

**DISCOVERY IN MERIT SYSTEMS
PROTECTION BOARD PROCEEDINGS**

I. GENERAL

A. Governing regulations

1. 5 C.F.R. §1201.71 - §1201.75

B. Parties to Merit Systems Protection Board ("MSPB") are entitled to conduct discovery.

C. MSPB discovery

1. To be conducted with minimum intervention by MSPB
2. Purpose -- enable party to obtain relevant information needed to prepare case
3. Rules interpreted to avoid delay

II. DEFINITION AND SCOPE OF DISCOVERY

A. Definition

1. "the process, apart from the hearing, by which a party may obtain relevant information, including the identification of potential witnesses, from another person or a party, that the other person or party has not otherwise provided" - 5 C.F.R. §1201.72(a)
 - a. Relevant information = includes information "reasonably calculated to lead to the discovery of admissible evidence"

B. Scope

1. 5 C.F.R. §1201.72(b) -- "any nonprivileged matter that is relevant to the issues involved in the appeal"
 - a. Requests to nonparties and nonparty federal agencies -- limited to information that is directly material to the issues
 - i. "material" = important; more or less necessary Black's Law Dictionary

III. CONDUCT OF DISCOVERY

A. Types of discovery

1. Interrogatories
 - a. Written questions about the case submitted by one party to another party or to a witness
2. Depositions
 - a. Oral questioning of a party or witness outside of court, but under oath
 - b. May be taken by any method agreed upon by the parties -- 5 C.F.R. §1201.75
 - c. Deponent subject to penalties for intentional false statements, i.e. perjury -- 5 C.F.R. §1201.75
3. Requests for production of documents or things for inspection or copying
 - a. Written request upon an opposing or third party to make certain documents or things available to the requesting party for review and/or photocopying
4. Requests for admission
 - a. Written statements of facts about a case presented to an opposing party and the opposing party is required to admit or deny each statement

B. Commencing Discovery

Remember: "Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response."

1. Discovery from a party

- a. Serve the discovery request upon the representative of the opposing party
 - i. No representative -- service upon the party
 - ii. Request must state:
 - A. Time limit for responding -- no later than 20 days after date of service of request or order of the judge
 - B. In case of deposition - specify the time and place of the taking of the deposition
 - b. Request directed to officer or employee of federal agency that is a party
 - i. Officer or employee must be made available on official time to respond
 - ii. Agency must help officer or employee in providing the information that is available to the agency
- B. Discovery from a nonparty
- 1. Sought from a federal agency or employee
 - a. Serve request for discovery on the nonparty federal agency or employee
 - 2. Sought from other categories of nonparties
 - a. Serve request for discovery on the other nonparty directly
 - 3. If party wishing discovery either does not make the request or nonparty does not voluntarily cooperate
 - a. Discovery obtainable through written motion to judge
 - i. Motion must show relevance, scope and materiality of the information sought

- ii. Authorized MSPB official will make ruling on the motion
 - A. Ruling will be provided to motioning party along with a subpoena
 - B. Subpoena will specify manner for seeking compliance and time limit for seeking compliance
 - C. Requesting party responsible for serving the subpoena and the approved discovery request

IV. RESPONDING TO DISCOVERY REQUESTS

- A. Party or nonparty federal agency
 - 1. Furnish the information or testimony requested
 - 2. Agree to make deponents available to testify within a reasonable time
 - 3. Stating objection to the request and the reasons for the objection
 - 4. **Response must be provided no later than 20 days after date of service of request or order of judge**
- B. Failure or refusal to respond to request
 - 1. Two scenarios:
 - a. Party fails or refuses to respond in full
 - or
 - b. Nonparty fails or refuses to respond in full to MSPB-approved order
 - ☞ same course of action**
 - 2. Motion to compel filed with judge
 - a. Must be accompanied by

- i. Copy of original request and statement establishing information sought is relevant and material
 - ii. Copy of response to request or sworn statement no response received
 - iii. Copy must be served upon other party and on any nonparty from whom discovery was sought
- b. Motion for order to compel must be filed within 10 days of date of service of objections or within 10 days after time for responding has expired
- c. Party, entity or person from whom discovery is being sought may file opposition to motion
 - i. Opposition filed with judge
 - ii. Must be filed within 10 days of date of service of motion

V. ORDERS FOR DISCOVERY

A. Issued by judge

- 1. Necessary elements of order -- 5 C.F.R. §1201.74(b)
 - a. "provision that the person to be deposed must be notified of the time and place of the deposition"
 - b. Conditions or limits on the conduct or scope of the proceedings
 - c. Limits on time for conducting depositions, answering interrogatories or producing documents
 - d. Other restrictions set by the judge

B. Failure to comply with judge's order compelling discovery

- 1. Sanctions may be imposed
 - a. Inference in favor of requesting party in regard to information

sought

- b. Not allowing party failing to comply from introduction evidence concerning the information sought
- c. Requesting party allowed to introduce secondary evidence

VI. MISCELLANEOUS

- A. Motion to depose a nonparty
 - 1. Accompanied by a request for a subpoena
 - 2. Submitted to judge within 25 days after date on which judge issues order to respondent agency to produce the agency file and response
- B. Subsequent discovery requests
 - 1. Requests made after initial discovery requests
 - a. Discovery requests after initial request -- must be served within 10 days of the date of service of prior response
- C. Important MSPB regulatory definitions -- 5 C.F.R. §1201.4
 - 1. Day = calendar day
 - 2. Service = "process of furnishing a copy of any pleading to Board officials, other parties, or both, either by mail, by facsimile, by personal delivery or by commercial overnight delivery"
 - 3. Date of service = date on which documents are served on other parties
 - 4. Certificate of service = document certifying that a party has served copies of the pleadings on the other party/parties

Example

**UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD**

BETTY RUBBLE,

Appellant,

v.

Docket No. DC00000-I-1

UNITED STATES GEOLOGICAL AGENCY,

Agency.

DECLARATION

I, Name of declarant, do hereby declare:

FACTS TO WHICH DECLARANT DECLARES

I declare under penalty of perjury under the laws of the United States of

America that the foregoing is true and correct.

Executed on

Date

Signature

CERTIFICATE OF SERVICE

**I hereby certify that copies of the foregoing (name of document)
were sent this _____ day of (month), 199 , by (specify type of delivery), to
the following:**

(state names and addresses of all parties to be served)

**(signature of representative &
address)**

**(Fill in Appellant's Representative's
Name)**

**Type out Name
Appellant's Representative
Address
Telephone Number**

**Type out Name
Appellant's Representative
Address
Telephone Number**