

§210.32

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of the investigation. Any admission made by a party under this section is for the purpose of the pending investigation only and is not an admission by him for any other purpose, nor may it be used against him in any other proceeding.

§210.32 Subpoenas.

(a) *Application for issuance of a subpoena—(1) Subpoena ad testificandum.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge.

(2) *Subpoena duces tecum.* An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(3) The administrative law judge shall rule on all applications filed under paragraph (a)(1) or (a)(2) of this section and may issue subpoenas when warranted.

(b) *Use of subpoena for discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that are in the possession, custody, or control of such person.

(c) *Application for subpoenas for nonparty Commission records or personnel or for records and personnel of other Government agencies—(1) Procedure.* An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records

of the Commission, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship or by alternative means.

(2) *Ruling.* Such applications shall be ruled upon by the administrative law judge, and he may issue such subpoenas when warranted. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) *Application for subpoena grounded upon the Freedom of Information Act.* No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. §552) shall be entertained by the administrative law judge.

(d) *Motion to limit or quash.* Any motion to limit or quash a subpoena shall be filed within such time as the administrative law judge may allow.

(e) *Ex parte rulings on applications for subpoenas.* Applications for the issuance of the subpoenas pursuant to the provisions of this section may be made ex parte, and, if so made, such applications and rulings thereon shall remain ex parte unless otherwise ordered by the administrative law judge.

(f) *Witness Fees—(1) Deponents and witnesses.* Any person compelled to appear in person to depose or testify in response to a subpoena shall be paid the same mileage as are paid witnesses with respect to proceedings in the courts of the United States; provided, that salaried employees of the United States summoned to depose or testify as to matters related to their public employment, irrespective of the party at whose instance they are summoned,

shall be paid in accordance with the applicable Federal regulations.

(2) *Responsibility.* The fees and mileage referred to in paragraph (f)(1) of this section shall be paid by the party at whose instance deponents or witnesses appear. Fees due under this paragraph shall be tendered no later than the date for compliance with the subpoena issued under this section. Failure to timely tender fees under this paragraph shall not invalidate any subpoena issued under this section.

(g) *Obtaining judicial enforcement.* In order to obtain judicial enforcement of a subpoena issued under paragraphs (a)(3) or (c)(2) of this section, the administrative law judge shall certify to the Commission, on motion or sua sponte, a request for such enforcement. The request shall be accompanied by copies of relevant papers and a written report from the administrative law judge concerning the purpose, relevance, and reasonableness of the subpoena. The Commission will subsequently issue a notice stating whether it has granted the request and authorized its Office of the General Counsel to seek such enforcement.

§ 210.33 Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) *Non-monetary sanctions for failure to comply with an order compelling discovery.* If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or

(6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure. Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(c) *Monetary sanctions for failure to make or cooperate in discovery.* (1) If a party or an officer, director, or managing agent of the party or person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the administrative law judge or the Commission may make such orders in regard to the failure as are just. In lieu of or in addition to taking action listed in paragraph (b) of this section and to the extent provided