

**18 Motions made during the hearing:**

**18.1 Generally:** During the hearing, motions are made to the Hearing Officer and may be made orally on the record, unless a written submission is otherwise required in this section. Responses may also be made orally on the record or in writing, but, absent permission of the Hearing Officer, are provided in writing before the hearing closes. When appropriate, the Hearing Officer rules on motions made at the hearing or referred to the Hearing Officer by the Regional Director [see § 2422.19(c)]. (See also *HOG 30* that provides for automatic exceptions to all adverse rulings.)

**18.2 Procedural requirements:** A party seeking to make a motion during the hearing adheres to the following specific procedural steps:

- a) Motions are generally made orally on the record. A written motion, if desired, may be filed with the Hearing Officer;
- b) The reason for the motion, if not self-evident, is given. For example, motions to strike certain testimony, dismiss a petition, postpone the hearing, etc., are supported with specific reasons, whereas a motion to amend the petition by the petitioner need not be justified.

After the motion is made, the party affected by the motion is permitted to state its position on the motion. Thereafter:

- a) All motions are ruled on by the Hearing Officer with the exception of a motion to dismiss a petition. A ruling is stated in terms of a motion being denied or granted;
- b) The basis for the ruling is not explained (see *HOG 28.4*);
- c) A party is not granted a postponement during the hearing to appeal an adverse ruling by the Hearing Officer to the Regional Director. In view of the automatic exception afforded a party to any adverse ruling, the Regional Director considers the matter when reviewing the record;
- d) Parties are limited to a reasonable length of time to argue their positions; and
- e) All matters spoken in relation to the motion are made on the record.

**18.3** ***Motions to dismiss made during the hearing:*** The Hearing Officer has no authority to rule on a motion to dismiss a petition. Generally, when such a motion is made, the moving party is informed that the Hearing Officer has no authority to make a ruling and that the motion is referred to the Regional Director for ruling at such time as the record is considered by the Regional Director. There are limited circumstances where a motion to dismiss warrants the immediate consideration of the Regional Director. In such cases, the Hearing Officer refers the motion to the Regional Director in the following manner:

- a) The Hearing Officer recesses the hearing for the purpose of contacting the Regional Director;
- b) The Regional Director is fully apprized of the relevant evidence or the actions of the parties bearing upon the motion to dismiss, including any objections to the motion;
- c) If the Regional Director intends to grant the motion to dismiss the petition, the Hearing Officer goes back on the record and states: “the motion to dismiss the petition is being referred to the Regional Director for ruling.” Normally, no more evidence is taken on any issue.
- d) The Hearing Officer cannot state, on or off the record, that the latter intends to grant the motion to dismiss, unless specifically authorized by the Regional Director;
- e) The hearing is then adjourned indefinitely; and
- f) If the Regional Director does not intend to rule on the motion immediately, the Hearing Officer informs the parties of the Director’s preliminary decision on the record. The Hearing Officer then completes the record and refers the motion to dismiss the petition to the Regional Director who acts upon it when s/he considers the entire record.

**18.4** ***Motions to intervene made during the hearing:*** Motions to intervene made during the hearing are generally untimely unless the intervening party shows good cause for granting the intervention [§ 2422.8(b)]. The Hearing Officer asks the party requesting intervention for the grounds for the request and the reasons for the delay in filing. The Hearing Officer then goes off the record and contacts the Regional Director to discuss the intervention request. As discussed in *HOG 17.4*, the Regional Director has discretion to give

permission to the Hearing Officer to grant “conditional intervention” under the limited circumstances discussed in *HOG 17.4.4* or instruct the Hearing Officer to refer the intervention request to the Regional Director for consideration. If the Regional Director grants the party “conditional” intervention, the Hearing Officer announces the Regional Director’s decision and follows the procedures in *HOG 17.4.4*.

- a) If the Regional Director instructs the Hearing Officer to refer the request to him/her for consideration, the Hearing Officer goes back on the record and announces that the request is being referred to the Regional Director for action. The party requesting to intervene is not permitted to participate in the hearing and the hearing continues.
- b) If the Regional Director decides that good cause has been shown for granting the intervention, the party may be permitted to participate in the hearing if it is still open. If the record is closed, the record is reopened for the limited purpose of allowing the intervenor to supplement the record with its position and evidence in support of its position. The other parties are permitted to participate fully.

**18.5** ***Motions to participate as amicus curiae:*** For good cause and with the permission of the Regional Director, the Hearing Officer may grant a party’s request to participate in the hearing as an *amicus curiae*. *Long Beach Veterans Administration Medical Center, Long Beach, California*, 7 FLRA 434 (1981). See also § 2429.9 of the regulations.

**18.6** ***Motions to sequester witnesses:***

**18.6.1** A motion for sequestration is made by a party in order to seek the exclusion of potential witnesses from the hearing room. The purpose is to ensure that they are not influenced when giving their testimony by the testimony of the preceding witness or witnesses. The Hearing Officer obtains the positions of all parties on the motion for sequestration.

Motions to sequester witnesses at a representation hearing normally are not granted by the Hearing Officer unless credibility questions are at issue in objections cases (see *HOG 36*).

**18.6.2** The request is made at the start of the hearing so that it applies to all witnesses and parties equally. If the request is made during the hearing, the Hearing Officer considers reasons for the delay in filing the motion and the parties’ positions when making his/her decision.

**18.6.3** If the Hearing Officer grants a sequestration request, s/he cautions witnesses not to discuss their testimony with anyone, or read the transcript testimony of other witnesses. The sequestered witness(es) then leaves the hearing room until called to testify.

**18.6.4** Irrespective of the Hearing Officer's ruling to grant sequestration, a party is normally allowed to have an advisor present in the hearing room to assist the representative of record during the hearing, even if that advisor later testifies.

**18.7 Motion to amend the petition:**

**18.7.1 General:** During the course of a hearing, a petitioner may seek to amend its petition. This is done by means of a request, or motion to amend, and if necessary, a supporting statement. The Hearing Officer, after soliciting the positions of the other parties and argument, grants the request unless the Regional Director gives approval to deny the request. **NOTE: it is very unusual to deny a petitioner's request to amend its petition.**

**18.7.2 Considerations on amending petitions:** The Hearing Officer considers any consequences of an amendment of the petition at hearing:

**18.7.2.1** Although the amendment does not have to be explicit, it may be necessary for the Hearing Officer to clarify what the petitioner seeks and solicit a clearer amendment. See e.g., *NMB*, 54 FLRA 1474 (1998) (the Authority found that nothing in case law or regulation requires a formal request to amend a petition in order to trigger the requirement to evaluate the duties of particular positions to determine whether they fall within particular statutory exclusions).

**18.7.2.2** If additional showing of interest is required, it is submitted at the time the amendment is filed. *U.S. Department of the Interior, National Park Service, Washington, DC*, 55 FLRA 311 (1999).

**18.7.2.3** Although amendments to petitions do not ordinarily require postponements, other parties may be entitled to additional time to prepare their case if the amendment is changes the scope of the unit, issues, party status, etc..

**18.7.2.4** Depending on the amendment, the Hearing Officer may be required to:

- a) recheck the petitioner's showing of interest;
- b) re-examine the appropriateness of unit;

- c) re-evaluate the timeliness of the petition;
- d) determine whether there are additional parties that may be affected by issues raised by the amended petition or that the status of a party(ies) has changed;
- e) reexamine the issues;
- f) ask the parties whether they are willing to change their positions; and
- g) reappraise the basis for the hearing and consult with the Regional Director.

It is the responsibility of the Hearing Officer to determine whether these questions exist and to act accordingly.

**18.7.3 Motion to amend the unit made during the hearing:** A motion to amend the unit may be made only by the petitioner. If any party, other than the petitioner, makes a “motion to amend the unit,” it is regarded as being, at most, a statement of position or contention of what the unit should be, and no ruling is made on such a “motion.”

However, if the Hearing Officer believes that the record would be better served by clarifying the unit description through the inclusion or exclusion of particular classifications, a suggestion to this effect is made to the petitioner. Off the record discussion regarding a possible amendment of the unit is permitted, but takes place in the presence of all parties. The Hearing Officer summarizes the off the record discussions on the record (see *HOG 11.7*).

**18.7.4 Obtaining complete description of amended unit:** When a motion to amend the unit is made by the petitioner, the entire unit is set forth on the record. It is not acceptable for the petitioner to state, for example, that it moves to amend the unit by “changing the unit only with respect to . . .” or “keeping the inclusions but adding the classification of . . . for the classification of . . .,” etc. Irrespective of the nature or the extent of the change being made by the amendment, whether involving a minor modification of terminology, such as changing the wording from “blue collar” to “Wage Board,” or enlarging the scope of the unit substantially, the entire unit description is stated.

**18.7.5 Ruling on a motion to amend the unit that does not change the scope of the unit:** A motion to amend the unit, like any other motion, is ruled on by the Hearing Officer after the other parties are asked whether they have any objections to the motion.

Irrespective of any objections raised or any contention that the motion be denied, the Hearing Officer grants the motion to amend the unit since:

- a) a petitioner has complete latitude to seek whatever unit it desires;
- b) in allowing the petitioner to amend the unit, the Hearing Officer does not, and cannot, pass upon the appropriateness or timeliness of the amended unit; and
- c) it is, therefore, left to the Regional Director to determine, if necessary, the appropriateness of the unit as amended. In addition, the Hearing Officer's ruling in granting the motion to amend the unit will be reviewed, as a matter of course, by the Regional Director.

**NOTE: Best practice: use a motion to amend a petition to withdraw a position whose eligibility is no longer in dispute rather than a stipulation to withdraw the position from the case.** This is a situation in which the parties "make a deal" rather than obtain a solution since neither party seeks a ruling from the Regional Director on the position. See *CHM 25.13.1*. In addition, the Authority has previously held that a stipulation concerning the resolution of positions in dispute is "deemed a motion to amend the petition and is hereby granted." *Pennsylvania Air National Guard*, 13 FLRA 538 (1983).

**18.7.6 Ruling on a motion to amend the unit that changes the scope of the unit:** A motion to amend the unit, like any other motion, is ruled on by the Hearing Officer after the other parties are asked whether they have any objections to the motion. Before granting a motion to amend the unit, the Hearing Officer takes the following actions (see also *HOG 18.7.2*):

- a) Goes off the record and assesses whether the amendment has substantially affected the scope of the unit. Changes in terminology only are distinguished from changes affecting the scope and content of the unit (see *CHM 13.9, 13.10 and 13.11*);
- b) Checks the showing of interest to determine if it is sufficient to support the proposed amendment. In any instance where additional

showing of interest is required, it is submitted with the amendment. See *U.S. Department of the Interior, National Park Service, Washington, DC*, 55 FLRA 311 (1999). See *CHM 18.13.6* for guidance on checking showing of interest.

- c) Determines whether there are timeliness issues to consider (*RCL 12* and *HOG 48*); and
- d) Calls the Regional Director if it appears that the amendment has resulted in enlarging or diminishing the scope of the unit.
  - (i) If the Regional Director concludes that the amendment has a substantial effect upon the unit and that there may be additional parties who are affected by the amended petition, the Hearing Officer goes back on the record and states: "Upon authorization by the Regional Director, the hearing is adjourned indefinitely pending a review of the amended petition and notification, if necessary of other potential interested parties." (see *HOG script 35.4*)
  - (ii) Where the Regional Director concludes that no substantial effect upon the unit has resulted from the amendment, the Hearing Officer continues with the hearing.

### **18.8 Motion to strike or expunge testimony:**

**18.8.1** A motion to strike is designed to have the Regional Director disregard a particular response by a witness or testimony given to a line of questioning. The basis in support of the motion to strike may be that the answer was unresponsive to the question or that the witness answered the question notwithstanding the fact that the objection to the question was sustained by the Hearing Officer. In ruling on the motion, the Hearing Officer uses the tests for relevancy and materiality. However, note that sustaining the motion results only in the disputed testimony being disregarded by the Regional Director in reviewing the record, unless the Hearing Officer's ruling is reversed by the Regional Director. Thus, granting such a motion does not involve a physical expunging of the testimony from the record.

**18.8.2** A motion to expunge, if sustained, results in the total eradication of the particular testimony or other matter stated, and, thus, is denied in all but the most extreme instances.

**18.9 Motion for continuance made during the hearing:** A party may request a continuance at any time during the hearing. The authority to grant such requests rests with the Hearing Officer. The Hearing Officer approves a motion for continuance upon a showing of good cause. When ruling on a continuance request, the Hearing Officer reconciles two policies: the importance of promptly processing representation cases under the Statute and the obligation to obtain a complete record (see also HOG 17.2). Absent unusual circumstances, before granting the motion for continuance, the Hearing Officer proceeds on those aspects where progress is possible. Such efforts to complete as much of the record as possible before adjourning the hearing may result in the motion being withdrawn.

**18.9.1 Grounds for continuance:**

**18.9.1.1 To bring in additional evidence:** If the ground given for a continuance is to bring in additional, relevant information, the Hearing Officer explores every alternative avenue by which the information may be elicited promptly (e.g., stipulation, adjournment to a more convenient place, etc.). If necessary, and only in rare situations, an adjournment may be avoided by arranging for the close of the hearing subject to the later introduction of an exhibit (see HOG 15.13).

**18.9.1.2 Hearing Officer adjourns hearing when evidence reflects a change in issues and/or a party(ies)' status:** When evidence identifies additional issues that were not contemplated, the Hearing Officer, on his/her own motion, continues the hearing to review the record and the issues, and to notify any additional parties. See *National Park Service*, 55 FLRA 466 (1999) where the Authority found that when the Regional Director decided the issues involved successorship, the status of the former incumbents changed from that of intervenor to incumbent. Therefore, the Authority found that these parties should have been recontacted to confirm their participation in the case .

Before adjourning a hearing when new issues arise to allow the parties to gather relevant evidence:

- a. the record is completed on any issues that were outlined in the Notice of Hearing, and
- b. the Hearing Officer explains to the parties what information is necessary for introduction upon the resumption of the hearing.



When the hearing resumes, the Hearing Officer concentrates on the additional information, but does not exclude other relevant evidence that may be offered.

**18.9.2 Hearing rescheduled:** Continuances may be to a date certain or may be indefinite. In the latter event, the hearing is rescheduled by an Order from the Regional Director to the parties. The Order is made part of the record on the resumption of the hearing. If the basis for the hearing is resolved or becomes moot, the hearing may be closed by Order of the Hearing Officer (see *CHM 59*).

