MSPB HEARING GUIDE

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INTRODUCTION

The purpose of a hearing is to elicit the complete factual account involved in a disputed issue. Unlike a trial court, where a judge or jury will render a decision shortly after hearing all the evidence, an administrative judge may not issue findings and conclusions until weeks after the hearing. The decision is, therefore, more likely to be based on the written record of the proceeding and the outcome a result of what the administrative judge finds upon reading the record. THEREFORE, THE MOST IMPORTANT ELEMENT OF THE HEARING IS THE DEVELOPMENT OF A CLEAR, COMPLETE AND ACCURATE WRITTEN RECORD.

An administrative judge is not usually familiar with the facts of the case prior to hearing, thereby making it incumbent upon the parties to present their case in the most logical and complete manner possible. To assure that all facts and evidence in support of your position are included in the record, detailed pre-hearing preparation is essential. This preparation should involve five principal steps.

(1) Define the issue or issues as clearly and simply as possible.

(2) Determine what facts must be established to prove or disprove those issues.

(3) Consider how you will prove those facts. That is, what evidence you need, who must be called as witnesses, and what documents are available or needed.

(4) Make notes on authorities and sections of Laws, Rules, and Regulations in support of your position.

(5) Analyze the opposing position and note questions which may arise in the course of the proceeding and how you intend to respond to them.

PRE-HEARING PREPARATION

1. Define the issue or issues as specifically and simply as possible, avoiding the use of general or vague terms or conclusions, which are actually statements of the legal effect of the facts. For example, rather than saying "Agency X is guilty of a prohibited personnel practice," phrase the issue in terms of discernible facts: "Agency X improperly suspended employee in retaliation for disclosing contractor fraud." By defining the issue in such a manner, it will be easier to recreate the specific incidents that will lead the administrative judge to conclude that management has acted improperly in taking the adverse action.

2. Once you have isolated the specific issue or issues in dispute, ask yourself, "What facts does the judge need to find, or not find, to reach the decision that I want?" For each issue identified in step 1, list every basic fact that the judge must find in order to reach the desired conclusion. This listing must be complete; if one fact is omitted, the judge may fail to arrive at your desired conclusion. Often, knowing which facts need to be proven will require some legal research into the elements of the charge against the employee (i.e., what the agency has to prove to prevail) or the elements of an affirmative defense (i.e., harmful error, prohibited personnel practice, not in accordance with law).

3. List the items of evidence necessary to establish each of the basic facts. This should include all witnesses who have personal knowledge regarding a specific aspect of the case and all papers and documents that support your position.

The technical rules of evidence, strictly followed in trial courts, do not apply to administrative hearings. Nevertheless, while generally more lenient about the admissibility of evidence, administrative judges do have discretion to exclude evidence that is not relevant, material, is unduly repetitious, or privileged information.

Relevant evidence makes the existence of the fact sought to be proved more or less probable. Material evidence directly bears on the issue one way or the other and ultimately determines the outcome of the case. Remember, you are trying to build a concise record and, therefore, should seek to introduce evidence that will influence the judge to accept our position. Useless or extraneous facts will only cloud the central issue and prolong the proceedings. Evidence which makes no difference one way or the other in the decision of a case has no place in the record.

Some evidence is more *reliable* than others. For example, statements of opinion, speculation, and second-hand knowledge (known as hearsay evidence), while generally admissible in administrative hearings, usually carry less weight than statements made from the personal knowledge of the witness.

Hearsay is evidence not produced from the personal knowledge of the witness but from the mere repetition of what the witness has heard others say. There are certain facts, however, which inherently are the products of hearsay and can only be proven through the introduction of hearsay evidence. Once such fact is the "reputation" of an individual within a community, which can be properly shown by witness testimony as to what they have heard about the person.

Anticipate the position management will take on a particular issue. This is absolutely

necessary to enable you to develop a logical rebuttal. It is not usually possible to obtain management's strategy prior to the hearing so it will be necessary to rely on any previous statements or written responses made by management with respect to the issue. However, the MSPB rules provide for pre-hearing "discovery," which is the process by which a party may obtain relevant information, including the identification of potential witnesses, from the other party or another person. One of the methods of discovery is the deposition, by which you may question the other side's witnesses under oath before the hearing. Try to step into your opponent's shoes and examine the issues from his point of view. This will enable you to find and correct any weak spots in your argument. The whole idea of careful and thorough forethought is to avoid being taken by surprise at the hearing.

4. Identify and list all pertinent laws, rules, regulations, and any relevant decisions rendered. Relate each to the appropriate point in your case.

5. Re-examine the list of facts, evidence and witnesses and identify those debatable points which may possibly be raised in the hearing. By identifying those areas of conflict between your witnesses and documents and that of the other side, you will be better able to spot weaknesses or gaps in your case and better prepared to answer any challenge that might arise.

PREPARATION OF WITNESSES

You must talk to your prospective witnesses at least once prior to their appearance in the hearing room, and in most cases, more than once. It is proper to explain the nature and subject of the hearing in order to ascertain the extent of his/her knowledge about the matter. You will then formulate questions designed to elicit from the testifying witness the full extent of his/her

knowledge. You should then review your questions and the witness's answers prior to the hearing.

It is also advisable to prepare the prospective witness for cross-examination. It should be possible, from your pre-hearing preparation, to predict some of the questions that the witness may be asked on cross-examination. Advise the witness not to argue or take sides when being questioned, to answer only the question asked, not to volunteer information, to be brief, absolutely accurate and truthful and entirely calm. Advise the witness to answer "yes" if asked on cross-examination if he/she discussed his testimony with the representative before the hearing. Also tell the witness to say that you advised him/her to be "brief, accurate and to tell the truth."

PREPARATION OF DOCUMENTS

All pertinent papers, having a bearing on the issue in question, must be collected and organized prior to the hearing. This should include the original proposed notice, the formal charge, any correspondence, bulletins, notices, agreements, and affidavits that have developed or been prepared during the course of the dispute. Also have readily available copies of the MSPB's rules (5 C.F.R. §1201), any applicable agency regulations, personnel guidelines, sections of the relevant laws, and any notes, summaries or calendar entries which cover meetings held between your side and the opposition.

Arrange the documents in an orderly and logical manner, relating each to the appropriate point in your argument. Those documents that are to be entered into the official record at the

hearing must be properly identified and marked (generally, the agency's documents are numbered and the appellant's documents are lettered). It is advised that you put the marked documents in a binder in proper order. You will need at least three sets of binders: one for the opposing party; one for witnesses testifying regarding the document; and one for the judge.

At the prehearing conference, the parties will likely agree (stipulate) to the admission of some or even all of the identified and marked exhibits. If the agency does not stipulate to a document that you want admitted into evidence, then you will have to introduce and seek admission of the document at the hearing. (See below).

THE HEARING

I. BASIC PROCEDURE

A. Administrative judge will open the hearing with a brief statement.

B. Opening Statements -- The Agency has the burden and normally will go first and make brief opening statement.

C. Presentation of Evidence (oral and documentary).

1. Agency will present witness first.
    - (a) You will have opportunity to cross-examine each witness.
    - (b) Agency will have opportunity to redirect the witnesses.
    - (c) You may have opportunity to recross.
    - (d) First party rests after putting on all its witnesses.
2. Employee presents case.
    - (a) Other side will have opportunity to cross-examine each witness.

(b) You will have opportunity for redirect examination of its witnesses.

(c) Agency may have opportunity for recross.

D. Each party will make a concluding statement, or waive the statement and request filing of written briefs.

E. Judge will close the hearing.

II. OPENING STATEMENT

In these opening remarks, the facts of the case should be set forth in as clear and orderly a manner as possible. The opening statement should include the facts that you intend to prove through the presentation of your witnesses and documentary evidence. A clear, concise, already written opening statement will make a helpful introductory chapter to the written record and will supply the person judging the case with a standard by which to tell what is pertinent to the case and to put the parts of the testimony into their proper place in his mind and notes.

Use your pre-hearing outline to prepare your opening statement. Briefly state the facts and the conclusions you wish the judge to find, and give him a preview of what you expect to do during the hearing.

III. ORAL EVIDENCE

Each witness called to the stand will be subjected to four stages of testimony: direct examination by the party calling the witness, cross-examination by the opponent, redirect examination by the first party, and recross-examination by the opponent. The questioning in each phase should, but may not always, be limited to the matters covered in the previous examination, e.g., cross-examination is limited to matters covered in direct, and redirect examination is restricted to subjects covered on cross-examination.

The very best form of oral testimony is a series of short, accurate and complete statements of facts. Again, it is emphasized that you are developing a written record from which the judge will derive his findings.

A. DIRECT EXAMINATION

1. Let the witness testify. Your questions should be so phrased to elicit complete factual statements from the witness. Avoid stating the facts yourself, requiring the witness to provide only a "yes" or "no" answer. This is considered a leading question and is generally only allowed on cross-examination. The facts are supposed to come from the witnesses and should appear in the record in their own language.

2. Example of proper direct-examination.

"Please state your name, address and occupation."

"What is your current connection with AFGE Local 0000?"

"What is your normal procedure for handling employee grievances?"

"How was the John Doe matter brought to your attention?"

"What action did you take upon learning of this matter?"

"What was management's response to your inquiry?"

3. A less effective method of direct-examination.

"Is your name James Smith of 100 Main Street, Washington, D.C. and are you employed as a researcher at ABC Agency?"

"Are you presently the president of Local 0000?"

"As local president, is it your responsibility to inquire into any employee grievance?"

4. Be brief and to the point in questions. Do not ask ten questions when one will elicit the whole answer . Accurate, well-worded questions produce the best results from the witness.

5. Do not repeat. One clear and succinct statement of a fact is as good as a dozen in a written record, unless, of course, a number of witnesses must testify to the same fact. Where you have a succession of witnesses testifying to the same fact, and each has heard the first witness so testify, you may put each on the stand and ask if he heard the first witness and if he was asked the same questions would he give the same answers.

6. Don't leave a vague or incomplete statement of fact unclarified in the record, If the witness is vague or incomplete in an answer, question him further on the same topic until the answer is clear and complete.

7. Don't skip over any lapses; if a fact is essential to the eventual decision, it must appear in the record in such form that the appropriate finding can be made in respect to it.

8. Carefully check off on your pre-hearing outline each bit of evidence as it goes into the record. By checking off every bit of evidence introduced into the record, you will be assured that all facts necessary in your case have been presented. This will enable you to see which facts must still be introduced before concluding your argument. Remember, if you fail to present all relevant facts, the judge may not be able to reach your desired conclusion.

B. CROSS EXAMINATION

Cross-examination should only be used for the specific purpose of either strengthening your position or weakening the opposition's case. If, after the direct-examination of an opposition witness, you believe that he falsely testified or that he has insufficient knowledge to

properly testify, try to attack the inaccuracy of his testimony through cross-examination. Further, if you know or strongly believe the witness to have information that will be either helpful to your case or damaging to the other side, try to elicit such information on cross-examination. To cross-examine for the sole purpose of badgering or embarrassing a witness is improper and useless.

When cross-examining an opposition witness, there are several things to keep in mind. Don't ask a question if you are unsure of the possible answer or feel that it may adversely affect your position. Try to elicit that point of fact from your own witnesses. Further, if an opposition witness favorably testifies to a fact, but then proceeds to explain or modify his answer, to the detriment of your position, request the witness to answer only your specific question. If he fails to do so, ask the administrative judge to direct the witness to answer only those questions asked of him. (If the opposition wishes the witness to further elaborate on his answer, they may question him on redirect-examination).

If an opposition witness is the only source of important information, his testimony must be taken. You have the choice of either questioning him on cross-examination or recalling him as your own witness and questioning on direct examination. In either situation, bear in mind that if you call him as your own witness, you are dealing with a hostile or adverse witness. Let the judge know that the person is an adverse witness and then, even though you called him, you can ask him leading questions just as if you were cross-examining the witness. Your questions should be so phrased as to require specific, exact answers from the witness. Avoid general questions that allow the witness to provide only general, vague answers. If a statement is made

in the course of the witnesses' testimony which adversely affects you case, try to refute it, but if you can't get anywhere with that witness, drop it quickly and refute the testimony through the presentation of your own witnesses.

Remember, unless you have some definite objective in mind, don't cross-examine a witness. You will only give the witness the opportunity to repeat or to strengthen his testimony against you. If the witness says nothing material against you on direct examination, don't cross-examine, unless you are sure he has facts that will help your case. Remember, you can counter the direct examination testimony with a rebuttal witness.

C. <u>REDIRECT AND RECROSS-EXAMINATION</u>

If you feel, after cross-examination, that your witness' testimony needs further clarification or elaboration, you may pose additional questions to the witness on redirect examination. This will allow you to refute or minimize any adverse statements that the opposition might have elicited from your witness.

Similarly, if matters come up on redirect examination of an opposition witness which require additional discussion, you may recross-examine the witness.

D. <u>OFFERS OF PROOF</u>

If one of you proposed witnesses if not allowed to testify or a document is rejected, ask the administrative judge for leave to make the following "offer of proof" <u>on the record</u>: If I had been allowed to call X, X would have said the following…" Lay it <u>all</u> out on the record to protect your appeal.

E. OBJECTIONS

Object only when it serves your purposes. Making a lot of objections on unimportant points may turn the administrative judge against you. Try and "feel out" the judge early on to see if he is the type that lets it all into evidence, or is strict about what he lets in. Act accordingly, once you determine where the judge is coming from. Do not alienate the judge; if you have an objection, make it, get a ruling, and sit down. Be polite, but firm. Name the specific reason you are objecting, e.g., question is irrelevant, form of opposing counsel's question is confusing or leading, hearsay, etc. While hearsay testimony is permitted, you may find it useful to politely point out to the judge that the testimony has been all hearsay and should not be given much weight. Then proceed to attack the witness' knowledge further on cross-examination.

IV. DOCUMENTARY EVIDENCE

Representatives should put into evidence all documents, letters, directives, affidavits, statements, etc. which favorably bear on the issue in dispute. Documentary evidence must be entered into the record by either stipulation (agreement) of the parties or introduction from a witness.

There are three stages in the introduction of a document into a record: identification, explanation and presentation or offer. The document must first be identified (the record must show what the document is). If this is not done by stipulation, it must be identified by a proper witness. The proper witness is the person most familiar with it, either because he prepared it or signed it. If the document has not already been marked in the prehearing process, then it should

be marked by the hearing reporter as "Exhibit _____ for identification." The mere fact that the document has been marked as an exhibit does not mean that it becomes part of the record. It must be admitted by the administrative judge .

The next step is an explanation of the document or its contents. This is for the purpose of showing that the exhibit is relevant and material to the issue. Often the mere description given of the document for identification purposes is enough to show that it is relevant and material. More often a short further description by the witness is needed. At any rate, it must appear in the record either at this point or later that the document is relevant and material to the issue.

The last stage of this process is to offer the document in evidence. The representative should say, "May the judge please, I offer in evidence this document, which has been marked 'Exhibit _____ for Identification'." It is at this point that the opposing party may ask questions concerning the document or object to its admission into evidence. When the judge determines that the exhibit will be admitted, it becomes part of the official record.

Any further testimony with respect to a particular document should be made after the document has been admitted into record.

V. CLOSING STATEMENT

At the conclusion of oral testimony, each party will have the opportunity to present a closing summary statement or submit a brief. If you decide to use a closing statement, then take this opportunity to tell the judge specifically how the evidence conforms to the employee's view of the case. If you have followed your pre-hearing outline closely, you should be able to prepare a closing statement prior to the conclusion of the hearing. The opening and closing statements should be closely related, one looking forward to the evidence and the other looking back at it.

A brief should set out each argument by identifying the governing law or legal principle and showing how the evidence supports or does not support the employee's and agency's case respectively. For example, if timeliness is an issue, then state the applicable rule or regulation defining the relevant timeframe and discuss the evidence that supports timeliness.