

## D. ALJ INVOLVEMENT AND DECORUM AT THE HEARING

### OVERVIEW:

Section 556(c)(5) of the APA (5 U.S.C. § 556(c)(5)) and § [2423.31](#)(a) of the Regulations empower an ALJ to “regulate the course of a hearing.” ALJs have broad latitude to “receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the hearing.” § [2423.31](#)(b). However, in determining the course of conduct of a hearing, an ALJ must be fair and impartial. § [2423.31](#)(a).

### OBJECTIVE:

To provide guidance to Trial Attorneys concerning an ALJ’s role in inquiring fully into the facts of a case and what the Trial Attorney does when matters concerning an ALJ’s alleged conduct of a hearing in an impartial or unevenhanded manner arise.

#### 1. AN ALJ’S INQUIRY INTO THE FACTS:

##### a. *An ALJ’s questioning of witnesses:*

- Is permissible under § [2423.31](#)(b);
- May occur during direct or cross-examination;
- May raise a matter which you did not wish to pursue;
- Is subject to the same requirements as are the parties’ questions under § [2423.31](#)(b) (materiality, relevance, undue repetition or privilege);

- Is subject to objections to specific questions or lines of questioning; and
- Is subject to objections made to cross-examination questions of your witness on the same grounds as objections to Respondent's questions (badgering, asked and answered, etc.).



*In light of an ALJ's broad latitude to inquire fully into the facts, care is taken before making any objection to an ALJ's questioning. All such objections are made respectfully.*

b. *An ALJ's offering of documentary evidence into the record:*

- Occurs infrequently;
- Is subject to the same requirements as other documentary evidence: authenticity, relevance, materiality, etc.; and
- Is subject to objections.

c. *Include on the record:*

- Any questioning of witnesses by the ALJ or discussion concerning witnesses' testimony or the ALJ's offer of a documentary evidence; or
- A summary/synopsis of the ALJ's questions or comments which occurred off the record, if the questions or comments or the offered documentary evidence may have material effect on the outcome of the case. (See discussion below on improper ALJ decorum).

d. *An ALJ's comments, questions or conversations during the hearing:*

- Are a common occurrence. Conversations often occur during opening statements or closing remarks; and
- Be prepared to respond to any questions concerning relevant case law posed by the ALJ.

## 2. **ALJ DECORUM AT HEARING:**

a. *Standard of ALJ conduct of hearing:*

- ALJs must conduct the hearing in an evenhanded manner that is free of bias.

For example, the ALJ may not make “disparaging remarks” nor attempt to “bully Counsel for the General Counsel into agreeing with his position.”

U.S. Department of Veterans Affairs, Medical Center, Jamaica Plain, Massachusetts, 51 FLRA No. 73, 51 FLRA 871, 875, 877 (1996) (ALJ acted inappropriately and failed to conform to minimal standards of judicial behavior and case assigned to a different ALJ on remand); Compare U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C., 55 FLRA No. 20, 55 FLRA 93, 98 n.9 (1999) (Authority remanded case to Chief ALJ for assignment to different ALJ due to intemperate nature of ALJ's comments at trial which raise significant questions whether the ALJ has predetermined the issue) with National Treasury Employees Union, 53 FLRA No. 138, 53 FLRA 1541, 1556 (1998) (“It is evident that the Judge became frustrated with and upbraided the Charging Party and his counsel in this case. Although the Judge may have uttered some intemperate remarks to the Charging Party and characterized the Charging Party's arguments and activities in a deprecating manner, the Judge's recommended decision does not appear to be tainted by any bias against the Charging Party); see also


District No. 1, Pacific Coast District Engineers Beneficial Association,  
274 NLRB 1481, 1485-86 (1985) (Member Hunter concurring) (ALJ disqualified on bias grounds based on record which established pattern of injudicious statements including sarcastic repartee).

b. *Procedure when ALJ's conduct of a hearing is improper:*

- Object, on the record, to the questionable conduct to ensure that the transcript reflects such objection and the basis for such objection. The objection may provide the basis for filing an exception to the ALJ's decision;

 Pursuant to § [2423.30\(d\)](#), objections not raised to an ALJ are deemed waived.

- Review the transcript upon its receipt to ensure that the court reporter has accurately transcribed the objection. If not, file a motion to correct the transcript;

 Pursuant to § [2423.21\(b\)\(4\)](#), motions to correct the transcript must be filed within 10 days after receipt of the transcript.

- Prepare a memorandum to the RA describing the circumstance at the hearing that gave rise to the objection;
- Expect the RA to forward the memorandum along with the pertinent pages from the transcript to the Deputy GC who will discuss the matter with the GC; and
- Discuss, upon receipt of a decision, with the RA whether to file an exception based upon the ALJ's conduct of the hearing.

- Q [Part 1, Chapter H](#) concerning an ALJ's Involvement in Settlements;  
[Part 1, Chapter L](#) concerning Motions;  
[Part 2, Chapter C](#) concerning Trial Attorney's Decorum;  
[Part 2, Chapter DD](#) concerning GC's Rebuttal;  
[Part 2, Chapter K](#) concerning Evidence, in General; and  
[Part 3, Chapter F](#) concerning Exceptions.

RESERVED