

K. SUBPOENAS

OVERVIEW:

Section [7132](#) of the Statute provides the statutory basis for issuance of **subpoenas duces tecum** and **ad testificandum** (requiring the production of documents or other evidence or attendance to personally testify). Section [2423.28](#) implements the statutory provisions governing subpoenas.

OBJECTIVE:

To provide guidance concerning the circumstances that do and do not warrant a request for a subpoena, the processing requirements for subpoena requests, and petition to revoke a subpoena.

1. CIRCUMSTANCES WHEN A SUBPOENA IS REQUESTED:

a. *Generally, why a subpoena is needed:*

A subpoena is issued to mandate the attendance of a witness or the production of a document at a hearing. A subpoena is not needed when the parties agree that the appearance of witnesses or the production of documents is necessary and there is no concern about whether or not the witnesses or document will appear at the hearing.

§ [2423.28](#)(a).

b. *In CO cases, subpoenas are usually needed to ensure the release of witnesses:*

It would be unusual for a Charging Party in a CO case to participate for, or on behalf of a labor organization and therefore to be authorized official time to appear as a witness. See § [7131](#)(c) of the Statute. In this circumstance, a subpoena is issued to ensure the witness's presence at the hearing but the Trial Attorney must evaluate the cost versus the benefit of employing this litigation strategy.

See 7th Infantry Division (Light), Fort Ord, California, 47 FLRA No. 82, 47 FLRA 864, 868-71 (1993).

- c. *A subpoena also can be used to establish the nonexistence of critical documents.*
- d. *A subpoena is necessary to ensure the payment of travel and per diem expenses for GC witnesses.*
- e. *A subpoena for documents must be issued to the person who can authenticate documents for admission into evidence.*
- f. **But not:** *Intra-management guidance, advice, counsel, or training within an agency or between an agency and OPM which may be precluded from disclosure by subpoena.*

§ 7132 of the Statute.



When in doubt, discuss litigation strategy with RA or Litigation Specialist.

2. OTHER CONSIDERATION: MILEAGE EXPENSES AND WITNESS FEES:

Section [7132\(c\)](#) provides only for the payment of mileage expenses. Mileage expenses do not encompass travel and per diem expenses incurred by witnesses. See Federal Aviation Administration, Northwest Mountain Region, Renton, Washington, 51 FLRA No. 81, 51 FLRA 986, 990-91 (1996).

See [Part 1, Chapter J](#), subsections 2.f. and g. concerning Official Time and Witness Fees.

3. PROCESSING REQUIREMENTS:

- a. *Subpoena requests to OALJ:*
 - Written requests are filed with the OALJ not less than 10 days prior to the opening of hearing or with the ALJ during the hearing.

- “Requests for subpoenas made less than 10 days prior to the hearing shall be granted on sufficient explanation of why the request was not timely filed.”

§ [2423.28\(b\)](#).



Unless otherwise directed by the RA or RD, when the RD issues a complaint and notice of hearing, the Region sends a standard form, signed by the RA requesting that the OALJ supply seven subpoenas duces tecum and seven subpoenas ad testificandum. For an example of this form, see [ATTACHMENT 1K](#).

b. *OALJ procedures:*


- All requests for subpoenas are honored, if timely requested. See [ATTACHMENT 1K](#) for an example of a Notice that the OALJ will issue sending the subpoenas to the Region that were requested.
- Requests may be made **ex parte**.

c. *Responsibilities of requester of subpoena:*

- i. Completion of specific information in the subpoena.
- ii. Requirements of service of the subpoena:
 - By a person who is at least 18 years old;
 - Who is not a party to the proceeding (we interpret this provision to permit a RO employee who is not involved in the case to serve subpoenas);
 - Certification by person who served the subpoena that s/he did so:
 - By delivering it to the witness in person;
 - By registered or certified mail; or

- By delivering the subpoena to a responsible person (named in the document certifying the delivery) at the residence or place of business (as appropriate) of the person for whom the subpoena was intended.

If this method of service is chosen, the subpoena shall show on its face the name and address of the party on whose behalf the subpoena was issued.

 *Although rarely an issue at hearing, remember to include subpoena forms (those issued by the ALJ pursuant to the Trial Attorney's request or blank forms) in your trial briefcase in case it is necessary to serve a subpoena at that time. After the hearing, destroy any unused subpoena forms.*

d. *Content of subpoena:*

Name and identify the witnesses or documents sought and state the reasons therefore. In general, a **subpoena duces tecum** must be reasonable and seek documents which are material and relevant to the matters at issue in the case. Otherwise, the subpoena may be subject to revocation.

e. *Identifying the person(s) to whom subpoena is directed:*

- i. **Subpoena testificandum** - name and address of the witness sought.
- ii. **Subpoena duces tecum** - name and address of the custodian of the records sought. When in doubt as to the identity of the proper official, name the Respondent's chief official.

Unless the Trial Attorney can independently authenticate documents subpoenaed or if the Respondent will stipulate to authenticity, the Trial

Attorney must require the custodian to appear at the hearing.

- f. *Examples of ways to identify the documents sought:*
- i. All documents, papers, records or other data, of whatever name, nature or description which concern in any way the proposal dated May 1, 1996 to suspend John E. Smith for three (3) days, and the decision dated June 30, 1996 to suspend John E. Smith for three (3) days.
 - ii. All documents of whatever name, nature or description which concern the decision to contract out the work of the switchboard operation at the Respondent's facility in Boston, Massachusetts. Such documents shall include, without limitation, all documents showing any recommendations, deliberations, studies, discussions, considerations and requests for permission, which preceded the Respondent's decision to contract out its telephone switchboard operation.



See [ATTACHMENT 1K](#) for an example of a completed subpoena form.

Discuss with the RA when to serve the subpoena. Unless the RA determines that different litigation strategy should be employed, all subpoenas are served at least 11 days before the pre-hearing conference is scheduled (allows for the expiration of the five-day period within which a petition to revoke may be filed if filing is by mail).

4. **PETITION TO REVOKE AND RULING ON PETITION TO REVOKE:**

- a. *Filing:*

Any person served with a subpoena who does not intend to comply must file a petition to revoke the subpoena with the OALJ within five days after the date of service of the subpoena. If a petition to revoke is filed during the hearing, it is filed with the presiding ALJ.

§ [2423.28](#)(e)(1).

b. *Service:*

A copy of any petition to revoke a subpoena shall be served on the party on whose behalf the subpoena was issued.

§ [2423.28](#)(e)(1).

c. *Ruling on petition to revoke:*

Grounds for revocation under § [2423.28](#)(e)(2):

The ALJ “shall revoke the subpoena if the person or evidence, the production of which is required, is not material and relevant to the matters under investigation or in question in the proceedings, or the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason in law the subpoena is invalid.”

 *The following is an example of “any other reason in law”:*

*The Trial Attorney files a petition to revoke whenever a member of the RO staff is served with a **subpoena ad testificandum** or **subpoena duces tecum** relying on three grounds: (1) there is a limited evidentiary privilege which protects the informal investigational and trial-preparatory processes of regulatory agencies such as the FLRA. See NLRB v. Silver Spur Casino, 623 F.2d 571, 580 (9th Cir. 1980); Stephens Produce Co. v. NLRB, 515 F.2d 1373, 1376 (8th Cir. 1975); Frank Invaldi, 305 NLRB 493 (1991); G.W. Galloway Co., 281 NLRB 262 (1986); (2) the GC has a policy stated in § [2423.8](#)(d) concerning the protection of the identity of individuals and the substance of their statements obtained during the course of the investigation as a means of assuring that all relevant information is obtained; and (3) pursuant to § 2411.11 which concerns compliance with subpoenas, the GC’s written consent is required before “files, documents, reports, memoranda, or records” and/or testimony are produced pursuant to subpoena.*

See [ATTACHMENT 1K](#) for 2 examples of a petition to revoke.

d. *Authority case law:*

Internal Revenue Service, Austin District Office, Austin, Texas, 51 FLRA No. 95, 51 FLRA 1166, 1181 (1996) (Authority found no merit to exception to ALJ's issuance of subpoena where Respondent did not petition to revoke subpoena and there was no evidence that Respondent was prevented from doing so if it believed that the subpoena was improperly issued, and in fact there was no evidence that the subpoena was improperly issued).

5. FAILURE TO COMPLY WITH SUBPOENA:

See [Part 2, Chapter J](#).

Q [Part 1, Chapter J](#) subsections 2.a. and c. concerning Subpoenas and the Reluctant/Hostile Witness;

[Part 1, Chapter J](#) subsections 2.f. and g. concerning Official Time and Witness Fees; and

[Part 2, Chapter J](#) concerning Compliance with Subpoena and Sanctions.

RESERVED

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