

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 Objections are normally withdrawn after an explanation is given.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*).