

CHAPTER SEVEN

PREPARATION FOR THE HEARING

Success depends upon previous preparation, and without such preparation there is sure to be failure.

— Confucius

Discovery has been completed, or it has progressed as far as it is going to go, and the case has not yet settled. In practical terms, that means the case will go to a hearing, assuming that the judge does not belatedly dismiss the appeal as untimely or beyond the Board's jurisdiction. Let's take a moment to review the basics of the hearing process.

A significant step in the hearing process is the submission to the judge, known as a prehearing submission, in which you tell the judge more about your case: what you think the important facts and issues are, who your witnesses will be, which documents you plan to introduce into the MSPB record for consideration by the judge, and any other matters that you need to bring to the attention of the judge, so that the judge can address those matters before the hearing. In this last category might be the need for subpoenas for witnesses, mention of any motions seeking to compel discovery that have not yet received a ruling from the judge, the status of any ongoing settlement discussions, and any other motions that may be necessary. Appropriate motions might include motions (by the agency) to dismiss a case or a portion of a case for lack of jurisdiction, motions by anyone to limit evidence from the other side during the hearing (known as motions *in limine*), motions for a continuance or postponement of the hearing date for good cause (set forth in a motion accompanied by a sworn statement or affidavits supporting the motion), motions (normally by the agency) for a security guard to be at the hearing, a motion to take testimony of some or all of the witnesses through videoconference or by teleconference, and motions addressing any other matters that arise in the course of your case.

Each side will have, or should have, submitted to the judge and served the other side with its prehearing submission by the time the judge gets the parties on the telephone through a conference call known as a prehearing conference. That conference call is quite significant. During the conference the judge will discuss several matters with the parties or their representatives: settlement status, who will be witnesses, which documents will be admitted as exhibits, how the various motions will be ruled upon, and a firm time, date, and place for the hearing.

I. PREHEARING ORDER AND PREHEARING SUBMISSION

The formalities of the prehearing process are begun through the issuance by the judge of a prehearing order. The order, generally in a standardized format used by all regional and field offices of the Board, requires the parties or their representatives to submit a written description of the elements of the case to the judge in a particular form, described below, known as a prehearing submission.

A. STATEMENT OF FACTS AND ISSUES

The Board first requires that you state the nature of the case: the underlying facts and issues you think are important for the Board's disposition.

If the case is an adverse action, a removal, for example, that results from alleged misconduct, you would likely set the stage by describing the agency, its mission, your location, position and duties, and exactly what went wrong and led to the action under appeal. You are essentially telling the judge your side of the events. If the agency made allegations that are untrue or inaccurate, say as much. If some of the allegations are true and some are not, tell the judge the areas of disagreement so the judge can focus on those areas during the hearing. If all of the underlying facts are undisputed, that is, you admit to the agency's allegations, tell the judge why the penalty is too harsh or why the allegations have nothing to do with your work situation and

should not merit discipline. To the extent possible, when you make an assertion of fact that is tied to something already in the record (the appeal, the attachments to the appeal, or the agency's response to the appeal and the attachments to that response), give the judge the reference, for example, the name of the document and its tab number, so that the information can be found and verified. Since you will be going to a hearing, not all of the information that will be presented in the hearing is necessarily reflected in the documents that precede the hearing. You can also refer to exhibits and testimony that you expect will be produced during the hearing.

Both sides state the issues they believe are material in the case. In the typical adverse action based upon misconduct, the issues are likely to be whether the misconduct occurred, whether it occurred in the manner described, whether there is a nexus between the misconduct and the agency's operations (usually an issue reserved for cases involving off-duty misconduct), or whether the penalty is unreasonable. There may be other, subsidiary issues, for example, the admissibility of evidence (which might be subject to a claim of privilege).

The appellant may have some affirmative defenses, typically including allegations that an action was discriminatory, that it occurred as a result of whistleblowing reprisal, or perhaps that it occurred as a result of reprisal because of an individual's past military service. Although Board rules allow these affirmative defenses to be raised at any time up to the prehearing conference (and they will often be raised either in the appeal or, on occasion, through an amendment of the appeal), if the allegation of discrimination or reprisal is raised after the prehearing conference, the judge will not likely permit the affirmative defense to be adjudicated unless there is a good reason why the defense could not have been earlier raised.

B. STIPULATIONS

The judge's prehearing order will require the party to identify any factual stipulations. A factual stipulation is an agreement between the parties that a certain fact is uncontested. In many cases there are a lot of facts that are undisputed, and some facts that are disputed, and then there are facts that no one can agree being disputed or undisputed. If the parties can agree upon facts, then those facts need not be proved at the hearing, with the result, in some cases, that some time is saved.

It is probably a waste of time in cases where there are disputes as to facts to try to sort out the facts that are undisputed and to create stipulations. Just creating stipulations takes a lot of time, because people do not agree at first on how the stipulations are to be phrased, so the stipulations go through a drafting process and a review process, which can be quite lengthy. It is easier to have the facts testified to and let the judge draw the conclusions from those facts, whether the testimony is over disputed facts or whether it is over facts that are essentially undisputed.

But there are cases where the facts are truly not disputed and what is in dispute is the penalty. An example might be misuse of a government credit card. The appellant might have used a government credit card to buy a relative a birthday present. It is undisputed that the government card was used for that purpose, so there is no disagreement as to the nature of the transaction, the reason for the transaction, the amount of the transaction, or the timing of the transaction. What is in dispute is whether a penalty is warranted and what the appropriate penalty should be.

C. THE WITNESS LIST

One reason to be careful in describing facts and issues is to provide a basis for the judge to rule on the admissibility of witnesses you wish to call to present testimony during the course of the hearing. If the factual presentation is detailed and ties together events and the individuals involved in those events, then the need for particular witnesses will become apparent. Board judges abbreviate hearings when they can, and judges often expect a fairly strong showing of importance of the testimony for a particular witness before that individual will be approved to testify at the hearing.

There are some witnesses whose testimony is ordinarily going to be admitted without serious dispute. The appellant can testify in his own case as a matter of right, but still the appellant must abide by the rules and list himself or herself as a witness. There are cases where the Board found that the judge properly prohibited an appellant from testifying in his or her own hearing because the appellant did not list himself or herself as a witness. It is not enough to allow the agency to list the appellant as a witness and for the appellant then to seek to testify if the agency ultimately does not call him as a witness. The appellant must separately list

himself or herself as a witness in order to be assured of the opportunity to testify at his or her own hearing.

Other witnesses are generally approved without a lot of fuss, as long as they are listed and their testimony is briefly described in the prehearing submission. These will include the deciding official and, often, the proposing official, the supervisor of the appellant (when the supervisor has knowledge of the circumstances leading to the proposed action), witnesses to significant factual events in the case, and, often, the individual who investigated the background of the case. Witnesses with lesser roles will require more extensive explanation of their expected testimony.

The witness description should include the name, position title, organizational location, geographic address, and general nature of the testimony of the witness. Some descriptions require a little more detail than others. The appellant can state that he or she will testify concerning all matters pertaining to the case, and the deciding or proposing official should not need a lot of description, since his or her role in the case should be evident. Other witnesses will require more description, enabling the judge to ensure that their testimony will relate to the facts and issues, and not be unduly repetitive of the testimony of other witnesses, although some repetition in these cases is unavoidable.

The limiting nature of the description of the testimony in the prehearing submission requires that the nature of their testimony be considered before that submission is prepared, so that important aspects of witnesses' testimony are not omitted, and thereby lost during the presentation of testimony at the hearing. For witnesses whose testimony is described in some detail, the judge will ordinarily limit the party who calls the witness to the areas of testimony that the party listed in the prehearing statement. For example, if the witness was listed as speaking about the facts of a particular event involved in the case, the judge may decide that the witness cannot testify about the character of the appellant if that witness was not also described as having testimony to offer concerning the appellant's character.

Some categories of witnesses require a bit more discussion. Investigators who compiled investigative reports that are part of the agency's response to the appeal would not ordinarily have much to add at a hearing, unless (and this is an important consideration) the investigation is challenged as incomplete, biased, or unless there is a serious question of how accurately the investigator recorded testimony or prepared witness statements. A discovery deposition of the investigator should disclose, prior to the hearing, if there is any real need for the investigator's testimony.

Character witnesses present some concerns. The Board allows character witnesses to support (or diminish) credibility or character, or attest to the habits, of the appellant and other witnesses, e.g., fact witnesses or proposing and deciding officials. A character witness should have some basis that can be articulated for stating that another person is a liar or that another individual habitually acts or fails to act in a certain manner. The character witness may have overheard statements of a witness or individual as to whom the character witness is to testify, or the character witness may have been in a position to observe the behavior of an individual whose character is at issue. Having a bunch of people swear that the appellant is truthful, or not truthful, is important only if credibility is at issue. If the testimony will be cumulative, the judge may limit the number of people who will testify concerning character or habit.

Most witnesses will fall into the category of those who are either witnesses to facts involved in an action or who had some role, procedural or substantive, in the processing of the action under appeal, examples being deciding officials or personnel specialists. Another category of witness includes the expert—the individual who through specialized training or experience can provide testimony on a matter that would not be within the ability of the average person to relate. Expert testimony is most often provided in Board cases through physicians who testify as to the mental or physical capacity or incapacity of an appellant. Other experts who offer testimony or reports in Board cases include: handwriting analysts, psychologists and social workers, ballistics specialists, and attorneys who may testify concerning some particularly arcane aspect of a specialized area of the law. The expert witness may require some special hearing arrangements, most often the ability to be called out of the normal order of witnesses (who otherwise await their turn to testify in a witness room). Generally a judge will, on request, accommodate a busy (and expensive) expert witness by taking the testimony of that individual at the reasonable convenience of that witness, the judge, and counsel—the idea being to set a time for the appearance of that witness so that she or he can arrive at the hearing, testify, and get out of the hearing without undue delay.

D. EXHIBIT LIST

The prehearing submission requires a list of exhibits that you intend to introduce into evidence. These should

be exhibits that are not already in the record. If the exhibits have been attached to the appeal, or if they are included in the agency's response to the appeal, they should not be duplicated separately as exhibits.

Exhibits are supposed to be identified by letter (A, B, C, etc.) for the appellant's exhibits, and by number (1, 2, 3 etc.) for the agency's exhibits. If a particular exhibit runs more than a page, it should be paginated. The pagination should appear either on the exhibit itself, or it should be added by you at the bottom center or right side of the page. Pagination makes it easier for witnesses to find particular sections of exhibits during their testimony, and it also makes it easier to reference a particularly important segment of an exhibit when the exhibit is discussed during oral argument or in a closing brief.

The exhibits are to accompany the prehearing submission to the judge, with a copy to opposing counsel. As part of the prehearing statement, there should be an exhibit list that identifies the exhibit by letter (for the appellant) and with a very brief description of the exhibit (e.g., a memorandum from the deciding official), along with the date of the exhibit.

E. OTHER MATTERS

Although the judge's order describing the contents of the prehearing submission will probably not say as much, it is a good idea to include a section on "other matters" if there are indeed other matters remaining outstanding for discussion or decision at the time of the prehearing conference that will follow review by the judge of the prehearing submission.

Other matters may include the need for subpoenas, the need for special scheduling arrangements for various witnesses, the status of settlement discussions, any outstanding motions that have not yet been ruled upon, ongoing discovery efforts, the need for an interpreter, any special arrangements that must be made to accommodate individuals participating in the hearing who are disabled, and any other matters that could conceivably bear upon the smooth processing of the hearing and orderly adjudication of the case.

II. PREHEARING CONFERENCE

After the judge receives the prehearing submissions from both sides, he will convene a telephone conference call with the parties to conduct a prehearing conference. The purpose of the prehearing conference is to establish the framework for the hearing and also to explore the possibility of settlement, just one more time.

During the conference, the judge will probably first inquire where the parties stand with respect to settlement. If the parties are close to settlement, but not quite there, the judge may consider delaying the hearing to allow the parties a little more time to resolve their differences and come up with a settlement agreement. But some judges will not delay the hearing; instead they will urge the parties to act more expeditiously to achieve settlement prior to the opening of the hearing.

Once the issue of settlement has been considered, the judge will probably state his or her understanding of what the issues are in the case and describe the burdens of proof of each party. The judge will check to see if the parties have come to any stipulations, and the judge may explore what stipulations can be reached if none have yet been agreed upon. Judges do not force the parties to stipulate matters, but they can certainly attempt to state obvious areas where there is no likely ground for disagreement to see if stipulations can be developed. The judge will then review the witness lists and discuss with the parties those witnesses who the judge believes to have no significant information to impart during the hearing process. If a witness has not been sufficiently described as to his or her expected testimony in the prehearing submissions, the judge will probably request some elaboration. The judge will likely also entertain objections from either side as to witnesses that the other side has listed. The judge will announce which witnesses have been approved for the hearing. The judge will also discuss arrangements to take the testimony of individuals who are approved witnesses but who cannot, for good reason, make it to the hearing. The judge might decide to use telephone testimony, or the judge might allow the parties to take a deposition in lieu of hearing testimony, or the judge could set a separate additional hearing date to receive the testimony of an individual who is unavailable on the scheduled hearing date. The judge will also likely describe the areas about which the witnesses are supposed to testify, so that their testimony during the hearing remains relevant to the issues involved in the case.

The judge will then next likely move on to exhibits. Often each side lists many of the same exhibits. If one side does not object to the exhibits of the other side, the judge will probably admit the exhibits into evidence.