CHAPTER FOUR

POSTHEARING MOTION PRACTICE—MSPB

A. Motions to Supplement or Reopen the Record

In the majority of MSPB cases, the record closes when the hearing ends. After all of the witnesses have been called and all exhibits entered into evidence or rejected, the administrative judge will give the parties an opportunity to make oral closing arguments. In concluding the hearing, the judge will specifically state that the hearing record is "now closed." As a general rule, this means no further evidence will be accepted from either party, no matter how important, without a showing that the proffered evidence was previously unavailable despite the exercise of due diligence by the party tendering the evidence.

On occasion, the judge will leave the record open for a brief period of time for the submission of a particular piece of evidence. For example, the judge may permit the parties to submit an internal agency regulation that both parties agree is relevant to a determination of the merits of the case but neither party has introduced into evidence. Or, it may be the judge will permit the parties to take and submit the deposition of a witness who, due to a last minute illness, was unable to appear and testify at the hearing. The submission of additional evidence is strictly limited to that delineated by the judge in leaving the record open.

Finally, in cases involving novel or complex legal issues, the judge may leave the record open for written closing arguments. This does not mean additional evidence can be submitted as attachments or exhibits to the closing argument. The final submission is limited to citation of the hearing record and any appropriate legal authority.

The Board itself greatly disfavors the submission of new evidence on appeal. As a general rule, with few and extremely limited exceptions, the hearing is the time and place for submission of evidence.

Motions to supplement or reopen the hearing record have, from their very inception, little chance of success. Whether the hearing was conducted by an experienced litigator or a *pro se* appellant, the Board strictly applies its criteria for the receipt of additional evidence. The best approach to motions to supplement or reopen the hearing record is a prophylactic one; make sure the evidence is submitted at the hearing. No representative, particularly one who has come well prepared for the hearing, should be bashful or ashamed about asking the judge for a few moments at the conclusion of his or her case to review preparation notes to ensure that no witness or exhibit has been overlooked. The request should be routine prior "resting" one's case.

Nonetheless, there are instances when a motion to supplement or reopen the record may be in order. In those instances, the authors offer the following.

1. Supplementing Record Prior to Initial Decision

Before considering when the Board may allow more evidence into a closed record, it is helpful to understand the Board's guidance on closing the record while the case is still before the administrative judge; that is, before the initial decision has been issued. Under 5 CFR § 1201.58, the Board provides:

> (a) When there is a hearing, the record ordinarily will close at the conclusion of the hearing. When the judge allows the parties to submit argument, briefs, or documents previously identified for introduction into evidence, however, the record will remain open for as much time as the judge grants for that purpose.
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> (b) If the appellant waives the right to a hearing, the record will close on the date the judge sets as the final date for the receipt or filing of submissions of the parties.
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> (c) Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed. The judge will include in the record, however, any supplemental citations received from the parties or approved corrections of the transcript, if one has

been prepared.

The administrative judge may request evidence from the parties concerning an issue and order its submission at any stage of the proceeding, even after a hearing has concluded. *See Sansom v. OPM*, 62 MSPR 560, 564, 567 (1994). According to the *Judge's Handbook*, Ch. 10, Sec. 14 (b):

> *Exhibits*. When an exhibit is outstanding at the conclusion of the hearing, arrangements must be made for its subsequent receipt. The document should be identified and assigned an exhibit number, and at the time it is submitted, provided to the other party for inspection and written comment, if appropriate.

If the judge asked for or expressly allowed a party to submit an outstanding exhibit, affidavit, or other evidence, the party submitting the evidence need not file a motion to have it accepted into the record. Otherwise, the party attempting to enter evidence into a closed record must file a motion asking the Board to accept the evidence and making arguments that it is new and material, and that despite due diligence, was not available prior to the close of the record. The *Judge's Handbook* explains at Ch. 10, Sec. 15(b):

> *Reopening the Record*. Once the record is closed, no additional evidence or argument may be accepted into the record except upon a showing that new and material evidence has become available that despite due diligence was not readily available prior to the closing of the record. Of course, the AJ may reopen the record on his or her own motion prior to issuing the initial decision. For example, where a party has raised new issues or new evidence in a timely, but last minute submission, the AJ must reopen the record to afford the other party(ies) an opportunity to respond. After the initial decision is issued, requests for reopening may only be granted pursuant to the very limited purposes set forth in 5 CFR 1201.113(a).

5 CFR 1201.113(a) provides that once an initial decision is issued it becomes a final decision in 35 days, unless a petition for review is filed or the Board reopens the case on its own motion.

Note that 5 CFR § 1201.58(c) seems to suggest that a party need only show the evidence was not "readily available" in order to have it accepted into a closed record. However, the *Judges' Handbook* makes it clear that the real standard the judge uses is the new and material evidence not previously available despite due diligence standard. Because most case law on this subject involves efforts to enter evidence in conjunction with a petition for review, the case law concerning those attempts is discussed below.

2. Supplementing Record After Initial Decision

The only way to supplement the hearing record after the initial decision has been issued is through a petition for review to the Board. The Board's standard for admitting new evidence at the appellate stage of a case is set forth at 5 CFR § 1201.115(d), which provides that the Board, after permitting the other parties an opportunity to respond, may grant a petition for review when it is established that:

> (i) New and material evidence is available that, despite due diligence, was not available when the record closed . . . .

The Board's policy on this is clear, logical, and fairly rigid. It also is consistent with the policy of virtually every court and administrative body that adjudicates cases. A need for finality in litigation is the key. Without any restraints on the parties submitting new evidence, litigation would never end.

3. New Evidence

Using Board case law, the concept of what "new" means is best explained in the negative. New evidence is evidence that was not, and could not have been, obtained by a party, through the use of due diligence, before the administrative judge closed the record. If the evidence existed, but in a different form before the close of the record, it is not new. *Wilson v. Dept. of Justice*, 58 MSPR 96 (1993). If discovery could have been used to obtain the information, it is not new. *Madrid v. Dept. of Interior*, 37 MSPR 418 (1988). If one avenue of discovery is unsuccessful, evidence will not be considered new if another method could have secured the evidence. *Davenport v. OPM*, 59

MSPR 370, 373-74 (1993). A party seeking to submit a document or other evidence that is not in the record must show that the proffered information, not just the document itself, was unavailable despite due diligence. *See Grassell v. Dept. Of Transp.*, 40 MSPR 554, 564 (1989).

To demonstrate due diligence, the party must offer a reasonable explanation as to why the additional evidence could not have been discovered earlier. It is each party's responsibility to pursue elusive evidence when the case is before the administrative judge through motions to compel discovery if initial discovery requests are ignored. *See Wagner v. EPA*, 54 MSPR 447, 453 (1992); *Pittman v. Dept. Of Interior*, 60 MSPR 365, 369-70 (1994).

4. Material Evidence

The second prong of the test for admission of new evidence is that it must be material. Material evidence, as a standard, requires more than a showing of bare relevance. In *Callahan v. OPM*, 6 MSPR 332, 334 (1981), *citing Powell v. Dept. Of Interior*, 2 MSPR 513 (1980), the Board explained:

> The Board has previously defined "material evidence" as that which is "directly relevant to and probative of the charges," and is "of a material and controlling character such as would change the substantial equities between the parties." . . .

The Board, in *Callahan*, *citing Russo v. DVA*, 3 MSPR 345 (1980), went on to say the newly submitted evidence "must be of sufficient weight to warrant an outcome different from that ordered by the presiding official." It is difficult enough to show that evidence is "new" under the standard; it is next to impossible to show that it also is "material."

5. Criteria for Admission

In a motion to admit evidence after the record is closed, the following considerations must be addressed to show evidence is new and material. They are:

- Whatever is offered must be evidence.
- The evidence must be new and the moving party must show that it was not previously available despite due diligence.
- The evidence must be material, *i.e.*, it must have enough import to make a difference in the outcome.
- The new evidence must be promptly filed upon its discovery.

Failure or deficient efforts to engage in discovery will not make evidence new. *See Spates v. USPS*, 68 MSPR 9 (1995). If a party fails properly to respond to discovery, the moving party should protect its rights by filing a motion to compel discovery. Failure to do so could constitute a waiver of the opportunity to argue that evidence is new. *See Cassidy v. USPS*, 65 MSPR 86 (1994). Also, if a party tries to supplement the record with evidence that should have been provided to the other party during discovery, the other party should not remain passive. Objections on the record are necessary, with appropriate motions for sanctions or other relief. *See Leftridge v. USPS*, 56 MSPR 340, 347 (1993).

Below are a few cases describing evidence which could qualify as new and material.

- *Impeachment Evidence*. An allegation that a witness lied during a hearing is a common argument that evidence is new and material, although in most cases it will not pass muster. The Board's criteria are strict. Generally, evidence offered to impeach a witness' testimony is not material, in that the credibility of one witness will not normally change the outcome of the case. For an example of when the Board found impeachment evidence new and material, read *Martin v. Dept. of Air Force*, 67 MSPR 309, 312-13 (1995). In that case, the appellant bragged to a former housemate after the initial decision that he had lied and that he had committed all of the misconduct. He told the former housemate that he had "gotten away with all of it." The evidence did not exist prior to the hearing; it was both new and material.
- *OWCP Claims*. Assume an appellant was charged absence without leave (AWOL) for

a long period of time. The appellant claimed his absence was due to a work injury, but the claim had been denied by the Office of Worker's Compensation Programs (OWCP). The Board upheld a penalty of removal against the appellant based on the AWOL charges. Subsequent to the initial decision, OWCP reversed its decision and provided benefits for the period of AWOL. Immediately upon receipt of the OWCP determination, the appellant submitted a copy of the new determination by OWCP and submitted a motion to reopen the record based on new and material evidence being available. In that case the charge of AWOL would no longer be valid and the appellant's removal would be reversed. *See McGilberry v. DMA*, 18 MSPR 560 (1984) (Removal sustained on other grounds-falsification of documents). This can also work in reverse: An OWCP determination that had provided benefits can be subsequently reversed to disallow benefits. In that case the agency would file a motion to reopen the case based on new and material evidence. *See Welber v. USPS*, 50 MSPR 557 (1991).

- *Adjudication of Past Discipline*. It is not unusual for an agency to rely on a prior disciplinary action to uphold a stronger penalty in a current action. The prior disciplinary action may be the subject of a grievance, an appeal, or an Equal Employment Opportunity complaint while the current case is being litigated before the Board. Should the appellant be exonerated of the previous discipline during or after the hearing in a Board case, that result could be new and material evidence because it was not otherwise available and would warrant reconsideration of the current penalty. *See Lopez v. Dept. of Justice*, 55 MSPR 644 (1992). This is true even after the time period for a petition for review has passed if the motion to accept the new evidence is promptly filed after the new evidence is received. *See Rush v. Dept. of Air Force*, 69 MSPR 416 (1996).

- *Evidence of Disparate Penalties*. Mitigation may occur after an appellant presents new evidence on petition for review that the agency took a lesser action against another similarly situated employee. *See Berkley v. USPS*, 38 MSPR 55 (1988). The key is that the evidence must be new. If the evidence already existed, but the party failed to discover or use it, it is not new evidence. *See Spates v. USPS*, 68 MSPR 9 (1995).

6. *Sample Motion to Reopen Record*

Below is a sample of a motion to reopen the record for the submission of new and material evidence. It is followed by a sample opposition to the motion. The problems encountered in the motion are similar to the problems encountered in most motions to reopen the record—the moving party was aware of the evidence but unable to secure it. As a result, the opposition is the more persuasive pleading. As an alternative to the motion, the appellant could have filed a motion to keep the hearing record open while engaging in continued efforts to secure the evidence. A moving party may have a better chance of convincing the Board, on appeal, that the judge erred in closing the record over his or her objection.