

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 the reporter mark it as "Petitioner*s Exhibit 1" or "Intervenor*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 as to the witness* 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 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.