IX. POSTELECTION

A. Role of Hearing Officer

The role of the hearing officer in a postelection challenges and/or objections hearing differs from the role of the preelection hearing officer because in a postelection hearing, the hearing officer makes credibility resolutions, findings, conclusions and recommendations. In other respects, however, the roles are similar. The postelection hearing officer conducts the hearing, opens, adjourns and closes the hearing and maintains order while the hearing is in session. The hearing officer listens to and passes on the admissibility of oral testimony and arguments concerning documentary evidence offered. It is to the hearing officer's advantage that a complete record is made because it forms the basis for the Hearing Officer's Report.

The parameters of the hearing on objections/challenges is the Regional Director's Supplemental Decision or Report on Objections/Challenges or Notice of Hearing, which sets forth the objectionable conduct asserted and/or the challenges in issue. The hearing officer must limit the hearing to the matters that the Regional Director has set for hearing. The hearing officer has the authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. *Iowa Lamb Corp*, 275 NLRB 185 (1985); *Precision Products Group*, 319 NLRB 640 (1995); *FleetBoston Pavillion,* 333 NLRB 655 (2001).

The hearing officer does not have access to the Region's investigatory file, nor direct or indirect knowledge of its contents; he/she is only furnished with the Supplemental Decision or Report on Objections/Challenges or Notice of Hearing in advance. Therefore, although the hearing officer should make sure that the record contains all relevant and competent evidence, his/her effort will be without the benefit of the material elicited in any prehearing investigation.

The hearing officer is not an advocate of any position but must be impartial in his/her rulings and conduct both on and off the record. The hearing officer may actively participate during the hearing by asking questions of witnesses. However, the hearing officer should keep in mind that, in a postelection case, the parties have their respective burdens of proof. If necessary, the hearing officer may cross-examine, call and question witnesses and call for and introduce appropriate documents. Under some circumstances, the hearing officer's pursuit of the development of a full record may lead to an appearance of undue assistance to one party or another. The hearing officer should exercise self-restraint, should give the parties an opportunity to develop points and should refrain from needlessly taking over. The hearing officer, while exercising restraint, should also be cognizant that his/her primary responsibility is to see that the record is clear and contains all relevant and competent evidence concerning matters raised at the hearing.

Finally, it is the duty of the hearing officer, on consideration of the record, to make credibility resolutions when necessary, as well as to make findings, conclusions and

recommendations that are fully explained and supported by the facts and analysis contained in his/her report. The content of a hearing officer's report is set forth more fully below in Section L. Pursuant to the General Counsel's guidelines, a Hearing Officer's Report on Objections, Challenges or both should be given priority attention. NLRB Casehandling Manual, Part Two, Representation Proceedings, Sections 11360.1 and 11390.1.

B. Burdens of Proof

1. Objections

In an objections case, the burden is on the objecting party to prove its case. A Board-conducted representation election is presumed to be valid. *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp*., 841 F.2d 191, 195 (7th Cir. 1988); *Progress Industries*, 285 NLRB 694, 700 (1987). Thus, an objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election.

2. Challenges

Generally, the party seeking to challenge a voter's eligibility bears the burden of proving the voter is ineligible to vote. Thus, where a party challenges a voter on Section 2(11) grounds or on other exclusionary grounds (confidential employee status, managerial employee or an employee that should be excluded from the unit), the challenging party bears the burden of proof. It is the obligation of the hearing officer to ask follow up questions and to obtain specific examples when the parties elicit generalized testimony regarding matters in issue, including issues on which the parties have a burden. If parties cannot supply specific examples in support of their generalized testimony, they should be required to state that on the record. Where the testimony is confusing, unclear or incomplete, the hearing officer should ask questions that will clear up the confusion or make the record complete.

(a) Challenges Based on Statutory or Policy Exclusions

As to challenges based upon the purported supervisory status of employees, the burden is on the party who seeks to exclude the employee. *NLRB v. Kentucky River Community Care, Inc.*, 121 S. Ct. 1861 (2001). Additionally, any party challenging voters on the ground that the voter is a manager, confidential employee or independent contractor bears the burden of proof.

(b) Challenges Based on Unit Placement

Certain challenges are based upon the wording of the unit description in the stipulation or Decision and Direction of Election. The Board has held that an agreement for an election is a binding contract and the parties are bound by the "clear and

unambiguous" terms of the agreement. *Caesar's Tahoe*, 337 NLRB No. 170 (2002); *Laidlaw Transit, Inc*. 322 NLRB 895 (1997). The hearing officer should not permit extrinsic evidence in these circumstances. Id. However, certain challenges may require an interpretation of the intent of the parties in entering into the unit stipulation. *Gala Food Processing, Inc*., 310 NLRB 1193 (1993). In this regard, where the unit stipulation is unclear, the Board examines the parties' intent. *NLRB v. Barker Steel Co., Inc.,* 800 F.2d 284, 286 (1st Cir. 1986). In doing so, it may be necessary to resort to extrinsic evidence. *Local Union 1395, International Brotherhood of Electrical Workers, v. NLRB,* 797 F.2d 1027, 1036 (D.C. Cir. 1986). Where the parties' intent remains unclear, community-of-interest principles apply.

(c) Not-On-List (NOL) Challenges

In order to be eligible to vote, the employee must be employed in the unit set forth in the stipulated election agreement or Decision and Direction of Election, employed on the payroll period cutoff date and employed on the day of the election. *Plymouth Towing Company, Inc.,* 178 NLRB 651 (1969). An NOL challenge may be easily resolved with payroll or other personnel records that the hearing officer may view prior to opening the record. The hearing officer must ascertain the reason that the voter was left off the eligibility list. If the employer provides no basis for having left the employee off the list or maintains that the voter is not eligible to vote, but nonetheless refuses to provide payroll records or other determinative evidence, the hearing officer should call witnesses or subpoena the information to resolve the challenge.

(d) Notification to Parties of Burdens of Proof

Prior to the hearing, the hearing officer should specify whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these bases bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

C. Procedural Matters

1. Motions

(a) Adjournments or Postponements

It is the General Counsel's policy that postelection hearings are to be conducted

on consecutive days wherever possible. Since postelection matters are to be resolved with the utmost dispatch, the notice of hearing should be issued as expeditiously as possible and the hearing scheduled at the earliest practical date with notification that it will be held on consecutive days until completed.

If a party requests a postponement at some point during the hearing, authority to grant such a request rests with the hearing officer. However, since the parties were advised prior to the hearing of the matter's urgency and that it would continue on consecutive days until completion, such a request should rarely be granted and only under the most compelling circumstances. When possible, the hearing should proceed on those issues where progress is possible. In some cases, a request for a postponement may be withdrawn after the hearing has proceeded in those aspects on which progress is possible.

If an adjournment or postponement is granted, it should be to a specific date, with the proviso that the hearing will continue on consecutive days thereafter until completed. The hearing officer should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption.

(b) Motions to Strike Testimony

Parties may submit a motion to strike testimony during a hearing. FRE Section 611(a) provides authority for striking direct-examination testimony where the witness was non-responsive on cross-examination. Motions to strike also may be based on incompetent testimony or answers to questions that are opinions rather than facts.

2. Subpoenas

The hearing officer should provide subpoenas to any party making a written request after the opening of the hearing. Subpoenas are available to the parties, subject to the standards set out in Section 102.66(c), Rules and Regulations. Subpoenaed information should be produced if it relates to any matter in question or if it can provide background information or lead to other evidence potentially relevant to the inquiry. *Perdue Farms*, 323 NLRB 345, 348 (1997) (the information needs to be only 'reasonably relevant').

Service of subpoenas may be made by personal service, by registered or certified mail, by telegraph or by leaving a copy at the principal office or place of business of the person required to be served. See Section 102.113(c) and (e), Rules and Regulations. *Best Western City View Motor Inn*, 327 NLRB 468 (1999) (the attorney's affirmation of service is sufficient, without the postal return receipt card). The date of service is the day that the subpoena is deposited in the mail or with a private delivery service that will provide a record showing the date it was tendered to the delivery service or is delivered in person. See Section 102.112, Rules and Regulations.

(a) Petitions to Revoke

Pursuant to Section 102.66(c), Rules and Regulations, parties may seek to revoke subpoenas, either in whole or in part. Petitions to revoke should be in writing and filed within 5 working days after the date of service of the subpoena (also called the "5 day rule"). The date of service for the purposes of computing the time for filing a petition to revoke shall be the date the subpoena is ***received.*** See Section 102.112, Rules and Regulations. However, there are times when petitions to revoke are submitted orally to the hearing officer or the petition to revoke may not be timely filed. Even if the petition to revoke does not explicitly comply with the Rules and Regulations, the hearing officer should rule on the substance of the petition to revoke.

To avoid unnecessary delay, a party seeking to revoke a subpoena may be required to respond in less than 5 working days. *Packaging Techniques Inc.*, 317 NLRB 1252, 1253 (1995). This rule applies to both subpoenas ad testificandum and duces tecum.

The hearing officer must rule on petitions to revoke which are filed after the hearing opens. If the petition to revoke is submitted to the Regional Director prior to the opening of the hearing, the Regional Director may refer the petition to the hearing officer for ruling. At the commencement of the hearing, the hearing officer may immediately be faced with a petition to revoke and may be asked for a ruling without the benefit of testimony. The hearing officer may defer ruling until later in the proceeding when it becomes more apparent whether the subpoenaed information is necessary.

Some of the most common reasons for revocation of subpoenas are:

(1) relevancy and materiality: the hearing officer must determine if and how the evidence sought will aid in completing the record. The hearing officer should require that the parties discuss the relevancy of the subpoenaed documents. The hearing officer should secure the parties' positions to see if there is room for compromise and an alternate source of information that may be satisfactory.

(2) burdensome and oppressive: a party asserts that accumulating documents is too difficult or the number of documents is too voluminous. However, it may be possible to narrow the request and eliminate the basis for the objection. This should be explored by the hearing officer.

(3) confidentiality: the subpoenaed party may contend that the documents to be produced are confidential because, for example, they contain confidential employee information, such as social security numbers or because the subpoena seeks proprietary information. Where confidentiality is asserted, the hearing officer may wish to consider the matter after an in camera inspection. Such an inspection allows the hearing officer to inspect the documents privately, apart from the involved parties, to determine whether the material is relevant, privileged or not producible for other reasons and whether portions of the documents may be redacted to satisfy confidentiality concerns.

(4) failure to tender the appropriate witness fees: if a witness fee was not served with the subpoena, the subpoena is invalid and must be re-served with the appropriate witness fee.

(5) proprietary information, such as production figures and profit and loss statements: The hearing officer may be faced with a claim that wage-related information is proprietary and confidential and not producible.

In sum, as noted above, if a party served with a subpoena contends that the items encompassed by the subpoena are irrelevant, privileged or otherwise exempt from production, the hearing officer should consider conducting an in camera inspection. The hearing officer should also look for areas of compromise, e.g., redaction of certain information or narrowing the scope of subpoena, in order to satisfy the subpoenaing party and allow the hearing to proceed.

Whenever the hearing officer rules on a petition to revoke, his/her rulings and the basis therefor should be clear and on the record, i.e., refer to each item in the subpoena and explain the decision to require production in whole or in part. If a hearing officer rules that some portions of the subpoenaed documents are not producible because, for example, they are irrelevant, or because they seek confidential information, he/she should grant the petition to revoke with respect to those portions of the subpoena and explain the basis for the ruling. The hearing officer may also choose to reserve ruling on all or part of petition to revoke the subpoena until after hearing some testimony, in order to determine whether the subpoenaed information is necessary for a determination of the issues. On occasion, continuation of the hearing, even with an outstanding petition to revoke, may resolve the issue because sufficient testimony is secured and the subpoenaing party is satisfied that production of the documents is no longer necessary. Where there continues to be a dispute about the subpoenaed documents, the subpoena, petition to revoke, the parties' positions and the hearing officer's ruling should be placed on a separate subpoena record. See Section 2(b), Subpoena Record.

(b) Subpoena Record

When there is an ongoing dispute regarding production of subpoenaed documents, a separate subpoena record should be established. To make a subpoena record, the hearing officer should inform the court reporter to stop the proceeding and begin a new transcript for the subpoena record. The subpoena record should include:

(1) a separate copy of the formal papers
(2) a copy of the subpoena at issue
(3) proof of service, and
(4) any written petitions to revoke the subpoena. If there are any written rulings on the petition to revoke, those documents should be included in a Board exhibit. On the record, the hearing officer should indicate the purpose of the proceeding, that a subpoena has been properly served and that the subpoenaed party is refusing to comply with the subpoena. All parties should state their respective positions regarding the subpoenaed documents and the hearing officer's ruling

should be made on the record.

The purpose of a subpoena record is to have a concise record of the dispute for the Regional Director, the Board and the district court.

(c) Subpoena Enforcement

Section 102.31(d), Rules and Regulations, requires the Regional Director to institute enforcement proceedings "unless in the judgment of the [Regional Director] the enforcement of such subpoena would be inconsistent with law and with the policies of the Act." Thus, upon the failure of any person to comply with a subpoena issued and upon the request of the subpoenaing party for enforcement proceedings, the hearing officer should advise Regional management of the enforcement request. After consultation with the hearing officer, the Regional Director will decide whether the subpoenaed documents are necessary for a determination of the issues. If the Regional Director determines that the subpoenaed documents are necessary, then, upon the request of a party, the General Counsel, "shall in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for enforcement of the subpoena." The Region should prepare the enforcement papers, but is not a party to the proceeding and does not assume responsibility for prosecution of the enforcement proceedings. See Section 102.31(d), Rules and Regulations. *Best Western City View Motor Inn,* 325 NLRB 1186 (1998).

(d) Contempt of Enforced Subpoena

If a district court orders compliance with the subpoena and the subpoenaed party continues to refuse to produce documents or to appear for testimony, then, upon request of the party on whose behalf the subpoena was issued, the Regional Director must institute contempt proceedings in U.S. District Court, upon noncompliance with an enforced subpoena. However, contempt proceedings need not be instituted by the Regional Director, absent a request by the party on whose behalf the subpoena was issued. The Regional Director is under no obligation to institute contempt proceedings sua sponte and need only do so upon request of the subpoenaing party. *Best Western* supra. Conversely, the party refusing to comply with the subpoena may be precluded from introducing secondary evidence on the matters covered by the dishonored subpoena. In such cases, the hearing officer should permit a brief offer of proof.

(e) Consequences of Refusal to Comply with Subpoena

When a party refuses to comply with a properly issued subpoena which requests the production of relevant material, the subpoenaing party can try to prove its case by the use of secondary evidence. *Bannon Mills*, 146 NLRB 611, 613 fn.4 (1964) (Board precluded a litigant from using records wrongfully withheld "and secondary evidence regarding matters provable by such records"). In addition, the hearing officer can strike defenses of a party who refuses to comply with subpoenas duces tecum and may also draw adverse inferences. See Section IX, C, 3, Adverse Inferences. In *Louisiana Cement Company*, 241 NLRB 536, 537 fn.2 (1979), the Board precluded the defiant party from

calling company officials and supervisors as its own witnesses where it had failed to comply with subpoenas calling for the testimony of these officials and supervisors.

In a postelection context, where a party has refused to produce documents that the hearing officer has deemed relevant to the issues for hearing, the hearing officer can rule that the refusing party cannot use the evidence it refused to produce to prove its case, either by way of cross-examination or during its case in chief. The hearing officer, on his/her own initiative, can also prevent the refusing party from introducing testimony relevant to issues covered by the material that was not produced. *Perdue Farms, Inc., Cookin' Good Division v. NLRB*, 144 F3d 830 (D.C. Cir. 1998).

The appropriate time to raise an objection to the introduction of evidence (documents or testimony) that a party refused to produce pursuant to subpoena is when the evidence is proffered at the hearing. If a party raises, for the first time, an objection to the evidence in a post hearing brief, it may constitute a waiver of the objection. *Hudson Neckwear Inc.*, 306 NLRB 226 (1992).

3. Adverse Inferences

When a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *Greg Construction Co*., 277 NLRB 1411 (1985). Thus, it may be inferred that the witness, if called, would have testified adversely to the party on that issue. When the missing witness is a supervisor or a manager who is still in the employ of the employer and that person would be the logical witness to testify regarding significant disputed matters, an adverse inference is properly drawn by the employer's failure to call that witness in its defense. The same can be said for a union-side witness. *International Automated Machines, Inc*., 285 NLRB 1122 (1987). There is no requirement that prior notification be given to a party against whom an adverse inference may be drawn. *Douglas Aircraft Co.*, 308 NLRB 1217 (1992).

However, the Board will not draw an adverse inference where a potential witness is equally available to both parties and is a non-party witness. *Local 259 UAW (Atherton Cadillac),* 225 NLRB 421, 422 fn.3 (1976); *Hudson Oxygen Therapy Sales*, 264 NLRB 61, 68 fn.11 (1982). Generally, employees are not presumed to be favorably disposed toward any party and no adverse inference is drawn against a party for not calling an employee witness. *Torbitt & Castleman Inc*., 320 NLRB 907, 910, fn.6 (1996). However, there may be circumstances where the hearing officer may, in making credibility determinations, weigh the party's failure to call a potentially corroborating employee bystander to corroborate the party's witness. *C & S Distributors Inc.*, 321 NLRB 404, fn.2 (1996).

When dealing with a party who refuses to comply with a duces tecum subpoena, the hearing officer may draw an adverse inference. *Teamsters Local 776 (Pennsy Supply*), 313 NLRB 1148, 1154 (1994). The hearing officer may also bar the non-

complying party from asking questions on direct or cross-examination about the subject matter sought by the subpoena. *Perdue Farms*, 323 NLRB 345, 348 (1997). Finally, the hearing officer may permit the introduction of secondary evidence by the party who has been disadvantaged. *Bannon Mills*, 146 NLRB 611, 614, fn.4 (1964). See the discussion of *Bannon Mills* in Section IX, C, 2 (e), above.

4. Factual Stipulations

During a hearing, the hearing officer may find that parties are prepared to enter into stipulations. If the outcome of a stipulation is that the matter, i.e., the challenges or the objections, is fully resolved, the stipulation need not be factual. NLRB Casehandling Manual, Part Two, Representation Proceedings Sections 11361.2 and 11391.2 note the circumstances under which such resolutions may be accomplished. Stipulations that do not fully resolve the matter, i.e., those that result in the continuation of the hearing to resolve other remaining challenges or objections, must be factual. For example, parties may enter into factual stipulations regarding the eligibility or unit placement of employees.

Hearing officers are encouraged to look for those situations in which, in order to avoid protracted testimony, the parties may be able to enter into factual stipulations resolving issues that are the subject of litigation. When parties are prepared to enter into such a stipulation, it should set forth specific facts and not simply legal conclusions. For example, where an individual's Section 2(11) status is in question, the hearing officer should elicit specific facts that establish that said individual is a Section 2(11) supervisor. All parties to the proceeding, including a decertification petitioner, must agree to the stipulation.

A stipulation of fact is conclusive, precluding withdrawal or further dispute by a party joining in the stipulation after the stipulation is accepted. It is not sufficient to secure a stipulation that involves a legal conclusion without supporting facts. Parties should be precluded from entering into stipulations simply agreeing that a particular employee "is a supervisor within the meaning of Section 2(11) of the Act." This holds true for all stipulations that involve eligibility issues.

In postelection proceedings, parties may enter into stipulations on eligibility for the limited purpose of the instant proceeding, i.e., with the understanding that the stipulation will not bind the parties for subsequent proceedings.

5. Admission of Statements or Affidavits In Postelection Hearing

Witnesses in a postelection proceeding may have provided a statement or an affidavit to the Regional Office. This may be an affidavit taken by a Board agent or one prepared by counsel. If the hearing officer is aware or has been advised that the witness provided an affidavit to any federal agency prior to the postelection proceeding, he/she should ensure that the Regional Office requests the agency possessing the statement to release it for use in the Board proceeding. NLRB Casehandling Manual, Part One, *Unfair Labor Practice Proceedings*, Section 10394.7; *Kawasaki Motors,* 257 NLRB 502 (1981). The hearing officer should be prepared to provide the parties with copies of any affidavits in possession of the Region from any pending or closed R or C case. The

affidavits from those case files should be reviewed by Regional Office personnel other than the hearing officer prior to the hearing. Copies should be appropriately redacted and readily available during the hearing. CHM, Sections 11426.1(b) and 11429.2-.3.

If a witness is called at a postelection hearing by the objecting party, another party may request a copy of the affidavit insofar as it relates to the subject matter about which the witness has testified. Such a request may be made only after the close of direct examination. See Section 102.118(b)(1), Rules and Regulations. A request for a witness' affidavit prior to the conclusion of the witness' direct examination is premature. Even if the witness gave a copy of the affidavit to a union agent, production cannot be required by subpoena prior to direct examination. *H. B. Zachary Co.,* 310 NLRB 1037 (1993). If a party subpoenas affidavits prior to the testimony of that witness, that portion of the subpoena should be quashed. Since the proper time for the request to produce an affidavit is at the close of direct examination, if a party seeks the affidavit after the witness has been excused, it is too late to require production. *Walsh-Lumpkin Drug*, 129 NLRB 294, 296 (1960).

If a party contends that portions of the affidavit do not relate to the subject matter of the witness' testimony, the hearing officer may exercise his/her discretion to inspect the affidavit in-camera and redact any portion of the affidavit that does not relate to the testimony. After the hearing officer has completed the in-camera inspection, he/she should note the findings on the record, along with the ruling regarding production of other affidavits.

Once the affidavit has been turned over to the requesting party, he/she may be given a reasonable period of time to examine the document before commencing cross-examination. Section 102.118(b)(1), Rules and Regulations provides that the affidavit can be used to impeach the witness's credibility. Normally, the portion of the affidavit that is inconsistent with the witnesses' testimony should be read into the record. If a party requests that additional sections be read or that the entire affidavit be admitted and if there is no objection to admission of the entire affidavit, it may be admitted into evidence. The hearing officer, when making credibility determinations, may weigh the witness' testimony at the hearing against the prehearing statement provided.

Unless the affidavit has been admitted into evidence, it must be returned to the hearing officer or Regional office representative upon conclusion of cross examination. Note that under Section 102.118(b)(1), Rules and Regulations, parties are not allowed to keep copies of affidavits for purposes other than cross-examination. Thus, parties may not use copies of affidavits for purposes of writing a posthearing brief. NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, Section 10394.9.

6. Audio or Visual Tape Recordings in Postelection Hearing

Issues regarding admissibility of tape recordings (audio or visual) can arise, e.g., when meetings, conferences or other events are alleged as objectionable and they have been recorded. If a party seeks to introduce a tape recording, it is admissible even when

the recording was made without the knowledge or consent of a party to the conversation. *Williamhouse of California Inc.*, 317 NLRB 699 fn.2 (1995). The Board has found the tapes admissible even when the taping violates state law. *Wellstream Corp*., 313 NLRB 698, 711 (1994). Nevertheless, the tape recording must be properly authenticated before its receipt into evidence. Proper authentication of a tape requires, in part, proof of chain of custody, further, an explanation of any editing must be provided by someone with knowledge of the editing. *Medite of New Mexico Inc.*, 314 NLRB 1145, 1146 fn.7 (1994). Hearing officers should be aware that tape recordings are frequently of less than perfect quality and some passages may be inaudible. However, unless the defects are so substantial that they render the entire recording untrustworthy, defects go to weight and not to the admissibility of the recording. *U.S. v. Parks*, 100 F.3d 1300, 1305 at fn.2 (7th Cir. 1996). The *NLRB Division of Judges Bench Book* suggests that the best way to receive evidence of a tape recording is to obtain a stipulation of a written transcript for receipt into evidence, along with the tape if requested.

In postelection cases, parties may subpoena and seek to introduce either audio or visual tape recordings, e.g., a video of electioneering. Tape recordings, either audio or visual, are subject to production by subpoena and are admissible upon proper authentication. *Delta Mechanical Inc.,* 323 NLRB 76, 77 (1997).

7. Immunity

Under Section 102.31(c), Rules and Regulations, if any party desires to obtain testimony from a witness who has claimed a privilege under the 5th Amendment, the party may request an order requiring the witness to testify under a grant of immunity. The Agency must obtain the Attorney General's approval (and possibly that of other state or local enforcement agencies) for transactional immunity, which means for immunity for purposes of the particular proceeding. Under no circumstances may the hearing officer grant requests for immunity. Instead, a memorandum should be sent to the Division of Operations-Management requesting immunity, along with supporting reasons for the request. Operations-Management will handle the request thereafter.

8. Appeals from Rulings

A request for special permission to appeal to the Regional Director or the Board a ruling by the hearing officer on motions, objections and orders should be made promptly and in writing. The hearing officer does not have to adjourn the hearing immediately. The hearing officer may ask that the special appeal be prepared at an appropriate break time. A copy must be served on the Regional Director and the other parties. See Section 102.65(c), Rules and Regulations. The other parties should be given an opportunity to respond to the special appeal.

The request should set forth the ruling, the reasons special permission should be granted and the grounds relied on for the appeal, including the prejudice that resulted from the ruling.

The hearing officer should recess the hearing long enough for the preparation of the request. The hearing should then be resumed, even though the Regional Director or the Board has not passed on the request. Once all evidence is received (other than the issues raised by the special appeal), the hearing should be closed whether or not the Regional Director or the Board has ruled on the special appeal. After ruling on the special appeal, the Regional Director or the Board will take further action as is appropriate.

D. Evidentiary Matters

Representation case hearings are investigatory proceedings. Although it is not required that the rules of evidence and trial procedure be strictly followed, they serve as a guide for helping the hearing officer make a sound record. See Section 102.66(a), Rules and Regulations. The most common objections to evidence are based upon relevance, materiality and hearsay. These issues and other evidentiary matters are discussed below.

Considerations in Ruling on Common Objections

Hearing officers are frequently faced with objections to oral testimony, a line of questioning, types of questions (e.g., leading questions, beyond the scope of direct examination, hearsay, etc.) and documentary evidence. When an objection is raised, the hearing officer should ask the basis for the objection. The other parties' positions should be solicited, and the hearing officer should render a clear ruling on the record (either overruled or sustained) together with a brief statement of the basis for the ruling. The hearing officer should permit the party adversely affected by the ruling to make an offer of proof, if requested (see Section 9, Offers of Proof). Any documentary evidence, which is ruled inadmissible, may be placed in a rejected exhibit file.

1. Foundation

Before a witness testifies on a subject, the record should reflect the basis for his or her knowledge. The basis of the witness' knowledge goes to the competency of that witness to testify about a particular subject. The competency of the witness to testify goes to the weight given that testimony and not admissibility. For example, if a witness testifies about the job duties of employees in a specific classification, the record should clearly establish how the witness obtained the information. Does the witness supervise these employees? Is the witness employed in the job classification being discussed? Is the witness at the facility on a regular basis? When, where, what time and who was present are the types of preliminary fact questions which should be asked to establish the witness' ability and competency to testify. Foundation questions also may help determine if the testimony is going to be relevant. If a witness does not have personal knowledge of facts that are in issue, the hearing officer should ask the party presenting that witness whether a more competent witness is available to testify. Thus, hearing officers should pay attention to the testimony, and, if necessary, interrupt the testimony where it is not probative. In extreme cases, where a party insists on further questioning

of an incompetent witness, the hearing officer should ask for an offer of proof. See Section 9, Offers of Proof.

2. Relevancy

Evidence is relevant if it has a tendency to make more (or less) probable a fact of importance to the issue under consideration. See FRE 401. If the evidence offered is going to be of help in deciding the matter under consideration it should be admitted. If not, then it should be excluded. Relevancy is a factor not only in oral testimony, but also regarding documentary evidence.

Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to the exhibit, the hearing officer should inquire about the relevancy of the document and what it is intended to show. The hearing officer can exercise his or her discretion and determine whether the documents are material and relevant to the issues. If the hearing officer determines that the documents are not relevant and should be excluded, the offering party may request that they be placed in the rejected exhibits file. See Section III, C, Rejected Exhibits. If voluminous documents are offered, the hearing officer should require the offering party to provide a full description and to designate with specificity the portions being relied on. Before ruling on admissibility, the hearing officer should request parties to analyze, preferably on the record, any documents offered; often, thereafter, there is no need to admit the documents. Additionally, the hearing officer should request that the parties submit a summary in lieu of voluminous documents. See Section IX, E, 6, Summaries.

3. Materiality

Materiality is related to relevance but is not identical. Materiality relates to the degree of importance of the evidence. If the evidence is relevant but of miniscule importance, it may be excluded.

4. Hearsay (FRE 801–807)

Hearsay is a statement (oral or written or non-verbal conduct), other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. This usually comes up in the context of a witness testifying about what someone else told him (e.g., ‘‘Joe told me he never works in the warehouse’’). If the testimony is being offered to prove the truth of what is asserted—that Joe never works in the warehouse—this would be hearsay. The witness has no direct knowledge of the fact and the declarant, Joe, a non-party, is not on the stand to be cross-examined about the matter. Similarly, a document may be excluded from evidence as hearsay if it is intended by the person as an assertion of truth of the matter asserted in the document.

The following are *not* hearsay:

(1) Prior inconsistent statements of the witness made under oath and now being

cross-examined;
(2) Consistent prior statements offered to rebut assertions that the statement has been fabricated;
(3) Statements which identify a person;
(4) Admissions of a party or its agents (if made during and relating to the agent's employment) and admissions adopted by a party. For example:

''My supervisor told me that Joe never works in the warehouse.'' 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.

Most common exceptions to the hearsay rule that hearings officers will encounter during a hearing are:

(1) Commercial publications. **FRE 803(17)**. For instance, Dun and Bradstreet reports and newspapers.

(2) Public records. **FRE 803 (8).** For instance, Secretary of State documents, certificates of incorporation and court records. See Section 11, Official/Judicial Notice.

(3) Business records and other records regularly kept (must present testimony by custodian or other qualified witness and establish that such records are regularly kept in the ordinary course of business and relates thereto). **FRE 803 (6).**

Note on Hearsay Evidence: Although there are many technical considerations about hearsay, it is important to remember that it may be received into evidence at an R case hearing in the discretion of the hearing officer. However, hearsay will probably be accorded lesser evidentiary value than non-hearsay evidence. *Northern States Beef*, 311 NLRB 1056 fn.1 (1993) (Administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies). The hearing officer should encourage parties to produce other witnesses or evidence that will be more probative of the point.

5. Leading Questions

A leading question is one in which the questioner suggests an answer to the witness by his or her question and merely receives agreement. In effect, the examiner is doing the testifying. If the proponent of a witness is asking leading questions in significant areas, the witness' responses will be of little assistance. If the hearing officer finds that the questioner is asking questions like, "do charge nurses direct the work of CNAs," he/she should make sure that, on objection or on his/her initiative, the questioner is cautioned not to use leading questions. If the record reflects answers to leading questions, it is likely that the testimony will lack specificity and the hearing officer must obtain specific examples on the record when a witness has answered such leading questions.

In most representation case situations leading questions are acceptable in preliminary areas (e.g., ''You are an employee of the Jones Co.?''). However, try to avoid leading questions during direct examination in critical areas (e.g., ''Isn't it correct that you have the authority to hire and fire?''). The value of the evidence is enhanced if the testimony provided is not an answer to a leading question. Leading questions on direct examination are permissible to refresh recollection of a witness who may have forgotten something (e.g., ''Do you recall anything being said about a truck accident?'') During cross-examination, leading questions are permissible.

6. Common Objections

Here are some common objections raised in postelection hearings and some suggested responses by the hearing officer:

Objection to hearsay testimony:

(a) Objection overruled. The testimony is not hearsay.
(b) Objection overruled. The testimony falls within a hearsay exception (delineate the exception).

Objection to documentary evidence as irrelevant:

(a) Objection overruled. The document is relevant and I will accord it whatever weight is appropriate.
(b) Objection sustained. The document is irrelevant and may be placed in the rejected exhibit file.

Objections to leading questions or questions beyond scope of direct:

(a) Objection overruled. The question is a preliminary or introductory question and thus a leading question is appropriate.
(b) Objection sustained. Counsel is excessively leading the witness and it appears that counsel, not the witness, is testifying.
(c) Objection overruled. This is an investigatory proceeding and, although the question goes beyond the scope of direct, I will allow the question in the interest of establishing a full and complete record.

E. Evidence Issues

1. Best Evidence

Where the contents of a document are in issue, the document is the best evidence available and should be produced. The hearing officer may allow oral testimony about the contents of the document, but should demand the document be produced and question the witness about the document. A copy of the original document is sufficient if there is no dispute about its authenticity or accuracy (i.e., a copy of a signed collective-bargaining

agreement is sufficient). If a document is not available, secondary evidence should be admitted in lieu thereof.

2. Authentication (FRE 901–902)

If there is a question regarding the authenticity of a document, evidence should be obtained to verify that fact. The burden of proof for authenticating a document is slight. The person offering the document has that burden and usually establishes authenticity through a witness who can relate its origin (e.g., showing the letter to the witness, having him/her identify it, establishing the basis for his/her knowledge about the letter). It is common practice to use a copy of the original when there is no dispute about the document's authenticity. This includes allowing the withdrawal of an original document so that a copy may be substituted in the record.

FRE 902 sets forth the type of documents which are self-authenticating. These include, but are not limited to, certified copies of domestic public documents and records, official publications, newspapers and periodicals.

3. Parole Evidence

Parole evidence is oral testimony of a witness offered to contradict or modify the terms of a written agreement. For instance, when the terms of a contract have been embodied in writing, like a collective-bargaining agreement, evidence of contemporaneous or prior oral agreements is not admissible for the purpose of varying or contradicting the written contract. However, extrinsic evidence may be introduced for the purpose of clearing up ambiguities or ascertaining the correct interpretation of the agreement. *Don Lee Distributors*, 322 NLRB 470, 484–485 (1996).

4. Scope of Cross-examination Exceeds Direct Examination

Generally, in adversarial proceedings, cross-examination is limited to matters raised on direct examination and/or matters going to the witness' credibility. This has no application in R case hearings. A cross-examiner should normally be permitted to ask a witness questions pertaining to relevant issues raised in the hearing, regardless of whether the subject was raised on direct examination.

5. Cumulative Testimony

Hearing officers should avoid permitting repetitious testimony on the record. If the hearing officer is satisfied that the record will not be enhanced by redundant evidence, it should be excluded. If the hearing officer finds that a party is eliciting testimony that is unduly repetitious, the hearing officer should ask for an offer of proof regarding the testimony. In such a case, the hearing officer may seek a stipulation that further witnesses would testify similarly. See Section 9, Offers of Proof. However, in a case involving close issues of fact, evidence that is corroborative and pertains to the issue in dispute is not repetitious testimony and should not be excluded. For example, where

charge nurses' 2(11) status is in issue, testimony from various charge nurses regarding the scope of their duties would not be repetitious and should be admitted if each nurse works in a different area of the facility or on different shifts.

6. Summaries

Voluminous documents are frequently reduced to summary form for better understanding. On request, the opposing party is given the opportunity to examine the underlying documentation on which the summary is based. See FRE 1006. The examination may have to be done at periods of time outside of normal hearing hours. The summary is typically received into evidence with the understanding that an objection will be entertained after examination of the underlying documents. In rare cases involving claims of privilege and when the parties agree to do so, the hearing officer may conduct an in camera inspection of the documents to confirm that the summary accurately reflects the underlying documents. If an in camera inspection is performed, the results thereof should be noted on the record.

7. Opinion Evidence

Opinion evidence proffered by witnesses is usually admissible. Opinion testimony commonly deals with such matters as time, distance, speed, etc. These are subjects that an observant person is competent to render an opinion about.

8. Offers of Proof

An offer of proof is generally a statement made by counsel or a representative setting forth the testimony of a witness if the party called that witness to testify. An offer of proof may be made when the hearing officer has ruled that a party may not examine a witness or offer exhibits on a topic to which an objection has been sustained. The party adversely affected by that ruling may ask permission of the hearing officer to make an offer of proof to show the content of the excluded evidence. This enables the reviewer of the record to determine whether it was appropriate to exclude the evidence. Normally, the offer is made in narrative form by counsel stating what the witness would testify to if permitted to answer a particular line of questioning. A question and answer offer of proof should generally not be allowed. On occasion, a party may wish to submit a written statement as an offer of proof. The written statement should be made part of the record as an exhibit.

Cross-examination does not follow the offer of proof. If the hearing officer determines, based on the proffer, that the testimony should be allowed, the hearing officer can reverse his/her earlier ruling on the objection and allow the party to elicit testimony in the area previously rejected by the hearing officer. However, if the hearing officer believes, based on the proffer, that his/her earlier ruling was correct, i.e., that the testimony was properly excluded to begin with, the hearing officer can receive the offer of proof, but state that "the evidence proffered is rejected." The matter is then in the record for the reviewing authority to decide if the hearing officer's ruling was proper.

9. Proactive Use of Proffers

Offers of proof can be an effective tool for controlling and streamlining a hearing. Regional Office practices vary on the use of offers of proof and the circumstances under which their use is appropriate. When a hearing officer elicits offers of proof, he/she will have a better idea of the evidence to be presented and can maintain more effective control over the hearing. This way, the hearing officer can streamline the hearing and exclude potentially redundant or unhelpful testimony.

10. Judicial Notice/Official Notice

Judicial notice allows a court to shortcut the taking of testimony regarding matters that are common knowledge (e.g., Washington, D.C., is the capital of the U. S.). Official notice allows an agency to recognize its own proceedings and decisions (e.g., relevant jurisdictional facts in another Board transcript). Matters arising in a prior case may or may not be dispositive of the current issue. For example, where the Board has asserted jurisdiction previously and a party asserts that the facts have changed, additional evidence may be required. The hearing officer may take official notice at the request of a party or on his/her own motion.

On occasion, a hearing officer will be asked to take either judicial or official notice of other agencies' proceedings or a decision from another Regional Office. For instance, a party may seek to introduce state unemployment compensation proceedings, which may establish a particular employee's eligibility (i.e., an independent contractor finding by a state's agency). The Board admits into evidence and considers decisions in state unemployment compensation proceedings, but does not give the decisions controlling weight. See *Cardiovascular Consultants of Nevada*, 323 NLRB 67, fn.2 (1997). If a party wishes to have official or judicial notice taken of any particular document, that party must produce a copy of the document.

11. Voir dire Examination

When a party offers an exhibit, the other parties may question the witness at that time concerning the exhibit. (E.g., Attorney A: "Mr./Ms. hearing officer, I offer into evidence this letter which is marked for identification as Employer's Exhibit 6 and which the witness has just identified." Hearing Officer: "Mr./Ms. B, any objection?" Attorney B: "May I voir dire the witness about the letter first?" Hearing Officer: "You may.") This interruption in the offering party's examination is permitted in order to clear up any questions the opposing party has about the authenticity of the exhibit. Voir dire questioning about an exhibit should be limited to the admissibility of the exhibit. Voir dire examination should be limited to a few basic questions about a document:

- who prepared the document?

- was the witness present when it was prepared/signed?
- is the document kept in the normal course of business?
- where is it kept?
- if the document is a summary, is the summary based on documents that are kept in the normal course of business; what is the summary based on?

Voir dire examination may also be used to question the competency or qualifications of the witness. See Section 1(a), Foundation. The questioner should not be allowed to question the witness in other areas until his/her normal turn to examine arises. Thus, voir dire questioning should not turn into cross-examination of a witness and the hearing officer should intervene in those circumstances.

12. Rejected Exhibits

If the hearing officer decides not to accept exhibits because they are not relevant or because they are cumulative, the offering party may request that they be placed in the rejected exhibit file. This should be permitted, as it will preserve the documents upon review to the Board. This may come up in the context of an offer of proof when exhibits accompany testimony or statements of the party.

F. Witnesses

1. Oath

Prior to testifying, each person called as a witness should be sworn in by the hearing officer. The hearing officer should ask the following question: "Do you solemnly swear that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth, so help you God?" Affirmation may be used if requested. On recall, a witness need not be resworn but should be asked to signify that he/she understands that he/she is still under oath.

2. Witness' Refusal to Answer Questions

If a witness refuses to answer a question that the hearing officer deems to be proper, the hearing officer can exercise his/her discretion to strike all testimony previously given by the witness on related matters. However, as an alternative, the hearing officer may advise the witness that refusal to answer the question may weigh against his/her credibility.

If a witness appears under subpoena but refuses to answer questions, it is as if the witness did not appear at all. Accordingly, subpoena enforcement proceedings may be appropriate where requested by the subpoenaing party. Under those circumstances, the district court judge should be notified that the subpoenaing party seeks an order compelling the witness to testify.

One way to avoid subpoena enforcement proceedings is to ask the subpoenaing party to wait until the end of the hearing to evaluate whether the subpoenaed witness remains a necessity. The subpoenaing party may find that, at the close of the hearing, there is sufficient record testimony in support of their position and that there is no longer

a need for the subpoenaed witness to testify. Thus, when faced with a request by a party to institute enforcement proceedings, the hearing officer should recommend too that the party await the completion of testimony and evaluate the need for the subpoenaed witness at that time. Note and advise the parties, that a request for subpoena enforcement must be made before the record closes.

3. Failure to Appear

If a subpoenaed witness fails to appear at the hearing and the Regional Director or the hearing officer believes that a decision cannot be made in the absence of that witness' testimony, the Regional Director may consider subpoena enforcement upon the request of the subpoenaing party. However, that process is a lengthy one and the Regional Director or the hearing officer may decide to avoid a protracted proceeding and decide the case without the subpoenaed witness if at all possible. The Regional Director or the hearing officer may also decide to call other witnesses instead of instituting subpoena enforcement proceedings.

4. Foreign Language Witnesses

Although non-English speaking witnesses have always appeared in representation cases, they now appear with greater frequency. Therefore, when preparing for a post election hearing, the Regional office and the hearing officer should be alert to any potential foreign language issue and should ask the parties to apprise the Regional Office promptly of a need for interpreter services. The hearing officer should ensure that appropriate arrangements for interpreters are made in order to avoid unnecessary expense or delay. In the event foreign language witnesses are required, the Regional Office must secure and pay for certified interpreter services. See *Solar International Shipping Agency,* 327 NLRB 369 (1998).

The Agency's limited budget is always a concern in regard to the expenses related to processing representation cases, particularly at hearings. The Regional Office and the hearing officer should take all reasonable steps to reduce costs, including interpreter costs. With respect to interpreter costs, hearing officers should exclude irrelevant and repetitious material from the record. In circumstances where it is unclear that a witness' testimony would be relevant or necessary and the witness would require a translator if called to testify, it may be appropriate for the Region Office or the hearing officer to request that the party which intends to call the non-English speaking witness identify, either through a formal offer of proof or any other satisfactory method, the nature of the testimony to be given by the witness. It may be possible to determine in advance (i.e., prior to retaining an interpreter) whether that testimony will be probative of the issues and require that witness and an interpreter.

5. Board Agents as Witnesses

Parties may seek the testimony of Board agents regarding conduct that occurred during the election. See CHM Section 11429.1. However, under Section 102.118(a)(1),

Rules and Regulations, before a Board agent may testify, the General Counsel must authorize such testimony. In GC Memorandum 94–14, the General Counsel granted Regional Directors the authority to consider and decide whether or not to approve most requests for authorization to allow a Board agent to testify under Section 102.118. Accordingly, a party seeking Board agent testimony must make a request in writing to the General Counsel or, in the circumstances outlined in GC Memorandum 94–14, the Regional Director, pursuant to Section 102.118, Rules and regulations.

Note for the parties that in *Millsboro Nursing & Rehabilitation Center, Inc*., 327 NLRB 879, fn.2 (1999), the Board held that there are important policy reasons for not involving Board employees as witnesses in Board litigation. See generally, *Sunol Valley Golf Co*., 305 NLRB 493 (1991) supplemented by 310 NLRB 357 (1993).

6. Sequestration of Witnesses

A motion for sequestration arises when a party seeks to exclude potential witnesses from the hearing room. The purpose is to ensure that their testimony will not be influenced by the testimony of other witnesses. Sequestration is a matter of right in C cases, not in R cases. *Hamilton Nursing Home*, 270 NLRB 1357 (1984); *Fall River Savings Bank*, 246 NLRB 831 fn.4 (1979) (R cases hearings not adversarial).

Accordingly, in a postelection hearing with multiple witnesses present where credibility of witnesses is at issue, the hearing officer should normally impose a sequestration order. Any request for sequestration should be made at the start of the hearing so it affects all witnesses and parties equally. If presented with such a request, the hearing officer should ask the parties whether the witnesses present in the hearing room are scheduled to or may testify. The hearing officer should then evaluate the position of the parties. If the hearing officer grants a sequestration request, the witnesses should be cautioned not to discuss their testimony with anyone and not to read the transcript testimony of other witnesses unless shown it by counsel for the purposes of rebuttal testimony. The sequestered witness(es) should leave the hearing room until called to testify. Use the following language when imposing a sequestration order:

> **I have granted a request to sequester witnesses. This means that all persons who are going to testify in this proceeding, with specific exceptions, may only be present in the hearing room when they are giving testimony. Each party may select one person to remain in the room and assist it in the presentation of its case. They may remain in the hearing room even if they are going to testify or have testified. The order also means that from this point on, until the hearing is finally closed, no witness may discuss with other potential witnesses either the testimony that they have given or that they intend to give. The best way to avoid any problems is simply not to discuss the case with any other potential witness until after the hearing is completed. Under the rule as applied by the Board, with one exception, counsel for a party may not in any manner, including by showing of transcripts of testimony, inform a witness about the content of the testimony given by a preceding witness, without express permission of the hearing officer. However, counsel for a party may inform counsel's own witness of the content of testimony and may**

show to a witness transcripts of testimony given by a witness for the opposing side in order to prepare for rebuttal of such testimony. I expect counsel to police the sequestration order and to bring any violation of it to my attention immediately. Also, it is the obligation of counsel to inform potential witnesses of their obligations under the order. It is also recommended that as witnesses leave the witness stand upon completion of their testimony, they be reminded that they are not to discuss their testimony with any other witness until the hearing is completed.

As witnesses leave the witness stand upon completion of their testimony, they should be reminded that they are not to discuss their testimony with any other witness until the hearing is completed.

After a witness has testified, the witness can remain in the hearing room. However, if that witness is called on rebuttal after having heard the testimony of others, the hearing officer should inquire as to what testimony the witness heard. The hearing officer can exercise his/her discretion in permitting the witness to testify on rebuttal but evaluate the credibility of that witness based on the testimony that witness provides.

As indicated above, a party is normally allowed to have a representative present in the hearing room to assist counsel during the course of the hearing. This is true even if that representative will later be called to testify. In this regard, an RD Petitioner is also a party, even though he/she may be called as a witness, the RD Petitioner may remain in the hearing room and may have a person assist him or her.

7. Hostile or Adverse Witnesses-Section 611(c) Witnesses

A witness who is either hostile or has interests adverse to the calling party may be asked leading questions and is subject to cross-examination by the party that called the witness. Under FRE 611(c), a witness is considered a hostile or adverse witness when that witness' relationship to the opposing party is such that his or her testimony may be adverse to that party. On rare occasions, FRE 611(c) may arise in a postelection case. A foundation should be laid to establish that the witness falls within the parameters for invoking FRE 611(c). If a dispute arises regarding use of FRE 611(c) examination, seek guidance from Regional Office management.

G. Conduct of Representatives

The Board expects that the parties will conduct themselves in a professional manner at hearings. If a party at a hearing engages in misconduct, the hearing officer should request that he/she conduct him or herself in an acceptable manner. If the party persists in its misconduct, the hearing officer should remind him/her of potential consequences, including sanctions, which could result from his/her behavior.

The Board's rules provide for two sanctions that can be applied to parties who engage in misconduct at hearings. Those sanctions are exclusion from the hearing and suspension or disbarment from further practice before the Board. The conduct of the

party must be of an aggravated nature to justify such sanctions. In addition, the Board has sometimes issued a note of censure or condemnation for less serious misconduct. See Section 102.177, Rules and Regulations and OM 94–6, OM 97-2, OM 01–80; *In re: Stuart Bochner*, 322 NLRB 1096 (1997); and *In re: Joel I. Keiler*, 316 NLRB 763 (1995).

The hearing officer may exclude from the hearing any party or its representative that has engaged in misconduct. The type of misconduct which may justify a hearing officer's invocation of this sanction would include: violence or threats of violence; subornation of perjury; or using rude, vulgar and/or profane language, if egregious. Before invoking the exclusion sanction, the hearing officer should discuss the matter with Regional Office management, as serious due process concerns are raised in this circumstance.

H. Pro Se parties

Unrepresented parties (pro se) may not be familiar with our processes, the pertinent law or their burden of proof. The hearing officer should take the time to explain the process involved and the extent of their obligations, if any, and should be particularly sensitive to any language difficulty problems. The hearing officer should explain the nature of the hearing, burdens of proof (Section B, above) and that he/she has the right to seek subpoenas to compel the testimony of witnesses, to call witnesses and to question witnesses on cross-examination. The hearing officer may also develop areas of testimony which he/she deems critical to the case. However, the hearing officer is not obligated to advocate on behalf of a pro se party and is not required to develop extensive lines of testimony.

I. Prehearing Procedures

1. Research Issues

Prior to the hearing, the hearing officer should research the issues that are set for hearing. He/she should review the Regional Director's Report or Notice of Hearing and the challenges and/or objections to determine the legal issues and research those issues prior to the hearing. When prepared with the applicable case law, the hearing officer will know the evidence that is needed for a complete record. As a start, use *An Outline of Law and Procedure in Representation Cases* or *The Developing Labor Law*.

2. Formal Papers

In advance of the hearing, the formal papers should be prepared. They consist of the following:

(a) Notice of Hearing with objections included or attached;
(b) Regional Director's Report on Objections or Challenges or Notice of Hearing directing a hearing;
(c) Exceptions to the Regional Director's Report on Objections or Challenges or Notice of Hearing;

(d) Any Board decisions on the Regional Director's Report on Objections or Challenges or Notice of Hearing;
(e) Any motions or requests on which prehearing rulings have been made that bear on the issues to be resolved by the hearing.

The formal papers should be placed in one legal backing, in chronological order, and marked as Board's Exhibit 1.

3. Prehearing Discussions

Prior to opening the hearing, the hearing officer should conduct an off-the-record conference to determine the positions of the parties and to discuss procedural matters. During the conference, the parties and the hearing officer can fully explore all potential areas of agreement in order to eliminate or limit, to the extent possible, litigation of issues and the significant costs associated with a formal hearing. The parties should be encouraged to share information and documents at the conference. If agreement is not reached, every effort should be made to narrow the issues that remain for the hearing. The hearing officer should also discuss with the parties the nature of the evidence to be presented and the order in which it will be elicited.

The hearing officer should attempt to resolve all challenges prior to opening the record. For instance, if an employee was left off the list because he/she was hired after the eligibility cutoff date (set forth in the stipulated election agreement or determined in the Decision and Direction of Election) or voluntarily left the employer's employ prior to the date of the election, these matters may be easily resolved with payroll or other personnel records. In resolving the challenges, the parties should execute a written document explaining the resolution of the challenge (e.g., the parties agree that Mr. Jones is eligible to vote because he performs unit work, was employed as of the payroll period eligibility date, and was employed on the day of the election). The hearing officer should explain that the parties may limit their resolution of eligibility to only the purpose of this proceeding.

Prior to the hearing, the hearing officer should specify whether the issues involve a presumption under Board law and identify which party has the burden of rebutting that presumption. If a party raises statutory exclusions, such as Section 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, the hearing officer should indicate, on the record, that the party seeking to exclude employees on these grounds bears the burden of proof.

The hearing officer should also state on the record that a party seeking to rebut a presumption under Board law or to meet a burden of proof must present specific, detailed evidence in support of its position; general conclusionary statements by witnesses will not be sufficient.

4. Requests for Postponements

Once the hearing opens, the schedule for the hearing is determined by the hearing officer. It is the Agency's policy that hearings are to be conducted on consecutive days wherever possible. However, the hearing officer at his/her discretion may adjourn to a later date or to a different place. In so doing, he/she should make an appropriate announcement on the record and notify the court reporting service of the date, time and place of the resumption. The hearing officer should insist upon an adequate basis for any adjournment request prior to ruling on the request. Motions of the parties for postponements may be granted for good cause, bearing in mind the importance of promptly processing the representation case. Unwarranted delay should be avoided and, when possible, the hearing should proceed on those issues where progress is possible. Adjournments or postponements should be to a specific date with the provision that the hearing will continue on consecutive days thereafter until completed.

5. Role of the Regional Director's Representative

The Regional Director may assign a Board agent, designated as representative of the Regional Director, to appear at the hearing to see that evidence adduced during the Region's administrative investigation becomes part of the record. If the Director appoints a representative, the Board agent should be thoroughly familiar with the contents of the Regional Office case file. The primary function of the representative is to see that the relevant evidence adduced during the investigation becomes part of the record. During the hearing, the file should be in his/her possession.

If a representative of the Regional Director is present during the hearing, he/she should make the following statement after entering his/her appearance at the hearing:

I am here as a representative of the Regional Director to see that the evidence adduced during the investigation is made available to the hearing officer. In this function, I may ask some questions and, if necessary, call witnesses. I am not here to advocate on behalf of any party to this proceeding. My services are equally at the disposal of the hearing officer and all parties.

The representative may voice objections, cross-examine, call and question witnesses and call for and introduce appropriate documents. If the information in the representative's possession warrants it, he/she should seek to impeach the testimony of witnesses called by others or contradict evidence that has been presented. However, the Regional Director's representative should not offer new material unless he/she is certain it will not be offered by one of the parties. If the representative finds it necessary to impeach the testimony of witnesses or contradict the evidence that has been presented, the representative must exercise self-restraint and display impartiality.

6. Statements of Witnesses

In preparation for the hearing, it is advisable to prepare copies of the relevant

portions of statements by witnesses. If there is to be a representative of the Regional Director at the hearing, these copies would enable him/her to provide the statements to the parties. In the event there is no representative, these copies should be provided to the hearing officer, prior to the hearing, in sealed envelopes labeled with the names of the affiants, to enable him/her to provide copies as the hearing progresses. These statements are not part of the record and should not be opened or examined by the hearing officer except in connection with their production under Section 102.118(c), Rules and Regulations. For the procedures to follow at the hearing for releasing the affidavits to the parties see Section C, 5, Admission of Statements or Affidavits In Postelection Hearing.

J. Opening the Record

1. General

The hearing officer should keep the record as short as is commensurate with it being complete. In this regard, the hearing officer should ask that the parties to the hearing succinctly state on the record their positions as to the issues to be heard. The hearing officer should also attempt to secure stipulations, wherever possible, in order to narrow the issues and to shorten the record. See Section C, 4, Factual Stipulations. The hearing officer should attempt to exclude irrelevant and cumulative material, including by utilizing offers of proof. See Section E, 8 and 9.

2. Opening Statement

At the commencement of the hearing, the hearing officer should make the following opening statement.

"The hearing will be in order.
This is a hearing before the National Labor Relations Board in the matter of _____- Case No. _____pursuant to the order of the Regional Director/Board dated ____.

The hearing officer conducting this hearing is _____.

The official reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. In the event that any of the parties wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. Exceptions automatically follow all adverse rulings. Objections and exceptions may, on appropriate request, be permitted to an entire line of questioning.

It appears from the Regional Director's/Board's order dated ____ that this

hearing is held for the purpose of taking evidence concerning _____.

In due course, the hearing officer will prepare and file with the Regional Director/Board, his/her report and recommendations in this proceeding and will cause a copy thereof to be served on each of the parties. The procedure to be followed from that point forward is set forth in Section 102.69, Rules and Regulations.

Will counsel and other representatives for the parties please state their appearances for the record? For the Regional Director? Are there any other appearances? Let the record show no response.

Will the parties please identify the issues for hearing and their positions on each issue?

Employer?
Petitioner?
Intervenor?

If the issue involves statutory exclusions, such as 2(11) supervisory status, or exclusions based on policy considerations, such as managerial status, confidential status, independent contractor or agricultural workers, advise the party with the burden that the burden lies with it and say the following:

Please be aware that (e.g., supervisory status) involves a statutory exclusion; the party seeking to exclude employees on these grounds bears the burden of proof. You must present specific, detailed evidence in support of your position; general conclusionary statements by witnesses will not be sufficient.

K. Briefs

In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should be not be permitted. The hearing officer should encourage the parties to prepare closing statements in lieu of briefs, providing them with sufficient opportunity to prepare their statements. Closing statements may include the pertinent case law that each party claims supports its position.

Where a hearing officer permits the filing of briefs, the hearing officer sets the time limits for filing. It is assumed that in the interests of expeditiously resolving a representation question, generally no more than 7 days should be allowed for the filing of briefs.

Parties should be advised that requests for extensions of time to file briefs will not be granted by the hearing officer, except under the most unusual circumstances. A request for an extension to file briefs must contain the specific reasons that a party cannot submit the brief within 7 days.

It should be made clear that a party planning to order a transcript for the purposes of a brief must make arrangements with the reporting service contractor to obtain it on an expedited basis, by pick up, delivery or overnight mail. The hearing officer should also advise the parties that a party's request for an extension of time to file briefs based upon a delay in receipt or the nonreceipt of a transcript will normally be denied in the event arrangements for expedited delivery were not made by the party.

L. The Hearing Officer's Report

1. General

The order directing the hearing always specifies whether the report should be served on the Regional Director or the Board. The form and content of the Hearing Officer's Report will vary according to the case. In general, it should narrate the background material, set forth the facts and apply the appropriate legal analysis. Questions of credibility should be resolved, with the basis for resolution cited. Appropriate recommendations should be made to the Board or the Regional Director. A copy of the Hearing Officer's Report should be served on all parties, including the Regional Director. If the Hearing Officer's Report is filed directly with the Board, eight (8) copies of the report should be sent to the Office of the Executive Secretary.

2. Due Dates

Pursuant to the General Counsel's guidelines, a Hearing Officer's Report on Objections, Challenges or both should be given priority attention. NLRB Casehandling Manual, Part Two, Representation Proceedings, Sections 11360.1 and 11390.1.

3. Credibility Determinations

A postelection hearing officer is required to evaluate the credibility of witnesses and explain his/her credibility findings in the Hearing Officer's Report. The Hearing Officer's Report should lay out credibility findings, including specifying the witnesses found to be credible and the basis for those findings. Where at all possible, they should not be based solely on the demeanor of the witness. It is critical that credibility findings and the basis for those findings be set forth in the report. Accordingly, it is recommended that credibility findings be as clear and explanatory as possible.

To this end, the hearing officer should not only pay careful attention to witnesses' substantive testimony, but also to their demeanor. The hearing office should take detailed notes while observing the witnesses, particularly where there are multiple witnesses, and look for the specificity of the witness' testimony; how detailed it was; its vagueness; whether the witness answered questions even on cross-examination in a direct non-combative manner; the witness' consistency on both direct and cross; whether the witness provided conclusionary responses or implausible explanations; to what extent the witness' testimony contradicted documentary evidence or the testimony of other witnesses; and internal inconsistencies. The hearing officer may evaluate the inherent

probability of events in assessing consistency or the truthfulness of the witness and may discredit a witness in part and credit a witness in part. *Universal Camera v. NLRB,* 340 U.S. 474 (1951). When assessing a witness' credibility, the hearing officer should keep in mind that not every inconsistency or vague response necessarily warrants discrediting that witness or that one does not have to discredit all of a witness's testimony.

4. Structure of Report

(a) Introduction of the Issues

At the outset of the Hearing Officer Report, a short introduction should briefly explain the purpose of the hearing, the issues presented, and the hearing officer's recommendations with respect to those issues, e.g., "Based on my credibility resolutions and the evidence presented, I recommend overruling Objection No. 1 and 3, but sustaining Objection No. 2." See samples on the legal writing bulletin board.

(b) Procedural History of the Case

Thereafter, the Hearing Officer's Report should lay out the procedural history of the case, in particular, the date the petition was filed, the date the parties entered into a stipulated election agreement or the date of the Regional Director's Decision and Direction of Election, the appropriate unit, the date of the election, the Tally of Ballots, the objections/challenges and the Notice of Hearing.

(c) Substantive Organization of the Report

After the explanation of the procedural history of the case, the report should discuss the facts of the case. Objections and challenges should be discussed separately, or in appropriate groupings, including identifying the legal standard involved, the evidence presented as to each objection/challenge (either testimony of witnesses or documentary evidence), the credibility resolutions that relate to the objections/challenges, and the hearing officer's analysis regarding those issues. Do not discuss facts in the analysis unless were previously laid out in the factual section

(d) Conclusions

The hearing officer's recommendations should be clear with respect to each challenge and/or each objection. Here are examples of suggested language to use in challenges and objections cases:

Where the ballots would not be counted:

Suggested language: It is recommended that the challenge to the ballots of Mr. Jones and Mr. Smith be sustained.

Where the ballots would be counted:

Suggested language: It is recommended that the challenge to the ballots of Mr. Smith and Mr. Jones be overruled and that their ballots be opened and counted.

Where objections are found to have merit:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objections No. 1 and 4 be sustained and that the election be set aside.

Where the objections are found to lack merit:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objection No. 2 be overruled and that the appropriate certification issue.

Where some objections have merit and others do not:

Suggested language: Based on the foregoing and the record as a whole, I recommend that [Petitioner's] [Employer's] Objection No. 1 and 3 be overruled, but that Objection No. 2 be sustained and the election be set aside.

(e) Exceptions

CHM Sections 11366.2 (Challenges) and 11396.2 (Objections) set forth the appropriate language to be used regarding the parties' rights to file exceptions to or a request for review of the Hearing Officer Report. [Note: If the report is addressed to the Regional Director rather than the Board, the exceptions language should be modified accordingly.]