** Who has classification authority for the employees involved in the petition? Who decides to establish positions, to fill vacancies, and what skills or training are needed for a position? How are vacancies filled? What are the differences within or between Activities?
4. **Retention, promotion and RIF.** What are the areas of consideration? How were these established? How have they been applied recently? What are the differences within and between Activities?
5. **Disciplinary and adverse action.** Who has authority to propose and decide such action? What are the differences within or between

Activities?

6. **Personnel policies and regulations.** Are personnel regulations promulgated centrally or locally? What are the differences within and between Activities? To what extent do local officials have any discretion with respect to implementing policies and regulations initiated centrally?
  
- D. **Personnel changes.** How are personnel moved between non-supervisory positions? From non-supervisory to supervisory positions? What are the differences in the ways changes are accomplished within and between Activities?
  
- E. **Employee services.** At what level are programs administered for equal employment, employee assistance, upward mobility, disability and workers compensation benefits, individual development, retirement, and health and life insurance? What are the differences in these programs within and between Activities?
  
- F. **Conditions of Employment**
  1. **Hours.** What are the hours of work of employees affected by the petition? Alternative Work Schedules, including whether employees work flexible schedules and/or compressed work weeks? Compensatory time? Starting and quitting times? Core hours? Restrictions on days off? Lunch hours? Break times? How were these established? What are the differences within and between Activities or organizations within each Activity?
  
  2. **Training.** What training is required and/or available

for the employees involved in the petition? What are the differences in training within and between Activities?

3. **Personnel.** At what level is the authority for personnel policy, service, and/or action? At what level are employee service programs provided? What are the differences in programs, services, and levels of authority within and between Activities?
4. **Associations.** At what level do associations exist such as Credit Unions, athletic, health or wellness groups, blood drives, literacy projects, and/or public school sponsorship? What are the differences within and between Activities?
5. **Impact.** All parties state specific positions concerning impact of the possible unit findings. What impact on the Agency/Activity is there from the various possible unit findings? What is the impact on employees?
6. **Factors.** What are the areas of consideration for hiring, promotion and RIF? Who issues vacancy announcements? Who has the authority to hire, fire, lay off, transfer or promote? Who determines the compensation and salary structure for vacancies? Where are the OPF's maintained? Who rates performance and writes appraisals? Who reviews and approves the appraisals? Who has the authority to initiate disciplinary or adverse action? Who has the authority to issue travel orders, direct training of employees, grant incentive and achievement awards? Who assigns parking, determines break and leave schedules, approves leave, overtime and compensatory time? Who

initiates personnel actions, personnel management programs, standards for performance evaluation and/or standards of personal conduct? Who determines the budget or is responsible for meeting a budget? Who has authority to negotiate and execute a collective bargaining agreement?

## 10. **EFFECTIVE DEALINGS**

Efficient use of resources derived from inclusion in existing units and negotiation in one unit rather than many units in segments of the activities.

- A. **History.** What is the history of collective bargaining dealings under the existing unit structure(s)? How have labor relations policy and labor relations authority been implemented and exercised respectively?
- B. **Grievances.** What are the formal, informal, negotiated and activity grievance procedures for employees involved in the petition? What is the past history of grievance processing?
- C. **Units.** In what way would the proposed units involved in the petition affect existing bargaining and grievance procedures? The parties are required to state their positions as to how the proposed units would promote effective dealings.
- D. **Authority.** What is the locus and scope of responsible personnel office(s)? Who handles the various personnel functions at present? How would the existence of the proposed units affect this authority? Are the employees involved special or unique because of job duties or work location in a manner which could affect the appropriateness of unit.

- E. **Limitations.** What is the extent of and who has authority to negotiate? What limitations are there on the authority of the petitioned-for Activity to negotiate? Are there any matters which could be negotiated if the unit were different from that proposed in the petition? Are there matters which could be negotiated only if the unit structure were different from that proposed? Why is this so?
- F. **Expertise.** What is the likelihood that personnel with greater labor relations experience will be available in the existing unit, the proposed unit or other possibly appropriate units? Who currently handles labor-management relations? Where in the organizational structure does this exist? At what level is labor relations consultation and support provided?
- G. **Policy.** At what level is labor relations policy set? How does the existence of multiple negotiated agreements, bargaining obligations, and grievance procedures affect labor relations dealings? Are employees performing essentially the same functions currently covered by different systems?
- H. **Training.** How and by whom are supervisors and managers trained in labor relations? Who decides on training requirements and those needing training? Where are the trainers located?

## 11. **EFFICIENCY OF AGENCY OPERATIONS**

Benefits to be derived from a unit structure bearing a rational relationship to the operational and organizational structure of the Activity.

- A. **Organization.** What, specifically, are the structure, chain of command, line of authority, and uniformity of personnel policy and practice considerations supporting the

effectiveness of the various proposed units?

- B. Structure.** What are the organizational structure, supervisory hierarchy, chain of command, authority over work functions, personnel and labor relations policies and dealings? Who reports to whom? What is the organizational structure of the personnel staff?
  
- C. Authority.** Do personnel with operational authority also have labor relations authority? What are the differences within and between Activities?

- D. **Benefits.** Why would any proposed unit be more beneficial than another proposed unit? How do the personnel policies and job benefits of employees differ within and between Activities?
- E. **Resources.** How is the effective use of negotiation resources derived from the existing unit structure? How would the proposed units affect the use of these resources? What effect would the various proposed units have on cost of the labor-management program, hours spent administering the program, staffing requirements, etc.
- F. **Impact.**
1. **Views.** What are the parties' views of the impact of the proposed and/or other potentially appropriate units on efficiency of operations or the effectiveness of dealings?
  2. **Agency operations.** What is the impact of the proposed unit structure on agency operations in terms of cost, productivity and use of resources?
    - a. **Cost.** What savings or costs (in terms of labor relations personnel, productivity, etc.) result from the existing unit(s), proposed unit(s) or other possibly appropriate units? What effect would the proposed unit(s) have on the cost of the labor-management relations program, hours spent administering the program, staffing requirements, etc.?
    - b. **Productivity.** What impact on productivity would result from the existing unit(s), proposed unit(s), other

possibly appropriate unit(s), or the existence of one or several units. Productivity includes work performed by employees as it affects them if one unit were found appropriate versus several and work performed by the managerial, supervisory and labor-management staff.

- G. Fragmentation.** Would the proposed unit result in fragmentation? If so, how, and how would this affect agency operations?

**REPRESENTATION OUTLINE II**  
(IDENTIFYING AREAS TO STRESS)

(note this particular outline is, in some respects, an example of  
an outline for a case involving a reorganization)

**1. MISSION**

Formal mission statements from former and new Activities.  
Testimony includes changes in mission and function as well as  
effect on organizational structure.

What effect do mission changes have on unit function(s)?

**2. ORGANIZATION**

**A. Charts**

Before and after charts

Overall structure

Complete branch-by-branch structure, including  
information as to what functions performed before and after

Description of work flow and flow of authority before and  
after reorganization

**B. Numbers**

Number of unit employees in old and new  
organizations. How many employees were directly  
affected by the reorganization?

Types of personnel actions used to staff new  
organization; what placements were used? Transfers?  
Requirement to apply for positions in new organization?

**C. Geography**

What was the physical lay-out before and after?  
Where were the employees located before and after the reorganization?

**3. BARGAINING HISTORY**

Copies of collective bargaining agreements. What are the effective and termination dates? What is the status of each contract? What is the status of negotiations, if any?

Copies of certification/recognition for each unit involved in the petition.

History of negotiations at former and present Activities.

**4. SUPERVISORY HIERARCHY**

Employee break down before and after, including lists of employees by name, position title, classification, grade and organizational placement.

Supervisory structure, including numerical ratios to employees before and after the reorganization. Numbers and classifications of employees reporting to each supervisor.

Is supervision controlled locally or centrally? What is the nature and extent of supervision in terms of the organizational structure before and after? What chains of command and lines of authority existed before and after the reorganization?

**5. JOB FUNCTIONS AND SKILLS**

Before and after lists of employees by name, position title, classification, grade and organizational placement. Testimony concerning ratios of GS, WG, Excepted Service, NAF, etc., employees.

Description of before and after job duties. Are there new functions, duties and employees?

Following the reorganization, are employees performing the same work under the same conditions of employment? If no, what are the specific changes?

What was the actual impact of the reorganization on the affected employees?

**6. INTEGRATION AND INTERCHANGE**

What facilities and equipment existed before and after the reorganization?

Detail any changes to the agency functions and employee interdependence of work functions following the reorganization.

Detail the effect, if any, of the reorganization on interchange between organizational entities, work locations of employees and intra-employee dealings/work relationships.

Prior to the reorganization, did units have any employees, supervisors or managers in common? If so, did this change as a result of reorganization? What were the changes and how did they affect the employees' day-to-day dealings within and between the Activities?

**7. TRANSFERS**

How were employees notified of the reorganization?

Were special placement programs used in the reorganization? If so, what were they and how did they affect employment in the current organization?

Before and after lists of employees by name, position title, classification, grade, organizational placement and type of appointment?

**8. PERSONNEL POLICIES AND PRACTICES**

List of employees by name, position title, classification, grade and organizational placement, before and after.

**Pay.** What were the compensation plans (GS, WG, excepted

service, NAF, etc.) of employees before and after the reorganization? What was the basis for these systems? Where is the payroll office located and did it change in reorganization?

**Personnel.** Is hiring, firing, promotion, transfer, layoff, or recall controlled centrally or locally? Has this changed in reorganization?

**Employment and Classification Authority.** What were they before and after?

**Promotion and RIF.** Where did authority lie before and after reorganization? What were the areas of consideration before? What are they now?

**Bargaining.** History of bargaining and the level of bargaining before and after the reorganization.

**Personnel Services.** Physical location of the servicing personnel office before and after the reorganization. Obtain evidence on the services that were/are provided and whether the personnel authority was/is local or central.

## 9. CONDITIONS OF EMPLOYMENT

Flow of work

Old and new manpower utilization

Desires of employees

Proposed Unit vs. Prior Unit

## 10. EFFECTIVE DEALINGS

Efficient use of resources derived from inclusion in existing units and negotiation in one unit rather than many units in segments of the Activities.

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

**History.** What is the past history of collective bargaining dealings under the existing unit structure(s)? How have labor relations policy and labor relations authority been exercised?

**Grievances.** What are the formal, informal, negotiated and activity grievance procedures for employees involved in the petition? What is the past history of grievance processing?

**Units.** In what way would the proposed units affect existing bargaining and grievance procedures? The parties are required to state their positions as to how the proposed units would promote effective dealings.

**Authority.** What is the locus and scope of responsible personnel office(s)? Who handles the various personnel functions at present? How would the existence of the proposed units affect this? Are the employees involved special or unique because of job duties or work location.

**Limitations.** What is the extent of the authority to negotiate? Who has authority to negotiate? What limits are on the petitioned-for Activity's authority to negotiate? Are there any matters which could be negotiated if the unit were different from that proposed in the petition? What matters could be negotiated only if the unit structure were different from that proposed? Why is this so?

**Expertise.** What is the likelihood that personnel with greater labor relations experience will be available in the existing unit, the proposed unit or other possibly appropriate units? Who currently handles labor-management relations? Where in the organizational structure does this exist? At what level is labor relations consultation and support provided?

**Policy.** At what level is labor relations policy set? How does the existence of multiple negotiated agreements, bargaining obligations, and grievance procedures affect labor relations

dealings? Are employees performing essentially the same functions currently covered by different systems?

**Training.** How and by whom are supervisors and managers trained in labor relations? Who decides on training requirements and those needing training? Where are the trainers located physically and organizationally?

**Impact.** What is the impact of the proposed unit structure on agency operations in terms of cost, productivity and use of resources?

**Cost.** What savings or costs (in terms of labor relations personnel, productivity, etc.) result from the existing unit(s), proposed unit(s) or other possibly appropriate units?

**Productivity.** What impact on productivity would result from the existing unit(s), proposed unit(s), other possibly appropriate unit(s), or the existence of one or several units?

## 11. EFFICIENCY OF AGENCY OPERATIONS

Benefits to be derived from a unit structure bearing a rational relationship to the operational and organizational structure of the Activity.

**Organization.** What, specifically, are the structure, chain of command, line of authority, and uniformity of personnel policy and practice considerations supporting the effectiveness of the various proposed units?

**Structure.** What is the organizational structure, supervisory hierarchy, chain of command, authority over work functions, personnel and labor relations policies and dealings? Who reports to whom? What is the organizational structure of the personnel staff?

**Authority.** Do personnel with operational authority also have labor relations authority? What are the differences within and between Activities?

**Benefits.** Why would any proposed unit be more beneficial than another proposed unit? How do personnel policies and job benefits of employees differ within and between Activities?

**Resources.** How is the effective use of negotiation resources derived from the existing unit structure? How would the proposed units affect the use of these resources? What effect would the various proposed units have on cost of the labor-management program, hours spent administering the program, staffing requirements, etc.?

**Impact.** What are the parties' views of the impact of the proposed or various other possibly appropriate units on efficiency of operations or the effectiveness of dealings? Would the proposed unit result in fragmentation? If so, how?

**REPRESENTATION OUTLINE III**  
(SKELETON for use in developing a more detailed  
outline tailored to a specific case)

1. Mission Statement of the Activity
2. Organization
  - a. Organization charts and function statements of each subdivision, including the flow from one organization to another.
  - b. Number of employees in the existing unit, as well as number of employees in petitioned-for unit.
  - c. Physical layout of organization and entities involved.
  - d. Physical location of employees involved.
3. Bargaining History
  - a. Collective bargaining history of all units at installation, especially the involved unit.
  - b. Bargaining history within the existing unit involved,  
including:
    - (i) copy of certification
    - (ii) copy of collective bargaining agreement or any memorandum of understanding currently in effect
    - (iii) termination date of contract
    - (iv) testimony regarding contractual provisions covering petitioned-for employees only

- c. Representation Practice
- 4. Supervisory Hierarchy
  - a. Organizational outline of employees' reporting structure before and after reorganization, including listings of employees involved.
  - b. Supervisory ratios
  - c. Extent of supervision, line of responsibility (central or local)
- 5. Job Functions and Skills
  - a. What are the WG, GS ratios and breakdowns within the existing unit as opposed to the petitioned-for unit?
  - b. What work functions are performed by each component group; what is the interrelationship of job functions?
  - c. Terms and conditions of employment:
    - (i) duties
    - (ii) location of positions in question
    - (iii) classification of jobs
  - d. Actual impact of changes on operations and functions and on labor relations dealings.
- 6. Integration of Operation and Interchange of Employees
  - a. Facilities used before and after internal realignment of functions
  - b. Would proposed unit(s) affect personnel practices and

policies? How? Other agency functions?

- c. Do petitioned-for employees actually spend time working together with established unit employees?
7. Transfer of employees from one organization to another
- a. How often have employees moved from one grouping to another?
8. Placement Programs: Merit Promotion
9. Personnel Policies and Practices
- a. List of personnel breakdown before and after
  - b. Compensation plan and salary plan before and after
  - c. Payroll office
  - d. Plans under which hiring, discharge, promotion, transfer, RIF (central v. local)
  - e. Re-employment and reclassification authorities
  - f. RIF, adverse action, discharge, seniority rosters, etc. (separate from or integrated with existing unit employees)
  - g. Personnel Mobility
    - (i) Movement of non-supervisory to supervisory
    - (ii) Movement of non-supervisory to non-supervisory
    - (iii) Movement of supervisory to non-supervisory to supervisory

- h. Bargaining History - certifications, contracts, and status of each. Status of negotiations. Description of levels at which grievances are addressed. Actual or potential impact of changes due to internal realignment.
- 10. Conditions of Employment
  - a. Flow of work
  - b. Desires of employees
  - c. Proposed unit



**38**      ***Scope of unit (including residual units, add-ons, expanding and contracting units)***

When applying the three appropriate unit criteria, section 7112(a) of the Statute also requires that the Authority will determine the scope of the proposed unit, that is, whether:

...the appropriate unit should be established on an agency, plant, installation, functional or other basis.

The scope of a unit involves a variety of appropriateness of unit issues. For instance, scope of unit questions may arise following reorganizations or when a union seeks exclusive recognition for a group of the agency's unrepresented employees. Scope of unit questions may also arise in petitions involving add-on elections to existing units, residual units, units of employees specifically excluded from existing units and expanding and contracting units.

In general, the relevant information in a case involving the scope of a unit is identical to that at issue in any case involving unit appropriateness. *See RCL 1 and HOG 37 - Appropriate Unit Determinations, Representation Outline I.*

**Relevant Information:**

- 1) Relevant information in a case turning on size or functional grouping includes the basic evidence necessary to make a determination of appropriateness of unit. *See section 37 - Appropriate Unit Determinations; Representation Outline I.* In addition, prior to a hearing on a petition for a unit limited to a functional grouping, the Hearing Officer researches all Authority decisions addressing that particular function, to determine the specific factors relied upon and to ensure that evidence concerning such factors is included in the record.

2) Information required in a case involving a residual unit includes information related to:

§ the location and description of all existing bargaining units within the Agency or Activity;

§ the organizational location, numbers types and grades of all remaining employees who are eligible for representation but are not represented.

The unrepresented employees are the employees that comprise the residual bargaining unit.

3) The appropriate unit criteria is analyzed in a unit the petitioner seeks to add-on to an existing unit to ensure that: 1) the petitioned-for unit is appropriate as a stand alone unit and 2) when combined with the existing unit, the overall unit is appropriate.

4) In any case involving an expanding unit, detailed information concerning the exact classifications and staffing levels anticipated is entered into the record, including any documentation or testimony as to management's timetable for hiring and goals for establishing a full complement of employees. The relevant factors include:

- a) whether the job classifications were filled or substantially filled and representative;
- b) whether the proposed successor was in substantially normal production at the time of the hearing;
- c) the size of the complement on the date of normal production;
- d) the time expected to elapse before a substantially larger complement will be at work; and
- e) the relative certainty of the employer's expected expansion.

- 5) In any case involving a contracting unit, detailed information is obtained concerning management's plans to eliminate employees from the unit. In particular, the record includes evidence as to planned timetables for letting employees go and whether there are plans to reassign or rehire the employees in another classification.

***For detailed guidance on this topic see RCL 2.***



**39**      ***Effect of changes in the character and scope of a unit due to a reorganization or realignment in agency operations***

This section discusses changes due to a reorganization or realignment in agency operations. These issues arise in petitions which seek to clarify or amend a certification or recognition in effect or a matter relating to representation. This section is divided into six parts:

- A.      Purpose and Standards for Resolving Issues Arising from Reorganizations.**
  - 1.      Analyzing the Effect of Reorganizations on Existing Bargaining Units**
  - 2.      Relevant Information Required**
- B.      Successorship.**
- C.      Accretion.**
- D.      Competing Claims of Successorship and Accretion.**
- E.      Consolidated Units.**
- F.      Case Handling Advice.**

- A.      Purpose and Standards for Resolving Issues Arising from Reorganizations.**
  - 1.      Analyzing the Effect of Reorganizations on Existing Bargaining Units**

Section 7111(b)(2) provides, in relevant part, that if a petition is filed with the Authority:

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

by any person seeking . . . an amendment to, a certification then in effect or a matter relating to representation; the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice.

This section applies whenever a petition is filed to resolve the effect of an agency reorganization on an existing unit, either with respect to employees who remain in the unit, employees who have been transferred from the unit or employees who have been added to the unit. See *CHM 27.5, Hearing Requirements*.

The substantive factors applied in cases arising from reorganizations have remained valid and consistent since Executive order 11491. **As discussed in HOG 37, *Appropriate Units*, and RCL 1, any case that concerns a question of representation requires an appropriate unit determination prior to proceeding to other issues.** Section 7112(a) of the Statute sets out the criteria for determining whether a unit is an appropriate unit for exclusive recognition:

The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under [the Statute], the appropriate unit should be established on an agency, plant, installation, functional or other basis and shall determine any unit to be an appropriate unit only if the determination ***will ensure a clear and identifiable community of interest among the employees in the unit and will promote***

***effective dealings with and efficiency of the operations of the agency involved.***

**2. Relevant Information Required:**

In *U.S. Department of the Navy, Commander, Naval Base, Norfolk, Virginia (USN)*, 56 FLRA 328 at 332 (2000) the Authority stated that, "in determining whether an existing unit remains appropriate after a reorganization, it will focus on the changes caused by the reorganization," [citing *Morale, Welfare and Recreation Directorate, Marine Corps Air Station, Cherry Point, North Carolina (Morale, Welfare)*, 45 FLRA 281 (1992)] "and assess whether those changes are sufficient to render a recognized unit inappropriate" citing *Defense Logistics Agency, Defense Supply Center Columbus, Columbus, Ohio (DLA Columbus)*, 53 FLRA 1114 at 1122-23 (1998).

**Factors considered in cases raising issues related to changes in the character and scope of existing bargaining units are the same as any other cases in which appropriate unit issues are raised. However, three issues affect any determination the Region or the Authority makes with respect to the impact of a reorganization on employees in existing bargaining units.**

- a. **When seeking information about the three appropriate unit criteria, it is first necessary to address the factors from two perspectives: how the unit functioned prior to the change and how it functions after the change.** Evidence is obtained with respect to the mission and organizational structure and other appropriate unit criteria **both before and after the reorganization.** Changes to employees and their conditions of employment, particularly their day-to-day working conditions, the actual impact on employees and the impact on agency operations, the blending of employees are all compared to the employees' conditions of employment prior to the reorganization.

For each factor that is considered for each of the appropriate unit

criteria discussed in *RCL 1* and *HOG 37*, the inquiry also includes:

1. What was the change and what prompted the change (the scope of the reorganization - how did it affect the agency and the activity that is the subject of the petition);
2. What effect did the change have on:
  - a. Working conditions;
  - b. Day-to-day operations;
  - c. Chain of command and authority to manage;
3. What was the purpose of the change;
4. How did the unit change (before and after);
5. Who was affected by the change and how;
6. What was changed as far as mission, function, organization, employees duties, skills, day-to-day operations, personnel practices and policies, etc.
7. Describe the bargaining unit history and discuss the impact of the bargaining unit history on efficiency and effectiveness criteria;
8. What was the chain of command prior to the reorganization and discuss the effect of any change in chain of command on ability of existing unit to operate efficiently as separate organizations or collectively;
9. Consider the timing of the change and the petition. Is the change ongoing such that it becomes a fact that is relevant to a unit determination?<sup>1</sup>

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<sup>1</sup>Information is relevant at time of hearing unless there are unusual circumstances. See *DPRO, Thiokol*.

- a. If so, is the petition premature?
  - b. If so, could the parties work under a memorandum of agreement until such time as the reorganization takes shape?
10. Does the proposed unit consist of a substantial and representative complement of employees;<sup>2</sup>
11. Does the proposed unit structure prevent or reduce fragmentation (compare the concept of fragmentation before and after the reorganization).<sup>3</sup>

To summarize, when examining the effects of a reorganization on an existing appropriate unit, the evidence reflects the employees’ terms and conditions of employment as well as other factors that are routinely considered when examining the appropriate unit criteria **both before and after** the reorganization. This is the best method for ensuring an adequate record and one that will provide sufficient information to decide the continued appropriateness of the unit and/or the extent that the reorganization affected employees in the existing unit.

**b. Additionally, timing is significant.**

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<sup>2</sup>*Naval Facilities Engineering Service Center*, 50 FLRA 363 (1995) (*Port Hueneme*)*Naval Facilities Engineering Service Center (NFESC)*, 50 FLRA 363 (1995) (reorganization case in which the Authority examined and set new standard for deciding successorship) at n.9. Discussion of the appropriate time for determining whether employees of the predecessor unit constitute a majority of the successor unit, citing *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).*Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

<sup>3</sup>In *U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 55 FLRA 359 (1999), the Authority stated that “the purpose of consolidation is to reduce fragmentation of unit. See AAFES, 5 FLRA at 661, 662. The Authority has never imposed a requirement that a consolidation petition eliminate unit fragmentation. The consolidation of six AFGE bargaining units into the current consolidated unit reduces unit fragmentation. ...”

When conducting hearings in such cases, the Regions ensure that the record reflects the stage of the reorganization and any further agency plans regarding future related reorganizations. Case law dictates that any unit determination is based on the facts presented at the time of the hearing. *FISC, Norfolk* is an excellent example of why it is necessary to obtain information about the affected employees from the perspectives of their inclusion in an appropriate unit prior to a reorganization and after a reorganization. In *FISC, Norfolk*, a case involving claims of successorship and accretion, the Authority had to balance the parties' competing claims: NAGE claimed that separating employees from the base-wide unit at the Yorktown detachment would be inappropriate and cause fragmentation; but FISC argued that not including the Yorktown detachment in FISC, Norfolk would cause fragmentation in FISC.

This case also demonstrates that it is important to obtain complete evidence about the facts and circumstances giving rise to the petition, i.e., often from a broader scope or perspective than reviewing the impact on the employees at a single site. For instance, if NAGE had filed the petition in FISC seeking a determination of the effect of the establishment of FISC only on its base-wide unit at Yorktown, the record may have emphasized different facts even though the results should have been the same. However, a review of relevant case law confirms that "how" and "what" evidence is presented may often lead to different results. Because the record in *FISC, Norfolk* presented evidence from both broad and narrow perspectives, the facts clearly demonstrated that including the Yorktown detachment in the FISC, Norfolk Activity was appropriate.

***For more detailed guidance on analyzing the effects of a reorganization, see RCL 3A.***

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<sup>4</sup> See *Defense Mapping Agency* and *FISC, Norfolk*.

## **B. Successorship.**

Successorship involves a determination of the status of a bargaining relationship between an agency/activity which acquires employees who were in a previously existing bargaining unit, and a labor organization that exclusively represented those employees prior to their transfer.

*In Department of the Navy, Naval Supply Center, Puget Sound, Bremerton, Washington and Department of the Navy, Fleet Industrial Supply Center, Bremerton, Washington (FISC, Bremerton), 53 FLRA 173 (1997) Department of the Navy, Fleet Industrial Supply Center, Bremerton, Washington (FISC, Bremerton), 53 FLRA 173 at 183, n.9 (1997).*

### **5. Relevant information for successorship includes:**

- (1) The full and correct name of the predecessor employer and the alleged successor employer. Obtain background and evidence of the nature of the transfer.
- (2) Evidence and documentation, if possible, of the basic mission, organization and operations of the predecessor employer and of the successor employer. This area corresponds to the appropriateness of the unit rather than the continuity of the mission. Explore “facts” relating to:
  - a. nature of the work;
  - b. type of service performed or work accomplished;
  - c. information about who is (was) serviced, i.e., customers;
  - d. changes in methodology of doing the work (equipment, machinery, etc.);

- e. changes in organization, functions, facilities and geographic changes in location;
  - f. composition of the work force at the alleged successor;
  - g. obtain charts and mission statements; and
  - h. cross reference to "Appropriate Unit," section 37.
- (3) Information concerning the significance of the change in the organization:
- a. Was the predecessor abolished; were its functions significantly reduced; did it continue to operate independently or did it participate in the operations of the successor?
  - b. Did the new employer assume the business of other entities as well as predecessor?
- (4) Information concerning the effect of the change on the workforce:
- a. description of bargaining unit at the predecessor (obtain copies of certifications and recognitions, contracts, etc.); and
  - b. portion of bargaining unit affected by reorganization: number acquired by alleged successor; information concerning employees who were acquired by alleged successor.
- (5) What was the effective date the alleged successor assumed control of the predecessor operations? Was there a hiatus between the official date of the

reorganization and the date the employees were actually transferred to the alleged successor. In any event, the following information must be explored:

- a. whether the job classifications were filled or substantially filled and representative;
  - b. whether the successor was in substantially normal production (at the time of the hearing);
  - c. the size of the complement on the date of normal production;
  - d. the time expected to elapse before a substantially larger complement will be at work; and
  - e. the relative certainty of the employer's expected expansion.
- (6) Characteristics of the successor; examine the extent the successor continued the mission and operations of its predecessor by establishing whether and to what extent:
- a. there has been continuity in the mission;
  - b. the successor operates from the same location;
  - c. the workforce is substantially the same;
  - d. the same jobs exist under the same working conditions. Get number, types and grades, including classifications of affected employees from the predecessor, both before and after change. Inquire about the work actually performed by the employees; has it changed, if so, how?
  - e. the same management and supervision have been

retained. If not, how have they changed?

- f. employees use the same equipment and have the same resources available as prior to the change; and
  - g. employees' duties are the same: they engage in the same type of work, or perform the same service or functions.
- (7) Are a majority of the alleged successor's employees in the **proposed (involved)** bargaining unit former employees of the predecessor? What is the workforce complement of the proposed unit?
- (8) How were the former employees placed with the alleged successor? Explore how the employees were notified and the placement program used (transfer of function, offered employment, etc.).
- (9) Describe any changes instituted by the alleged successor in such matters as:
- a. duties
  - b. working conditions
  - c. personnel policies and practices
  - d. facilities and other terms and conditions of employment
- (10) Did the alleged successor merge or combine the operations of the predecessor with other preexisting operations? If so, were the employees in other preexisting operations previously represented by a labor organization? If so, obtain the name of labor organization, description of

the unit and copies of any existing certifications, recognitions or collective bargaining agreements. Did the alleged successor hire any employees to combine with employees from the predecessor?

- a. Ascertain how many employees were in each group or unit prior to such merger or combination.
- b. Ascertain the employee complement at the alleged successor. (total number of employees, including numbers, types from each previously represented unit, newly hired employees and/or employees who were already on the rolls.

(11) Explore whether and to what extent the (two) combined groups have been integrated with one another. The issue is whether the predecessor's former employees retained or lost their identity, constitute a separate appropriate unit or are combined with other employees in a newly created appropriate unit. Examine the degree of integration and interchange among employees in terms of:

- a. job duties and responsibilities
- b. supervision
- c. interaction and contact
- d. interchange and transfer
- e. common working conditions
- f. access to common facilities and opportunities
- g. similarities in personnel policies and practices

**C. Accretion.**

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

Accretion involves the addition, without an election, of a group of employees to an existing bargaining unit. Accretion issues most frequently arise as a result of a reorganization or realignment of agency operations.

**To find accretion, the acquired employees:**

- < are not in newly created positions that fall within the express language of the unit description. Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey (Fort Dix), 53 FRA 287 (1997). See *RCL 15*.
- < do not constitute an appropriate separate bargaining unit on their own.
- < become functionally and administratively integrated into the gaining organization's pre-existing unit(s), and that adding the transferred employees to the unit(s) would be appropriate under section 7112(a) of the Statute in that the employees in the resulting unit share a community of interest with employees in the established unit and the resulting unit promotes effective dealings with and efficiency of operations of the agency.

***For more detailed information on accretion, see RCL 3C.***

**Relevant Information:** The record covers:

- 1) information concerning whether the acquired employees constitute a separate appropriate unit; *RCL 1* and *HOG 37*.
- 2) the organizational structure and staffing patterns of the two entities prior to and after the reorganization;
- 3) the supervisory chain of command of the gaining entity;

- 4) the nature and scope of personnel and labor relations authority at the various managerial levels, both before and after the reorganization;
- 5) the specific role and authority of the various servicing personnel offices, both before and after the reorganization;
- 6) the nature and scope of differences among the various facilities with respect to personnel policies and practices, both before and after the reorganization;
- 7) the role of the gaining entity in providing administrative support to the various facilities;
- 8) the areas of consideration and competition with respect to the various facilities, both before and after the reorganization;
- 9) bargaining history throughout the facilities;
- 10) how the entities have functioned (e.g. the flow of work) after the reorganization;
- 11) the nature and degree of employee transfer and interchange among the various facilities, both before and after the reorganization;
- 12) the extent to which a separate unit would result in fragmentation of units; and
- 13) the numbers of employees in the transferred group and in the existing unit.

**Note: Questions have been raised concerning the differences between accretion and successorship in reorganization cases.** Essentially, accretion concerns the status of a group of employees

while successorship concerns the status of a bargaining relationship between an agency/activity which acquires employees who were in a previously existing bargaining unit and a labor organization that exclusively represented those employees prior to their transfer. Reorganizations often raise both accretion and successorship issues because the impact of what happened is not immediately clear on the unit structure. It is important to find out what happened to the employees and determine how the reorganization affected their conditions of employment. Once information is gathered, the factors of accretion and successorship can be applied and analyzed. It is not possible to have both an accretion and a successorship involving the same employees.

#### D. Competing Claims of Successorship and Accretion.

*NFESC*, 50 FLRA 363, with respect to the units(s) determined to be appropriate. The outcome of the *NFESC* analysis determines whether the gaining organization is a successor for purposes of collective bargaining with the labor organization(s) that represented the transferred employees at their previous employer.

- 3) If it is determined that the transferred employees are not included in, and constitute a majority of employees in, a separate appropriate unit in the gaining organization, the Authority applies its long-established accretion principles. The outcome of this analysis determines whether the transferred employees have accreted to a pre-existing unit in the gaining organization.

**The quality of the record is vitally important.** *FISC, Bremerton*, 53 FLRA 173 (1997), the Authority affirmed the Regional Director's finding that FISC, Concord Detachment was a successor employer to the Concord Naval Weapons Station (NWS Concord) for an appropriate unit of employees transferred from NWS Concord to the newly established FISC, Concord Detachment. The Regional Director, as affirmed by the Authority, based his decision on different facts in the record.

**Relevant information includes first obtaining information outlined in *RCL 1*; then applying the factors discussed in *RCL 3A* to determine whether the affected employees constitute a separate appropriate unit. Depending on the answer to that question the successorship (*RCL 3B*) or accretion (*RCL 3C*) outlines are applied.**

#### E. Consolidated Units:

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

When applying the appropriate unit criteria to a successorship/accretion situation that involves a consolidated bargaining unit, the criteria are applied with respect to the entire nationwide consolidated unit. The Region does not apply the criteria to any organizational segment (or former unit encompassed within the consolidated unit) below the level of exclusive recognition. Thus, successorship and accretion issues are not considered below the level of exclusive recognition. *Compare* Social Security Administration, District Office, Valdosta, Georgia (SSA, *Valdosta*), 52 FLRA 1084 (1997).

**40**      ***Issues related to the majority status of the currently recognized or certified labor organization and/or defunctness***

Section 7111(b)(2) of the Statute permits the filing of a petition seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation. Based on current Authority case law, three types of petitions may be filed under this section that raise issues related to the majority status of the currently recognized or certified labor organization:

1.      petitions questioning the continued majority status of the recognized or certified labor organization which are generally filed by agencies;
2.      petitions filed by an exclusive representative to amend its certification in which the investigation raises a reasonable cause to believe a question of representation (QCR) or defunctness exists; and
3.      questions of defunctness of the exclusive representative which is an interrelated, but not identical, concept.

In the three scenarios, section 7111(b)(2) provides, in relevant part, that if a petition is filed with the Authority:

by any person seeking . . . an amendment to, a certification then in effect or a matter relating to representation; the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after a reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. . . .

The Authority stated in U.S. Department of the Interior, Bureau of

Land Management, Phoenix, Arizona (BLM), 56 FLRA 202, 206 (2000) that “[c]onsistent with the plain wording of this section, if in investigating a petition to amend a certification there is reasonable cause to believe that a QCR exists, then an opportunity for a hearing on the matter „shall“ be provided. This statutory requirement is not discretionary and does not depend on the type of petition filed. Rather, it depends on whether there is reasonable cause to believe that a QCR exists. The Authority noted, in this respect, that § 2422.1 of the regulations provides for only one type of petition.

***For more detailed guidance on this topic see RCL 4.***

**Relevant information includes:**

- 1) The current collective bargaining agreement, if any.
- 2) The exclusive representative's contacts with the Activity in representational matters, including:
  - a) grievances or evidence of any informal attempts to enforce the collective bargaining agreement;
  - b) evidence of demands to bargain in response to management initiated changes;
  - c) evidence of participation in negotiations, e.g., memorandum of understanding, term negotiations (incomplete or otherwise);
  - d) unfair labor practice charges filed or processed by the union; and
  - e) evidence of representation by the union of bargaining unit employees in other matters, e.g., EEOC, MSPB, Office of Special Counsel, Inspector General inquiries.
- 3) Evidence and documentation that the union has designated stewards/officers.
- 4) Testimony or documentation regarding recruiting or membership drives conducted by the exclusive representative.
- 5) Records or documentation regarding bargaining unit employees on dues withholding.
- 6) Records/documentation regarding bargaining unit employees on dues withholding over periods of time, in order to gauge if there has been a rapid or large decline in membership.

- 7) With respect to petitions filed to amend the certification filed by an incumbent due to a reaffiliation or a merger, in addition to the information discussed above, the number of employees in the bargaining unit, the number of union members in the unit, and the number of employees who voted for and against reaffiliation.

**41**      **(Reserved)**

**42**      **Dues allotment**

A labor organization may be granted certification for the limited purpose of negotiating an agreement for dues allotment under section 7115(c) of the Statute, which provides:

(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in a labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

**Standard:** To certify a union for dues allotment, the union is required to file a petition with a Regional Office that includes the following criteria:

- a)      the petition seeks certification for dues allotment for a unit for which there is no exclusive representative
  
- b)      the claimed unit is appropriate for exclusive recognition  
**and**

- c) the petitioner provides a showing of **membership** of not less than 10 percent (10%) in the unit claimed to be appropriate.

A Hearing Officer does not permit issues to be raised about evidence of membership issues in a hearing on a petition for dues allotment. Similar to other petitions requiring a showing of interest, the Regional Director administratively determines adequacy of the evidence submitted. See *CHM 18.3*.

***For more detailed information on this topic see RCL 6.***

***Relevant Information:*** See *Section 37, Appropriate Unit Determinations, Representation Outline.*





**43**      ***Changes in the name of the certified or recognized exclusive representative***

This section discusses the concepts and procedures for processing petitions to amend a certification or recognition due to changes in the name of the certified or recognized labor organization. Such changes fall within two categories:

**A.      Technical or nominal changes:**

These changes occur when the union merely seeks a technical or nominal change in its certification due to a clerical or administrative error. See National Aeronautics and Space Administration, Headquarters, Administrative Division, 12 FLRA 152 (1983) (granted a name change for the exclusive representative - no discussion of *Montrose* factors).

**B.      Montrose: changes in affiliation or mergers of labor organizations:**

When a petitioner seeks amendment to reflect a change in affiliation resulting from either a reaffiliation or a merger of unions, two conditions must be met.

The two conditions that must be met to determine whether the designation of the exclusive representative of a recognized or certified unit may be amended are:

1.      **Due Process:** *Montrose* sets out specific procedures to ensure that union members have an adequate opportunity to vote on the change.
2.      **Continuity of Representation:** Any change in an affiliation may not affect the continuity of the unit employees' representation and clearly does not leave open questions concerning such representation.

***For more detailed information on technical changes and Montrose see RCL 7.***

**Relevant information:**

- 1) Existing Recognition
  - a) certification of representation or letter of recognition for affected unit;
  - b) copy of existing collective bargaining agreement(s) covering affected unit; and/or
  - c) background only: number of employees in affected bargaining unit.
  
- 2) Special Meeting
  - a) What factors did incumbent consider in setting date, time and place of meeting? Was the meeting held at place and time when regular membership meetings would normally be held? If not, why not and where was it held?
  - b) Copy of the notice of the meeting (e.g., letters, bulletins, post cards, postings, advertisements, etc.). Method of notice distribution (e.g., mailed to last known home address, mailed to work address using internal mail system, posted on union bulletin boards, etc.). Was the notice distributed differently than other meeting notices; if so, how?
  - c) Extent of advance notice given to members of special meeting. Is this different from the amount of notice given of other union meetings? If not, why was there a difference?
  - d) Number of employees in the bargaining unit; number of union members in affected unit; number of such members in attendance at meeting; number of members who voted and copies of any

- existing attendance records for meeting.
- e) What was discussed at the meeting, i.e., was the proposed change in affiliation the sole purpose/topic of the meeting? If not, what else was discussed at this meeting?
  - f) Who, what, when, where, and how as to the events at the special meeting. In particular, what were the members told about the proposed change? What was the substance of the discussion? Were questions asked? If so, what were they and what answers were given? Obtain copies of any meeting minutes.
  - g) Description of site used to conduct election and the procedures used to ensure secrecy of ballot. If the incumbent represents more than one unit, was vote limited to union members from affected unit?
  - h) What was done to safeguard ballots during the vote itself and between the voting and the ballot count? What were the procedures used to conduct the election and count the ballots? Who counted the ballots? If no election was held during the special meeting, why not? Was election held sometime thereafter? If so, when and using what procedures?
  - i) Copy of the ballot.
  - j) What was the outcome of the election? Obtain evidence, such as tally, results certification or minutes.
- 3) Continuity of Representation:
- a) Description of whether and, if so, which local officers/representatives of the incumbent be retained by the gaining labor organization.

- b) Description of the differences, if any, between the officer/steward structures of the incumbent and gaining labor organizations. Similar information on differences in overall representational capabilities.
- c) Description of the differences, if any, between the dues structures of the incumbent and the gaining labor organization.
- d) Has the gaining union agreed to assume responsibility for administering the incumbent's contract and otherwise to represent the unit? Are there any agreements between the incumbent and the gaining union concerning finances, such as transfer of an arbitration fund or other fund? Is there any evidence to suggest that the gaining union is not capable of representing the unit?
- e) Discuss any organizational changes to the extent that any changes in the organizational structure will affect the union's representation of the unit, authority to administer and execute the collective bargaining agreement and constitution.
- f) Based on the size of the unit and the size of the membership, is there a reasonable cause to believe that a QCR exists? See also *RCL 4* and *HOG 40*.

**C. Impact of Trusteeships on Reaffiliation Petitions:**

1. Trusteeship Imposed After the Filing of the Petition: when a trusteeship is imposed after a reaffiliation vote and after the filing of a petition to change the certification, the trusteeship cannot affect the processing of the petition and the issuance of a new certification. *New Mexico Army and Air National Guard, 56 FLRA 145, 149 (2000)*.

2. Trusteeship Imposed Prior to the Petition, Whether Before or After the Vote:

The Assistant Secretary has taken a position in cases where a party has challenged the legality of the purpose of a trusteeship imposed to block a reaffiliation vote. The parties in these cases had *Montrose* petitions pending in the Regions which had been deferred pending the Assistant Secretary's determination on the validity of the trusteeships which were imposed prior to the filing of the petition. The Assistant Secretary took the legal position that parent labor organizations cannot impose a trusteeship simply to prevent a local from disaffiliating from the parent organization.

**When there is no pending case before the Department of Labor and the trusteeship was imposed prior to the filing of the petition, the Regional Director examines the validity of the purpose of a trusteeship.** In view of the legal position taken by the Assistant Secretary and noting particularly that it is the Assistant Secretary and not the Office of the General Counsel that has established the test for determining the validity of trusteeships, **Regions limit the examination to a factual finding of whether the illegal purpose of blocking reaffiliation was the purpose for imposing the trusteeship.**

With respect to the procedural validity of the trusteeship, the Regions:

- < ascertain whether the matter is pending before the Department of Labor;
- < examine the procedural requirements of the parent union's constitution and bylaws and decide if those provisions were followed;
- < obtain a copy of the national union's constitution and bylaws;
- < obtain a copy of the letter from the national placing the local exclusive representative under trusteeship;
- < decide if the local union was afforded a fair hearing; and

- < determine if the trusteeship was authorized or ratified after that hearing as provided for in the parent union's constitution and bylaws.

***For detailed guidance on this topic see RCL 7.***

#### 44 **Schism**

Schism is defined as “[a] basic intraunion conflict over policy at the highest level of an international union or within a federation which results in a disruption of existing intraunion relationships; and the employees seek to change their representative for reasons related to such conflict resulting in such confusion in the bargaining relationship that stability can only be restored by an election.” In a schism case, the petitioner generally asserts that the intra-union conflict constitutes the type of unusual circumstances which justifies the filing of an election petition during a contract bar period or which justifies severance of a group of employees from a larger appropriate unit.

**Standard:** Department of the Navy, Pearl Harbor Naval Shipyard Restaurant System, Pearl Harbor, Hawaii (*Pearl Harbor*) 28 FLRA 172 (1987) is the first and only case considered by the Authority on the merits of schism. In that case, the Authority adopted private sector case law as a guide in rendering his decision. Citing *Hershey Chocolate*, 121 NLRB 901, (1958), the Authority adopted NLRB precedent in determining whether an asserted schism existed.

In *Hershey Chocolate*, 121NLRB 901, the NLRB established three conditions that must be present to find that a schism exists:

1. There must be a basic intra-union conflict affecting the certified representative. A basic intra-union conflict is any conflict over policy at the highest level of an international union, whether or not it is affiliated with a federation, or within a federation, which results in the disruption of existing intra-union relationships. *Hershey Chocolate* 121NLRB at 907.
2. Employees in the unit seek to change their bargaining representative for reasons related to the basic intra-union conflict and have an opportunity to exercise their judgment on the merits of the controversy at an open meeting, called

with due notice to the members in the unit for the purpose of taking disaffiliation action for reasons related to the basic intra-union conflict. *Hershey Chocolate* 121NLRB at 908.

3. The action of the employees in the unit seeking to change their representative took place within a reasonable time after the occurrence of the basic intra-union conflict. *Hershey Chocolate* 121NLRB at 908.

***For detailed guidance on this topic see RCL 8.***

***Relevant information:***

In addition to evidence of exclusive recognition, the record in a schism case includes all basic information involved in a contract bar case. See section 48 - Timeliness, for a discussion of contract bar issues. Other relevant information in a schism case includes documents and testimony showing:

- 1) the nature of and the reasons for the internal conflict asserted as evidence of schism; to what extent did the employees' dissatisfaction with the collective bargaining agreement influence the internal conflict?
- 2) what is the highest level of the national or international union involved and at what level did the internal conflict occur?
  - a) What was the nature of the internal conflict?
  - b) What was the fundamental policy question?
- 3) the nature and extent of any action taken by employees in the unit based on the conflict, specifically as to the realignment, disaffiliation or expulsion of unit members from the incumbent labor organization.

- 4) if disaffiliation has occurred, was a special meeting held to discuss and vote on the disaffiliation issue?
- a) in what manner and when were the members notified of the meeting? When was the meeting held?
  - b) description of the discussion at the meeting.
  - c) numbers of members at the disaffiliation meeting as compared to attendance at previous, regularly held meetings of the incumbent. Numbers of employees in the unit at the time of the disaffiliation action. Was the meeting limited to members of the union or could any member of the bargaining unit attend?
  - d) the proposition voted upon at the disaffiliation election, including a copy of the ballot, if available. Results of any disaffiliation vote, including documentation of actual tally, if available.
  - e) description of which, if any, of the former officers of the incumbent were elected or appointed to offices in petitioner's organization.
  - f) whether a new charter was issued to the petitioner and, if so, when the charter was issued, including a copy of the document, if available.
  - g) number and nature of grievances handled by the petitioner on behalf of employee(s) in the unit. Identical information for the incumbent.
  - h) the dates of meetings conducted by the petitioner since disaffiliation, including average numbers of members in attendance at each meeting. Identical information for the incumbent.

- i) the numbers of members on dues deduction for the petitioner. Identical information for the incumbent.
  - j) the numbers of stewards acting on behalf of the petitioner. Identical information for the incumbent.
  - k) details of the election or appointment of new officers, whether by the petitioner or the incumbent.
  - l) description of the nature and extent of confusion in the bargaining relationship caused by the internal conflict, including testimony on this point from the agency as well as the petitioner and incumbent.
  - m) if members have been expelled, the Hearing Officer obtains documents and testimony from **all** affected groups as to the events involved in the expulsion.
- 5) What was the length of time between the alleged intra-union conflict and the movement to sever the relationship?





## 45 Severance

Severance issues arise when a petitioner seeks to "carve out" or sever employees from an established bargaining unit to establish a separate unit. Any election petition requesting severance from an existing unit requires a 30 percent showing of interest in the petitioned-for unit, not 30 percent of the existing bargaining unit. Office of Hearings and Appeals, Social Security Administration, 16 FLRA 1175 (1984).

**Standard:** Severance is granted only in the rare circumstances where:

- (1) the existing unit continues to be appropriate under the criteria set forth in section 7112(a)(1) of the Statute; and
- (2) unusual circumstances are present which justify removing the particular group of employees from the existing unit.

In addition to obtaining a complete record on the appropriateness of the existing unit, and evidence of unusual circumstances warranting consideration of severance, the Hearing Officer obtains a complete record as to the appropriateness of the proposed unit of severed employees (*RCL 1* and *HOG 37*). This is not inconsistent with the Authority's finding in *Carswell Air Force Base*. Since only the Regional Director is empowered to make representation case determinations, the Hearing Officer obtains a complete and adequate record, without pre-judging the results.

Relevant information in a severance case includes:

- 1) Copy of the certification;
- 2) Copy of the collective bargaining agreement or any memorandum of understanding currently in effect, including any extensions of the agreement, signed by the

parties, so that the expiration date of the contract can be determined;

- 3) Testimony regarding contractual provisions covering petitioned-for employees;
- 4) Evidence showing incumbent's representation of the unit (e.g., grievances filed on behalf of employees; unfair labor practice charges filed on behalf of employees, etc.);
- 5) Evidence showing incumbent's representation of the unit, with respect to the petitioned-for employees (e.g., grievances filed on behalf of these employees; unfair labor practice charges filed which involved these employees, etc.); and
- 6) Disclaimers of interest filed by the exclusive representative and any other documents which establish that the exclusive representative is not interested in further representation of these employees.
- 7) If the issue arises in the context of a reorganization or realignment in which the existing unit is still appropriate:
  - a) do the employees make up a distinct functional grouping of employees? If so, are they new hires or employees from the pre-existing unit?
  - b) if the employees are new hires, do all of the parties agree to the severance?
  - c) if the incumbent filed a disclaimer for the employees, were its subsequent actions consistent with its disclaimer?

***For more guidance on this topic see RCL 9.***

**46      *Status of a labor organization***

**A.      *Compliance with section 7103(a)(4) of the Statute.***

A labor organization is defined in section 7103(a)(4) of the Statute as:

[A]n organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment ... .

Section 7103(a)(4) also provides four statutory exemptions in defining labor organization under the Statute:

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike.

**Basis for challenge:** Section 2422.11(a) of the regulations states that the **only** basis on which a challenge to the status of a labor organization may be made is compliance with 5 U.S.C. 7103(a)(4).

The Authority has held that challenges may also be filed pursuant to section 7111(f)(1) of the Statute. Section 7111(f)(1) prohibits granting exclusive recognition to a union which is subject to corrupt or undemocratic influences. See **Part B** below.

**Note:** There are major differences between the private sector and federal sector definitions of a labor organization. Private sector precedent on this issue may be misleading.

**Relevant information:**

- 1) full and correct name of the organization;
- 2) affiliation, if any;
- 3) manner and extent of employee participation in the organization;
- 4) nature and extent of the organization's "dealings with" the agency;
- 5) discussion of whether dealings concern grievances and conditions of employment (include examples);
- 6) information concerning whether employees pay dues, fees or assessments to the organization and in what manner; and
- 7) information concerning whether the parties have been involved in earlier Authority proceedings in which the party currently challenging the status of the labor organization failed to raise the issue.

**B. Claims made pursuant to section 7111(f)(1) of the Statute that a labor organization should not be accorded exclusive**

**recognition under the Statute because the labor organization is subject to corrupt influences or influences opposed to democratic principles.**

In 1997 the Authority issued cases stating that a petition or a challenge raising claims pursuant to section 7111(f)(1) may be filed and addressed by the FLRA. If filed as a petition, there is nothing in the Statute or its legislative history that suggests that a petition filed pursuant to section 7111(f)(1) requires a showing of interest or is subject to the timeliness requirements. In all other respects, such a petition is processed according to the regulations concerning petitions which do not require a showing of interest. See Division of Military And Naval Affairs (New York National Guard), Latham, New York and National Federation of Civilian Technicians (NYNG), 53 FLRA 111 (1997) and U.S. Information Agency, Washington, D.C. and American Federation of Government Employees, Local 1812, AFL-CIO, (USIA), 53 FLRA 999 (1997). See also *CHM 20.1.8 and RCL 10B*.

Section 7111(f)(1) of the Statute, provides that:

(f) Exclusive recognition shall not be accorded to a labor organization—

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

***For Case Handling Procedures, see CHM 5.10, 19.1, 20.1.8, 23.9.3.***

***For additional guidance for analyzing these cases, see RCL 10B.***

***Relevant information:***

- 1) Obtain a copy of the constitution and bylaws; obtain testimony from a union officer concerning whether and how they meet the criteria set forth in 5 U.S.C. 7120a.
- 2) Evidence must be introduced by the challenging party that

the presumption that the labor organization is free from corrupt and anti-democratic influences is rebutted as set forth in 5 U.S.C. 7120b.

- 3) Such evidence must be in the form of a finding by a third party with jurisdiction over the allegations asserted to establish corrupt or anti-democratic influences.
- 4) If a third party with jurisdiction over the conduct alleged to establish the requisite reasonable cause finds a violation based on the same facts raised by the 7111(f)(1) challenge, the Hearing Officer accepts that finding as evidence that there is reasonable cause to believe that the presumption of freedom from corrupt or anti-democratic influences has been rebutted.
- 5) If the presumption is rebutted, the burden of proof under section 7111(f) shifts to the accused labor organization to demonstrate that, in fact, it is free from influences that would preclude recognition. Consistent with the requirements of section 7120(b), the accused labor organization is then asked to furnish evidence to the Hearing Officer of its freedom from such influences.

A labor organization meets this burden by providing evidence, for example, that:

- (a) the violation found by a third party has been cured (for example, that sanctions imposed by a parent organization have been lifted); or
- (b) the violation found by a third party is in effect de minimis and thus is insufficient to warrant denial or revocation of certification.

**47 (Reserved)**



## **48      *Timeliness of election petitions***

Timeliness requirements for petitions are imposed by section 7111 of the Statute and implemented in section 2422.12 of the regulations. The Statute's timeliness requirements apply **only** to petitions seeking an election, whether filed by labor organizations, by individuals seeking decertification of an exclusive representative or by agencies.

***For detailed guidance on timeliness issues, see RCL 12.***

### ***Relevant Information***

#### **A.      Election and Certification Bars**

- 1)      Obtain the election agreement or certification of representative upon which the party is basing the claim of election or certification bar. Given the nature of these bars, this should be the only information necessary for the record. In a case raising a certification bar, a collective bargaining agreement executed by the parties during the certification year is also entered into the record.
  
- 2)      If the parties dispute whether the petitioned-for unit is the same or a subdivision of the unit for which a bar exists, obtain evidence which establishes whether the petitioned-for unit is the same unit, a broader unit or a subdivision of the unit involved in an earlier election. The Hearing Officer strictly limits the evidence on these points.

#### **B.      Contract Bars**

- 1)      In general, the record in all cases involving alleged contract bars includes at a minimum:
  - a)      the positions of all parties on whether the agreement constitutes a bar to the petition

- b) the agreement signed and dated by the parties and the reproduced version of the agreement that was prepared for distribution
  - c) the predecessor agreement to the agreement that is asserted to be a bar
  - d) documentation showing the date and nature of any determination by an agency head pursuant to the section 7114(c) process
  - e) the document containing the request to renegotiate an agreement containing automatic renewal provisions and any response(s) to the request.
- 2) When a party claims that the collective bargaining agreement is not "lawful" and thus, cannot serve as a bar:
- a) Obtain for the record a copy of the agreement and any related documents such as evidence of a ratification requirement and compliance with such a requirement.
  - b) Testimony as to the parties' interpretation and application of the challenged provision(s) is necessary.
- 3) Where the issue is the effective date of the contract:
- a) Obtain a copy of the agreement at issue.
  - b) Obtain copies of any related documents concerning the agency head approval process (e.g., letter containing the section 7114(c) higher agency approval; memorandum of understanding) which shed light as to the effective date of the contract, approval date or the intent and application of the duration provisions of the contract.

- c) Obtain testimony concerning the parties' interpretation and application of the challenged provision(s).
- 4) Where a party asserts that the contract was automatically renewed and thus, bars the petition and/or where a request to renegotiate a contract which contains an automatic renewal clause is at issue:
  - a) Obtain a copy of the agreement at issue.
  - b) Obtain copies of any related documents (e.g., letter of section 7114(c) higher agency approval; memorandum of understanding, etc.) which shed light as to the effective date of the contract.
  - c) Obtain copies of any documents (e.g., a demand to renegotiate the agreement, etc.) that, in accordance with the contract's terms, may have prevented the contract from automatically renewing.

- 5) Where the ratification of a contract by the union's membership is an issue:
  - a) Obtain a copy of the document containing the agreement that the contract would be submitted to the membership for ratification and obtain related testimony as to the agreement.
  - b) If no written agreement exists, obtain testimony concerning the nature and extent of the parties' understanding as to the submission of the contract for ratification. If applicable, the union's constitution and by-laws is entered on the record. Testimony and documents regarding the parties' practice as to ratification votes for prior contracts may be necessary in this situation.
  - c) Obtain testimony and documents that establish that the ratification vote occurred and the results of that voting.
- 6) Where premature extension of a contract is at issue:
  - a) Obtain a copy of the collective bargaining agreement, which was extended. This includes any documents which shed light on the effective date of the collective bargaining agreement, which was extended.
  - b) Obtain a copy of any documents on which a party relies in its assertion that the contract was extended.
  - c) Obtain testimony concerning the execution of the extension.

## **C. Unusual Circumstances**

- 1) If it is asserted that unusual circumstances exist which warrant the filing of an election petition at any time:
  - a) Obtain a full and complete record as to the changed or unusual circumstances. In general, this requires all evidence which would normally be obtained, particularly in cases such as those involving reorganizations, schism, defunctness or severance. See Appropriate Unit: *HOG 37*, Scope of Unit: *HOG 38*, Reorganizations - *HOG 39*, Schism: *HOG 44*, etc.

#### **D. Dismissal, Withdrawal or Disclaimer Bars**

- 1) Where a bar is asserted, based upon the dismissal or withdrawal of a petition or a disclaimer of interest:
  - a) Obtain the earlier petition, the notice of hearing or election agreement.
  - b) Obtain the request to withdraw the petition and any documentation of the approval of the withdrawal.
  - c) Obtain a copy of the disclaimer of representation.
  - d) Relevant testimony concerning a withdrawal, dismissal or disclaimer bar would include the same scope of unit inquiry addressed in the election and certification bar section concerning the "same unit or a subdivision thereof."
  - e) In cases involving withdrawal, dismissal or disclaimer bars, if a party attempts to submit evidence or testimony in addition to the introduction of the withdrawal, dismissal or disclaimer, the Hearing Officer asks for an offer of proof, as the withdrawal, dismissal or disclaimer speak for themselves.

**49 Unit consolidation**

Section 7112(d) of the Statute provides for the consolidation of existing units:

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

***For detailed guidance on unit consolidations, see RCL 13.***

***Relevant information:***

- 1) Basic information corresponding to the appropriate unit criteria discussed in *HOG 37* and *RCL 1*.
- 2) The degree of commonality and integration of mission and functions of the components involved. Discuss the mission and organizational structure of the Agency and its relationship to the unit sought to be consolidated. Information is sought concerning:
  - < the existence of a central office and its authority, personnel and administrative functions;
  - < regional or field office structure;
  - < entities which operate from the central office.
  - < There must be a sufficient degree of commonality and integration of mission and function to justify the appropriateness of the consolidation unit.
- 3) The distribution of the employees involved throughout the

organizational and geographical components of the Agency. This is a “primary element” in evaluating whether a community of interest exists in consolidation cases. U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio (AFMC), 55 FLRA 359, 364 (1999). Consider the following: locations of units sought to be consolidated; functions and work environment of bargaining unit employees.

- 4) The degree of similarity in the occupational undertakings of the employees in the proposed unit. Discuss the composition of the workforce. Information is obtained concerning:
  - < the numbers, types and positions of employees in each unit sought to be consolidated,
  - < the grade structure of the employees,
  - < the supervisory ratio,
  - < the total number of employees sought to be consolidated and as compared to other employees in the agency or activity that are not part of the proposed consolidation.
- 5) Bargaining history relating to proposed bargaining unit including: dates and copies of recognitions or certifications; information concerning the existence of contracts; grievance procedures and representation practices and dues checkoff.
- 6) Delegation and situs of authority for operations and policy. Who formulates and implements policy? How is it implemented? Discuss relationship between units and/or headquarters.
- 7) Locus and scope of personnel and labor relations authority and functions. Information is obtained concerning:
  - < the extent there are centralized policies concerning personnel and labor relations matters, guidelines, etc.;
  - < the parameters of local directors (or unit management) to exercise their discretionary authority;
  - < the decentralization in implementing personnel policies and practices in the field; and
  - < whether employees work under similar labor relations

policies and procedures.

This factor does not require that labor relations and personnel decisions be processed centrally. *AAFES*, 5 FLRA at 659.

"[t]he applicable legal standard looks to whether policy-making authority over personnel and labor relations policy is consistent with the proposed consolidation, rather than whether the administration or „operation“ of these policies is local or centralized." *AFMC* at 364.

- 8) Degree of interchange between units. Information is obtained concerning the frequency and type of interchange that may occur between units sought to be consolidated and compare that information to the interchange between units in the proposed consolidation and other units. To what extent do employees share common personnel policies and practices, merit staffing programs and areas of consideration for reduction in force? Examine commonality in the payroll, hours of work, dress code and other working conditions such as hiring, firing, transfer, disciplinary actions training programs, awards programs etc.
- 9) Examine effective dealings including:
  - a) efficient use of negotiation resources derived from negotiation of a single contract as compared to multi unit or multiple contracts. Past experience of the agency/activity and labor organization under a given unit structure in making effective dealings determinations. As a general matter, the Authority also considers the past collective bargaining experience of the parties in making "effective dealings" determinations. *AAFES*, 5 FLRA at 661-62);
  - d) whether the unit would adequately reflect the agency's organizational structure or would require creating a new agency structure. Department of Defense, National Guard Bureau and National Federation of Federal Employees, Independent, Department of Defense, National Guard Bureau and National Association of Government Employees, 13 FLRA 232, 237 (1983); Department of

Agriculture, Farmers Home Administration and National Federation of Federal Employees, Independent, 20 FLRA 216, 221 (1985).

- e) limitations on the ability to negotiate matters of critical concern to employees because of fragmentation of existing unit.
    - (i) are there any matters that could be negotiated if the units were consolidated?
    - (ii) would either party take different positions on negotiable issues if the unit were consolidated?
    - (iii) are there any special or unique concerns the employees have because of the nature of their work or their location; could certain local matters best be determined by local authority?
  - f) likelihood that people with greater expertise in negotiations will be available in a larger unit.
  - g) level at which labor relations policy is set in the agency; training in the implementation of a number of negotiated agreements and grievance procedures covering employees performing essentially the same duties.
- 10) Examine efficiency of agency operations:
- a) benefits to be derived from a unit structure which bears some rational relationship to the operational and organizational structure of the agency/activity;
  - b) do the personnel who have operational authority also have authority in labor-management relations?
  - c) impact of a given unit structure on agency operations in terms of costs, productivity and use of resources.

- (i) cost factors: personnel and impact on productivity as a result of one unit;
  - (ii) hours spent administering one unit versus many units and staffing requirements.
- d) The extent to which the proposed consolidation reduces unit fragmentation and as a result, promotes an effective bargaining unit structure. See *AAFES*, 5 FLRA at 661-62. In

Section 7135 of the Statute states the circumstances in which recognition may be granted or continued in units which include supervisors. Section 7135(a)(2) provides that nothing shall preclude:

the renewal, continuation or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

***Mixed units of supervisors and nonsupervisory personnel:***

The Authority's view that section 7135(a)(2) permits the "grand fathering" of mixed units of both supervisory and nonsupervisory personnel has been rejected by the courts. *United States Department of Energy v. FLRA (Department of Energy)*, 880 F.2d 1163 (10th Cir. 1989), noting that section 7112(b)(1) of the Statute prohibits supervisors from being included in bargaining units established under the Statute unless their inclusion is expressly authorized by section 7135(a)(2) of the Statute. The court held that section 7135(a)(2) allows the Authority "to recognize only exclusive units of supervisors, not mixed units." *Id.* at 1167 (footnote omitted).

***Units limited to supervisors:*** The Authority will permit exclusive recognition in a unit consisting solely of supervisors in very limited circumstances in which a labor organization has:

- a) traditionally or historically represented units of supervisors in private industry **and**
- b) held exclusive recognition for a unit of supervisors in a federal agency on the effective date of the Statute.

See Department of Energy, Western Area Power Administration, 38 FLRA 935 (1990).

It is anticipated that few, if any, petitions will be filed concerning the establishment of either mixed units or supervisor-only units. If petitions are filed seeking to exclude supervisors from existing mixed units, relevant information would include evidence to show whether the agency gave timely notice to the union of its intention to remove supervisors from the existing mixed unit. ***For more information about this topic, see RCL 14.***



## **EMPLOYEE CATEGORIES HOG 51 through HOG 64**

### **51 General considerations**

Definitions for terms such as exclusive representative, employee, professional, supervisor, labor organization are found in section 7103 of the Statute. In addition, section 7112 prohibits the inclusion in any bargaining unit of specific categories of employees (e.g., confidential, engaged in federal personnel work).

The Authority alone is empowered to determine bargaining unit eligibility. See *U.S. Small Business Administration (SBA)*, 32 FLRA 847 (1988). The Authority makes such determinations based on testimony as to an employee's actual duties at the time of the hearing, rather than on duties that may exist in the future. See *Department of Housing and Urban Development, Washington, D.C.*, 35 FLRA 1249, 1256-1257 (1990). Evidence such as a position description for a position may be useful in making unit determinations, but is not controlling. The hearing addresses whether the incumbent is performing all work listed in the position description, or is performing other work not listed in the position description. Some cases involve special circumstances which are also addressed at the hearing.

***For more guidance and discussion about general considerations in deciding unit eligibility, see RCL 15.***

#### ***Relevant questions to consider:***

For information and questions related to specific statutory exclusions, consult the Table of Contents for the employee category(ies) at issue. **In all unit eligibility cases, Hearing Officers obtain information relating to the Agency or Activity's mission, organization and functions. This information is crucial for understanding how the disputed employee performs his/her work and how it relates to the accomplishment of the Agency or Activity's mission.** The following questions pertain to special unit determination situations:

1. Where an employee has recently been placed in the position in question:
  - a) Obtain a copy of the vacancy announcement, position description and performance standards for the position.
  - b) What duties are the employee currently performing?
  - c) What has the newly-hired employee been told regarding his or her duties?
  - d) What types of training has this new employee attended, or what type of training is this new employee scheduled to attend?
  - e) Develop a record, if possible, of the duties of the predecessor in the position.
  - f) Are there other similarly-situated employees and what do they do or have they done?
2. Is the employee an employee of an agency as defined in 5 U.S.C. 7103(a)(2) and (3)?
3. In cases that the parties dispute whether new employees are automatically part of an existing unit (as compared to accretion - see *HOG 39C and RCL 3C*), what is the unit definition?
  - a) Is it "sufficiently broad" to include the disputed positions?
  - b) Did the parties include these employees previously and then remove them from the unit?
  - c) Were the employees excluded on a statutory basis

previously?

- d) Were the employees in a separate bargaining unit at the activity?
4. If the employees were transferred from another facility, they cannot be considered under *Department of the Army, Headquarters, Fort Dix, Fort Dix, New Jersey (Fort Dix)*, 53 FLRA 287 (1997). See *RCL 15 and compare to RCL 3*.



## **52 Employee within the meaning of the Statute**

An “employee” is defined in section 7103(a)(2) of the Statute as an individual employed by an “agency,” with certain specific exceptions. The definition of employee is very broad and has been applied to a wide variety of federal positions established in accordance with various laws and regulations. Inquiry into the status of individuals as “employees” is not limited to questions of whether a particular exception in section 7103(a)(2) applies to the position(s) at issue. The threshold question in any case involving the status of individuals as “employees” is whether the employees are employed by an “agency” as defined in section 7103(a)(3).

***For specific examples and guidance, see RCL 16.***

***The following information is relevant in developing evidence on this issue:***

- 1) Documentation and testimony showing which entity is the employer of the individuals at issue in the petition.
- 2) Documentation showing whether the employer is an executive agency of the federal government, a sub-component of a federal agency or other governmental entity.
- 3) Documentation and testimony describing the relationship between the employer and a federal agency.
- 4) Where specifically applicable to a particular exception in section 7103(a)(3):
  - a) Documentation and testimony showing the geographic location of the position(s) at issue and the citizenship status of the individual(s) occupying the position(s);
  - b) Documentation and testimony showing whether

individual(s) occupying the position(s) at issue are military members; and

- c) Evidence as to whether the individual(s) are supervisors or management officials; see *HOG 62-Supervisors* and *HOG 58-Management Officials*.





**53      *Internal audit / investigation function***

Section 7112(b)(7) excludes from all bargaining units:

any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

Employees engaged in investigation or audit functions are excluded from bargaining units under section 7112(b)(7) on the basis that inclusion of individuals performing these functions would create a conflict with bargaining unit status. The nature of the investigation/audit and what the investigation/audit might uncover as it pertains to unit employees is controlling as to this exclusion.

***For guidance on this topic, see RCL 17.***

***Relevant matters to cover at a hearing include:***

- 1)      The mission of the agency component in which the disputed position(s) are located.
- 2)      Typically, agency regulations or directives that exist which describe the work performed by and the authorities possessed by these investigators or auditors. Obtain copies of these regulations or directives for the record.
- 3)      Obtain copies of position descriptions and performance standards for the position(s).
- 4)      Testimony from the incumbent(s) of the disputed

position(s) includes a:

- a) description of the specific job functions of the employees;
  - b) if applicable, description of the type(s) of investigatory functions they perform;
  - c) if applicable, description of the type(s) of audit functions they perform;
  - d) discussion on whose behalf in the agency these investigations or audits are being performed;
  - e) discussion of whether and how the employees under investigation directly affect the internal security of the agency.
- 5) Obtain testimony about what matters are investigated or audited.
- a) Provide examples of the examples of the investigations of unit employees that the disputed employee(s) has performed.
  - b) Describe the claims, such as travel vouchers which were filed by employees, that the disputed employee(s) has audited.
  - c) Describe the agency programs that the disputed employee(s) has audited.
  - d) To what extent is the disputed employee(s) "primarily engaged" in investigation and audit functions (include percentage of time they spend on these investigations or audits; type of work performed - reviewing reports prepared by others

versus actually conducting the investigation or audit).

- e) Explain whether and how the investigation functions are undertaken to ensure that the employees' duties are discharged with honesty and integrity.

For example, in U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (*DOJ*), 55 FLRA 1243 (2000), in its remand, the Authority instructed the Regional Director to "consider whether the Legal Assistant's (the disputed employee) investigations of allegations that employees have used excessive force or have violated the civil rights of inmates constitute investigation of whether such employees have performed their duties honestly and with integrity."

- 6) Who directs the subject investigations or audits; to whom do the subject employees report?
  - a) The investigative or audit process is described in detail.
  - b) The review process of the investigation or audit is described in detail.
  - c) How do these investigations or audits affect bargaining unit employees?
  - d) Have any employees been disciplined or removed as a result of the investigations or audits performed by these individuals? If so, discuss.
  - e) Have procedures or programs been changed to

enhance or promote internal security as a result of an investigation or audit by one of these employees? If so, discuss.

- f) Describe the overall effectiveness of the work accomplished by the disputed employee(s).





## **54      *Administering a labor relations statute***

Three sections of the Statute discuss exclusions based on duties related to “administering a labor relations statute.”

**Section 7103(a)(3)** excludes from the definition of “agency” the Federal Labor Relations Authority and the Federal Service Impasses Panel.

**Section 7112(b)(4)** excludes from any bargaining unit “an employee engaged in administering any provisions of the Statute.” This provision includes federal mediators of the Federal Mediation and Conciliation Service who were found to administer the provisions of Section 7119(a) of the Statute and, therefore, are not eligible for representation. Federal Mediation and Conciliation Service, Region 7, San Francisco, California, 3 FLRA 138 (1980); and Federal Mediation and Conciliation Service, 52 FLRA 1509 (1997).

Other federal employees are employed by federal agencies which administer statutes that pertain to labor-management relations. As to their situation, **section 7112(c)** provides as follows:

Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization --

- 1) which represents other individuals to whom such provisions applies; or
- 2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provisions applies.

**Section 7112(c)** pertains solely to those employees who are

involved in administering a law intended to affect or regulate, in some way, the **collective bargaining process** or other matters directly affecting the labor-management relationship. U.S. Department of Labor, Pension and Welfare Benefits Administration, 38 FLRA 65 (1990). Section 7112(c) of the Statute does not prohibit these employees from being represented by a union in a bargaining unit. Rather, section 7112(c) places restrictions on the types of unions that can represent such employees.

***For detailed guidance on these three sections of the Statute, see RCL 18.***

***Relevant Information:*** The record includes the following information:

- 1) Copy of the mission, organization and functional statements of the agency employing the employees in questions.
- 2) Copies of any laws or regulations which this agency administers.
  - a) Which of these laws or regulations relate to labor-management relations?
  - b) How do these laws or regulations relate to labor-management relations?
  - c) In what way does the law administered by the agency intended to affect or regulate, in some way, the **collective bargaining process** or other matters directly affecting the labor-management relationship?
- 3) Copies of the position description and performance standards for the positions at issue.
  - a) Obtain testimony about the duties of these

employees, as they relate to the laws or regulations that allegedly involve the collective bargaining process?

- b) Examine the duties and responsibilities of the employees to determine whether and the extent to which the employees administer the law or regulation that allegedly involves the collective bargaining process.
- 4) What labor organization is seeking to represent these employees?
- a) Does this labor organization represent other employees? If so, who and in what bargaining units?
  - b) Is this labor organization affiliated directly or indirectly with any other labor organization(s) and what units of employees does that labor organization(s) represent?
- 5) Are there other employees in the agency who are in bargaining units; if so, describe.



## 55 **Confidential employee**

“Confidential employee” is defined in Section 7103(a)(13) of the Statute as:

... an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations.

A unit is not appropriate if it includes confidential employees [section 7112(b)(2)].

An employee is a "confidential" if (1) there is evidence of a confidential working relationship between an employee and a supervisor or manager and (2) the supervisor or manager is significantly involved in labor-management relations. This two-part, labor-nexus test is used to examine the nature of an employee's confidential working relationship. See U.S. Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371 (1990). Both factors must be present for an employee to be considered "confidential" within the meaning of section 7103(a)(13).

At a hearing the Hearing Officer explores not only the work of the employee whose status as a confidential is in dispute, but also the work of the person with whom or for whom the disputed employee works. It is also important to focus on the stage at which this confidential employee is involved in the process by which management labor-relations policies are developed (i.e., is the employee present during the development of the policies, or does the employee's involvement occur after the management policy has been developed and decided).

***For guidance on “confidential employees,” see RCL 19.***

### ***Relevant information:***

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

- 1) Documentation, such as the mission statement, organizational and functional charts of the Activity, locating not only where the alleged confidential employee is found on the chart, but also the individual(s) for whom the employee works in a confidential capacity.
  
- 2) Testimony and documentation as to the actual duties of the employee, focusing especially upon the employee's assigned tasks that result in the employee being involved in labor-management relations.
  - a) Obtain testimony from the individual about his/her daily routine (obtain a copy of the position description and performance standards).
  
  - b) Obtain testimony from the individual about his/her participation and attendance at management meetings where discussions ensue concerning labor relations issues, contract negotiations strategies and proposals and personnel policies. Determine the involvement of the employee at these meetings: note taker, etc.
  
  - c) Obtain testimony from the individual about his/her participation in the preparation of management's responses for grievances, unfair labor practices, negotiation demands, proposed disciplinary actions and other personnel actions that may result in the filing of grievances under the negotiated grievance procedure.
  
  - d) Obtain testimony from the individual about the nature and extent of the employee's access to confidential information concerning other employees and management labor relations

policies and plans.

- e) Obtain testimony from the individual about the types of advice or assistance the employee gives to other employees or supervisors or managers in labor relations/personnel matters.
  - g) What is the percentage of time employee spends in above activities?
  - h) Percentage of time that the employee spends doing other activities such as typing, filing documentation constituting labor-management materials?
- 3) Testimony and documentation regarding the individual who formulates or effectuates management policies in the field of labor-management relations.
- a) Obtain a copy of the position description and performance standards.
  - b) Obtain testimony from the individual about his/her responsibility for establishing, interpreting, or implementing personnel/labor relations policies.
  - c) Obtain testimony from the individual about his/her actual participation in contract negotiations and development of contract proposals.
  - d) Obtain testimony from the individual about his/her participation in handling grievances/arbitrations and disciplinary and adverse actions, and obtain examples of grievance decisions, replies to proposed disciplinary actions, etc.
  - e) Obtain testimony from the individual about his/her

participation in labor-union meetings?

- f) Obtain testimony from the individual about his/her participation and involvement in Equal Employment Opportunity Complaints, Merit Systems Protection Board Proceedings, awards, and promotions.
  - g) What is the nature of this person's attendance and participation at Agency meetings at which sensitive labor relations matters are discussed and deliberated? To what extent does this person advise, develop, and/or implement negotiating positions or proposals?
  - h) To what extent is this person involved in preparing arbitration cases for hearing?
  - i) To what extent does this person consult with management regarding the handling of unfair labor practice cases?
  - j) What is the extent of this person's participation in the formulation and development of the Agency's labor relations policies?
  - k) Describe the involvement of the alleged confidential employee's involvement in above matters, obtaining documents when possible.
  - l) To what extent does the employee, in the normal performance of his/her duties, obtain advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters?
- 4) Obtain specifics from the Activity concerning the potential disruption to or conflict within the Agency's operations

which will result if the alleged confidential employee(s) is included in the bargaining unit.



**56**      ***Employees engaged in personnel work***

Section 7112(b)(3) of the Statute excludes from an appropriate units "an employee engaged in personnel work in other than a purely clerical capacity." Employees are considered "personnelists" under section 7112(b)(3) if their inclusion in the unit would result in a conflict of interest between work duties and union membership.

***For detailed guidance on this topic, see RCL 20.***

***Relevant information:***

- 1)      Documentation, such as organizational charts, of the activity, locating where the alleged federal personnelist is found on the chart.
  
- 2)      Evidence and documentation as to the actual duties of the employee, focusing especially upon the employee's assigned tasks that result in the employee being involved in federal personnel work. Obtain copies of the employee's position description and performance standards.
  
- 3)      Describe the nature of the involvement by this person in the preparation and processing of personnel actions including hiring, adverse actions, promotions, pay increases, transfers, demotions, awards, performance appraisals, and training. The party(ies) focus the employee's testimony on the extent of independent judgment exercised by that employee in the performance of these duties.
  - a)      What does this employee do to initiate these forms? How independently is this person functioning in this process?

- b) What does the employee do in the review of these forms? Is this person reviewing these forms prior to their issuance, for accuracy?
  - c) What is this employee's involvement in the filing or distribution of completed forms.
- 4) Describe the nature of the employee's involvement in the creation of personnel policies or activity policies.
- a) Copies of any such policies are helpful, as is a description of the individual's participation in their formulation.

- 5) Describe the records and information about unit employees to which the employee has access and for what purpose?
- 6) Describe how the employee advises supervisors and managers in personnel matters, such as disciplinary matters, responding to grievances, etc.
  - a) Copies of personnel actions, grievance responses, or other documents which reflect this involvement are helpful, as is a description of the employee's
  - b) Copies of any personnel or staffing studies conducted by the employees is entered in the record, along with testimony of the employee's participation in the studies.
- 7) Does the individual counsel employees on personnel matters, such as retirement benefits, insurance benefits, etc.
  - a) Copies of documents which reflect this assistance to employees are helpful, as is a description of the individual's work in these matters.
  - b) The employee explains any independent judgment s/he exercises in this counseling on the record.
- 8) What is this employee's involvement in the development or implementation of Equal Employment Opportunity programs at the activity?
  - a) Describe any EEO studies conducted by the employee in these matters, studies in which contain recommendations as to the attainment of EEO goals are of particular importance.
  - b) Describe this employee's participation in the

establishment of EEO hiring, educational or promotion goals for the activity?

- c) What is the extent of this person's involvement in the EEO counseling process?
- d) What is the extent of this person's involvement in the EEO investigative process?
- e) What is the extent of this person's involvement in the EEO adjudicatory or settlement process?

## **57 General attorneys**

Congress intended that attorneys, like other professional employees, have the same right to be represented in bargaining units that Congress conveyed to other federal employees. Membership in a labor organization is in itself not incompatible with the obligations of fidelity owed to an employer by its employees. See *Dun & Bradstreet-II*, 240 NLRB 162, at 163 (1979) The American Bar Association's (ABA) Model Canons of Professional Responsibility is not controlling when making bargaining unit determinations under the Statute.

Some attorneys perform duties which otherwise cause them to be excluded from bargaining units. When considering the bargaining unit status of an attorney, a complete examination is made of all the relevant duties and responsibilities of the individual in the position to determine whether the position can be included in the unit or whether it must be excluded based upon a statutory requirement. For items related to specific confidential or federal personnelist exclusions, consult those employee categories in *HOG 55* and *HOG 56* of this manual. For security work, see *HOG 61*. ***For substantive guidance on analyzing evidence, see the specific RCL that pertains to the appropriate exclusion being claimed.***

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

Where an attorney is being assigned duties or functions as a representative of management, the question may arise as to whether inclusion of this attorney would create a conflict of interest. In such situations, questions to explore at the hearing are:

- 1) Evidence and documentation of any advice and responses given or prepared by the General Attorney in labor relations and personnel matters to Agency personnel.
- 2) Evidence and documentation of representation of the agency in hearings before the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority and arbitration hearings, or any other legal proceedings involving unit employees.
- 3) Evidence and documentation of access to internal personnel policy documents and management's internal advice and counsel on labor-related matters. Cover the areas of contract negotiations, the disposition of grievances, action to be taken on proposed disciplinary and adverse actions and management's guidance to supervisors and managers concerning such issues.
- 4) Examine the activities that the incumbent performs that are "sensitive" to the government and directly related to the protection and preservation of the military, economic, and productive strength of the United States, including the security of the government in domestic and foreign affairs, against or from espionage, sabotage, subversion, foreign aggression, and any other illegal acts which adversely affect the national defense. Department of Energy, Oak Ridge Operations, Oak Ridge, Tennessee, 4 FLRA 655 (1980).



**58      *Management official***

"Management official" is defined in section 7103(a)(11) of the Statute as:

... an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policy of the agency.

A unit is not appropriate if it includes management officials [section 7112(b)(1)].

***For specific guidance on management officials, see RCL 22.***

***Relevant information*** includes:

- 1) Documentation, such as the mission statement, organization and function charts of the Activity that locate the alleged management official.
- 2) Testimony from the employee of his/her actual duties and responsibilities and documentation including:
  - a) a copy of the position description and performance standards of the employee.
  - b) Given the nature of the work performed by a management official, copies of any agency regulations or directives which address the authorities and responsibilities of this position.
- 3) What decisions are made by the employee in the performance of the job? Obtain copies of policies, regulations, directives, etc. issued by the employee.

- a) What is the scope of the authority of the employee (i.e., what types of decisions does s/he have authority to make).
  - b) To what extent does the employee draft and implement rules, regulations, directives, binding decisions that interpret laws?
  - c) What is the affect of any decision made and who is affected by the decision?
  - d) Are these decisions made pursuant to established policies or regulations? If so, obtain copies of the relevant documents.
- 4) Do some or all of the decisions of the employee require higher agency approval?
- a) The steps of the review process are be well-documented for the record. Obtain copies of policies, regulations, directives, etc. written by the employee, that have been through this review process.
  - b) If the decisions must be approved by higher agency officials, how often are the decisions of the employee approved? How often are they disapproved?
- 5) Are the decisions of the employee subject to any type of review process?
- a) The steps of the review process are well-documented for the record. Copies of the employee's policies, regulations, directives, etc.

that have been through this review process are entered into the record.

- b) If the decisions or recommendations must be reviewed, how often are they accepted? How often are they rejected?
- 6) The employee actually may not be making policy, but may be making recommendations as to the formulation of policies. Obtain copies of recommended policies, regulations, directives, etc. drafted and copies of the final policy, regulation, directive, etc. issued. Describe the employee's involvement in the making of policy.
- a) The steps of the recommendation process are well-documented for the record.
  - b) How often are the recommendations of the employee adopted? How often are they disapproved?
- 7) Does the employee attend supervisory or managerial meetings?
- a) What is typically discussed at these meetings? How often are they held? Obtain minutes of these meetings, if possible.
  - b) How often does this employee attend these meetings?
  - c) What is the nature of the employee's participation at these meetings?
- 8) What is the employee's responsibility concerning the Agency's operations or policies? Obtain specific examples with documentation.

- 9) If the employee is not making policy determinations or making recommendations as to policies, what exactly, is the level of participation by the employee in formulating, developing, determining or influencing Agency policies. Obtain specific evidence concerning the exact nature of this participation.

Evidence concerning information in items "1" and "3" through "7" are obtained through testimony and documentation introduced by supervisor(s) of the disputed employee, operational managers, employees in similarly situated positions, as well as the employee.





**59 Professional employee**

Section 7103(a)(15) of the Statute defines a professional employee as:

(A) an employee engaged in the performance of work--

(i) requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities;

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominately intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work; and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

B) an employee who has completed the course of specialized intellectual instruction and study described in subparagraph (A)(I) of this paragraph and is performing related work under appropriate direction or guidance to qualify

the employee as a professional employee described in subparagraph (A) of this paragraph.

***For specific guidance on this topic, see RCL 23.***

Relevant questions to determine professional status include the following:

- 1) What are the specialized educational or training requirements for this position?
  - a) The X-118 standards for the position and grade in dispute may be helpful.
  - b) What did the vacancy announcement of this position state as to educational and/or training requirements?
  - c) What did the vacancy announcement of similar positions state as to educational and training requirements?
  - d) Does the person whose position is in dispute have these educational or training prerequisites?
  - e) What state licenses or memberships in professional associations does this person possess and are they needed for the position?
- 2) Describe the duties of this position and the nature of the work.
  - a) The employee describes his/her duties. Are the duties routine, varied, standardized, manual, mental?
  - b) Examples of documents or reports authored by this

individual in his/her employment capacity may be helpful, as would be testimony as to how such documents were created.

- c) What is the nature of supervision given to the employee?
- d) Describe the independent judgment or discretion that is exercised.
- e) Is work predominately intellectual and varied in character as distinguished from routine, mental, manual, mechanical or physical? Description of the work performed, including examples of the work is vital.
- f) Is the work of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time? Examples of work performed is essential.
- g) Describe how the work requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or hospital. Distinguish this from a general academic education or from an apprenticeship or training in the performance of routine mental, manual, or physical processes?
- h) Is the employee in question, otherwise qualified, working under the close supervision of a professional employee in preparation for becoming a professional? If so, explain the working relationship.



**60**      ***Schedule C positions***

“Schedule C” positions are described in 5 C.F.R. 213.3301:

**Section 213.3301 Positions of a confidential or policy-determining character.**

Upon specific authorizations by OPM, or under the terms of an agreement with OPM, agencies may make appointments under this section to positions which are policy-determining or which involve a close and confidential working relationship with the head of an agency or other key appointed officials. Positions filled under this authority are excepted from the competitive service and constitute Schedule C. ...

Neither the definition of “employee” in section 7103(a)(2) of the Statute nor the specific unit exclusions set forth in section 7112(b) of the Statute references Schedule C employees.

The same eligibility factors considered when determining if any employee is to be included in a bargaining unit are applied to determining unit eligibility of Schedule C employees.

***See also RCL 24 for more information on Schedule C positions.***

***For questions related to specific Statutory exclusions, consult the Table of Contents for the employee category(ies) at issue.***

In addition to questions concerning specific categories, other relevant questions include the following:

1. Evidence and documentation of the basic mission, organization and operations of the agency. This area

corresponds to the community of interest of the disputed employees with unit employees. (See also *RCL 1 - Appropriate Unit Determinations* - also *HOG 37* for a discussion of community of interest).

2. To what extent are the conditions of employment for the disputed employee(s) similar or dissimilar to bargaining unit employees? Areas of consideration include:
  - a. Method of appointment
  - b. Promotion procedures
  - c. Removal and reduction in force policies
  - d. Compensation and retirement programs
  - e. Performance appraisal
  - f. Benefits, including life and health insurance
  - g. Security investigations, drug testing policies
3. Discuss the duties and functions of the disputed employee(s) and of the employees included in the bargaining unit. Describe the work that the disputed employee(s) performs and compare with the work of the bargaining unit employees. Include information on how the disputed employee(s) is assigned work, and performs work as compared to bargaining unit employees. Do the disputed employee(s) and the bargaining unit employees share common supervision?
4. To what extent are the disputed employee(s) in a close and confidential working relationship with the head of the agency or other key appointed official?
5. To what extent does the disputed employee(s) participate

in policy-making with the head of the agency or other key appointed officials?



**61 Security work**

Generally, employees engaged in intelligence, counterintelligence or national security work are excluded from bargaining units. Three sections of the Statute address these exclusions:

**Section 7103(a)(3)** specifically excludes from the definition of "agency" the following agencies engaged in national security work: (1) the Federal Bureau of Investigation; (2) the Central Intelligence Agency and (3) the National Security Agency. Thus, employees of these agencies cannot be in any bargaining units.

**Section 7103(b)(1)** allows the President to exclude employees of certain agencies or subdivisions from coverage of the Statute. This section provides:

The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that-

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

In the past, Presidents have excluded entire agencies or subdivisions thereof from coverage of the Statute.

**Section 7112(b)(6)** excludes employees in certain categories from all bargaining units. This section applies to specific positions, rather than to an agency or subdivision. Section 7112(b)(6) excludes from any bargaining unit:

any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security.

Under section 7112(b)(6) the Activity must show (1) that the individual employee is engaged in the designated work, and (2) that the work directly affects national security.

***For specific guidance on each of these sections, see RCL 25.***

***Relevant information includes:***

- 1) Evidence of the mission of the agency, activity or subdivision in which the disputed position(s) are located.
  - a) Does the mission relate to the military, economic and productive strength of the United States?
  - b) In what respect does the work of the agency relate to the national security of the government?
- 2) Obtain organizational charts which identify the disputed position(s).
  - a) What is the chain of command of the employee in the position at question?
- 3) What are the duties of this employee, as they relate to intelligence, counterintelligence and national security matters?
  - a) Obtain testimony from the disputed employees and a copy of their position descriptions for the position(s) at issue.
  - b) To qualify for the position, what type of security clearance (e.g., secret, top secret) is the employee required to maintain?

- c) What level of security clearance does the employee have?
  - d) Given the nature of this work, most likely agency or activity regulations exist, which describe and limit the authorities of an employee in this position. These documents are entered in the record.
- 4) Information as to the relationship of the position to intelligence, counter-intelligence or national security work.
- a) Describe how this employee is involved in cases involving espionage, illegal drug sales, hijacking, kidnapping, and acts of terrorism.
  - b) Describe how this employee is involved in planning, directing and coordinating a command security system which includes security of information, personnel and operations.
  - c) Does this employee maintain a vault or have access to a vault where top secret material is kept? How the employee maintains the vault and a description of the full range of his/her duties are necessary.
  - d) Describe the involvement of this employee in the operation of special communication systems used to communicate top secret material. The employee describes this system as extensively as possible as well as the employee's duties regarding the system. Often, due to the nature of the materials handled, this is difficult, since no one at the hearing has the proper clearances and representation hearings are public proceedings.
- 5) How is this employee involved in the granting of security

clearances?

- a) Does the employee conduct investigations into individuals regarding the granting of security clearances and make recommendations, or grant such clearances? The investigatory process is described.
  - b) Is this employee functioning only as a fact-finder in reviewing applicants for positions, and is not otherwise involved in hiring determinations? The employee describes the way that s/he performs his/his work.
- 6) How is this employee involved with classified information?
- a) Does the employee maintain a classified material system and/or review classified material? The parties explore fully the employee's responsibilities and duties.
  - b) Does the employee control access to or the release of classified information or destroy information as needed as part of a system of protecting records? The employee describes his/her responsibilities and duties.
  - c) What is the classification level of the material this person handles (i.e., secret, top secret, crypto)?
- 7) If the position is a clerical one, a description of the actual work performed by the clerical is most important, so that determinations can be made as to whether the clerk's work is routine in nature, as it pertains to the sensitive documents.

## 62 **Supervisors**

Section 7103(a)(10) of the Statute defines "supervisor" as:

an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term „supervisor“ includes only those individuals who devote a preponderance of their employment time to exercising such authority.

***See RCL 26 for detailed guidance on supervisory criteria and the analytical framework for analyzing unusual positions subject to this Statutory exclusion.***

### ***Relevant information:***

- 1) Documentation, such as organizational charts, of the activity, locating the work group involved and the general hierarchy of that portion of the activity.
- 2) Evidence and documentation as to the actual duties of the individual, focusing on the tasks that allegedly result in supervisory status.
  - a) Obtain a copies of the position descriptions and performance standards of the individual and subordinates.
  - b) Documentation of the names of and positions held by subordinates.

- c) Describe the work done by the alleged subordinates.
  - d) Describe how the work performed by the alleged supervisor differs from or is similar to that of subordinates?
- 3) Describe the extent and nature of the individual's involvement in the hiring process?
- a) Does the individual participate in the interviewing of applicants? How many times has s/he participated in interviews?
  - b) Does the individual make recommendations as to whom to hire? If so, how often are those recommendations adopted? How many times has the individual made such recommendations? When did this occur.
  - c) Does the individual act as the selecting official in hirings and promotions? How often does this occur? Obtain documentation of this.
- 4) Describe the extent and nature of this person's involvement in the assignment of work.
- a) Does the individual distribute work? Is this distribution of work based upon written guidelines?
  - b) Does individual reassign work? The process by which work is reassigned is explored in detail.
  - c) How is this individual involved in determining the number of employees to be used on which projects?

- d) Does individual distribute work in accordance with his/her evaluation of the capabilities of employees.
  - e) How are overtime assignments made?
  - f) Does the individual schedule or prioritize work?
  - g) Does the individual maintain records of employee performance?
  - h) To what extent is the individual responsible for the completion and quality of the work from the work group?
  - i) To what extent does the individual rely on instructions from others or on standard operating procedures in assigning work?
  - j) Does the individual instruct employees on how to perform the work?
  - k) Does this individual have the authority to approve leave?
  - l) Has this individual denied a leave request or absence from the job, on the basis of workload requirements?
- 5) How does this individual become involved in the detail, transfer or reassignment of employees within the activity?
- a) Has this person recommended the detail, transfer or reassignment of any employee(s)?
  - b) If so, how many of the recommendations were followed? How many were not?
  - c) Does this person have the authority to detail,

transfer or reassign employees within the activity?  
If so, using specific examples, describe his/her role  
in the process.

- 6) Does this person have the authority to suspend, discipline or remove employees?
  - a) Has this person counseled, disciplined or removed any employees?
  - b) Has this person recommended that an employee be counseled, reprimanded, suspended or removed? Describe how that recommendation was processed and whether the employee was disciplined in any way.
  - c) Have grievances under the negotiated grievance procedure been filed, challenging this disciplinary action?
  
- 7) Is this individual involved in the performance appraisal process?
  - a) Does this individual complete annual performance appraisals for employees? Obtain copies of the appraisals.
  - b) How are these evaluations used in promotion actions, the granting of awards, reemployment decisions?
  - c) Does this individual have the authority to promote employees? To recommend their promotion? How often are his/her recommendations followed?
  
- 8) Does the individual participate in or determine when and which employees will be furloughed, reduced in force or recalled?

- 9) How is this individual involved in the grievance process?
- a) Have any actions taken by the individual been the subject of a grievance? Using such a grievance, the parties develop the record as to the involvement of the individual in the grievance process.
  - b) Have any recommendations made by the individual been the subject of a grievance? Using such a grievance, the individual explains his/her involvement of in the grievance process.
  - c) Has this individual adjusted any grievances? Examples of such adjustments are entered into the record.
- 10) What is the involvement of this person in other matters, which might shed light on supervisory authority.
- a) In connection with this position, has this person attended supervisory training? Is such training a prerequisite for the position?
  - b) Does this person attend supervisory or management meetings? The witness describes these meetings in detail, covering how often they are conducted, who attends and what transpires at these meetings.
  - c) Does this person have the authority to approve or deny leave? Are there any minimum staffing guidelines that the person follows when considering if leave should be approved?



63 ***Firefighters and nurses***

Section 7103(a)(10) of the Statute contains a special definition of "supervisor" as it pertains to firefighters and nurses, stating that with respect to any unit including firefighters or nurses, the term "supervisor" includes only those individuals **"who devote a preponderance of their employment time exercising supervisory authority."**

The Statute contains no definition of "nurse" and no specific meaning of the term "nurse" has been developed through Authority cases. Section 7103(a)(17) of the Statute defines "firefighter" as:

...any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment.

There are two important aspects to the statutory definition of a supervisory firefighter or nurse. The supervisory firefighter or nurse must spend a **preponderance of employment time** engaged in supervisory functions.

***For guidance when analyzing the supervisory status of nurse or firefighter positions, see RCL 27.***

***Relevant questions as to supervisory indicia can be found in HOG 62. The following information is also developed in cases involving the supervisory status of firefighters and nurses:***

- l) Testimony and documentation concerning the mission of the agency or activity and the organizational structure of the fire department or activity to which the firefighters are assigned.
  - a) Testimony concerning the duties of the incumbent

and copies of the position description and performance standards for the position in question.

- b) For the position in dispute, what does the employee do, in the furtherance of fighting fires, utilizing firefighting apparatus, etc.?
  - c) Any special pay and retirement benefits enjoyed by the employee because s/he is a firefighter is included in the record.
  - d) What are the work schedules of supervisors and employees?
  - e) Describe the supervisory duties performed by this employee. (See *HOG 62 and RCL 26*)
  - f) Describe the amount of time the employee spends in these supervisory duties during his/her given shift.
  - g) Explore the difference, if any, between duties of the position in dispute and the duties of other employees who work in the same area.
  - h) What is the frequency of contact with other employees by the employee whose position is in dispute?
- 2) Documentation concerning the mission of the agency or activity and the organizational structure of the hospital, clinic or activity to which the nurses are assigned.
- a) Testimony concerning the duties of the incumbent and copies of the position description and performance standards for the position in question.
  - b) Educational requirements for the position at issue.

- c) Hours of work or type of work schedule worked by the employee, whose position is in dispute, and others in the work area.
- d) Describe the supervisory duties performed by this employee. (See *HOG 62* and *RCL 26*)
- e) Describe the amount of time the employee spends in these supervisory duties during his/her given shift.
- f) Have the employee testify about the amount of time s/he spends in patient care.
- g) Where does this employee work and where do the alleged subordinates work.



## **64 Temporary employees**

Agencies may hire employees to “temporary” or “term” appointments of fixed durations, as defined in 5 C.F.R. 316. Temporary or term employees may be included in a unit with other employees, as long as their inclusion would otherwise be appropriate. In addition, a separate unit of temporary employees is appropriate, as long as the unit meets the criteria of section 7112(a)(1) of the Statute.

***For detailed guidance on making unit determinations involving “temporary” employees, see RCL 28.***

### ***Relevant information includes:***

- 1) Documentation as to the type of appointment of these employees.
  - a) Any statutes, federal regulations or executive orders which govern these appointments is obtained.
  - b) Any agency regulations which govern these appointments is obtained.
- 2) For those who have limited tenure, pursuant to their appointment:
  - a) The number of months or years commonly worked by employees, serving in this appointment. It may be necessary to explore, over a period of several years, how persons in this appointment have been employed.
  - b) Pursuant to law, executive order or federal regulation, must the person in this limited tenure appointment be converted to permanent tenure

after a certain period of time. Has the activity complied with this requirement?

- c) Historically, have employees in this limited-tenure appointment competed for and been given appointments of permanent tenure.
  - d) Whether, and how frequently do employees with limited tenure receive new appointments with the same or different tenure - and how long does this usually go on?
- 3) Documentation as to the hours of work of these employees.
- a) Is there a guarantee of a certain number of hours?
  - b) What is the pattern of number of hours worked by these employees, per week, per month, per year.
- 4) Do these employees who have limited tenure appointments share in a community of interest with those on permanent appointments?
- a) Do they share in the same supervision?
  - b) Do they work side-by-side with permanent employees?
  - c) What are their assigned duties and what are the duties assigned to those having permanent tenure?
  - d) What are the hours of work of those on limited tenure appointments and what are the hours of work of permanent employees?

- e) Who handles personnel matters for those who have limited tenure and those who have permanent tenure?
- f) What type of benefits (e.g., health, retirement, etc.) do temporaries enjoy? Are these the same types of benefits that permanent employees enjoy?
- g) Are temporary employees in the same competitive areas for RIF as are permanent employees?



Figure 34.4

**S REPORT**

Case  
Name: \_\_\_\_\_  
\_\_\_\_\_

Case Number:  
\_\_\_\_\_  
\_\_\_\_\_

Hearing Officer:  
\_\_\_\_\_  
\_\_\_\_\_

1. Pleadings:

(a) Petition filed on \_\_\_\_\_  
(date)

(b) Hearing on \_\_\_\_\_ (date(s)) at  
\_\_\_\_\_ (place)

(c) Parties:

Agency/Activity:

\_\_\_\_\_  
\_\_\_\_\_

Petitioner:

\_\_\_\_\_  
\_\_\_\_\_

Intervenor:

\_\_\_\_\_  
\_\_\_\_\_

Intervenor:

- 
2. Issue(s): Summarize the matters that were in issue at the hearing and the pertinent evidence with respect to each issue.

\_\_\_\_ Appropriate Unit:

\_\_\_\_ Eligibility:

\_\_\_\_ Clarification or amendment relating to recognition or certification (explain):

\_\_\_\_ Clarification or amendment relating to matter relating to representation (explain):

\_\_\_\_ Timeliness:

\_\_\_\_ Consolidation:

\_\_\_\_ Determinative challenged ballots:

\_\_\_\_ Other:

3. Procedure: Discuss any unusual or significant problems affecting the proceeding and/or any rulings made as to which the Hearing Officer is in doubt:

List only those rulings on important or unusual questions as to which the Hearing Officer is in doubt, such as rejection of offer of proof, refusal to issue subpoena, denial of motion to intervene. It is not necessary to list rulings on motions to correct names, places, minor amendments of petition, denials of motions to strike testimony, etc.

4. Bar(s) to Election:

In Issue \_\_\_\_\_

Not in Issue \_\_\_\_\_

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

Indicate alleged bar in issue; i.e., agreement bar, election bar or certification bar, positions of the parties and summary of the relevant evidence.

5. Showing of Interest: (see *CHM 18.15*)

\_\_\_\_\_ FLRA Form 52 attached

\_\_\_\_\_ Showing of Interest (not) adequate for unit contended appropriate by Activity and/or incumbent-intervenor

\_\_\_\_\_ Showing of Interest (not) adequate for alternative unit(s) acceptable to petitioner

\_\_\_\_\_ Showing of Interest (not) adequate in relation to (inclusion) (exclusion) of classification(s) in issue

6. Stipulations: List the stipulations.

7. Recommendations made on the record: Review the instructions given by the Regional Director concerning making recommendations on the record. Note the issue and the recommendations made.

8. Other Issue(s) or Problem(s): Summarize relevant facts regarding any issue(s) or problem(s) not covered under any of the above paragraphs; e.g., status of labor organization.

9. Briefs:

a. Will briefs be filed? \_\_\_\_\_

b. Due date: \_\_\_\_\_

10. \_\_\_\_\_ s estimate of transcript pages: \_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_

Hearing Officer





Figure 35

**HEARING OFFICER'S SCRIPT**

ON THE RECORD. THE HEARING WILL BE IN ORDER.

THIS IS A FORMAL HEARING IN THE MATTER  
OF....., CASE  
NUMBER.....BEFORE THE FEDERAL  
LABOR RELATIONS AUTHORITY.

Read the entire caption of the case from the notice of hearing.

THE HEARING OFFICER APPEARING FOR THE FEDERAL  
LABOR RELATIONS AUTHORITY IS .....

WILL REPRESENTATIVES FOR EACH OF THE PARTIES  
PLEASE STATE THEIR APPEARANCE FOR THE RECORD,  
INCLUDING TITLE, ADDRESS AND ZIP CODE?

FOR THE (ACTIVITY) (AGENCY)?

FOR THE PETITIONER?

FOR THE INTERVENOR(S)?

If appearance is by an attorney, obtain full name of law firm.

Appearance by a labor organization representative must also show  
the national with whom affiliated.

I WISH TO INFORM ALL PARTIES THAT THE OFFICIAL  
REPORTER MAKES THE ONLY OFFICIAL TRANSCRIPT OF  
THESE PROCEEDINGS AND ALL CITATIONS IN BRIEFS OR  
ARGUMENTS MUST REFER TO THE OFFICIAL RECORD.  
AFTER THE CLOSE OF THE HEARING ONE OR MORE OF THE  
PARTIES MAY WISH TO HAVE CORRECTIONS MADE IN THE

RECORD. ALL SUCH PROPOSED CORRECTIONS, EITHER BY AN AGREED STATEMENT, STIPULATION, OR MOTION SHALL BE MADE IN WRITING TO THE REGIONAL DIRECTOR.

I WISH TO STRESS THE FACT THAT ALL MATTERS SPOKEN IN THE HEARING ROOM ARE RECORDED BY THE OFFICIAL REPORTER WHILE THE HEARING IS IN SESSION. IN THE EVENT THAT ANY OF THE PARTIES WISHES TO MAKE OFF-THE-RECORD REMARKS, REQUESTS TO MAKE SUCH REMARKS ARE DIRECTED TO THE HEARING OFFICER AND NOT TO THE OFFICIAL REPORTER. STATEMENTS OF REASONS IN SUPPORT OF MOTIONS AND OBJECTIONS SHOULD BE AS CONCISE AS POSSIBLE. OBJECTIONS AND EXCEPTIONS MAY, UPON APPROPRIATE REQUEST, BE PERMITTED TO STAND TO AN ENTIRE LINE OF QUESTIONING. AUTOMATIC EXCEPTIONS WILL BE ALLOWED TO ALL ADVERSE RULINGS.

THE SOLE OBJECTIVE OF THE HEARING IS TO ASCERTAIN AND INQUIRE INTO THE RESPECTIVE POSITIONS OF THE PARTIES AND TO OBTAIN A COMPLETE AND FULL FACTUAL RECORD UPON WHICH A DECISION MAY BE BASED. IT MAY BECOME NECESSARY FOR THE HEARING OFFICER TO ASK QUESTIONS, AND TO EXAMINE WITNESSES, WITH RESPECT TO MATTERS NOT RAISED OR PARTIALLY RAISED BY THE PARTIES. THE SERVICES OF THE HEARING OFFICER ARE EQUALLY AVAILABLE TO ALL PARTIES TO THIS PROCEEDING.

AFTER THE CLOSE OF THE HEARING, THE REGIONAL DIRECTOR WILL ISSUE A DECISION AND ORDER.

- 1. *Receiving formal papers in evidence:*** (see *HOG 4.1, 10.2.2 and 32.4*)

I NOW PROPOSE TO RECEIVE THE FORMAL PAPERS INTO THE RECORD.

THE PARTIES WERE AFFORDED THE OPPORTUNITY TO EXAMINE THE PAPERS PRIOR TO THE OPENING OF THIS HEARING.

ARE THERE ANY OBJECTIONS TO RECEIVING IN EVIDENCE THE FORMAL PAPERS AS AUTHORITY EXHIBITS MARKED 1a THROUGH 1..... FOR IDENTIFICATION?

HEARING NO OBJECTION, THEY ARE RECEIVED INTO THE RECORD.

A party is allowed to state its objections, in full, on the record. If the objection is raised as to the admissibility of an exhibit, the Hearing Officer explains that the formal papers are necessary to the Authority's jurisdiction in the matter, that receipt of the exhibits in evidence does not establish the truth of the matters contained therein, that any relevant evidence may be introduced irrespective of the contents of the exhibits and, in any event, the Regional Director will pass on the admissibility of such exhibits and any other evidence.

If the other party does not withdraw its objection after this explanation, the objection is overruled.

If a party seeks to raise an issue or makes a motion on any matter unrelated to the formal papers (e.g., intervention, showing of interest, etc.) before all papers are received in evidence, ruling by the Hearing Officer on that motion is deferred until after disposing of Authority exhibits.

If an issue is raised regarding:

- a) the adequacy of the showing of interest, see section 33.1;
- b) the validity of the showing of interest, see section 33.2;
- c) the status of a labor organization, see section 33.3; or
- d) or motion to dismiss petition, see section 18.3

of this Guide.

**2.        *Ascertaining correct names of parties:*** (see HOG 3 and 32.5)

MR./MS. ..., IS THE NAME OF THE ACTIVITY AND THE AGENCY APPEARING ON THE PETITION NAMELY, .... CORRECT?

MR./MS. ..., IS THE NAME OF THE PETITIONER APPEARING  
ON THE  
PETITION,  
NAMELY ...  
CORRECT?

MR./MS. ...., IS THE NAME OF THE INTERVENOR APPEARING ON THE PETITION/NOTICE OF HEARING, NAMELY, ... CORRECT?

If a party states that its name is not correct, the party enters the correct name for the record, after which the Hearing Officer reads the following statement into the record:

ARE THERE ANY OBJECTIONS TO HAVING THE PETITION AND THE OTHER FORMAL PAPERS AMENDED SO THAT THE NAME OF THE (ACTIVITY, AGENCY, PETITIONER, INTERVENOR) WILL APPEAR CORRECTLY IN THE CAPTION AS .....

The affiliation, if any, with national, international, and/or parent federation, is given in full.

No abbreviation in the name of a labor organization is permitted, except in the single instance of AFL-CIO.

The correct name of a labor organization, as provided by its representative, need not be supported by documentary evidence or testimony.

**3.        *Other motions to amend the petition:*** If the Hearing Officer knows in advance (as a result of prehearing discussions) that the

petition will be amended, it is amended at this time (see HOG 18.7 and 32.6 for instructions on handling amendments to petitions).

4. **Intervention and cross-petition:** Motions to intervene and cross-petitions that were filed immediately prior to the opening of the hearing are reviewed and, if necessary, ruled on (see *HOG 17.4, 23 and 32.7*).

(A)(1) When the motion to intervene is being granted:

MR./MS. .....,YOUR MOTION TO INTERVENE, ON BEHALF OF ....., IS GRANTED.

- (2) If the Hearing Officer has any doubt as to the propriety of permitting intervention, s/he states the following:

MR./MS. .....,YOUR MOTION TO INTERVENE, ON BEHALF OF ....., IS GRANTED, CONDITIONALLY (if necessary, AND SUBJECT TO A SUBSEQUENT CHECK OF THE SUFFICIENCY OF THE SHOWING OF INTEREST). A FINAL DECISION IS BEING RESERVED FOR THE REGIONAL DIRECTOR.

(B)(1) With respect to cross-petitions:

WITH RESPECT TO THE CROSS-PETITION, WHAT ARE THE POSITIONS OF THE PARTIES ON CONSOLIDATING THE CROSS-PETITION WITH THE PETITION PRESENTLY BEFORE THE HEARING OFFICER?

ON THE BASIS OF A DISCUSSION WITH THE REGIONAL DIRECTOR, THE REGIONAL DIRECTOR HAS DECIDED TO CONSOLIDATE / NOT TO CONSOLIDATE THE CROSS-PETITION WITH THE PETITION PENDING BEFORE THIS HEARING OFFICER.

- (2) If the petitions are consolidated:

I WILL NOW INTRODUCE THE CROSS-PETITION AS

AUTHORITY EXHIBIT #...

ARE THERE ANY OBJECTIONS TO RECEIVING INTO EVIDENCE AUTHORITY EXHIBIT # .....?

HEARING NO OBJECTION, AUTHORITY EXHIBIT # ..... IS RECEIVED.

- (3) If the intervention or cross-petition is filed during the hearing: the Hearing Officer will ask the party to state the grounds for the request and the reasons for the delay in filing. The Hearing Officer will then contact the Regional Director (or acting RD) to discuss the reasons for the party's delay in filing. If it appears that the party requesting intervention has shown good cause for granting an extension to the timeliness requirements, the Regional Director may allow the Hearing Officer to grant "conditional" intervention. If it does not appear that the party's untimely intervention warrants further consideration, the Regional Director will instruct the Hearing Officer to refer the intervention request to the Regional Director for action (see *HOG 17.4*, and *18.4* and *23* for cross-petitions).

5. **Other prehearing motions presented by the parties upon opening the hearing:** Other motions are handled similarly to those discussed above (see *HOG 18, 24, 32.8* and *33*).
6. **Outlining the issues presented by the petition:** The following are examples of scripts which concern issues that are commonly raised in petitions. (see *HOG 32.9, 2* and *3.8*)
- a. **Appropriate unit:** (see *HOG 37*)

This sample involves a consolidated hearing for two election petitions:

THE UNIT SOUGHT BY THE PETITIONER IN CASE NO. ...., IS DESCRIBED AS FOLLOWS IN THE AMENDED PETITION:

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

(describe proposed unit)

THE UNIT SOUGHT BY THE SAME PETITIONER IN CASE NO. ...., IS DESCRIBED AS FOLLOWS IN THE AMENDED PETITION:

(describe proposed unit)

MR./MS. ...., WHAT IS THE POSITION OF THE PETITIONER REGARDING THE APPROPRIATENESS OF THE PETITIONED-FOR UNITS?

MR./MS. ...., WHAT IS THE POSITION OF THE ACTIVITIES REGARDING THE APPROPRIATENESS OF THE PETITIONED-FOR UNITS?

ALTERNATIVE UNIT(S) (optional, see *HOG script 35.8*)

AT THIS TIME, WILL THE PETITIONER STATE FOR THE RECORD ITS POSITION AS TO WHAT UNIT(S), IF ANY, IT WOULD BE WILLING TO PROCEED TO AN ELECTION IN AS AN ALTERNATIVE TO THE UNITS SOUGHT BY THE AMENDED PETITIONS?

WHAT IS THE POSITION OF THE ACTIVITIES REGARDING ANY SUCH ALTERNATIVE UNIT(S)?

**b. Eligibility:** (see *HOG 51 through 64*)

This sample involves a request to clarify multiple bargaining positions.

IN THIS CASE, THE PETITIONER SEEKS TO CLARIFY THE BARGAINING UNIT DESCRIBED BELOW WHICH WAS CERTIFIED ON ..... IN CASE NO. ....:

(Describe the recognized or certified unit directly from the recognition or certification; if neither document is available,

the Hearing Officer may rely on the unit description in the contract. If there are any discrepancies between the names of the parties to the case as opposed to the names of the parties on these documents, this is clarified on the record, either through a stipulation or testimony.)

THROUGH THIS PETITION, THE PETITIONER, ....., PROPOSES THAT THE ABOVE-DESCRIBED UNIT BE CLARIFIED BY INCLUDING THE FOLLOWING EMPLOYEE(S):

<u>TITLE</u>	<u>GRADE</u>	<u>SERIES</u>
<u>INCUMBENT</u>		

Note: When clarifying units, a petition must specify the positions held by specific individuals that it seeks to clarify. For example, a petition may seek to clarify only certain Program Analysts, GS-9. The record must track the petition and reflect the names of the individuals who encumber the positions affected by the petition. The record in this example then reflect why the petitioner seeks to clarify the status of certain individuals and not others. When a petition seeks to clarify the status of an entire classification of employees, e.g., all Program Analysts, GS-345-9, the parties prepare an exhibit that identifies the names and organizational location of the incumbents. This is a joint exhibit absent a stipulation that the petition seeks to clarify the status of all employees who encumber the specific position at issue.

MR./MS. ...., HAVE I CORRECTLY STATED THE PURPOSE OF THE ....'S PETITION TO CLARIFY THE UNIT?

MR./MS. ...., IS THIS .....(other party)'S UNDERSTANDING OF THE PURPOSE OF THE ....'S CLARIFICATION OF UNIT PETITION?

WILL EACH OF THE PARTIES STATE ITS POSITION WITH RESPECT TO THE INCLUSION OR EXCLUSION OF (EACH OF) THE CLASSIFICATION(S) IN ISSUE, NAMELY.....?

MR./MS. ...., FOR THE PETITIONER?

MR./MS. ...., FOR THE (ACTIVITY) (AGENCY)?  
MR./MS. ...., FOR THE INTERVENOR?

- c.                    *Matters relating to representation (e.g., reorganization, accretion, successorship, Montrose):* (see HOG 37 through 50)**

IN THIS CASE, THE PETITIONER SEEKS TO CLARIFY THE BARGAINING UNIT DESCRIBED BELOW WHICH WAS CERTIFIED ON ..... IN CASE NO. ....:

In this sample, there is only one unit being clarified as a result of a substantial change in the character and scope of the unit. The existing unit description is being read into the record. On the other hand, a large reorganization may affect many units. Rather than read all of the units into the record, the parties can prepare a joint exhibit setting forth descriptions of the units and the dates of recognition or certification with copies of appropriate recognitions and certifications.

THROUGH THIS PETITION, THE PETITIONER(S) SEEKS TO CLARIFY THE CERTIFIED UNIT(S) BY: [Provide a clear and concise statement of the issues being raised by the petition and the results the petitioner(s) seeks.]

MR./MS. ...., HAVE I CORRECTLY STATED THE PURPOSES OF THE PETITIONER'S PETITION?

MR./MS. ...., IS THIS THE (other party)'S UNDERSTANDING OF THE PURPOSES OF THE PETITIONER'S PETITION?

The Hearing Officer confirms that all parties understand the purpose of the petition.

- d.                    *Unit consolidations:* (see HOG 49 and CHM 23.8)**

This example is a request to consolidate two separate bargaining units.

THROUGH THIS PETITION, THE PETITIONER, ....., SEEKS TO CONSOLIDATE (cite number of units) TWO SEPARATE EXISTING BARGAINING UNITS WHICH IT CURRENTLY REPRESENTS. ONE OF THE UNITS IS A UNIT OF EMPLOYEES OF .....(name of Activity/Agency), WHICH AS MOST RECENTLY CERTIFIED ON .... (cite date) IN CASE NO. .... IS DESCRIBED AS FOLLOWS:

(describe current unit "A" directly from the recognition or certification; if neither document is available, the Hearing Officer may rely on the unit description in the contract. If there are any discrepancies between the names of the parties to the case as opposed to the names of the parties on these documents, this discrepancy is clarified on the record, either through a stipulation or testimony.)

THE SECOND OF THESE UNITS CURRENTLY REPRESENTED BY ..... (union) IS A UNIT OF EMPLOYEES OF..... (name of activity/agency), WHICH AS MOST RECENTLY CERTIFIED ON.....(date) IN CASE NO. ...., IS DESCRIBED AS FOLLOWS:

(describe current unit "B" directly from the recognition or certification; if neither document is available, the Hearing Officer may rely on the unit description in the contract. If there are any discrepancies between the names of the parties to the case as opposed to the names of the parties on these documents, this discrepancy is clarified on the record, either through a stipulation or testimony.)

THE DESCRIPTION OF THE UNIT SOUGHT BY THE PETITIONER TO CONSOLIDATE THE ABOVE DESCRIBED EXISTING BARGAINING UNITS IS AS FOLLOWS:

(describe proposed consolidated unit - see *CHM 28.13* that discusses conforming units to Statutory exclusions)

If there are a number of units to be consolidated, the parties may prepare a joint exhibit describing each of the units sought to be

consolidated, showing the date of recognition or certification and attaching copies of the recognitions and certifications, if available.

Questions when the petition is not jointly filed (tailor if petition is jointly filed):

MR./MS. ...., DOES THE ABOVE ACCURATELY DESCRIBE THE EXISTING BARGAINING UNITS WHICH ARE THE SUBJECTS OF THIS PETITION AND THE ACTIVITIES/AGENCIES' UNDERSTANDING OF THE CONSOLIDATED BARGAINING UNIT SOUGHT BY THE PETITIONER?

MR./MS. ...., DOES THE ABOVE ACCURATELY DESCRIBE THE EXISTING BARGAINING UNITS WHICH ARE THE SUBJECTS OF THIS PETITION AND THE PETITIONER'S UNDERSTANDING OF THE CONSOLIDATED BARGAINING UNIT SOUGHT BY THE PETITION?

**e. *Determinative challenged ballots:* (see CHM 49)**

This sample involves determinative challenged ballots.

THE SOLE PURPOSE OF THIS HEARING IS TO DETERMINE THE BARGAINING UNIT ELIGIBILITY STATUS OF (name of activity/agency and number of employees whose challenged ballots are determinative) EMPLOYEES IN ORDER TO RESOLVE THEIR DETERMINATIVE CHALLENGED BALLOTS.

OF THESE DETERMINATIVE CHALLENGED BALLOTS, THOSE OF THE FOLLOWING EMPLOYEES WERE CHALLENGED BY THE (identify challenging party) BASED ON ITS CONTENTION THAT THESE EMPLOYEES ARE (e.g., supervisors, managers, etc.) WITHIN THE MEANING OF (cite applicable section of Statute):

<u>NAME</u>	<u>POSITION DESCRIPTION TITLE</u>
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MR./MS. ...., HAVE I ACCURATELY IDENTIFIED THE EMPLOYEES WHOSE BALLOTS THE ..... CHALLENGED AND THE REASON FOR THOSE CHALLENGES BY THE .....?

MR./MS. ...., DOES THIS ACCURATELY REFLECT THE ....'S

UNDERSTANDING REGARDING WHICH EMPLOYEES' BALLOTS THE ... CHALLENGED AND THE REASON FOR THOSE CHALLENGES BY THE .....?

THE REMAINING DETERMINATIVE CHALLENGED BALLOTS, AS CAST BY .....(name of employees), WERE CHALLENGED BY THE ..... AS FOLLOWS:

<u>NAME</u>	<u>POSITION DESCRIPTION TITLE</u>	<u>REASON FOR CHALLENGE</u>
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MR./MS. ...., HAVE I ACCURATELY IDENTIFIED THE EMPLOYEES WHOSE BALLOTS WERE CHALLENGED AND THE REASONS FOR THOSE CHALLENGES BY THE .....?

MR./MS. ...., DOES THIS ACCURATELY REFLECT THE ....'S UNDERSTANDING REGARDING WHICH EMPLOYEES' BALLOTS THE ... CHALLENGED AND THE REASONS FOR THOSE CHALLENGES BY THE .....?

THE PARTIES SHOULD BE AWARE THAT IF THE REGIONAL DIRECTOR, OR ULTIMATELY, AS APPLICABLE, THE FEDERAL LABOR RELATIONS AUTHORITY, DETERMINES THAT FOR PURPOSES OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, ANY OF THE EMPLOYEES WHO CAST DETERMINATIVE CHALLENGED BALLOTS ARE, IN FACT, ELIGIBLE TO VOTE IN THE ELECTION HELD IN THIS CASE, THOSE ELIGIBLE EMPLOYEES' BALLOTS WILL BE OPENED AND COUNTED TOGETHER WITH THE OTHER ELIGIBLE EMPLOYEES WHO CAST BALLOTS IN THE ELECTION. A REVISED TALLY OF BALLOTS WILL THEN BE PREPARED, REFLECTING THEIR DESIRE ON THE QUESTION OF REPRESENTATION.

MR./MS. ...., DOES MY DESCRIPTION OF THE PURPOSE OF THIS HEARING ACCURATELY REFLECT THE ACTIVITY'S UNDERSTANDING OF THE MATTERS AT ISSUE IN THIS

PROCEEDING?

MR./MS. ...., DOES MY DESCRIPTION OF THE PURPOSE OF THIS HEARING ACCURATELY REFLECT THE ACTIVITY'S UNDERSTANDING OF THE MATTERS AT ISSUE IN THIS PROCEEDING?

- f.** ***Timeliness issues:*** This issue is always addressed in a hearing involving a petition that seeks an election. Even if timeliness is not an issue in dispute, the following questions is asked to clarify the record. (see *HOG 32.10 and 48*)

DOES ANY PARTY CONTEND THAT THERE IS A BAR TO AN ELECTION IN EITHER OF THE PETITIONED-FOR UNITS IN THESE CASES BASED ON AN AGREEMENT, PRIOR ELECTION, OR CERTIFICATION?

MR./MS. ...., WHAT IS THE POSITION OF THE LABOR ORGANIZATION YOU REPRESENT ON THIS ISSUE?

MR./MS. ...., WHAT IS THE POSITION OF THE ACTIVITIES ON THIS ISSUE?

If timeliness is not an issue, it may be stipulated as a nonissue:

IT IS HEREBY STIPULATED BY ALL PARTIES THAT THERE IS NO BAR TO AN ELECTION IN THIS CASE BASED UPON AN AGREEMENT, PRIOR ELECTION OR CERTIFICATION.

If timeliness is an issue, the Hearing Officer frames the issue in the form of a stipulation of an issue to be explored at the hearing (see *HOG 32.13*). The following is an example of a stipulation reached at a hearing where timeliness is the sole issue:

THE SOLE ISSUE RAISED BY THE SUBJECT PETITION FOR PURPOSES OF THIS HEARING IS WHETHER AN ELECTION IN THE PROPOSED UNIT IS BARRED BY A COLLECTIVE

BARGAINING AGREEMENT. THERE ARE NO OTHER ISSUES WHICH WOULD PRECLUDE AN ELECTION BEING HELD IN THIS CASE.

7. **Alternative unit(s):** If appropriate to the issues, the Hearing Officer asks the petitioner if there are any alternative units for which the petitioner would be willing to seek representation through an election (see *HOG 32.11*). As noted above, the Hearing Officer may ask the parties for their positions on alternative units early in the proceeding; other Hearing Officers may ask this question at the end of the hearing; or at both the beginning and the end of the hearing. The point is to make sure the record contains sufficient evidence for the Regional Director to make a decision on the appropriateness of the alternative unit.
8. **Receiving stipulations:** (see *HOG 10.2.4, 26, and 32.12*)

The following is an example of a stipulation for a non-issue:

IN AN OFF-THE-RECORD DISCUSSION, THE PARTIES AGREED TO THE FOLLOWING STIPULATION:

THE PARTIES HEREBY STIPULATE THAT NO INDIVIDUAL UNIT ELIGIBILITY MATTERS ARE AT ISSUE FOR PURPOSES OF THIS HEARING AND THAT NO INDIVIDUAL ELIGIBILITY DISPUTES STAND IN THE WAY OF PROCEEDING TO AN ELECTION SHOULD THE PETITIONED FOR UNITS SOUGHT BY THE PETITIONER IN THESE CASES, AS DESCRIBED ABOVE, BE FOUND APPROPRIATE FOR EXCLUSIVE RECOGNITION BY THE FEDERAL LABOR RELATIONS AUTHORITY.

IS IT SO STIPULATED?

Have the parties state their agreement with the stipulation.

THE STIPULATION IS RECEIVED.

The following is an example of a factual stipulation for a

supervisory position:

ON THE BASIS OF AN OFF-THE-RECORD DISCUSSION,  
THE FOLLOWING STIPULATION IS PROPOSED:

IT IS HEREBY STIPULATED BY THE PARTIES THAT ..... (name of person) IS A SUPERVISOR WITHIN THE MEANING OF SECTION 7103(a)(10) OF THE STATUTE BASED ON HIS/HER AUTHORITY TO HIRE EMPLOYEES. ON THREE OCCASIONS HE HAS BEEN THE SELECTING OFFICIAL FOR MERIT PROMOTION ACTIONS INCLUDING..... (identify the positions and/or promotion announcements as well as the names of those hired).

IS IT SO STIPULATED BY THE ACTIVITY?

BY THE PETITIONER?

BY THE INTERVENOR?

THE STIPULATION IS RECEIVED INTO THE RECORD.

Note that this stipulation includes a description of the legal conclusion agreed upon by the parties and a justification for that conclusion.

The following is a sample stipulation where the parties agree that the testimony of one employee holding a particular position at a particular grade will be representative of all employees holding that position at that grade:

THE PARTIES STIPULATE THAT THE DUTIES PERFORMED BY (identify individual) ARE REPRESENTATIVE OF ALL ACTIVITY EMPLOYEES AT ISSUE IN THIS PETITION WHO HOLD THE POSITION OF (identify position title, series and grade). THE PARTIES FURTHER STIPULATE THAT THE DECISION REACHED BY THE REGIONAL DIRECTOR/AUTHORITY REGARDING THE BARGAINING UNIT ELIGIBILITY OF (identify

same individual named in first sentence) WILL BE APPLIED TO DETERMINE THE BARGAINING UNIT ELIGIBILITY OF (identify all other employees at issue in the petition who hold the same position at the same grade). THESE EMPLOYEES ALSO HOLD THE POSITION OF (identify same position title, series, and grade name in the first sentence).

9. ***Outlining issues to be explored at the hearing:*** Outline the issues to be addressed at the hearing. These include issues identified by the Regional Director as crucial to resolution of the petition, even if the parties do not agree that they are relevant (see *HOG 2, 3.7, 32.13, and 33.9*).

I WILL NOW OUTLINE THE ISSUES TO BE ADDRESSED AT THIS HEARING.

The Hearing Officer outlines the issues.

If the Regional Director authorizes the Hearing Officer to make recommendations on the record, the Hearing Officer states:

THE REGIONAL DIRECTOR HAS GIVEN ME DISCRETION TO MAKE RECOMMENDATIONS ON THE RECORD ON THE FOLLOWING ISSUES.

If the Hearing Officer is not authorized to make recommendations on the record, the Hearing Officer states:

I WILL NOT BE MAKING RECOMMENDATIONS ON THE RECORD IN THIS PROCEEDING.

10. ***Summarizing the parties' positions:*** (see *HOG 32.14*). If not already placed into the record by this point, each party makes an opening statement summarizing its position on each issue raised by the petition as well as any other issue outlined by the Hearing Officer (see *HOG 32.13*). Note that in eligibility issues, the parties are required to state their position on each disputed position.

MR./MS. ...., WHAT IS THE POSITION OF THE PETITIONER REGARDING THE.... ..... (state issue)?

MR./MS. ...., WHAT IS THE POSITION OF THE ACTIVITIES REGARDING THE .... .....(state issue)?

**2.1 Presentation of evidence:** (see HOG 32.15)

WE ARE NOW READY FOR DISCUSSION AND EXAMINATION OF THE ISSUE(S) IN THIS CASE.

MR./MS. ...., YOU MAY PROCEED WITH YOUR FIRST WITNESS.

Usually the Activity/agency goes first. When the witness reaches the stand, the Hearing Officer administers the oath:

DO YOU SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE WILL BE TRUE AND CORRECT TO THE BEST OF YOUR KNOWLEDGE OR BELIEF?

The Hearing Officer then asks the witness to state his/her name, position and business address (optional), and place of employment for the record. Once this information is provided, the Hearing Officer advises the Representative to proceed with the examination.

See HOG 12 through 14, "Evidence," which address leading questions, relevancy, etc., HOG 15 specifically concerns "Exhibits."

**3.1 Recommendations on the record:** (see HOG 32.17). If the Hearing Officer is permitted to make recommendations on the record, the following is a guideline for ensuring the record reflects the issue, the recommendation and the basis for the recommendation. The Hearing Officer states:

I WILL NOW MAKE MY RECOMMENDATIONS WITH RESPECT

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

TO THE FOLLOWING ISSUES: (list issues).

WITH RESPECT TO THE ISSUE OF .... , I WILL SUMMARIZE THE RELEVANT EVIDENCE:

When summarizing the evidence, the Hearing Officer references testimony and documentation so that the reader of the record may refer directly to the evidence used to support the recommendation.

DO ANY OF THE PARTIES HAVE ANY FURTHER INFORMATION?

The Hearing Officer allows the parties to reference evidence that the Hearing Officer did not summarize, but is already in the record and the party(ies) consider relevant. The Hearing Officer may not permit the parties to place on the record new evidence without calling witnesses and/or introducing documentation. If the parties argue that the evidence cited by the Hearing Officer is incorrect, then the Hearing Officer notes the disagreement for the record, but does not engage in a discussion or argument of the merits.

I WILL NOW GO OFF THE RECORD TO PREPARE MY RECOMMENDATION(S). I ANTICIPATE THAT I WILL REQUIRE APPROXIMATELY (minutes, hours or one day) depending on the issues)..... WE WILL RESUME AT (state time).

After hearing additional evidence, the Hearing Officer makes his/her recommendation.

I RECOMMEND THAT THE REGIONAL DIRECTOR FIND ....

It is not sufficient to state simply that: "I am prepared to recommend that Ms. Smith is not a confidential employee... ." Any recommendation is supported by a factual summary, an analysis of the factors considered in making the recommendation and references to applicable case law, as appropriate.

A PARTY IS NOT PERMITTED TO RESPOND TO THE RECOMMENDATION ON THE RECORD EXCEPT DURING THE CLOSING ARGUMENT OR, AFTER THE CLOSE OF THE HEARING, IN HIS/HER BRIEF.

- 4.1 *Change of party position:*** Once the presentation of evidence has been completed, the Hearing Officer asks the parties whether, in light of the evidence received, they wish to make any changes to their respective positions on the issues. In addition, if applicable, the Hearing Officer also asks whether the parties would now agree to proceed to an election in the proposed unit or in an alternative unit (see *HOG 32.18*).

IN LIGHT OF THE EVIDENCE PRESENTED, DO ANY OF THE PARTIES WISH TO CHANGE THEIR POSITION ON ANY ISSUE?

IN LIGHT OF THE EVIDENCE PRESENTED, ARE THE PARTIES WILLING TO PROCEED TO AN ELECTION IN THE PROPOSED UNIT OR IN AN ALTERNATIVE UNIT?

- 5.1 *Additional matters:***

Office of the General Counsel  
Hearing Officer's Guide

Revised August 2000

IS THERE ANYTHING FURTHER THAT EITHER OF THE PARTIES WISH TO PRESENT?

**6.1 Closing remarks:** (see HOG 32.19 and 32.20)

DOES EITHER OF THE PARTIES WISH TO ARGUE ORALLY AT THIS TIME?

AT THIS TIME, SINCE NEITHER OF THE PARTIES DESIRES TO PRESENT FURTHER EVIDENCE IN THE ABOVE-REFERENCED CASE, I WILL MAKE THE FOLLOWING REMARKS. A PARTY DESIRING TO FILE A BRIEF IN THIS MATTER WITH THE REGIONAL DIRECTOR, ..... (provide address of the appropriate regional office) MUST FILE THE ORIGINAL AND TWO (2) COPIES WITHIN THIRTY (30) DAYS FROM THE CLOSE OF THIS HEARING. THE DATE OF FILING SHALL BE DETERMINED BY THE DATE OF MAILING INDICATED BY THE POSTMARK DATE. IF NO POSTMARK DATE IS EVIDENT ON THE MAILING, IT SHALL BE PRESUMED TO HAVE BEEN MAILED FIVE (5) DAYS PRIOR TO RECEIPT. IF THE FILING IS BY PERSONAL DELIVERY, IT SHALL BE CONSIDERED FILED ON THE DATE IT IS RECEIVED BY THE REGIONAL DIRECTOR. COPIES OF THE BRIEF SHALL BE SERVED ON ALL PARTIES TO THE PROCEEDING.

REQUESTS FOR ADDITIONAL TIME IN WHICH TO FILE A BRIEF SHALL BE MADE TO THE REGIONAL DIRECTOR, IN WRITING, AND COPIES SHALL BE SERVED UPON THE OTHER PARTIES, AND A STATEMENT OF SUCH SERVICE SHALL BE FILED WITH THE REGIONAL DIRECTOR. REQUESTS FOR AN EXTENSION OF TIME SHALL BE IN WRITING AND RECEIVED NO LATER THAN FIVE (5) DAYS BEFORE THE DATE SUCH BRIEFS ARE DUE. NO REPLY MAY BE FILED IN ANY PROCEEDING EXCEPT BY SPECIAL PERMISSION OF THE REGIONAL DIRECTOR.

DOES EITHER OF THE PARTIES INTEND TO FILE A BRIEF WITH THE REGIONAL DIRECTOR, FEDERAL LABOR RELATIONS AUTHORITY, ...REGION? IF SO, BRIEFS ARE DUE TO THE REGIONAL DIRECTOR BY CLOSE OF BUSINESS, \_\_\_\_\_. IS THERE ANYTHING FURTHER TO COME BEFORE THE HEARING OFFICER AT THIS TIME? LET THE RECORD SHOW NO RESPONSE.  
THE HEARING IS NOW CLOSED.



Figure 37.1

**REPRESENTATION OUTLINE I**  
(TO ASSIST PARTIES IN PREPARING FOR HEARING)

**1. BASIC REQUIREMENTS**

**A. Evidence**

1. **Standards.** Assertions by the parties are not evidence. Evidence is established through the testimony of witnesses, stipulations and exhibits admitted into the record.
2. **Necessity.** At the prehearing conference and during the hearing, the Hearing Officer will determine the necessity of the testimony of proposed witnesses and proposed exhibits and will identify additional witnesses whose testimony is required and additional exhibits necessary to a complete record.

**B. Witnesses**

1. **Standards.** The parties present witnesses who can testify to and answer questions concerning all facts and issues raised by the petition(s).
2. **Necessity.** All participants deemed necessary by the Hearing Officer will receive official time under section 7131 of the Statute. Any disputes over necessity of participants will be decided by the Hearing Officer.
3. **Knowledge.** Witnesses testify to and answer questions about their personal knowledge of the facts. Second-hand, third-hand or lesser knowledge reduces the relevance of the testimony.
4. **Reference to record.** All testimony during the hearing

refers to specific exhibits which have been introduced into the record.

5. **Stipulations.** All stipulations are based on fact and include information and exhibits, as necessary, establishing the facts of the matter and/or referencing exhibits already received in the record which support the factual basis of the stipulation.

C. **Testimony**

1. **Standards.** Witnesses testify to and answer questions about their personal knowledge of the facts and documents relevant to the issues of the case. When testifying about documents, the witnesses are generally those who authored or initiated the documents.
2. **Availability.** If witnesses with personal knowledge are not readily available, the parties identify those with direct knowledge and also name additional witnesses whose personal knowledge most nearly approximates the direct testimony described above.
3. **Identification.** The parties name all of their respective witnesses and the subjects about which each witness will testify prior to the prehearing conference. This allows the Hearing Officer to determine the necessity of the proposed testimony of these witnesses.

D. **Documents**

1. **Standards.** Documents may be accepted into the hearing record by joint submission, by stipulation of the parties, or by one of the parties.
2. **Identification and authentication.** Any exhibit introduced by a party is identified by and testified to by a witness or witnesses who has/have first-hand knowledge of the authenticity of the exhibit, the content of the exhibit, and factual matters concerning the exhibit.
3. **Regulations.** If a party proposes to introduce excerpts

from agency regulations, the excerpts are authenticated as true and correct copies. In addition, if only a portion from a regulation is submitted, a copy of the whole regulation is available for review by the parties.

4. **Joint exhibits.** If the parties jointly introduce exhibits, all such exhibits may be referred to by witnesses and/or in briefs.
5. **Objections.** Any party objecting to the introduction of evidence should state the basis for the objection on the record. The Hearing Officer then allows the party proposing introduction of the evidence an opportunity to state a position. The Hearing Officer then rules on admissibility. Exceptions to overruled objections are automatically a part of the record. Thus, there is no need for the parties to state such exceptions.
6. **Stipulations.** Stipulations concerning the introduction of exhibits includes information demonstrating the factual basis of the stipulation and the relevance of the document.

## 2. **MISSION AND FUNCTION STATEMENTS**

- A. **Mission.** Agency statement of its basic mission. Activities' statements of basic mission(s).
- B. **Function.** Description of how each Activity functions (as needed).
  1. **Differences.** If a proposed unit involves employees of a particular Activity but a party asserts that the unit is broader or narrower, basic mission statements of all entities is entered into the record and testified to.
  2. **Mission and function.** Testimony is required from witness(es) knowledgeable about the mission and function of each Agency and Activity and the interrelationships between them.
  3. **Exhibits.** Obtain for the record copies of the mission and function statements from all affected Agencies, Activities/organizational components.

### 3. **ORGANIZATION**

- A. **Charts.** Organizational charts of Agency and Activity(ies), updated as necessary.
- B. **Identification.** Testimony concerning which Activity(ies) employ the employees involved in the petition and where in the organization the employees are located is crucial.
- C. **Commonality.** Testimony is required concerning shared mission and functions of organizations in which employees involved in the position are employed. Testimony specifically identifies where in those organizations the employees are located.
- D. **Geographic - Physical Location.**
  - 1. **Organization.** What are the geographic locations in relation to the organization of the Activities? Do Activities have field organizations? Where?
  - 2. **Function.** Testimony matches the mission and function statements to the organizational charts, thereby showing each Activity's function and relationship to others. What is the organizational framework, beginning with the major organizational components and working down the chart? What does each component do? Similarities? Differences? Interrelationships?
  - 3. **Location.** Where are each of the employees involved in the petition physically located? How far are the separate locations from each other? Describe any interchange of work and employees between locations.
  - 4. **Numbers.** Obtain information concerning the numbers and types of employees at each agency / activity / organizational component. This can be established by having the Agency prepare an employee listing reflecting each employee's organizational placement, job title, series and grade, and unit eligibility.

4. **DELEGATIONS OF AUTHORITY**

What authority has been delegated for bargaining, management, supervision, policy, procedure, regulation, administration, and personnel functions? At what level do these delegations exist? What is the effect of these delegations?

5. **BARGAINING HISTORY**

- A. **Incumbents.** Obtain the complete name of each exclusive representative and description of each unit at each Activity.
- B. **Units.** Obtain copies of certifications/recognitions for each unit.
- C. **Contracts.** Obtain copies of the most recent collective bargaining agreements for each unit. What is the status of each such agreement, including the status of any negotiations?
- D. **Dealings.** What is the history of former or existing recognitions, including information as to elections, certifications and contracts. Obtain copies of all certifications, letters of recognition and contracts, for the proposed unit(s) and any other existing units of the agency. When were elections held, what groups of employees were involved and how many employees were affected? Did contracts automatically renew? At what level were negotiations held, both term negotiations and impact negotiations?

6. **SUPERVISORY HIERARCHY**

- A. **Structure.** What is the supervisory structure at the Agency and at each Activity (as relevant) and the lines of supervisory authority within each Activity (and/or between Activities), using the organizational chart(s)?
- B. **Nature.** What is the extent and nature of supervisory duties and responsibilities within or between Activities? Who reports to whom? Who is responsible for specific supervisory functions within or between Activities?
- C. **Control.** Is supervision centrally or locally controlled within the

organizational structure? Are there differences in the supervisory controls between the Activities involved? Are supervisors responsible for common supervision over more than one work group?

**7. JOB FUNCTIONS AND SKILLS**

- A. **Positions.** Obtain copies of the position descriptions for the categories of employees involved in the petition.
- B. **Employees.** The Activity is required to compile listing(s) of all employees involved in the petition which show each employee's name, position title, classification, grade and location within the organization. Include a numerical table showing total numbers of employees by eligibility in each proposed unit.
- C. **Work.** Evidence includes the types of work performed by employees involved in the petition, including descriptions of job duties and actual work performed, the flow of work within and between Activities, and the qualifications and training necessary to perform the work.
- D. **Equipment.** Is special equipment needed to perform certain work? Where is this equipment located? Is training needed to operate the equipment? What is the availability of such training? Are opportunities for advancement and/or movement between positions affected by the availability of this equipment or training?
- E. **Differences.** How do work flow, job duties and/or necessary qualifications, equipment and training differ within and between Activities?

**8. INTEGRATION OF OPERATION AND INTERCHANGE OF EMPLOYEES**

- A. **Movement.** Testimony and documents showing personnel movement, policy and decision making flow, using organizational charts.
- B. **Commingling.** Whether and how employees and functions are commingled among different organizations within and between Activities.

- C. **Commonality.** Whether and in what ways components of the Activities have employees, supervisors and/or managers in common, identifying the individuals involved using the organizational charts, employee listings, position descriptions, etc.
- D. **Work flow.** What is the flow of work processes, duties and responsibilities in relation to the mission(s)? Is there interrelationship or interdependence between components in work flow, processes or responsibilities?
- E. **Integration.** In what ways are employees and their job functions integrated within and between Activities? Are there frequent transfers of work and/or personnel? How is this accomplished? How is the work coordinated within and between Activities? Are employees required to apply for openings to cross organizational lines?
- F. **Operations.** Is there employee contact between components in performing or transferring work? What is the relative isolation of components? Obtain a description of mobility and interchange of employees between components. What is the extent of telephone contact or inter-component visits? What for? By whom? How often? Where to and from? How many people involved? Clearance necessary from another component to perform certain work?
- G. **Interchange.** Who substitutes for employees' absences for vacation or illness? Over the prior year or so, what is the extent, purpose and duration of TDY assignments? What category/classification of employee(s) have gone on this travel and for what purpose? Within the past three years, how many permanent or temporary transfers were made laterally or by promotion? What category/classification of employee(s) were transferred and for what reason? Have the numbers of transfers increased or decreased ? If so, why?

## 9. **PERSONNEL POLICIES AND PRACTICES**

- A. **Pay systems.** Description of the pay systems applicable to all of the employees involved (GS, WG, Excepted Service, NAF, etc.), including descriptions of the differences between pay systems.

- B.**     **Payroll office.** Location of servicing payroll office? Placement within the organizational structure?

C. **Administrative Services**

1. **Personnel services.** Location of servicing personnel office? How is the personnel office staffed? Placement within the organizational structure? Who handles personnel management? Where does personnel management fit within the organizational structure? If there is more than one personnel office, are there differences in authority between personnel offices?
2. **Personnel actions.** Are personnel actions done centrally or locally? Who decides on hiring, firing, promotion, transfer, layoff, and recall of employees? How are these actions accomplished and these actions processed? Where do the entities performing these functions fit within the organizational structure?
3. **Employment and classification authority.** Who has classification authority for the employees involved in the petition? Who decides to establish positions, to fill vacancies, and what skills or training are needed for a position? How are vacancies filled? What are the differences within or between Activities?
4. **Retention, promotion and RIF.** What are the areas of consideration? How were these established? How have they been applied recently? What are the differences within and between Activities?
5. **Disciplinary and adverse action.** Who has authority to propose and decide such action? What are the differences within or between Activities?
6. **Personnel policies and regulations.** Are personnel regulations promulgated centrally or locally? What are the differences within and between Activities? To what extent do local officials have any discretion with respect to implementing policies and regulations initiated centrally?

D. **Personnel changes.** How are personnel moved between non-

supervisory positions? From non-supervisory to supervisory positions? What are the differences in the ways changes are accomplished within and between Activities?

**E. Employee services.** At what level are programs administered for equal employment, employee assistance, upward mobility, disability and workers compensation benefits, individual development, retirement, and health and life insurance? What are the differences in these programs within and between Activities?

**F. Conditions of Employment**

1. **Hours.** What are the hours of work of employees affected by the petition? Alternative Work Schedules, including whether employees work flexible schedules and/or compressed work weeks? Compensatory time? Starting and quitting times? Core hours? Restrictions on days off? Lunch hours? Break times? How were these established? What are the differences within and between Activities or organizations within each Activity?
2. **Training.** What training is required and/or available for the employees involved in the petition? What are the differences in training within and between Activities?
3. **Personnel.** At what level is the authority for personnel policy, service, and/or action? At what level are employee service programs provided? What are the differences in programs, services, and levels of authority within and between Activities?
4. **Associations.** At what level do associations exist such as Credit Unions, athletic, health or wellness groups, blood drives, literacy projects, and/or public school sponsorship? What are the differences within and between Activities?
5. **Impact.** All parties state specific positions concerning impact of the possible unit findings. What impact on the Agency/Activity is there from the various possible unit findings? What is the impact on employees?

6. **Factors.** What are the areas of consideration for hiring, promotion and RIF? Who issues vacancy announcements? Who has the authority to hire, fire, lay off, transfer or promote? Who determines the compensation and salary structure for vacancies? Where are the OPF's maintained? Who rates performance and writes appraisals? Who reviews and approves the appraisals? Who has the authority to initiate disciplinary or adverse action? Who has the authority to issue travel orders, direct training of employees, grant incentive and achievement awards? Who assigns parking, determines break and leave schedules, approves leave, overtime and compensatory time? Who initiates personnel actions, personnel management programs, standards for performance evaluation and/or standards of personal conduct? Who determines the budget or is responsible for meeting a budget? Who has authority to negotiate and execute a collective bargaining agreement?

10. **EFFECTIVE DEALINGS**

Efficient use of resources derived from inclusion in existing units and negotiation in one unit rather than many units in segments of the activities.

- A. **History.** What is the history of collective bargaining dealings under the existing unit structure(s)? How have labor relations policy and labor relations authority been implemented and exercised respectively?
- B. **Grievances.** What are the formal, informal, negotiated and activity grievance procedures for employees involved in the petition? What is the past history of grievance processing?
- C. **Units.** In what way would the proposed units involved in the petition affect existing bargaining and grievance procedures? The parties are required to state their positions as to how the proposed units would promote effective dealings.
- D. **Authority.** What is the locus and scope of responsible personnel office(s)? Who handles the various personnel functions at

present? How would the existence of the proposed units affect this authority? Are the employees involved special or unique because of job duties or work location in a manner which could affect the appropriateness of unit.

- E. **Limitations.** What is the extent of and who has authority to negotiate? What limitations are there on the authority of the petitioned-for Activity to negotiate? Are there any matters which could be negotiated if the unit were different from that proposed in the petition? Are there matters which could be negotiated only if the unit structure were different from that proposed? Why is this so?
- F. **Expertise.** What is the likelihood that personnel with greater labor relations experience will be available in the existing unit, the proposed unit or other possibly appropriate units? Who currently handles labor-management relations? Where in the organizational structure does this exist? At what level is labor relations consultation and support provided?
- G. **Policy.** At what level is labor relations policy set? How does the existence of multiple negotiated agreements, bargaining obligations, and grievance procedures affect labor relations dealings? Are employees performing essentially the same functions currently covered by different systems?
- H. **Training.** How and by whom are supervisors and managers trained in labor relations? Who decides on training requirements and those needing training? Where are the trainers located?

## 11. **EFFICIENCY OF AGENCY OPERATIONS**

Benefits to be derived from a unit structure bearing a rational relationship to the operational and organizational structure of the Activity.

- A. **Organization.** What, specifically, are the structure, chain of command, line of authority, and uniformity of personnel policy and practice considerations supporting the effectiveness of the various proposed units?
- B. **Structure.** What are the organizational structure, supervisory hierarchy, chain of command, authority over work functions,

personnel and labor relations policies and dealings? Who reports to whom? What is the organizational structure of the personnel staff?

- C.** **Authority.** Do personnel with operational authority also have labor relations authority? What are the differences within and between Activities?

- D. **Benefits.** Why would any proposed unit be more beneficial than another proposed unit? How do the personnel policies and job benefits of employees differ within and between Activities?
- E. **Resources.** How is the effective use of negotiation resources derived from the existing unit structure? How would the proposed units affect the use of these resources? What effect would the various proposed units have on cost of the labor-management program, hours spent administering the program, staffing requirements, etc.
- F. **Impact.**
1. **Views.** What are the parties' views of the impact of the proposed and/or other potentially appropriate units on efficiency of operations or the effectiveness of dealings?
  2. **Agency operations.** What is the impact of the proposed unit structure on agency operations in terms of cost, productivity and use of resources?
    - a. **Cost.** What savings or costs (in terms of labor relations personnel, productivity, etc.) result from the existing unit(s), proposed unit(s) or other possibly appropriate units? What effect would the proposed unit(s) have on the cost of the labor-management relations program, hours spent administering the program, staffing requirements, etc.?
    - b. **Productivity.** What impact on productivity would result from the existing unit(s), proposed unit(s), other possibly appropriate unit(s), or the existence of one or several units. Productivity includes work performed by employees as it affects them if one unit were found appropriate versus several and work performed by the managerial, supervisory and labor-management staff.
- G. **Fragmentation.** Would the proposed unit result in

fragmentation? If so, how, and how would this affect agency operations?

Figure 37.2

**REPRESENTATION OUTLINE II**  
(IDENTIFYING AREAS TO STRESS)

(note this particular outline is, in some respects, an example of an outline for a case involving a reorganization)

1. **MISSION**

Formal mission statements from former and new Activities. Testimony includes changes in mission and function as well as effect on organizational structure.

What effect do mission changes have on unit function(s)?

2. **ORGANIZATION**

A. **Charts**

Before and after charts

Overall structure

Complete branch-by-branch structure, including information as to what functions performed before and after

Description of work flow and flow of authority before and after reorganization

B. **Numbers**

Number of unit employees in old and new organizations. How many employees were directly affected by the reorganization?

Types of personnel actions used to staff new organization; what placements were used? Transfers? Requirement to apply for positions in new organization?

**C. Geography**

What was the physical layout before and after? Where were the employees located before and after the reorganization?

**3. BARGAINING HISTORY**

Copies of collective bargaining agreements. What are the effective and termination dates? What is the status of each contract? What is the status of negotiations, if any?

Copies of certification/recognition for each unit involved in the petition

History of negotiations at former and present Activities

**4. SUPERVISORY HIERARCHY**

Employee break down before and after, including lists of employees by name, position title, classification, grade and organizational placement.

Supervisory structure, including numerical ratios to employees before and after the reorganization. Numbers and classifications of employees reporting to each supervisor.

Is supervision controlled locally or centrally? What is the nature and extent of supervision in terms of the organizational structure before and after? What chains of command and lines of authority existed before and after the reorganization?

**5. JOB FUNCTIONS AND SKILLS**

Before and after lists of employees by name, position title, classification, grade and organizational placement. Testimony concerning ratios of GS, WG, Excepted Service, NAF, etc., employees.

Description of before and after job duties. Are there new functions, duties and employees?

Following the reorganization, are employees performing the same work under the same conditions of employment? If no, what are the specific changes?

What was the actual impact of the reorganization on the affected

employees?

6. **INTEGRATION AND INTERCHANGE**

What facilities and equipment existed before and after the reorganization?

Detail any changes to the agency functions and employee interdependence of work functions following the reorganization.

Detail the effect, if any, of the reorganization on interchange between organizational entities, work locations of employees and intra-employee dealings/work relationships.

Prior to the reorganization, did units have any employees, supervisors or managers in common? If so, did this change as a result of reorganization? What were the changes and how did they affect the employees' day-to-day dealings within and between the Activities?

7. **TRANSFERS**

How were employees notified of the reorganization?

Were special placement programs used in the reorganization? If so, what were they and how did they affect employment in the current organization?

Before and after lists of employees by name, position title, classification, grade, organizational placement and type of appointment?

8. **PERSONNEL POLICIES AND PRACTICES**

List of employees by name, position title, classification, grade and organizational placement, before and after.

**Pay.** What were the compensation plans (GS, WG, etc.) of employees before and after the reorganization? What was the basis for these systems? Where is the payroll office located and did it change in reorganization?

**Personnel.** Is hiring, firing, promotion, transfer, layoff, or recall controlled centrally or locally? Has this changed in reorganization?

**Employment and Classification Authority.** What were they before and

after?

**Promotion and RIF.** Where did authority lie before and after reorganization? What were the areas of consideration before? What are they now?

**Bargaining.** History of bargaining and the level of bargaining before and after the reorganization.

**Personnel Services.** Physical location of the servicing personnel office before and after the reorganization. Obtain evidence on the services that were/are provided and whether the personnel authority was/is local or central.

9. **CONDITIONS OF EMPLOYMENT**

Flow of work

Old and new manpower utilization

Desires of employees

Proposed Unit vs. Prior Unit

10. **EFFECTIVE DEALINGS**

Efficient use of resources derived from inclusion in existing units and negotiation in one unit rather than many units in segments of the Activities.

**History.** What is the past history of collective bargaining dealings under the existing unit structure(s)? How have labor relations policy and labor relations authority been exercised?

**Grievances.** What are the formal, informal, negotiated and activity grievance procedures for employees involved in the petition? What is the past history of grievance processing?

**Units.** In what way would the proposed units affect existing bargaining and grievance procedures? The parties state their positions as to how the proposed units would promote effective dealings.

**Authority.** What is the locus and scope of responsible personnel

office(s)? Who handles the various personnel functions at present? How would the existence of the proposed units affect this? Are the employees involved special or unique because of job duties or work location.

**Limitations.** What is the extent of the authority to negotiate? Who has authority to negotiate? What limitations are there on the authority of the petitioned-for Activity to negotiate? Are there any matters which could be negotiated if the unit were different from that proposed in the petition? Are there matters which could be negotiated only if the unit structure were different from that proposed? Why is this so?

**Expertise.** What is the likelihood that personnel with greater labor relations experience will be available in the existing unit, the proposed unit or other possibly appropriate units? Who currently handles labor-management relations? Where in the organizational structure does this exist? At what level is labor relations consultation and support provided?

**Policy.** At what level is labor relations policy set? How does the existence of multiple negotiated agreements, bargaining obligations, and grievance procedures affect labor relations dealings? Are employees performing essentially the same functions currently covered by different systems?

**Training.** How and by whom are supervisors and managers trained in labor relations? Who decides on training requirements and those needing training? Where are the trainers located, physically and organizationally?

**Impact.** What is the impact of the proposed unit structure on agency operations in terms of cost, productivity and use of resources?

**Cost.** What savings or costs (in terms of labor relations personnel, productivity, etc.) result from the existing unit(s), proposed unit(s) or other possibly appropriate units?

**Productivity.** What impact on productivity would result from the existing unit(s), proposed unit(s), other possibly appropriate unit(s), or the existence of one or several units?

## 11. EFFICIENCY OF AGENCY OPERATIONS

Benefits to be derived from a unit structure bearing a rational relationship to the operational and organizational structure of the Activity.

**Organization.** What, specifically, are the structure, chain of command, line of authority, and uniformity of personnel policy and practice considerations supporting the effectiveness of the various proposed units?

**Structure.** What is the organizational structure, supervisory hierarchy, chain of command, authority over work functions, personnel and labor relations policies and dealings? Who reports to whom? What is the organizational structure of the personnel staff?

**Authority.** Do personnel with operational authority also have labor relations authority? What are the differences within and between Activities?

**Benefits.** Why would any proposed unit be more beneficial than another proposed unit? How do personnel policies and job benefits of employees differ within and between Activities?

**Resources.** How is the effective use of negotiation resources derived from the existing unit structure? How would the proposed units affect the use of these resources? What effect would the various proposed units have on cost of the labor-management program, hours spent administering the program, staffing requirements, etc.?

**Impact.** What are the parties' views of the impact of the proposed or various other possibly appropriate units on efficiency of operations or the effectiveness of dealings? Would the proposed unit result in fragmentation? If so, how?

Figure 37.3

**REPRESENTATION OUTLINE III**

(SKELETON for use in developing a more detailed outline tailored to a specific case)

1. Mission Statement of the Activity
2. Organization
  - a. Organization charts and function statements of each subdivision, including the flow from one organization to another
  - b. Number of employees in the existing unit, as well as number of employees in petitioned-for unit
  - c. Physical layout of organization and entities involved
  - d. Physical location of employees involved
3. Bargaining History
  - a. Collective bargaining history of all units at installation, especially the involved unit.
  - b. Bargaining history within the existing unit involved, including:
    - (i) copy of certification
    - (ii) copy of collective bargaining agreement or any memorandum of understanding currently in effect
    - (iii) termination date of contract
    - (iv) testimony regarding contractual provisions covering petitioned-for employees only
  - c. Representation Practice
4. Supervisory Hierarchy

- a. Organizational outline of employees' reporting structure before and after reorganization, including listings of employees involved.
  - b. Supervisory ratios
  - c. Extent of supervision, line of responsibility (central or local)
5. Job Functions and Skills
- a. What are the WG, GS ratios and breakdowns within the existing unit as opposed to the petitioned-for unit?
  - b. What work functions are performed by each component group; what is the interrelationship of job functions?
  - c. Terms and conditions of employment
    - (i) duties
    - (ii) location of positions in question
    - (iii) classification of jobs
  - d. Actual impact of changes on operations and functions and on labor relations dealings
6. Integration of Operation and Interchange of Employees
- a. Facilities used before and after internal realignment of functions
  - b. Would proposed unit(s) affect personnel practices and policies? How? Other agency functions?
  - c. Do petitioned-for employees actually spend working together with established unit employees?
7. Transfer of employees from one organization to another
- a. How often have employees moved from one grouping to another?
8. Placement Programs: Merit Promotion

9. Personnel Policies and Practices

- a. List of personnel breakdown before and after
- b. Compensation plan and salary plan before and after
- c. Payroll office
- d. Plans under which hiring, discharge, promotion, transfer, RIF (central v. local)
- e. Re-employment and reclassification authorities
- f. RIF, adverse action, discharge, seniority rosters, etc. (separate from or integrated with existing unit employees)
- g. Personnel Mobility
  - (i) Movement of non-supervisory to supervisory
  - (ii) Movement of non-supervisory to non-supervisory
  - (iii) Movement of supervisory to non-supervisory to supervisory
- h. Bargaining History - certifications, contracts, and status of each. Status of negotiations. Description of levels at which grievances are addressed. Actual or potential impact of changes due to internal realignment?

10. Conditions of Employment

- a. Flow of work
- b. Desires of employees
- c. Proposed unit



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## **OTHER OFFICE OF THE GENERAL COUNSEL RESOURCE MANUALS**

The **Representation Case Handling Manual** (REP CHM) provides procedural and operational guidance to the General Counsel's staff when processing representation petitions filed pursuant to Part 2422 of the FLRA's regulations. Part One discusses processing petitions from providing substantive issues to investigating and resolving the underlying representation matters, and to issuing a certification or taking other final action. Part One tracks, for the most part, the subject matter format in the representation regulations. Part Two consists of resources that the General Counsel's staff uses when processing petitions, including a Cross Reference Table, Flow Charts, Appendices, FLRA Forms and Documents, and sample Figures.

The **Representation Case Law Guide** (RCL) presents a variety of relevant substantive issues that arise when processing representation petitions and unfair labor practice cases that raise representation issues. The RCL defines each topic, discusses relevant case law and sets forth an analytical framework for deciding each case consistently and properly.

The **Unfair Labor Practice Case Handling Manual** (ULPCHM) provides procedural and operational guidance to the General Counsel's staff when processing unfair labor practice charges filed pursuant to Subpart A Part 2423 of the FLRA's regulations. It is divided into 5 Parts that address various topics/issues that arise during distinct phases of the ULP process—from pre-charge through pre and post investigation. It also codifies the OGC's policies with respect to: Facilitation, Intervention, Training, and Education; Quality of Investigators; Scope of Investigations; Injunctions; Prosecutorial Discretion; Settlements; and Appeals. As appropriate, the ULPCHM references relevant case law and provides for uniformity and best practices; criteria and principles governing Regional discretion and judgment; and model and sample forms and letters.

The **Litigation Manual** (LM) provides comprehensive guidance to regional Trial Attorneys in prosecuting ULP cases. The Manual covers each aspect of the trial process—from the issuance of a complaint and notice of hearing to the Authority's decision and order. Where appropriate, it refers to OGC Policy and relevant case law, and contains many examples of litigation techniques, both in the body of the Manual (Binder I) which concerns substantive litigation guidelines, and in the Attachments section of the Manual (Binder II) which contains a compilation of forms, policies, OGC Guidances, or models relating to the subject matter covered in Binder I.