



## **Recommendation 70-4**

### **Discovery in Agency Adjudication**

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(Adopted June 2-3, 1970)

Prehearing discovery in agency adjudication insures that the parties to the proceeding have access to all relevant, unprivileged information prior to the hearing. Its primary objectives include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication. Agencies that conduct adjudicatory proceedings generally enjoy broad investigatory powers, and fairness requires that private parties have equal access to all relevant, unprivileged information at some point prior to the hearing.

#### **Recommendation**

It is therefore recommended that each agency recognize the following minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7 and 8 of the Administrative Procedure Act, now codified as 5 U.S.C. 554, 556 and 557. Individual agencies may permit additional discovery where appropriate and may tailor the recommended standards to meet the needs of particular types of proceedings where special or less elaborate discovery procedures will accomplish the same basic objectives or where the protective measures here recommended will be inadequate to achieve the ends sought. Each agency should undertake to train its hearing examiners in the application of the rules it promulgates to implement these standards. This training should draw upon the experience of other agencies, the Federal Courts, private practitioners, and bar associations.

The recommended minimum standards include the following procedures:

1. *Prehearing Conferences.* The presiding officer should have the authority to hold one or more prehearing conferences during the course of the proceeding on his own motion or at the request of a party to the proceeding. The presiding officer should normally hold at least one prehearing conference in proceedings where the issues are complex or where it appears likely that the hearing will last a considerable period of time. The presiding officer at a prehearing conference should have the authority to direct the parties to exchange their evidentiary exhibits and witness lists prior to the hearing. Where good cause exists, the parties should have



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

the right at any time to amend, by deletion or supplementation, their evidentiary exhibits and witness lists.

2. *Depositions.* A party to the proceeding should be able to take depositions of witnesses upon oral examination or written questions for purposes of discovering relevant, unprivileged information, subject to the following conditions:

(1) the taking of depositions should normally be deferred until there has been at least one prehearing conference;

(2) the party seeking to take a deposition should apply to the presiding officer for an order to do so;

(3) the party seeking to take a deposition should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity, along with the deponent, to notify the presiding officer of any objections to the taking of the deposition;

(4) the presiding officer should not grant an application to take a deposition if he finds that the taking of the deposition would result in undue delay;

(5) the presiding officer should otherwise grant an application to take a deposition unless he finds that there is not good cause for doing so; and

(6) the deposing of an agency employee should only be allowed upon an order of the presiding officer based on a specific finding that the party applying to take the deposition is seeking significant, unprivileged information not discoverable by alternative means. Any such order should be subject to an interlocutory appeal to the agency.

An order to take a deposition should be enforceable through the issuance of a subpoena ad testificandum.

3. *Witnesses— (a) Prior Statements.* At the prehearing conference or at some other reasonable time prior to the hearing the attorney or employee appearing on behalf of the agency in the proceeding should make available to the other parties to the proceeding any prior statements of agency witnesses which are in the possession of the agency or obtainable by it from any other Federal agency and which relate to the subject matter of the expected testimony. "Statement" is defined to include only a written statement signed or adopted by the witness or a recording or transcription which is a substantially verbatim recital of an oral statement made by the witness to an agent of the Federal government.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

(b) *Narrative Summaries of Expected Testimony.* At the prehearing conference or at some other reasonable time prior to the hearing each party to the proceeding should make available to the other parties to the proceeding the names of the witnesses he expects to call and a narrative summary of their expected testimony. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to designate any prior statement or statements of an agency witness which he makes available to the other parties under Recommendation 3 (a) as all or part of the narrative summary of that witness' expected testimony. Where good cause exists, the parties should have the right at any time to amend, by deletion or supplementation, the list of names of the witnesses they plan to call and the narrative summaries of the expected testimony of those witnesses.

4. *Written Interrogatories to Parties—(a) Availability.* A party to the proceeding should be able to serve written interrogatories upon any other party for purposes of discovering relevant, unprivileged information. A party served with interrogatories should be able, before he must answer the interrogatories, to apply to the presiding officer for the holding of a prehearing conference for the mutual exchange of evidentiary exhibits and other information. Each interrogatory which requests information not previously supplied at a prehearing conference should be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection should be stated in lieu of answer. The party upon whom the interrogatories have been served should serve a copy of the answers and objections within a reasonable time upon the party submitting the interrogatories. The party submitting the interrogatories may move the presiding officer for an order compelling an answer to an interrogatory or interrogatories to which there has been an objection or other failure to answer.

(b) *Interrogatories Directed to the Agency.* Each agency should designate an appropriate official on whom other parties to the proceeding may serve written interrogatories directed to the agency. That official should arrange for agency personnel with knowledge of the facts to answer and sign the interrogatories on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to interrogatories served upon the agency. Interrogatories directed to the agency which seek information available only from the agency head, member, or members should only be allowed upon an order of the agency based on a specific finding that the interrogating party is seeking significant, unprivileged information not discoverable by alternative means.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

5. *Requests for Admissions— (a) Availability.* A party to the proceeding should be able to serve upon any other party a written request for the admission, for purposes of the pending proceeding, of any relevant, unprivileged facts, including the genuineness of any document described in the request.

(b) *Requests Directed to the Agency.* Each agency should designate an appropriate official on whom other parties to the proceeding may serve requests for admissions directed to the agency. That official should arrange for agency personnel with knowledge of the facts to respond to the requests on behalf of the agency. The attorney or employee appearing on behalf of the agency in the proceeding should have the authority to make and sign objections to requests for admissions served upon the agency. Requests directed to the agency which seek admissions obtainable only from the agency head, member or members should only be allowed upon an order of the agency based on a specific finding that the requesting party is seeking significant, unprivileged information not discoverable by alternative means.

6. *Production of Documents and Tangible Things—(a) From Non-Parties.* A party to the proceeding should be able to obtain in accordance with agency rules a subpoena duces tecum requiring a non-party to produce relevant designated documents and tangible things, not privileged, at a prehearing conference, at the taking of the non-party's deposition, or at any other specific time and place designated by the issuing officer.

(b) *From Parties.* A party to the proceeding should be able to apply to the presiding officer for an order requiring any other party to produce and to make available for inspection, copying or photographing, at a prehearing conference or other specific time and place, any designated documents and tangible things, not privileged, which constitute or contain relevant evidence. The party seeking production should serve copies of the application on the other party or parties to the proceeding, who should be given an opportunity to notify the presiding officer of any objections. The presiding officer should order the production of such designated documents and tangible things unless he finds that there is not good cause for doing so.

(c) *From the Agency.* For the purposes of paragraph 6, the agency conducting the proceeding should be considered a party to the proceeding whether or not the agency staff participates as a party to the proceeding.

7. *Role of the Presiding Officer—(a) Control over Discovery.* The presiding officer should have the authority to impose schedules on the parties to the proceeding specifying the periods of time during which the parties may pursue each means of discovery available to them under



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

the rules of the agency. Such schedules and time periods should be set with a view to accelerating disposition of the case to the fullest extent consistent with fairness.

(b) *Interlocutory Appeals.* Except as provided by paragraph 2 (6) above, an interlocutory appeal from a ruling of the presiding officer on discovery should be allowed only upon certification by the presiding officer that the ruling involves an important question of law or policy which should be resolved at that time by the appropriate review authority. Notwithstanding the presiding officer's certification, the review authority should have the authority to dismiss summarily the interlocutory appeal if it should appear that the certification was improvident. An interlocutory appeal should not result in a stay of the proceedings except in extraordinary circumstances.

8. *Protective Orders—(a) Authority of Presiding Officer in General.* The presiding officer should have the authority, upon motion by a party or by the person from whom discovery is sought, and for good cause shown, to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(b) *Names of Witnesses.* The presiding officer should have the authority upon motion by a party or other person, and for good cause shown, by order (a) to restrict or defer disclosure by a party of the name of a witness, a narrative summary of the expected testimony of a witness or, in the case of an agency witness, any prior statement of the witness, and (b) to prescribe other appropriate measures to protect a witness. Any party affected by any such action should have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony or, in the case of an agency witness, his prior statement or statements, to prepare for cross-examination and for the presentation of his case.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

(c) *In Camera Proceedings*. The presiding officer should have the authority to permit a party or person seeking a protective order to make all or part of the showing of good cause in camera. A record should be made of such in camera proceedings. If the presiding officer enters a protective order following a showing in camera, the record of such showing should be sealed and preserved and made available to the agency or court in the event of an appeal.

9. *Subpoenas*. The presiding officer should have the power to issue subpoenas ad testificandum and duces tecum at any time during the course of the proceeding. Agencies affected by this Recommendation that do not have the statutory authority to issue subpoenas should seek to obtain any necessary authority from the Congress.

### Citations:

38 FR 19786 (July 23, 1973)

\_\_\_ FR \_\_\_\_\_ (2012)

1 ACUS 37

**Note:** Recommendation No. 71-1 supersedes section 5 of Recommendation No. 70-3 and paragraphs 2 (6) and 7 (b) of Recommendation No. 70-4, adopted June 2-3, 1970, insofar as they deal with interlocutory appeals.