13 Considerations in developing evidence:

13.1 Best evidence rule: Generally, the two most common methods of developing record evidence are through witness testimony and the introduction of documents.

13.1.1 Testimony: The best evidence obtained from witnesses is testimony provided by those with first hand knowledge of the matters under examination.

13.1.2 Introduction of documents: To prove the contents of a document, the best evidence is the document itself. Production of the document prevents fraud or error as to the exact words of the document. While oral testimony regarding the content of a document is permissible, the Hearing Officer makes every effort to secure the document in order to complete the record. The Hearing Officer is responsible for ensuring the document is relevant to the proceeding. Any inconsistencies and ambiguities in the document itself and as compared to other documents and testimony are clarified in the record. Any codes or abbreviations are explained on the record.

13.2 Ruling on the admissibility of evidence: The following issues may arise as to the admissibility of evidence:

13.2.1 Foundation:

a) The foundation for a witness' testimony is demonstrated by establishing a basis for the witness' knowledge regarding the matter about which s/he will be questioned. The common phrase is "qualifying a witness." Asking a witness to state his/her name, title, position and to describe his/her position is basic information required. In addition, *when, where, what time, and who was present* are the types of preliminary fact questions which are asked to establish the witness' ability to testify. Foundation questions also help determine if the witness' testimony is going to be relevant.

b) The foundation for the admission of documents is established by authenticating those documents. This is accomplished by showing the document to the witness through whom it is being offered in evidence and asking the witness to describe it. The witness, based upon firsthand knowledge, describes the nature and content of the document. In most instances, this completes the identification and authentication of the document.

13.2.2 Relevancy: Relevancy concerns whether the evidence offered is going to help decide the matters under consideration. If not, the Hearing Officer considers excluding it, regardless of whether any party objects. Relevancy is a factor not only in oral testimony, but also in documentary evidence (see *HOG 15.9* for a discussion applying the concept of "relevancy" to bulky exhibits).

13.2.2.1 Evidentiary considerations - unit: Decisions regarding unit determinations reflect the conditions of employment that exist at the time of the hearing rather than what may exist at the time in the future unless there are definite and imminent changes planned by the agency. *Defense Logistics Agency, Defense Contract Management Command, Defense Contract Management District, North Central, Defense Plant Representative Office-Thiokol, Brigham City, Utah (DPRO-Thiokol),* 41 FLRA 316 (1991). See also *RCL 1* and *HOG 37.*

13.2.2.2 Evidentiary considerations-employee eligibility: Determinations of an employee's unit eligibility are based on testimony as to an employee's actual duties at the time of the hearing, rather than on duties that may exist in the future. See *Department of Housing and Urban Development*, *Washington, D.C.*, 35 FLRA 1249, 1256-1257 (1990); *Veterans Administration Medical Center, Prescott, Arizona,* 29 FLRA 1313, 1315 (1987) (Bargaining unit eligibility determinations are not based on evidence such as written position descriptions or testimony as to what duties had been or would be performed by an employee occupying a certain position, because such evidence might not reflect the employee's actual duties.)

13.2.3 Materiality: Materiality is related to relevance, but is not identical. Materiality concerns the degree of importance of the evidence. If the evidence is relevant but of minuscule importance, it may be excluded (see also *HOG 13.2.7* regarding cumulative evidence).

13.2.4 Hearsay and admissions: Hearsay is evidence not based upon the personal knowledge of the witness but on what the witness has heard others say. It is secondhand evidence as distinguished from original evidence (e.g., "Bill told me that Joe quit the union," rather than "Joe said he quit the union.").

Hearsay is distinguishable from admissions made by a party opponent. What a *party or its agents* say or do in the presence of a party opponent or its agents is not hearsay but an admission (e.g., "My supervisor told me that he told Bill to quit the union or be fired."). This is an admission by an agent of

a party and is not hearsay. Such testimony can be received to prove the truth of the matter asserted.

While hearsay is received into evidence at the discretion of the Hearing Officer, it is of little evidentiary value. The Hearing Officer insists that parties produce other witnesses or evidence that is more probative of the point.

13.2.5 ***Leading questions:*** A leading question is one in which the question suggests an answer to the witness; a leading question calls for a yes or no answer. In effect, the party's representative is doing the testifying by using leading questions.

On direct examination, leading questions are acceptable in preliminary areas (e.g., "You are employed by...?" or "You're the Personnel Officer of the Activity?"). They are not permitted in critical areas (e.g., "Isn't it true that the mission of the activity is...?" or "Isn't it true that you type labor relations documents?"). Leading questions asked by the questioner on direct examination are permitted initially when a witness appears intimidated by the process, hostile, identifies with the opposing party, surprises the questioner with his/her responses, is mentally impaired, or otherwise uncooperative. On objection, or on the Hearing Officer's own motion, the questioner of a "friendly" witness is cautioned not to use leading questions in critical areas. The Hearing Officer assists the parties by illustrating the proper phrasing of non-leading questions. The Hearing Officer is not permitted to ask leading questions (see *HOG 32.16*, examination by Hearing Officer).

During cross-examination, that is, questioning by representatives of the other parties, leading questions are permissible.

13.2.6 ***Oral evidence that contradicts written evidence:*** Oral evidence that appears to contradict written evidence is not excluded if it is necessary to complete the record. Otherwise, it can be excluded if it is not probative.

13.2.7 ***Cumulative evidence:*** Cumulative evidence is repetitive evidence on a point that has already been fully established. Such evidence burdens the record and is excluded.

13.2.8 ***Opinion evidence:*** Opinion evidence is what the witness thinks or believes in regard to the matter in dispute as distinguished from personal knowledge of the facts themselves. Generally, opinion evidence is not relied on in lieu of fact.

13.2.9 ***Judicial notice:*** Judicial notice allows a Hearing Officer to shortcut the

taking of the testimony regarding matters that are common knowledge (e.g., "The U.S. Department of Labor is an agency of the Federal government."). An objecting party is normally permitted to show the contrary by competent evidence (see also *HOG 29, Offer of Proof*).

13.2.10 Official notice: Official notice allows an agency to recognize its own proceedings and decisions (e.g., recognizing the relevant facts in a related Authority decision). The matter of which official notice is taken may or may not be dispositive of the current issue. For example, earlier jurisdictional facts are brought up to date, etc. The Hearing Officer takes such notice at the request of a party or on his/her own motion, after notifying the parties of the ruling. (e.g., "The Authority decided in *6 FLRA 52* that it will not generally clarify the bargaining unit status of vacant positions.") An objecting party is normally permitted to show the contrary by competent evidence. (See also *HOG 29, Offer of Proof*).

13.2.11 Administrative notice: Administrative notice allows a Hearing Officer to recognize information obtained from a commonly recognized source for that information. [*see U.S. Department of Defense, National Guard Bureau, New York National Guard, Latham, New York,* 46 FLRA 1468 at 1474 (1993) where administrative notice was taken to OPM's publication "Union Recognition in the Federal Government."] An objecting party is normally permitted to show the contrary by competent evidence. (See also *HOG 29, Offer of Proof*).

13.3 Theories of res judicata: A party may raise the argument in a case that there is controlling precedent and the precedential case "'is res judicata in the instant case.'" *National Mediation Board (NMB*), 54 FLRA 1474, 1478 (1998). In *NMB*, the Authority found that neither of the two theories of res judicata - - claim preclusion and issue preclusion applied in that case.

13.3.1 Doctrine of claim preclusion: The doctrine of claim preclusion bars a subsequent suit between the same parties on the same cause of action where there has been a final judgment on the merits of that cause of action. *NMB*, 54 FLRA 1474 (1998) citing Stein, Mitchell and Mezines, *Administrative Law*, 40.01 at 40-2. See also *United States Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas and American Federation of Government Employees, AFL-CIO, National Border Patrol Council,* 41 FLRA 259, 263 (1991).

13.3.2 Doctrine of issue preclusion: The doctrine of issue preclusion "prevents a second litigation of the same issues of fact or law even in connection with a different claim or cause of action." *NMB* quoting *U.S. Department of the Air*

Force, Scott Air Force Base, Illinois, and National Association of Government Employees, 35 FLRA 978, 982 (1990). The Authority stated in *NMB* that this doctrine does not apply, however, where there is a question of whether the underlying legal doctrines at issue remain valid and cited *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 599-600 (1948); *Western Oil and Gas v. U.S. Environmental Protection Agency*, 633 F.2d 803 (9th Cir. 1980). Further, the Authority found that the doctrine of issue preclusion is not intended to prevent an adjudicatory body, such as the Authority, from reexamining applicable legal principles where necessary.