III. 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.

A. Objections: 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, not to its 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, while listening to the testimony, should interrupt 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 B, 8, 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. FRE 401. If the evidence offered is going to be of help in deciding the matter under consideration, it should be admitted; if not, it

should be excluded. Relevancy is a factor not only to oral testimony, but also documentary evidence.

Exhibits are not admissible unless relevant and material, even though no party objects to their receipt. Even if no party objects to an 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 for hearing. 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. 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. Section III, B, 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 nonverbal 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 arises 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 were 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 the hearing officer 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 III, B, 10, 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 relate 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 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 such questions as "do charge nurses direct the work of CNAs," make sure that on objection or on your own 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 preelection circumstances, 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 preelection 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).
(c) Objection overruled. This is not an adversarial proceeding where credibility is in issue and the reader of the record will accord whatever weight is appropriate to the testimony received.

Objection to documentary evidence as irrelevant:

(a) Objection overruled. The document is relevant and the reader of the record 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 not an adversarial 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.

B. 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 and 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 III, B, 8, 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' Section 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. FRE 1006. The examination may have to be done at periods of time outside 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 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.

No cross-examination follows 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 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 agency's proceedings or a decision from another Regional Office. For instance, a party may seek to introduce State unemployment compensation proceedings, which the party contends may have an impact upon an 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. *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. For example: 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 the document being offered:

- 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 and what is the summary based on?

Voir dire examination may also be used to question the competency or qualifications of the witness. See Section A, 1, 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.

C. 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.

D. 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 any other witnesses. In preelection R cases, sequestration of witnesses is not appropriate because the proceeding is non-adversarial in character and credibility questions are not resolved by the hearing officer. It is, however, a decision within the discretion of the hearing officer. Compare Section IX, F, 6, Sequestration of Witnesses, concerning sequestration in postelection hearings.

E. Appeals of the Hearing Officer's Evidentiary Rulings

Parties may appeal the hearing officer's rulings by seeking permission to file a special appeal to any adverse rulings. Section II, H, Appeals From Rulings.