CHAPTER 1
DISCOVERY: OVERVIEW AND RULES

I. DEFINITION AND PURPOSE

Discovery is a prehearing process in which parties gather information and learn facts about the other party's case. While many believe that discovery is more useful to the appellant than the agency, good use of discovery is often invaluable to the agency's case. Agency discovery became more significant with the additional, more potent affirmative defenses employees have gained since the last update to this book, such as the Whistleblower Protection Enhancement Act (WPEA) and the Americans with Disabilities Act Amendment Act (ADAAA).

The discovery process begins once the appellant files the appeal. The MSPB receives the appeal and issues the "acknowledgment order." The acknowledgment order is a set of instructions to the parties that is signed by the administrative judge (AJ) assigned to the case. Read the acknowledgment order carefully. Read it again and *make a calendar of deadlines*. The acknowledgment order informs the parties of a large amount of essential information, including the time periods that are relevant to the discovery process. A typical acknowledgment order informs the parties that within 20 calendar days of the date of the order, the agency must file its response to the appeal with the MSPB, certifying that it has also sent a copy to the appellant and/or his or her designated representative. Additionally, the parties have 30 days to begin discovery. The time period is short and can leave the party defenseless should the party fail to start on time. An AJ has wide discretion in rejecting motions to compel due to untimely discovery requests. *Esparza v. Dept. of Air Force*, 22 MSPR 186 (1984). After receipt of the acknowledgment order, it is very important to keep a calendar of all the deadlines pertinent to the case, i.e., the date the agency response is due to the Board, the date discovery must be initiated, the date the discovery responses are due, the date a motion to compel must be made, and the date the agency must contact the employee to discuss settlement. Do not expect the AJ to remind the parties of deadlines. The Board will not find reversible error in an AJ's failing to inform the parties that the time period set for discovery in the acknowledgment order had expired absent an abuse of discretion that prejudiced a party's substantive rights. *See Davis v. Dept. of Defense*, 103 MSPR 516, 523 ¶ 13, 2006 MSPB 293 (2006).

In terms of discovery, the goal is to discover relevant and admissible evidence, but at the onset, the requester need not prove that the evidence *will* be admissible. Instead, 5 CFR 1201.72(a) defines "relevant" as including "information that appears reasonably calculated to lead to the discovery of admissible evidence." *Ryan v. Dept. of Air Force,* 113 MSPR 27, 2009 MSPB 235 (2009); *Beam v. OPM,* 77 MSPR 49, 57 (1997); 5 CFR 1201.72(a). What constitutes relevant information in discovery is to be liberally interpreted, and uncertainty should be resolved in favor of the movant absent any undue delay or hardship caused by such request. *McGrath v. Dept. of Army,* 83 MSPR 48, 51 ¶ 7 (1999); *Bize v. Dept. of Treasury,* 3 MSPR 155, 164 (1980). The scope of discovery is broad: "[d]iscovery covers any nonprivileged matter that is relevant to the issues involved in the appeal." *Baird v. Dept. of Army,* 517 F.3d 1345, 1351 (Fed. Cir. 2008); 5 CFR 1201.72(b).

Discovery is the vehicle to ask questions and obtain documents or answers that could impact the party's ability to present its best case. The central focus of discovery is to find out information that you do not know; however, it is also important for confirming what you think you already know. Both sides can pin the other down in order to clarify the issues and pare issues not in dispute from the appeal. Stipulations may be reached instead of litigating uncontested points and facts. Of course, a major disadvantage of discovery is it may reveal points of fact or law that might otherwise not be recognized by the other side, but discovery is important in plotting a litigation strategy, to include discussing settlement options. At least from your party's perspective, ignorance is never bliss when it comes to litigation.

Advantages to using discovery include, but are not limited to:

- Gain admissions
- Preserve testimony from ill or dying individuals
- Confirm facts thought known
- Find out if there are possible due process violations, such as impermissible *ex parte* communications
- Explore other defenses the party may raise
- Reduce hearing time
- Sharpen testimony and arguments
- Obtain documents and files, to include e-mails, voicemails
- Find out information about potential expert witnesses
- Learn information on timeliness, jurisdiction
- Obtain information in order to file motions to eliminate or pare down the case based on admissions
- Obtain information from persons, corporations and entities who are not parties to the appeal
- Assess witness credibility early in the game
- Obtain information from other agencies with pertinent information
- Find out what is important to the other side for possible settlement ideas

Think about the possible uses of discovery from either the appellant's or the agency's perspective. For example, in a misconduct case, the agency will usually want information about the appellant's bases for the appeal, bases for challenges to the charges, the penalty and how the agency's selection will be challenged, witnesses who will be called, comparator's appellant may raise, and all information about any affirmative defenses. An appellant can raise a new affirmative defense even after the appeal is filed, so it is unwise to believe that all is known from the appeal form. The appellant may want information which the agency may use that is not contained in the case file, information about others who may have provided *ex parte* evidence that might constitute a due process violation, evidence of a disparity in the penalty imposed, the factors and reasoning that the deciding officials considered in taking the action, how the penalty was selected and by whom, who the agency's witnesses will be, or copies of agency directives which may demonstrate a harmful error in the processing of the case.

Information may be obtained during discovery regarding any matter that is relevant to the case. "Relevant" information has been broadly construed to encompass any matter that reasonably could lead to matters pertinent to the case, not just those that are known to have a direct bearing on it at the time the requests are made. What constitutes relevant material in discovery is to be liberally interpreted. Discovery is not limited to the issues raised in the pleadings, for the process itself is designed to define, as well as narrow, the issues. Sometimes discovery is extended to include nonparties having information relevant, but more strictly material, to the case.

Although due process rights for an appellant generally begin before a case is filed with the MSPB, and the Board's attention has increased in ensuring the appellant receives all evidence and aggravating *Douglas* Factors relied upon are provided to appellant prior to a decision being made, rarely is everything of relevance known about the merits of a case when an appeal is filed—from either side of the fence. While an employee generally receives notice of the proposed action, a right to the evidence upon which the agency bases the action, and an opportunity to respond to the proposal prior to a decision being made, much information often remains unexplored.

Once an action is appealed, the only way to fully test the muscle of an agency's case or an appellant's defenses is to engage in further fact-finding. Because the employee often does not engage legal counsel or other assistance until the action is effected against him or her, he or she may be unaware of the possible weaknesses in an agency's case or of affirmative defenses that can be raised in conjunction with the appeal. Agency representatives, on the other hand, often find themselves defending managers who prove to be more unwise or devious than is evident, or who are ignorant in many areas of knowledge important to the complicated area of federal personnel decisions. Information that neither party realizes may affect the outcome of the case begins to surface as accusations are hurled and rebuttals are formed.

Discovery may be conducted against the employing agency, OPM, and other federal agencies with information pertaining to the appeal. *See Templeton v. OPM*, 951 F.2d 338, 342 (Fed. Cir. 1991) (permitting "broad" discovery "from the FAA, OPM and any other government agencies that may have records pertinent to his claim"), but under 5 CFR 1201.72(b), discovery requests directed at a nonparty federal agency must be "limited to information that appears directly material to the issues involved in the appeal." An exception follows for Individual Right of Appeal cases.

Discovery concerning affirmative defenses favors somewhat broader discovery. In *Ryan v. Dept. of Air Force*, 113 MSPR 27, 2009 MSPB 235 (2009), an IRA case stressed the significance of an AJ's reasonable evaluation of discovery requests when the appellant is met with an assertion that the agency has clear and convincing evidence that the challenged personnel action would have been taken in the absence of reprisal. *See Jenkins v. EPA*, 118 MSPR 161, 175–76 ¶¶ 27–28, 2012 MSPB 70 (2012) (whistleblower defense: remanding to AJ, for among other reasons, improper denial of discovery from witnesses whose testimony may have been probative on reprisal issues). In *Markland v. OPM*, 73 MSPR 349, 355 (1997), the Board extended *Abbott v. USPS*, 27 MSPR 442 (1985), *supra*, to hold that "[i]nsofar as the appellant's requested discovery related to his affirmative defense of reprisal, that relationship may constitute a factor favoring somewhat broader discovery." *See McGrath v. Dept. of Army*, 83 MSPR 48, 52 ¶ 9 (1999); *Redd v. USPS*, 101 MSPR 182, 189–90 ¶ 15, 2006 MSPB 32 (2006) (appellant is entitled to obtain evidence that could support his claim of disparate treatment race discrimination).

In summary, discovery is essential for testing affirmative defenses from both sides of the fence. Use the tool to continue assessing the merits of the case. Like any machinery, discovery can only be of use to those who have some idea how to operate it. Discovery improperly used is a waste of time or a form of harassment. Discovery used in a meaningful manner is invaluable and can benefit both parties. And the time to flesh out the case facts is when the case is before the AJ, as absent an abuse of discretion, the Board generally does not disturb the AJ's discovery and evidentiary rulings. *Fox v. Dept. of Army,* 120 MSPR 529, 553 ¶ 42, 2014 MSPB 6 (2014); 5 CFR 1201.58(c).

II. ROLE OF THE ADMINISTRATIVE JUDGE IN INITIAL DISCOVERY MATTERS

Where jurisdiction is clear, at the outset of the appeal, the AJ provides basic discovery instructions to the parties. The Board does not conduct an investigation of the appellant's case on the appellant's behalf. *See Guthrie v. USPS*, 41 MSPR 102, 105 (1989) ("We note that the appellant himself, rather than the Board or the agency, is responsible for preparing and presenting his own defense to the action.").

The individual parties are responsible for initiating and following through on appropriate discovery. *See Cassidy v. USPS*, 65 MSPR 86 (1994). Parties are also expected to start and complete discovery with minimum Board intervention. 5 CFR 1201.71. Said differently, outside of ruling on discovery-related motions, the AJ does not get involved in routine discovery matters. In a case involving OPM and an agency representative who failed to participate in various proceedings, the appellant failed to show that he informed the AJ that he intended to discover information during the processing of the appeal, at the prehearing conference, or at the hearing. If the appellant had so informed the AJ, the AJ could have reminded the appellant of the Board's discovery procedures, answered any questions about discovery that the appellant may have had, and then removed himself from the discovery process). *Helfman v. OPM,* SF-831M-14-0084-I-1 (Nonprecedential 8/18/2014), *citing Christofili v. Dept. of Army*, 81 MSPR 384, 390 ¶ 15 (1999). For *pro se* appellants, it is crucial to know that appellants may not escape the consequences of inadequate representation. *See Wynn v. USPS,* 115 MSPR 146, 2010 MSPB 214 (2010); *Bedynek-Stumm v. Dept. of Agric.*, 57 MSPR 176 (1993).

If there is any doubt on being able to start or complete discovery in a timely manner, parties are advised to utilize the Board's case suspension procedure under 5 CFR 1201.28 which provides that the AJ may issue an order suspending the processing of an appeal for up to 30 days. All that is needed is the request by one or both of the parties early in the appeal. If the suspension request is jointly made and done so early in the proceedings, the parties need not provide evidence and argument to support the request. However, if made by only one party, the party should provide reasons for needing the suspension. Most AJs do not seem to expect an extraordinary reason, but supply whatever is relevant. The

suspension process is described in the acknowledgment order issued after the appeal is filed. It is also described in the Board's regulations. 5 CFR 1201.28 (2015). The AJ may grant a second request to suspend the processing of an appeal for up to an additional 30 days.

Another tool is for a party to ask to dismiss the case without prejudice (meaning it can be refiled) for discovery reasons. A dismissal without prejudice is a procedural option the Board has held is committed to the sound discretion of an AJ. *Burke v. VA*, 94 MSPR 1, 2 (2003). It will be granted at the request of one or both parties or, to avoid a lengthy or indefinite continuance. *Keefer v. Dept. of Agric.*, 92 MSPR 476, 480 (2002); *Milner v. Dept. of Justice*, 87 MSPR 660, 665–66 (2001).

It is also noteworthy, that if the parties decide to use the Board's Mediation Appeals Program (MAP), the processing of the appeal and all deadlines are suspended until the mediator returns the case to the AJ. This provision does not apply where the parties enter into other forms of alternative dispute resolution.

If the party feels the AJ is prejudiced against that party in making discovery rulings, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. In *Easley v. DHHS,* AT-3330-10-0751-I-1 (Nonprecedential 4/6/2012), the Board cited *Oliver v. Dept. of Transp.,* 1 MSPR 382, 386 (1980) and *Bieber v. Dept. of Army,* 287 F.3d 1358, 1362–63 (Fed. Cir. 2002) (quoting *Liteky v. United States,* 510 U.S. 540, 555 (1994)) to state in pertinent part, that an AJ's conduct during the course of a Board proceeding warrants a new adjudication only if the AJ's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible." "[T]he administrative judge did not err in failing to conduct a hearing, responding to the appellant's motion to compel discovery, or determining that the Board lacked jurisdiction to consider the appellant's allegations of prohibited personnel practices."

III. RESPONSIBILITY OF THE PARTIES IN PURSING DISCOVERY

The parties are responsible for beginning and following through on appropriate discovery. *See Cassidy v. USPS*, 65 MSPR 86 (1994).

Do not file the initial discovery with the MSPB AJ; it must be served on the party who is to respond. *Foo v. Dept. of Agric.,* SF-1221-15-0133-W-1 (Nonprecedential 6/3/2015) ("Regarding discovery, the record reflects that the appellant erroneously filed his discovery requests, as well as his responses to the agency's discovery, with the administrative judge, who returned them to the appellant along with an explanation of why he was doing so.")

Parties who fail to exercise due diligence in pursuing discovery are responsible for the absence of evidence to support claims. *See Walton v. TVA,* 48 MSPR 462 (1991); *Yarborough v. Dept. of Justice* 32 MSPR 691, 693 (1987) (the AJ did not deny the appellant discovery where the appellant failed to follow the discovery regulations or file a motion to compel with the AJ). *See King v. Dept. of Navy*, 98 MSPR 547, 552 ¶ 10 (2005), *aff'd*, 167 Fed. Appx. 191 (Fed. Cir. 2006). Appellant must identify the "relevant documents" that were not produced and show that he was unable to properly defend himself or that his substantive rights were prejudiced. *See Karapinka v. Dept. of Energy,* 6 MSPR 124 (1981). *Ingram v. Dept. of Army,* 116 MSPR 525, 2011 MSPB 71 (2011), *aff'd*, ___Fed. Appx.___, 2015-3110 (Fed. Cir. 2015) ("[T]he record, though limited, is complete—the appellant waived a hearing and the parties made their final evidentiary filings in response to the administrative judge's close of record order….While appellant has not preserved any discovery issues for our review, we note that the agency appears to have been less than responsive to the appellant's discovery requests (and the administrative judge was less than thorough in addressing this problem."). Parties must show they complied with the Board's regulations to pursue a potentially successful motion to compel. If not, then a failure to rule is generally deemed not prejudicial to the party's rights. *See Johnson v. Dept. of Justice*, 104 MSPR 624, 638–39 ¶ 30, 2007 MSPB 42 (2007).

Parties are expected to try to work out differences regarding discovery on their own, and such effort must be a good faith attempt. In *McCarthy v. Int'l Boundary & Water Comm'n,* 116 MSPR 594, 619 ¶ 44, 2011 MSPB 74 (2011), *aff'd,* 497 Fed. Appx. 4 (Fed. Cir. 2012), *cert. denied,* 134 S. Ct. 386 (2013), the Federal Circuit determined:

> Mr. McCarthy criticizes a number of discovery and evidentiary rulings by the Board and the administrative judge. We have held that "[p]rocedural matters relative to discovery and evidentiary issues fall within the sound discretion of the board and its officials." *Curtin v. Office of Pers. Mgmt.,* 846 F.2d 1373, 1378 (Fed. Cir. 1988). "If an abuse of discretion did occur with respect to the discovery and evidentiary rulings, in order for petitioner to prevail…he must prove that the error caused substantial harm or prejudice to his rights which could have affected the outcome of the case." *Id.*
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> Mr. McCarthy's primary contention is that the administrative judge abused his discretion in denying Mr. McCarthy's motions to compel. But according to the Commission, Mr. McCarthy's request failed to comply with 5 C.F.R. § 1201.73(e). That regulation states, in part, that "[before filing any motion to compel discovery, the moving party shall discuss the anticipated motion with the opposing party either in person or by telephone and the parties shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement." 5 C.F.R. § 1201.73(e)(1). While Mr. McCarthy claims to have complied with this requirement, the Commission points out that Mr. McCarthy never meaningfully conferred before he filed the motion to compel and that his representatives simply demanded in a single email that the Commission withdraw all objections or he would file a motion to compel. After the administrative judge denied his motions to compel, Mr. McCarthy filed a motion for certification of an interlocutory appeal of the ruling, or in the alternative, for reconsideration. But Mr. McCarthy still failed to explain how he had complied with 5 C.F.R. § 1201.73(e).

In line with this requirement, prior to filing a motion to compel, the party must certify that it made good faith efforts to resolve the dispute. *See Rittgers v. Dept. of Army*, DA-0752-13-0098-I-2 (Nonprecedential 12/26/2013) ("The appellant admits on review that he 'failed to notify the Agency that he was going to submit' a motion to compel; he claimed, however, that such an action would have been 'futile.'). *Latham v. U.S. Postal Service*, 117 MSPR 400, ¶ 73 (2012) (finding that the administrative judge did not abuse her discretion in denying the appellant's motion to compel because, among other things, it did not contain a statement that the parties made a good faith effort to resolve the discovery dispute on their own"). But, the deadline for filing motions to compel if informal efforts to resolve the issue is not successful, is *very short* (10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for a response has expired under 5 CFR 1201.73(d)(3)).

Although the regulations state that a party "must answer a discovery request within the time provided either by furnishing to the requesting party the information requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection," if the party either fails to respond, only partially responds, or attempts to work out the issues do not

result in the needed result within the regulatory time limits, the best offensive move is to file a timely motion to compel after making attempts to discuss the matter with the other party.

Practice Tip

In terms of trying to resolve issues, the author suggests e-mail or written form as it will then be faster to attach those documents to the motion to compel as evidence of the effort. If telephone calls are made, the party will need to document those (dates, what was discussed in terms of the discovery or lack of responses, or messages left), in declaration form.

If the parties are responding to each other, then a joint motion (i.e. with both parties agreeing) can be filed with the AJ to waive or extend a deadline. But even with filing a joint motion, if the AJ does not quickly grant the motion to extend the deadlines, the party should still timely file a motion to compel. It *cannot* be assumed that the AJ will extend discovery. In *Stockton v. Dept. of Interior*, SF-0752-13-0434-I-1 (Nonprecedential 7/18/2014), the appellant filed timely discovery, then sent two "reminders" to the agency, stating he would give the agency a "few more days" before filing a motion to compel. However, the record closed on the case during that time. Appellant filed a motion to compel, but the AJ denied the motion since it was untimely and the record had closed. The *Stockton* case, among many others, shows that the parties must protect their interests. Even if the parties are working in good faith to resolve the issues, the best course is to file the motion to compel on time.

Failure to use discovery is a poor excuse for being unprepared for a hearing, and the failing is unlikely to be looked upon with sympathy by an MSPB AJ. It is the party's right and responsibility to engage in meaningful discovery in order to fully assess and re-assess the strength of a case. If, after the record closes and a decision is made, a party stumbles upon some facts which may have helped the case at the hearing, that evidence, if it was otherwise available prior to the closing of a record and could have been gained through discovery, will not be a valid basis for a petition for review of the initial decision. *See Brown v. USPS,* 62 MSPR 76 (1994); *Radziewicz v. USPS*, 42 MSPR 692 (1990).

The same applies when after reaching a settlement, a party complains that evidence from pending discovery might have proven his or her allegations. Documents which an appellant could have obtained through the discovery process cannot be considered previously unavailable despite due diligence. *Whitaker v. DHHS,* DE-1221-13-0118-W-1 (Nonprecedential 1/22/2015); *Terry v. EEOC,* 111 MSPR 258, 260–61 ¶ 8, 2009 MSPB 77 (2009); *see De Le Gal v. Dept. of Justice,* 79 MSPR 396, 400 (1998) (in the absence of a motion to compel, the appellant failed to show that he exercised due diligence in obtaining evidence), *aff'd,* 194 F.3d 1336 (Fed. Cir. 1999) (Table). Due diligence in pursuing information is required because it is the parties' responsibility if there is an absence of information. One cannot wait and use discovery at the petition for review stage of the case; it must be utilized while the case is pending in before the AJ in the Board's regional or field office. *See Fortson v. Dept. of Navy*, 60 MSPR 154, 158 (1993) (Board regulations do not provide for discovery during the adjudication of a PFR); *see also Mosby v. DHUD*, 114 MSPR 674, 676 ¶ 4, 2010 MSPB 198 (2010).

However, if a party exercised due diligence and the other party did not provide relevant information, this can be cause for a remand. In *Lewis v. VA,* 111 MSPR 388, 392 ¶ 9, 2009 MSPB 96 (2009), the agency failed to provide appellant's representative with possible comparator discipline taken on others for the same offense. After close of the record, appellant's representative obtained that information via another case and filed a PFR on Mr. Lewis' case. The Board found that "Given that the new evidence includes two fairly recent instances of the agency imposing lesser penalties on other employees for seemingly similar misconduct, and the similarity of the circumstances presented in this appeal…we remand this appeal, so that the administrative judge may take evidence and argument with respect to these two employees and the circumstances surrounding the agency's actions against them, and make a new penalty determination." Discovery, however, does have limitations. The methods can only uncover that which is in control of the parties. There is no provision that a party must seek out information which it does not possess in order to respond. Further, discovery is to be used to gain information reasonably calculated to lead to relevant evidence. Not every piece of information in a party's possession is discoverable. Certain types of information are privileged, and are not required to be released.

Moreover, discovery is not the exclusive means through which information can be sought. *Christofili v. Dept. of Army,* 81 MSPR 384, 390 (1999), addressed this issue when an agency objected to an appellant's counsel obtaining information by calling current and former employees of the agency and obtaining statements from them. The agency asserted that the appellant must use the Board's discovery procedures as the sole method of obtaining evidence within the agency's control in a Board appeal. The Board disagreed, stating that there is no regulatory requirement that a party obtain evidence only through the Board's discovery procedures. However, as the Board pointed out in *Christofili* at footnote 3, if a party attempts to obtain relevant information from another person or party without using discovery and the party does not agree to provide the information, the party failing to use discovery has no basis for asserting error or prejudice to his substantive rights by the other party's failure to produce the information. *See Buscher v. USPS*, 69 MSPR 204 (1995).

Make any arguments about discovery matters while the case is before the AJ. The appellant cannot successfully argue that he was denied discovery for the first time in the petition for review (before the full Board, rather than the AJ). The assertion that the agency did not respond to discovery or responded improperly or at a time that did not permit hearing preparation must be made in the proper manner to the AJ before the hearing. *Smith v. OPM*, 31 MSPR 406, 409–10 (1986); *see Johnson v. VA*, DA-3330-12-0214-I-1 (Nonprecedential 11/1/2013) ("Issues relating to discovery must be raised before the administrative judge or they are precluded on review. *Smith v. Office of Personnel Management*, 31 MSPR 406, 409–10 (1986)."); *Chaney v. USPS,* SF-0752-09-0834-I-1 (Nonprecedential 8/25/2010) ("To the extent the appellant is attempting, by this claim, to raise an issue regarding discovery, his failure to have filed a motion to compel below precludes his raising the issue for the first time on petition for review. *Szejner v. Office of Personnel Management*, 99 MSPR 275, ¶ 5 (2005), *aff'd*, 167 F. App'x 217 (Fed. Cir. 2006)."); *Markland v. OPM*, 73 MSPR 349, 354–57 (1997), *aff'd*, *Markland v. OPM*, 140 F.3d 1031 (Fed. Cir. 1998).

If a party disagrees with rulings made by the AJ, it is imperative to preserve the objection on the record. The best course is to request reconsideration of an unfavorable decision, then state again disagreement with the ruling if it remains unfavorable. This preserves the argument on appeal. *Figueroa v. DHS*, 119 MSPR 422, 425–26 ¶¶ 4–6, 2013 MSPB 33 (2013).

Apart from Board discovery processes, an appellant may file Freedom of Information Act requests with not only the agency-employer and also with other agencies. However, the Board cannot enforce such attempts. These tools are discussed more in Chapter 2.

IV. OVERVIEW OF PROCEDURES

A. TIME LIMITS AND PROOF OF FILING

It is virtually fatal to discovery efforts if a party indulges in *playing out* the time limits allowed in the MSPB regulations. To state this differently, take steps not only to *obey* the deadlines given for discovery, but to stay ahead of all deadlines. The reason for this rapid approach is the Board's policy of deciding an appeal within 120 days of receipt. In order for the AJ to make a decision before the 120th day, it is common for the hearing date to be set between 65–75 days of the receipt of the appeal. Approximately a week or so before the hearing, the parties must hold prehearing conference calls and file prehearing submissions, which include exhibits and witness lists. In order to submit the information required for the prehearing submissions, discovery must be completed. The discovery process must be started and completed expeditiously. 5 CFR 1201.73(d)(4) (2012) provides that discovery must be completed within the time designated by the AJ or, if no such period is designated, no later than the prehearing or close of record conference.

This is important in planning approaches to discovery. Having said this, if an agency is dealing with a *pro se* appellant, some representatives find it advantageous to wait until close to the 30-day deadline to initiate discovery so that the appellant is not alerted to the impending deadline to file discovery on the agency. But if this is done, the agency must be prepared to expeditiously move forward as soon as the discovery is due.

If a party is represented, then the other party must serve the representative, not individual witnesses (or the AJ), the discovery requests. In *Muhammad v. Dept. of Army,* AT-315H-14-0356-I-1, AT-1221-14-0160-W-1 (Nonprecedential 8/27/2014), instead of serving his discovery requests upon the agency's representative, appellant served separate sets of requests directly to three different witnesses, which was improper and exceeded the allowable number of interrogatories. The Board found that the AJ did not commit any error in denying appellant's motion to compel.

In calculating and planning the time needed for Board filings there are three important things to know.

(1) "Days" mean calendar days in MSPB proceedings (5 CFR 1201.4 (h)).

(2) Filing dates start with the date of the order, filing, or date on a certificate of service—not on the date a party receives the document, although if mailed, 5 days are added to a party's deadline.

(3) If a deadline falls on a Saturday, Sunday, or federal holiday, the filing period will include the first workday after that date.

Regarding computation of time, Board regulations state at 5 CFR 1201.23:

> In computing the number of days allowed for complying with any deadline, the first day counted is the day after the event [e.g. filing by the other party or an order from the administrative judge] from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date. Unless a different deadline is specified by the Board or its designee, 5 days are added to a party's deadline for responding to a document served on the party by mail.
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> > *Example 1*: If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2.
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> > *Example 2*: The judge orders the appellant to file a response to a jurisdictional order no later than October 15, 2012, and that the agency's response is due 10 days after the filing of the appellant's pleading. If the appellant serves the agency with a pleading via regular mail on October 15, the agency's deadline for filing a response will be October 30, not October 25.

The importance of correctly computing due dates cannot be overemphasized. *Start discovery on time*! If discovery is not timely initiated, it may be deemed waived and the requesting party blocked from initiating discovery, subject to review of the AJ's rulings under a highly deferential "abuse of discretion" standard. *See Key v. GSA,* 60 MSPR 66 (1993). However, keep in mind that such rulings are within the AJ's authority and that the AJ may waive the time limits. *See Schoenrogge v. Dept. of Justice*, 76 MSPR 216 (1997); *McLaughlin v. USPS,* 55 MSPR 192 (1992) (AJ waived Board regulations regarding motions to compel, by improperly issuing a subpoena *sua sponte* compelling the appellant's attendance at a deposition, and by failing to limit the scope of the agency's discovery).

Failure to have a representative, or having an inexperienced or incompetent one, does not excuse missing deadlines. *See Key v. GSA*, 60 MSPR 66, 68 (1993) (refusing to waive the time limit for a *pro se* appellant who later obtained counsel who wanted to pursue discovery; "It is well settled that a delay caused by an appellant's efforts to obtain legal counsel is not good cause for an untimely filing."). The time limit also applies to motions to depose nonparties (along with associated requests for subpoenas). *Masood v. Dept. of Navy*, 49 MSPR 399, 403 (1991) (holding that a delay in initiating discovery is not automatically excused by reason of the inexperience of a representative).

Many appeals are now handled through the Board's electronic appeal system. If using the Board's electronic file system, the day of issuance is presumed as the date of receipt. However, if the acknowledgment order is sent via regular postal service mailing, the regulations appear to give 35 days for a party to start discovery as under 5 CFR 1201.23, unless a different deadline is specified by the Board or its designee, 5 days are added to a party's deadline for responding to a document served on the party by regular mail. Although not regarding a discovery ruling, in *Brown v. Dept. of Defense*, SF-0752-14-0310-I-1 (Nonprecedential 2/25/2015) (the Board found the agency's submission 1 day late; "A petition for review generally must be filed within 35 days after the date of issuance of the initial decision, or if the party filing the petition shows that the initial decision was received more than 5 days after it was issued, within 30 days after the party received the initial decision. 5 CFR § 1201.114(e). Here, the initial decision was issued on November 4, 2014, making its finality date December 9, 2014. The agency's petition for review, however, bears a postmark of December 10, 2014. Pursuant to 5 CFR § 1201.4(l), '[t]he date of filing by mail is determined by the postmark date.' Applying this standard, we find the agency's petition for review untimely filed.").

Never miss the 30-day mark to avoid a problem, but *never ever* miss the 35-day mark.

What does "filed" mean? As explained in 5 CFR 1201.22, "filed" means a document or pleading being served "with the appropriate Board office by commercial or personal delivery, by facsimile, by mail, or by electronic filing under § 1201.14."

Under 5 CFR 1201.22(b)(3), there is useful information about appellants who try to evade delivery or fail to check the address given for the Board appeal:

> (3) An appellant is responsible for keeping the agency informed of his or her current home address for purposes of receiving the agency's decision, and correspondence which is properly addressed and sent to the appellant's address via postal or commercial delivery is presumed to have been duly delivered to the addressee. While such a presumption may be overcome under the circumstances of a particular case, an appellant may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service. The appellant may also be deemed to have received the agency's decision if it was received by a designated representative or a person of suitable age and discretion residing with the appellant. The following examples illustrate the application of this rule:
>
> > *Example A*: An appellant who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision.
> >
> > *Example B*: An appellant who did not receive his or her mail while in the hospital may overcome the presumption of actual receipt.
> >
> > *Example C*: An appellant may be deemed to have received an agency decision received by his or her roommate.

Although the following case law does not necessarily address discovery filings, the rules remain the same for all Board filings.

1. Filing Using Electronic Filing Under 5 CFR 1201.14

Agencies generally must file using the Board's electronic system. One must first register, but it is a simple process. Because initial discovery requests and responses are not filed with the MSPB AJ, do not use the system for this purpose.

However, if discovery-related motions or other pleadings are filed, e-filing can be used, and the party will then usually need to file the discovery as an attachment to the motion. MSPB documents served electronically on registered e-filers are deemed received on the date of electronic submission. Following the instructions at e-Appeal Online, the MSPB's e-Appeal site (https://e-appeal.mspb.gov), is the only method allowed for filing electronic pleadings with the MSPB. The MSPB will not accept pleadings filed by electronic mail (e-mail). If e-filing is undertaken, be sure to read the Board's regulations at 5 CFR 1201.14. If there are any problems with e-filing, the party should file using traditional methods (fax, commercial delivery, USPS) and note the issues with e-filing in the submission. The Board's web page for e-filing also invites parties to comment on the effectiveness of e-filing and if problems are noted, the party may use that vehicle to so state.

Last, if there are problems during discovery, make an objection on the record to adverse rulings in order preserve the objections for appeal. *Ingram v. Dept. of Army,* 116 MSPR 525, 530 ¶ 2 n.4, 2011 MSPB 71 (2011), *aff'd*, ___Fed. Appx.___, 2015-3110 (Fed. Cir. 2015), states:

> [T]he record, though limited,[4] is complete—the appellant waived a hearing and the parties made their final evidentiary filings in response to the administrative judge's close of record order.
>
> > [4] While appellant has not preserved any discovery issues for our review, we note that the agency appears to have been less than responsive to the appellant's discovery requests (and the administrative judge was less than thorough in addressing this problem").

2. Filing by Mail

Note the earlier section on adding 5 days to filings sent by regular mail. *See Brown v. Dept. of Defense*, SF-0752-14-0310-I-1 (Nonprecedential 2/25/2015). The date of filing if using the Postal Service mail stream is the postmark date. *Brown v. Dept. of Air Force,* 64 MSPR 93, 95, n.* (1994), *aff'd,* 47 F.3d 1180 (Fed. Cir. 1995) (Table). Placing a discovery document in the agency's mail stream is not sufficient; without a timely valid U.S. Postal Service postdate on the mailing, the other party may be on good grounds not to answer the untimely request. *See Biddle v. Dept. of Treasury*, 63 MSPR 521 (1994); *McGrath v. Dept. of Defense*, 64 MSPR 112, 115, n.* (1994). However, a party who reasonably establishes that a letter was sealed, properly addressed, and deposited in the U.S. Mail with postage prepaid has a rebuttable presumption that the letter reached the addressee in due course of the mails. *See Stracquatanio v. OPM,* 54 MSPR 529, 532 (1992); *McFarland v. DHHS*, PH-315H-14-0578-I-1 (Nonprecedential 8/19/2014).

A party may submit credible evidence, in the form of an affidavit or sworn statement, to establish that despite a postmark date that appeared to indicate an untimely filing, the pleading was actually placed in the Postal Service mail stream before the deadline passed and was timely filed. *See Odom v. USPS*, 67 MSPR 511 (1995); *Raphel v. Dept. of Army*, 50 MSPR 614, 618 (1991). The *Raphel* rule also applies to pleadings not received. If a party shows by credible evidence that a submission was properly placed in the mail stream, it will be treated as filed on the date it was placed in the mail stream, regardless of whether the party receives it. *See Gaydon v. USPS*, 62 MSPR 198, 201–02 (1994), *review dismissed*, *Gaydon v. MSPB,* 36 F.3d 1113 (Fed. Cir. 1994) (Table). The date of mailing is presumed to be the date the filing was postmarked, but the presumption may be overcome by credible unrebutted evidence in the form of an affidavit or sworn statement showing that the pleading was actually placed in the postal mail stream on a date other than the postmark date. *See Blue v. USPS*, 65 MSPR 370, 373 (1994).

If discovery was filed and the other party claims it was not received or was untimely filed, the requesting party is advised to demonstrate that it acted with due diligence. To show due diligence, the party should submit an affidavit or sworn statement in response to the claim that the discovery was untimely, specifically describing in detail how he or she mailed the discovery and when it was deposited at the Post Office or dropped in a Post Office box. *See McFarland v. DHHS*, PH-315H-14-0578-I-1 (Nonprecedential 8/19/2014) ("Evidence that a letter was sealed, properly addressed, and deposited in the U.S. Mail with postage prepaid gives rise to a rebuttable presumption that the letter reached the addressee in due course of the mails").

2. Filing by Facsimile

The date of filing by fax is the date imprinted on the fax; the fax is timely if filed before midnight of the filing date. *See Dooley v. Dept. of Air Force*, 57

MSPR 684, 686 (1993), *aff'd,* 22 F.3d 1105 (Fed. Cir. 1994) (Table); *Thompson v. Dept. of Navy,* 62 MSPR 145, 147 (1994), *appeal dismissed*, *Thompson v. MSPB,* 36 F. 3d 1114 (Fed. Cir. 1994) (Table). If a party submits credible, unrebutted evidence that a pleading (a petition for review) was submitted by facsimile before the deadline passed, the filing is timely filed. *See Odom v. USPS,* 67 MSPR 511 (1995). In *Odom,* the Board did not have a record of receipt of a petition for review. To show that the submission was timely, the appellant's counsel submitted a facsimile confirmation sheet showing that a transmission was made to the Board by facsimile at 11:34 P.M. on the date of the deadline. Along with the fax sheet, appellant's counsel submitted a declaration under penalty of perjury in which he affirmed he had timely filed the submission. This was accepted as timely filed. Although the cited case law deals with petitions for review, the Board is likely to treat other submissions in the same manner.

3. Filing by Commercial Delivery

If a filing is made by commercial delivery (e.g. Federal Express), then it must be delivered to the overnight company by the due date. *See Loehr v. Dept. of Navy*, 58 MSPR 10 (1993); *Hull v. GSA*, 58 MSPR 187 (1993). Note again the earlier section regarding 5 CFR 1201.22(b)(3). An appellant may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service. *See Giddings v. USPS,* CH-0752-14-0523-I-1 (Nonprecedential 10/30/2014).

4. Filing by Personal Delivery

If a discovery filing is made in person, make certain there is someone present to receive it. Take an extra copy to retain and have it stamped and/or initialed by the person to whom the discovery requests are given. However, the Board accepted an appeal delivered in person after hours on the due date in *Cohen v. Dept. of Commerce*, 56 MSPR 578 (1993). The Board analogized the personal delivery after hours to an after-hours facsimile, or the placing of an appeal into the postal service mail stream. As "days" are counted the same way in discovery-related matters and filing of initial appeals, this interpretation of timely personal delivery is likely to extend to a discovery-related matter.

5. Proof of Filing

It is important to keep a receipt of your discovery filings in the event the timeliness of the filing is challenged. If the discovery is sent by the Postal Service, get a certificate of mailing that clearly shows the date of the filing. If sent by facsimile, save the receipt showing the facsimile numbers and date. For commercial deliveries, save a copy of the manifest and billing form. If delivering in person to the other party, have an extra copy handy so that the person receiving the item can certify receipt by date stamp or initialing. If the other party claims nonreceipt of a discovery filing, send a copy of the proof of mailing and a sworn statement concerning the timely filing to the AJ with the motion to compel discovery. In the event that the party did not obtain proof of the date of filing, the affidavit attesting to the date of filing may be enough. Should the other party fail to rebut the presumption of timeliness, the filing is considered timely. *See Thomas v. Dept. of Defense*, 66 MSPR 546 (1995); *Reynolds v. Dept. of Justice*, 63 MSPR 189, 193 (1994).

B. DISCOVERY INVOLVING NONPARTIES—DIFFERENCES

The three major differences between discovery from nonparties and discovery from a party are: (1) a showing must be made that the information sought *is* directly material to the issues of the case as opposed to the usual standard of being merely reasonably calculated to be relevant; (2) subpoenas must be obtained if the nonparty does not respond to voluntary discovery methods; and (3) the party requesting the presence of a witness must pay witness fees. Those fees must be paid or offered to the witness at the time the subpoena is served, or, if the witness appears voluntarily, at the time of appearance. However, a federal agency or corporation is not required to pay or offer witness fees in advance.

There is one caveat: regarding the "directly material" requirement; the 1994 amendments to the Whistleblower Protection Act, Pub. L. 103B424 § 4 (1994), *codified at* 5 USC 1221(d) give more authority to the Board to issue subpoenas in Individual Right of Action cases:

> (1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

Although no case law was found directly discussing this portion of the statute, note the difference between this language and all other language concerning nonparties. If the case is an Individual Right of Action, the party is not required to show that the evidence *is* directly material. Instead, the lesser standard of "reasonably calculated" to lead to discoverable evidence applies.

As with all discovery matters, time limits for discovery to nonparties must be observed. Voluntary cooperation is to be sought prior to getting the AJ involved, but do not hesitate, after making an attempt to resolve the issues, to file a motion with the AJ within the applicable time frame if there is any doubt as to the nonparty's cooperation. The Board has instructions for how to obtain discovery from nonparties but they are intermingled throughout the regulations at 5 CFR 1201.73 so they are not repeated here.

Discovery requests to nonparties may be made in various forms if voluntary cooperation exists. It is noted that written interrogatories to nonparties are not allowed under FRCP 33, *however,* statute under 5 USC 1204(b)(2)(B), the statute provides that any designated employee of the Board may order responses to interrogatories by any individual. 5 USC 1204(b)(2) provides:

> (2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual—
>
> > (A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and
> >
> > (B) order the taking of depositions from, and responses to written interrogatories by, any such individual.

The Supreme Court, in *Elgin v. Dept. of Treasury*, 132 S. Ct. 2126 (2012), endorsed the Board's authority to order responses to interrogatories without

mention of FRCP 33, finding "[T]he CSRA empowers the MSPB to take evidence and find facts for Federal Circuit review. *See* 5 U.S.C. §§ 1204 (b)(1)–(2) (providing that the MSPB may administer oaths, examine witnesses, take depositions, issue interrogatories, subpoena testimony and documents, and otherwise receive evidence when a covered employee appeals a covered adverse employment action)." Therefore, arguments about nonparties not being required to respond to interrogatories on the basis of FRCP 33 should be non-availing.

In *Arrowsmith v. DHS,* PH-0752-11-0322-I-1 (Nonprecedential 5/17/2013), the Board explained its authority:

> Administrative judges have broad discretion in regulating discovery, and, absent a showing that the administrative judge abused her discretion, the Board will not find reversible error. *Vores v. Dept. of Army,* 109 MSPR 191, ¶ 14 (2008), *aff'd,* 324 F. App'x 883 (Fed. Cir. 2009). Pursuant to 5 U.S.C. § 1204 (b)(2), an administrative judge may issue a subpoena requiring the attendance and presentation of testimony of an individual and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, and order the taking of depositions from, and responses to written interrogatories by, any such individual. *See also* 5 CFR 1201.81(a). Subsection (d) of 5 U.S.C. § 1204 provides that a subpoena may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. Rule 45(b)(3) of the Federal Rules of Civil Procedure, Service in a Foreign Country, provides for issuing and serving a subpoena directed to a U.S. national or resident who is in a foreign country.

Under 5 CFR 1201.73(e):

> *Limits on the number of discovery requests.*
>
> (1) Absent prior approval by the judge, interrogatories served by parties upon another party or a nonparty may not exceed 25 in number, including all discrete subparts.

See Chapter 4 for more information on depositions and the practical aspects of deposing nonparties.

C. INITIAL DISCOVERY REQUESTS AND RESPONSES

It is most critical to start discovery of some type in a timely manner. If a party fails to start discovery within the required time period, it has effectively waived rights to it unless good cause is shown. A delay caused by an appellant's efforts to obtain legal counsel is not good cause for late filing. *See Key v. GSA,* 60 MSPR 66 (1993). However, the AJ can also waive the time limits. *See Schoenrogge v. Dept. of Justice*, 76 MSPR 216 (1997). *Pro se* appellants or those otherwise inexperienced in MSPB matters are not excused from procedural requirements, although the Board does have a policy of construing *pro se* pleadings liberally. However, do not take chances. Even if only a few interrogatories are sent the first round, do not miss the opportunity to begin the process. In MSPB practice, the filing of one set or type of discovery does not preclude filing more discovery prior to responses on the initial requests. If a full discovery request cannot be completed with the initial 25 day period, you do not have to wait until the other party responds to file more.

Even though discovery does not have to be initiated until 30 days from the date of the Board's acknowledgment order, if you are the appellant, begin discovery as soon as the appeal is filed with the Board; if you represent the agency, begin discovery as soon as the MSPB acknowledgment order is received. From an agency perspective, in a case where it is evident that an appeal will be filed, it is smart to have your discovery ready and filed *prior* to responding to the Board's acknowledgment order because the Board's proceedings move very quickly. The Board usually renders the initial decision within 120 days, so the parties often do not complete discovery before a hearing is scheduled and held. Do not allow yourself the luxury of using the Board's outer time limits in discovery matters.

Alternative Strategy

Despite the author's advice, an alternative strategy is to deliberately delay beginning discovery until the last minute in the hope that the other party is either not aware of the procedures or has let the time period pass them by. If you use this tactic, the first discovery request is safely filed on about the 28th day of the period under 5 CFR 1201.73(d), by regular mail. If dealing with a party not familiar with MSPB proceedings and has not filed discovery, the advantage is that the requesting party will be able to obtain information, and the untimely party, not aware that this tool should be used, will not.

Once filed, the other party has 20 calendar days to respond (5 CFR 1201.73(d)(2)) after the date of service of the request. This is a short time. Prior to the 2012 amendments to the Board's regulations, the Board did not count out the time that regular mail took to reach a party, now however, the regulation under 5 CFR 1201.23 adds 5 days to respond if a document is served by regular mail.

The serving party must inform the other party of the time limits for response (5 CFR 1201.73(a)). See samples of introductory language and definitions in Chapter 3. Given the frequent confusion on how to count "days," it helps to list the actual date the response is expected rather than merely stating that the party has 20 "days" to respond.

If objections are filed to the discovery, no response is received, or the response is deemed improper or inadequate, the requesting party has 10 calendar days from the date the response should have been received or the inadequate response was filed to file a motion to compel discovery.

Motions to compel are discussed in more detail later in Chapter 9; however, it is worth noting here that motions must be filed appropriately, with all needed attachments. A motion filed concerning a discovery dispute must have as attachments:

- A copy of the discovery request at issue
- A copy of the response, if responses of any kind were received, and
- If *no* discovery response was received, a statement that no response has been filed, along with an affidavit or sworn statement under 28 USC 1746 attesting to the non-receipt.

A party should send the AJ *and* the other party the above documents, with arguments about why the discovery is reasonably calculated to lead to relevant evidence regarding the case. Also, the party must send the motion along with a certificate of service. A certificate of service is a list of

the names and addresses of the parties to the proceeding or their representatives, which states the date and method by which a filing was made. Sample styles of certificates of service are included in later chapters. The certificate may be created as a separate page, or at the end of the motion. Any pleading by the other party in opposition to a motion to compel or subpoena discovery must be filed with the AJ within 10 days of the date of service of the motion. Under the *Judges' Handbook*, Chapter 5 (2)(b), "Motions that are clearly without merit, inexplicably late, or clearly non-controversial, may be ruled on without seeking input from the opposing party. If an objection is received after a ruling is made, the AJ, according to the circumstances, may treat the objection as a Motion for Reconsideration." Before filing a motion to compel, counsel seeking to file the motion will first have to attempt adjustment of the dispute with opposing counsel, a process discussed in Chapter 9.

Returning to discovery requests, if an adequate response to the initial discovery request is received, but sparks more questions or a need for more documents, the requesting party has 10 calendar days from the date of service of the first response to file additional discovery, unless otherwise directed by the AJ (5 CFR 1201.73(d)(2)). More discovery requests are untimely if made *after* the 10 day filing period following the prior response to discovery. *See Richard v. Dept. of Defense*, 66 MSPR 146, 156 (1995). The Board can be harsh on deadlines, even for *pro se* appellants. In *Lopez v. Dept. of Army,* SF-0752-13-3992-I-1 (Nonprecedential 7/23/2014), an appellant who appeared to be diligent in pursuing discovery, but claimed he did not "clearly understand" the process for compelling discovery was deemed untimely on a number of issues, including filing follow-up discovery one day late.

As discussed in numerous parts of this book, time becomes very short in MSPB discovery matters. It is not unusual for responses to be produced at the last minute. Remember the AJ's broad hand in discretionary matters. Already said but repeated here—keep a calendar of all deadlines. A party may wish to also annotate the calendar a few days in advance of each deadline to stay apprised of deadlines and have to time to attempt to resolve issues with the other party and/or prepare motions, as needed.

D. SUBSEQUENT DISCOVERY REQUESTS AND RESPONSES

Any discovery requests following the initial request shall be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed by the AJ. 5 CFR 1201.73(d)(2). This rule is mentioned in precedential decisions that enforce the rule, an example being *Richard v. Dept. of Defense*, 66 MSPR 146, 156 (1995):

> …In a discovery request dated May 23, 1994, the appellant sought, among other things, transcripts of grades for students who were involved in parent–teacher conferences with the appellant, performance appraisal forms for each teacher that was evaluated by the school's principal, and copies of each letter written by a fellow teacher regarding each conference that he attended in his role as a Teacher. In order for this May 23, 1994 discovery request to be timely filed, it must have been served within ten days of the date of service of the prior response. *See* 5 CFR § 1201.73(d)(2). Our review of the record indicates that the prior response to the appellant's initial discovery request was dated May 10, 1994. The appellant has not shown that she served her May 23, 1994 discovery request within ten days of the date of service of the agency's May 10, 1994 response. Thus, we find no error in the administrative judge's determination that the appellant's May 23, 1994 discovery request was untimely filed. We also discern no error in the administrative judge's finding that the information requested was not relevant or reasonably calculated to lead to the discovery of admissible evidence. *See* 5 CFR § 1201.72(a)–(b).

The Board, to date, occasionally mentions this rule in decisions, and does not generally disturb the discretionary decisions of its AJs on procedural matters. *See Lopez v. Dept. of Army,* SF-0752-13-3992-I-1 (Nonprecedential 7/23/2014) (follow-up discovery one day late).

However, for cases being adjudicated on the record, it may be error for an AJ to cut off discovery before the period for discovery closed. In *Lynch v. Dept. of Defense*, 114 MSPR 219, 222–23 ¶¶ 6–11, 2010 MSPB 117 (2010), the Board remanded a VEOA case for completion of discovery and for the opportunity to the appellant to use the fruits of discovery when the AJ issued an initial decision before the period for discovery closed:

> The parties' actions regarding discovery were consistent with the guidance provided in the Board's regulations, i.e., that the parties attempt to resolve discovery disputes between themselves "with a minimum of [administrative judge] intervention." 5 CFR § 1201.71. The administrative judge should not have issued the initial decision when she knew or should have known that the time limit for the parties to submit evidence obtained through discovery had not expired.

E. METHODS OF OBTAINING ADDITIONAL TIME FOR DISCOVERY

Either or both parties may need to delay the start of discovery, or have additional time to complete it. Various samples are included in this chapter for requesting additional time for discovery. If an appellant is looking for a representative or just trying to figure out how to start discovery on his or her own, appellant should file a simple motion right away, asking to suspend the case under the procedures. Suspensions can be granted twice for 30 days each and very little justification is needed to support such a motion if timely. The procedures for doing so follow and a sample is at the end of this chapter. Also included below is information for cases that will be mediated using the MSPB Mediation Appeals Program (MAP). If parties engage in MAP, discovery will be suspended if using the program. If the case is suspended, the AJ will likely not rule on any issues or motions during the suspension period.

> 5 CFR § 1201.28 *Case suspension procedures*.
>
> (a) *Suspension period*. The judge may issue an order suspending the processing of an appeal for up to 30 days. The judge may grant a second order suspending the processing of an appeal for up to an additional 30 days.
>
> (b) *Early termination of suspension period*. The administrative judge may terminate the suspension period upon joint request of the parties or where the parties request the judge's assistance and the judge's involvement is likely to be extensive.
>
> (c) *Termination of suspension period*. If the final day of any suspension period falls on a day on which the Board is closed for business, adjudication shall resume as of the first business day following the expiration of the period.
>
> (d) *Mediation*. Whenever an appeal is accepted into the Board's Mediation Appeals Program (MAP), the processing of the appeal and all deadlines are suspended until the mediator returns the case to the judge. This provision does not apply where the parties enter into other forms of alternative dispute resolution.

Practice Tip

Another option is to file a short request for an extension to complete discovery, but in recent times, the author notes that the suspension procedure seems to be preferred by AJs.

If more discovery is contemplated, do not wait to file for a suspension or extension. Either complete discovery quickly, or file a motion for an extension or for a suspension of the case on time with the AJ. If a suspension is granted, then postponement of other deadlines and the hearing date will also likely occur—if this is desired, it should be requested when filing a motion.

Another option when a lengthy period may be needed is for a party to ask for a dismissal without prejudice to complete discovery. An AJ may order a dismissal without prejudice at the request of one or both parties, or to avoid a lengthy or indefinite continuance. *Gingery v. Dept. of Treasury,* 111 MSPR 134, 138 ¶ 9, 2009 MSPB 59 (2009). In *Camyn v. VA,* SF-0752-15-0549-I-1 (Nonprecedential 7/24/2015) (AJ dismissal 2015), the parties made a joint request for a lengthy postponement for purposes of engaging in mediation and, if necessary, concluding discovery. Good cause was shown and the request was granted.

What the best option is depends on the circumstances of the case and parties. The Board has determined that the need to complete discovery is a valid reason to either delay a hearing or dismiss the appeal without prejudice for a reasonable time period pending completion of discovery. *See Gardner v. Dept. of Treasury*, 68 MSPR 258 (1995). The AJ has the authority to change the time, place, or date of the hearing or suspend, adjourn, or continue the hearing by regulation (5 CFR 1201.51(b)). The AJ also has the authority to waive a Board regulation unless a statute requires application of the regulation (5 CFR 1201.12). Because of this flexibility, the AJ has the discretion to vary the course of events if valid arguments to support the need for more time for discovery are made, especially if the party makes sound pleadings that the case cannot be fairly adjudicated within the Board's usual 120-day adjudication period.

V. THE PRICE OF NOT USING DISCOVERY OR USING IT POORLY

A. FAILURE TO USE DISCOVERY

Use the relevant fruits of discovery. Any surprises that occur at a hearing as a result of the poor use of discovery are the fault of the representatives or *pro se* appellant, not the AJ. The acknowledgment orders issued by AJ provide discovery instructions.

Once this acknowledgment order is issued, the parties have clear direction to start discovery. If discovery is not pursued, the Board will not entertain a claim of harm because of failure to receive information. Arguments from a party are properly rejected when the party fails: to comply with the Board's orders concerning discovery and fails to initiate discovery in a timely manner; to file a motion for an extension of time to engage in discovery before the record closes; or to file a motion to compel discovery. *See Sanders v. Dept. of Army*, 64 MSPR 136, 140 (1994). A claim that failure to produce documents at a hearing caused harm in the presentation of a party's case is invalid if the party could have obtained the information through discovery. *See Armstrong v. USPS*, 28 MSPR 45, 48 (1985). If the party fails to exercise due diligence in pursuing discovery, that party is responsible for the absence of evidence to support or to defend claims. *See Walton v. TVA,* 48 MSPR 462 (1991); *Head v. OPM*, 53 MSPR 421 (1992).

Discovery is not the exclusive means through which information can be sought. If, however, a party attempts to obtain relevant information from another person or party without using discovery and the party does not agree to provide the information, the party failing to use discovery has no basis for asserting error or prejudice to his substantive rights by the other party's failure to produce the information. *See Buscher v. USPS*, 69 MSPR 204 (1995); *see also Christofili v. Dept. of Army*, 81 MSPR 384 (1999) (parties may obtain evidence through any lawful means, but a party who fails to use discovery has no basis for later claiming error because the evidence was not produced).

As pointed out in *Christofili*, a party may obtain information through any *lawful* means. Surreptitiously searching through desks and papers and photocopying the sensitive information of other employees is not a proper discovery technique. An appellant's perceived need to obtain documentation for his defense would in no way justify an indiscriminate search through other employees' desks and papers. *See Heath v. Dept. of Transp.*, 64 MSPR 638, 651 (1995). This has held true in more recent cases. A detailed explanation of the factors involved in determining whether an employee's use of sensitive records is reasonable is found in *Bennett v. DHHS,* CH-0752-12-0193-I-1 (Nonprecedential 4/2/2014), citing to *Niswander v. Cincinnati Insurance Co.,* 529 F.3d 714, 722 (6th Cir. 2008).

Practice Tip

Use discovery instead of pilfering through agency records to defend yourself in a case.

B. INCOMPLETE OR DEFICIENT DISCOVERY

It is important to explore what the other side knows or has access to about the case. An appellant who does not explore his own affirmative defenses with discovery cannot later claim that an agency engaged in bad faith by not producing information. In *Spates v. USPS*, 68 MSPR 9, 13 (1995), the appellant raised the affirmative defense of disparate penalties for the first time on petition for review. He failed to make discovery inquiries into his defense and did not file a motion to compel asserting that the agency failed to produce relevant evidence. He did not demonstrate due diligence or ordinary prudence in obtaining the information he desired.

No provisions are available to engage in discovery at the petition for review level. *See Cassidy v. USPS*, 65 MSPR 86 (1994); *Armstrong v. USPS*, 28 MSPR 45 (1985). In *Cassidy,* the appellant entered into a settlement agreement before his case was decided. He later claimed that the settlement was tainted with fraud because the agency failed to disclose and produce polygraph records he had requested during discovery before the settlement. The Board, in its decision dismissing the petition for review for other reasons, chided the appellant that while he requested discovery in the initial proceedings, he did not pursue the responses properly. The Board stated in *Cassidy*, 65 MSPR at 90:

> The appellant has not shown that he exercised the necessary due diligence to obtain the information that he learned during his May 31, 1994 discussion with an agency polygraph examiner. *See Lybrook,* 51 MSPR at 244; *Campbell v. U.S. Postal Service*, 51 MSPR 122, 125 (1991). Each party to an appeal is responsible for discovery, which is the process of obtaining relevant information needed to prepare its case. *See* 5 CFR 1201.71.

> The appellant had requested during discovery that the agency produce the polygraph charts, graphs, and/or tapes of the informants.… The agency objected to the production of these documents, asserting that they were not relevant to the issues in the proceeding. Instead of filing a motion to compel the production of these documents, as was his responsibility, the appellant chose to enter into a settlement agreement and withdraw his appeal. The appellant may not now correct his judgmental error after the fact. *See Campbell*, 51 MSPR at 125.

A similar result was reached in *Whitaker v. DHHS,* DE-1221-13-0118-W-1 (Nonprecedential 1/22/2015), when after reaching settlement, appellant wanted to pursue discovery.

Likewise, an appellant who is dissatisfied with an AJ's handling of discovery should not abandon his request for a hearing "under protest" because he believes that he has been denied access to information needed to support his claims. The Board and the courts do not look favorably upon an appellant who waived his right to a hearing and then seeks further development of the record only upon review. *See Markland v. OPM,* 73 MSPR 349 (1997) (aff'd, *Markland v. OPM*, 140 F.3d 1031 (Fed. Cir. 1998), *post*). Moreover, if an appellant should have sought a motion to compel or motion for sanctions, he should do so timely. *Stiles v. DHS*, 116 MSPR 263, 267 ¶ 8, 2011 MSPB 28 (2011), *also see Stockton v. Dept. of Interior*, SF-0752-13-0434-I-1 (Nonprecedential 7/18/2014).

More information is included in Chapter 9, concerning motions, and in discussions of the adequacy of various methods employed and defenses against discovery, found in Chapters 4–9.

C. HOW DISCOVERY MAY AFFECT CASE BEING JUDGED ON THE RECORD

For various reasons, an appellant may decide to withdraw his request for a hearing. Sometimes, it is a strategic move when the agency's case is based on a weak record. The agency usually bears the burden of proving its case, so failure to use discovery can be detrimental to the agency's case because the agency may have prepared to rely heavily on the testimony of witnesses at a hearing to support a poor evidence file. If the appellant employs various affirmative defenses, the agency lacks a method to explore the merits of those allegations. Bereft of this information, the agency's case may be in danger. On the other hand, the appellant bears the burden of proving affirmative defenses, so the opposite can also be true.

While the AJ allows arguments prior to the closing of the record, if the parties fail to engage in discovery, the record may not be well-developed or the parties may be surprised by the other's submission. Although both sides can enter sworn statements and other evidence to support the record more, this potential problem may be avoided if the parties engage in discovery, because the AJ will give the parties an opportunity to enter evidence from information obtained during discovery, prior to the close of the record. All of the above is said, recognizing that the agency must be careful not to introduce evidence that would create a "*Stone*" or "*Ward*" type violation. This comment refers to the due process concerns that are commonly a defense for appellants described in *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999) and *Ward v. USPS*, 634 F.3d 1274 (Fed. Cir. 2011), which is a different subject than this book. [For more information on due process refer to Renn C. Fowler's, *Due Process in Adverse and Performance Based Actions* (Dewey Publications Inc.).]

The Board will not sustain an objection to discovery information entered into the record without a hearing if the other party had an opportunity to provide clarifying evidence prior to the close of the record. In *Crawford v. Dept. of Treasury,* 56 MSPR 224 (1993), the appellant withdrew his request for a hearing, and depositions taken during discovery were allowed into the record. If there are problems during discovery, make an objection on the record to adverse rulings in order preserve the objections for appeal. *Ingram v. Dept. of Army,* 116 MSPR 525, 2011 MSPB 71 (2011), *aff'd*, ___Fed. Appx.___, 2015-3110 (Fed. Cir. 2015).

Abandoning discovery during the process and asking for judgment on the record was a particularly bad idea in *Markland v. OPM*, 73 MSPR 349 (1997). By waiving his right to a hearing, it was the appellant, not the AJ, who was responsible for preventing the production of evidence.

Sometimes, the AJ cuts discovery off too soon. In *Lynch v. Dept. of Defense*, 114 MSPR 219, 222–23 ¶¶ 6–11, 2010 MSPB 117 (2010), the Board remanded a Veterans Employment Opportunity Act (VEOA) case for completion of discovery and for the opportunity to the appellant to use the fruits of discovery when the AJ issued an initial decision before the period for discovery closed:

> In his petition, the appellant asserts that the administrative judge erred by issuing the initial decision before he was able to submit the evidence that he received from the agency through discovery and his response to it. The appellant asserts that the agency's responses to his discovery requests support his position that there is a genuine issue of material fact regarding the agency's assertion and the administrative judge's finding that the agency did not obstruct his right to compete for the GS-12 Quality Assurance Specialist position.
>
> An administrative judge's errors regarding discovery matters are subject to an abuse of discretion standard. *Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 452 (1992), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). The rules governing discovery in Board proceedings are set out in the Board's regulations at 5 C.F.R. 1201.71–.75. These regulations require that "[d]iscovery must be completed within the time limit the judge designates." 5 C.F.R. 1201.73(d)(5). Initial discovery requests must be served within 25 days of the administrative judge ordering the agency to produce its file and response. 5 C.F.R. 1201.73(d)(1). The agency must respond to an appellant's discovery request within 20 days. 5 C.F.R. 1201.73(d)(2). If the agency serves objections to the appellant's discovery request or if the agency does not timely respond to the appellant's discovery request, the appellant has 10 days to file a motion to compel discovery. 5 C.F.R. 1201.73(d)(4). If the agency timely responds to the appellant's discovery request, the appellant has 10 days from receipt of the response to file a follow-up discovery request. 5 C.F.R. 1201.73(f)(2).
>
> In the acknowledgment order, the administrative judge set the time frame for discovery consistent with the provisions of the Board's regulations, indicating that a party's initial discovery request must be served within 25 days of October 27, 2009, and the opposing party's responses to discovery must be served no later than 20 days after the date of service of the other party's discovery request. If the parties timely filed discovery requests and responses using the entire period set by the administrative judge for discovery, the discovery period ended on December 21, 2009. The administrative judge issued the initial decision on December 11, 2009, without informing the parties that the discovery period had closed. As the agency's response to any discovery request by the appellant could have been filed on the last day provided for such response, issuance of the initial decision prior to the close of discovery effectively denied the appellant any opportunity to contest any of the agency's objections, file a motion to compel, or follow up with requests for further discoverable material based upon the agency's initial response.