

J. ENFORCEMENT OF SUBPOENAS AND SANCTIONS

OVERVIEW:

Pursuant to § [2423.28](#)(f) the GC may request that the Authority's Solicitor seek enforcement of a subpoena if a party fails to comply with that subpoena. In addition, a party that fails to comply with a subpoena, or any other regulatory requirement governing pre-hearing and hearing matters, is subject to sanctions pursuant to § [2423.24](#)(e).

OBJECTIVE:

To provide guidance concerning the process of enforcement of a subpoena, a request for sanctions for non-compliance with a subpoena, or a request for sanctions for non-compliance with any other regulatory requirement.

1. ENFORCEMENT OF SUBPOENA:

a. *Action by Authority's Solicitor:*

In the event of non-compliance with a subpoena, upon request of the party on whose behalf the subpoena was issued, the Solicitor shall, on behalf of that party, institute proceedings in the appropriate district court for the enforcement of the subpoena, unless to do so would be inconsistent with law and the policies of the Statute. § [2423.28](#)(f).

b. *Jurisdiction:*

U.S. District Court for the judicial district in which the person to whom the subpoena is addressed resides or is served. § [7132](#)(b) of the Statute.

c. *Motion to Continue:*

Where circumstances indicate the advisability of seeking enforcement of a subpoena, move to continue the hearing to provide the necessary time to take such action.

d. *NLRB case law:*

Duly issued subpoenas are enforced if the agency is seeking information "not plainly incompetent or irrelevant to any lawful purpose." NLRB v. Williams, 396 F.2d 247, 249 (7th Cir. 1968) (quoting Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943)).

2. SANCTIONS FOR NON-COMPLIANCE WITH SUBPOENA:

a. *When to move for sanctions at hearing:*

Move for sanctions at hearing when situations arise where such action is indicated.

For example, you might request the ALJ to exclude testimony and evidence going to the matters raised in the documents which Respondent has failed to produce in response to the subpoena. In addition, brief the issue to the ALJ.

b. *An ALJ has the discretion to issue protective orders and to order sanctions, including drawing inferences adverse to the position of the party refusing to produce documents.*

Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, 40 FLRA No. 64, 40 FLRA 792, 803 (1991). For a discussion of adverse inferences, see [Part 2, Chapter L](#).

c. *Case law: Sanctions and Subpoenaed Documents:*

Authority case law concerning requests for sanctions, in-camera examination of subpoenaed documents by the ALJ:

Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 30 FLRA No. 19, 30 FLRA 127, 138-40 (1987) (*NWS*) (ALJ did not err in not imposing sanctions for Respondent's non-compliance with subpoena and agreeing only to an in-camera review of the documents by the ALJ because, despite reluctance of courts to permit in-camera review of documents, ALJ minimized the effect of the in-camera review by adequately and accurately describing and clarifying the content so as to provide meaningful, although limited, direct and cross-examination and argument to the ALJ).

NLRB, 38 FLRA No. 48, 38 FLRA 506, 514-16 (1990), remanded on other grounds sub nom. NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (relying on *NWS*, ALJ did not abuse discretion in denying sanction and adverse inference requests when Respondent refused to comply with a protective order because memorandum was provided for ALJ's in-camera review and ALJ adequately and accurately described the content of the memorandum so as to provide for meaningful, direct and cross-examination).

See also National Park Service, National Capital Region, United States Park Service, 38 FLRA No. 86, 38 FLRA 1027, 1034-35 (1990) (to the same effect), remanded on other grounds sub nom. NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992); and

Department of Veterans Affairs, Finance Center, Austin, Texas, 48 FLRA No. 21, 48 FLRA 247 (1993) (ALJ did not abuse discretion by not requiring Respondent to disclose documents under a protective order, but instead examining the documents in-camera and adequately and accurately describing them so as to provide for meaningful, direct and cross-examination and arguments for counsel for the General Counsel and the Union).

3. SANCTIONS FOR NON-COMPLIANCE WITH REGULATORY REQUIREMENTS GOVERNING PRE-HEARING AND HEARING MATTERS:

a. *When to move for sanctions at hearing:*

Move for sanctions at hearing when situations arise where such action is indicated.

- b. *Situations when Trial Attorney may move for sanctions:*
- i. When Respondent's case deviates from what was disclosed in the pre-hearing disclosure document:
 - Respondent seeks to introduce evidence that was not listed on the index of documents provided as part of the pre-hearing disclosure document;
 - Respondent seeks the testimony of a witness who was not on the list of witnesses provided by Respondent as part of the pre-hearing disclosure document; and
 - Respondent seeks to rely upon an affirmative defense that was not disclosed to the Trial Attorney before the hearing, or in sufficient time to fully and fairly litigate the issue raised by the defense.
 - ii. When Respondent fails to meet the regulatory time frames for pre-hearing disclosure or fails to meet the time frames for such disclosure set forth in the ALJ's pre-hearing order (and good cause for such late disclosure has not been shown). See Puerto Rico Air National Guard, 156th Airlift Wing (AMC), Carolina, Puerto Rico, 56 FLRA No. 21, 56 FLRA 174, 177 (2000), petition for review filed sub nom. American Federation of Government Employees, Local 3936, AFL-CIO v. FLRA, 00-1417 (1st Cir. filed Mar. 24, 2000). As a result of the Respondent's failure to participate in pre-hearing disclosure, Authority upheld ALJ's sanctions prohibiting Respondent from introducing evidence to the extent that the Respondent challenged any of the ALJ's evidentiary or factual findings).
 - iii. When Respondent fails to comply with an ALJ's pre-hearing order.

- iv. When Respondent fails to participate in the pre-hearing conference.



In each case in which the Respondent has failed to comply with a requirement, the Trial Attorney proposes a sanction that directly mitigates the harm caused by insufficient notice, e.g., seek to preclude witness from testifying who was not on pre-hearing witness list; seek to preclude introduction of evidence to prove defense not disclosed pre-hearing.

EXAMPLE OF MOVING FOR SANCTION


Failure to Disclose Affirmative Defense “covered by”

Trial Attorney: Respondent has failed to disclose the “covered by” affirmative defense upon which it relies in defending against the § [7116\(a\)\(1\)](#) and (5) allegation in the complaint. Respondent failed to comply with § [2423.23\(c\)](#) in not disclosing this defense as required in the pre-hearing document dated and served by fax on November 11, 1997, nor mentioning this defense during the pre-hearing conference that occurred on November 13, 1997 (see pre-hearing conference summary).


In promulgating new ULP regulations, the Authority stated in the comments that were provided as supporting supplementary material regarding the pre-hearing disclosure regulation: “early prehearing disclosure will enable the parties to knowledgeably and more effectively prepare their cases without having to guess what evidence or theories others in the litigation will offer.” ([62 Fed. Reg. 40911](#), 40919 (July 31, 1997)).

Counsel for the General Counsel has been prejudiced by Respondent's failure to timely raise this affirmative defense. Because Counsel for the General Counsel has not had the required time to knowledgeably and effectively prepare a case to rebut this defense, we request that the Judge sanction the Respondent and prohibit the raising of the "covered by" affirmative defense at the hearing. Imposition of a sanction is necessary to ensure that Respondent's failure to comply with the regulatory requirements is not condoned.

In all situations where the Respondent has failed to comply with the pre-hearing requirement to disclose defenses, e.g., Respondent fails to disclose "legitimate justification" for taking action in an (a)(2) discrimination case, the Trial Attorney would make the same argument.

 *If the ALJ declines to sanction Respondent, the Trial Attorney preserves this issue for appeal to the Authority on exceptions by objecting on the record to the ALJ's decision.*

If the Trial Attorney is caught by surprise, ask the ALJ for a brief recess so that the RA or RD can be contacted to provide guidance.

 *The Authority's statutory jurisdiction may be raised at any time, but the facts upon which the Authority determines it has jurisdiction may be challenged only upon timely exception. See NLRB v. Konig, 79 F.3d 354, 360 (3d Cir. 1996) (Court rejected consideration of jurisdictional defense that LPN's were supervisors because that "factual" determination was within Board's purview and was not raised before the Board) (citations omitted).*

It is the GC's position that the failure to raise an affirmative defense by a responsive pleading and, as required, the Respondent has not raised the defense in a pre-hearing

disclosure document, results in waiver of that defense. Note, however, in civil practice that it has been held that there is no waiver if the failure to raise an affirmative defense does not cause prejudice, i.e., the defense is raised in reasonable time. Moore, Owen, Thomas & Co. v. Coffey, 992 F.2d 1439, 1445 (6th Cir. 1993) (citation omitted) (the purpose of a rule requiring Respondent to disclose affirmative defenses is to give the opposing party notice of the defense and a chance to rebut it).

In addition, the Trial Attorney should be aware that unlike the Authority's regulations, no pre-hearing disclosure requirement exists under the NLRB's regulations. Miami Rivet of Puerto Rico, Inc., Miami Rivet Co. and Raytech Corp., 318 NLRB 769, 776 (1995) (cannot force pre-hearing disclosure of defenses). If necessary, the Trial Attorney is prepared to point to this difference between the Board's and the Authority's regulations to show prejudice in raising a defense that was not disclosed pre-hearing.

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[Part 1, Chapter N](#) concerning Pre-hearing Disclosure;

[Part 1, Chapter P](#) concerning Pre-hearing Order;

[Part 1, Chapter Q](#) concerning Pre-hearing Conference;

[Part 1, Chapter K](#) concerning Petitions to Revoke Subpoena; and

[Part 2, Chapter L](#) concerning Adverse Inference.

RESERVED