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7 March 2005

MEMORANDUM

From: Chief Administrative Law Judge

Reply to G-CJ Policy Letter 05-01
Attn of: G Jordan
202 267-2940

To: Distribution

Subj: GUIDELINES FOR DISCOVERY REQUESTS

Ref: (a) 33 CFR Part 20 Subpart F
(b) 63 FR 16731 et seq. (Apr. 4, 1998)
(c) 64 FR 28062 et seq. (May 24, 1999)

1. **Purpose.** This policy letter provides guidance to Administrative Law Judges in ruling on discovery requests in administrative proceedings under 33 CFR Part 20. The Rules of Practice, Procedure and Evidence for Formal Administrative Proceedings divide discovery into two forms, (1) mandatory discovery and (2) further discovery. Mandatory discovery is designed to prevent "trial by surprise" and requires parties to provide witness lists and copies of exhibits to the ALJ and the other parties. All other discovery is limited and should be authorized only by order of the ALJ. One principal purpose of the rules was to establish consistent discovery practices and adherence to these guidelines will assist in that goal.

2. **Background.** Prior to 1999, Discovery in Suspension and Revocation cases was very limited. The Suspension and Revocation statute has no provisions for discovery and the regulations had no provisions for discovery. "No right to discover the names of witnesses is contained in the statutory authority for these proceedings nor in the implementing regulations. The Investigating Officer had no legal obligation to inform appellant of the names of all witnesses to be called." Appeal Decision 2040 (RAMIREZ). "The extent of discovery to which a party is entitled [in an administrative proceeding] is primarily determined by the particular agency; the Federal Rules of Civil Procedures are inapplicable and the Administrative Procedure Act fails to provide expressly for discovery." Pacific Gas and Elec. Co. v. FERC, 746 F.2d 1383, 1387 (9th Cir. 1984).

a. In suspension and revocation cases, CG pre-hearing discovery was limited to supplying elements of the investigatory records required under Jencks v United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L.Ed 2d. 1103 (1957). Restated, Jencks concerns any witness statement that has been reduced to writing and requires that if the agency intends to call that witness, a copy of the statement must be disclosed to the opposing party. Respondents had no requirements for discovery and many proceedings were delayed by the introduction of surprise testimony or exhibits. Some Administrative Law Judges ordered further discovery in various cases to ensure due process.

b. The Deposition Rules in the old Part 5 Suspension and Revocation cases were designed solely for testimonial preservation. The advent of telephonic testimony in the 1984 version of the rules virtually eliminated recourse to depositions. Under those rules, depositions in the United States were almost universally held before an ALJ in those cases.

c. The Class II civil penalty statute required the agency to craft limited discovery rules. When the Class II procedural rules were issued a variation of the current discovery rules was included. The purpose was very limited discovery and other than the mandatory discovery, only on the order of the ALJ.

d. When the consolidated rules were issued in 1999, discovery along the lines of the Class II rules were included. The intent remains the same (1) limited discovery and (2) the prevention of trial by surprise. Additionally, the 1999 rules included as a purpose for the discovery rules, the establishment of consistent discovery procedures. The preamble to the proposed rule states, “Under the current S&R rules, there are no formal discovery procedures. This can create problems when copies of exhibits and witnesses are not presented in a timely manner and with sufficient notice to the other party. Most ALJs have introduced requirements for discovery on their own, but these differ from judge to judge.” 64 FR28053 at 28056.

3. **Mandatory Discovery.** The current rules presume that in administrative cases, the parties have access to the evidence and witnesses. To prevent trial by surprise, each party is to provide the other party a list of witnesses and exhibits. A summary of expected testimony of witnesses shall be included as well as copies of exhibits. 33 CFR 20.601(a)

4. **Further Discovery.** These rules require that other than mandatory discovery, further discovery may occur only by order, and then only when the ALJ determines that—

- a. It will not unreasonably delay the proceeding;
- b. The information sought is not otherwise obtainable;
- c. The information sought has significant probative value;
- d. The information sought is neither cumulative nor repetitious; and
- e. The method or scope of the discovery is not unduly burdensome and is the least burdensome method available.

33 CFR 20.601(d)

5. **Party’s Responsibilities.** A party seeking discovery must file a motion for discovery that sets forth—

- a. The circumstances warranting the discovery;
- b. The nature of the information sought; and
- c. The proposed method and scope of discovery and the time and place where the discovery would occur.

33 CFR 20.601(e)

6. **Interrogatories and Depositions.** Interrogatories and depositions have further requirements for issuance. 33 CFR 20.603 and 33 CFR 20.605. Interrogatories and depositions are considered more burdensome by their very nature.

- a. **Interrogatories.** When requesting interrogatories the motion must include—

- (1) A statement of the purpose and scope of the interrogatories; and
- (2) The proposed interrogatories.
- (3) An ALJ is required to review the interrogatories and may approve all, some, or deny the request.

33 CFR 20.603(b)

b. Depositions. A deposition is available only upon a showing of good cause and upon a finding that—

- (1) The information sought is not obtainable more readily by alternative methods; or
- (2) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation at the hearing.
- (3) The Party's motion must state—
 - (a) The purpose and scope of the deposition;
 - (b) The time and place it is to be taken;
 - (c) The name and address of the person before whom the deposition is to be taken;
 - (d) The name and address of each witness from whom a deposition is to be taken;
 - (e) The documents and materials which the witness is to produce; and
 - (f) Whether it is intended that the deposition be used at a hearing instead of live testimony.
 - (g) The motion must state if the deposition is to be by oral examination, by written interrogatories, or a combination of the two.
 - (h) The deposition may be taken before any disinterested person authorized to administer oaths in the place where the deposition is to be taken.

33 CFR 20.605

(4) The ALJ must review the motion and only upon a showing of good cause the ALJ may issue an order to obtain the testimony of the witness. The order should reflect that the deposition must be conducted under the provisions of 33 CFR 20.605. The usual purpose for depositions in our proceedings is to preserve testimony for a witness who would otherwise be unavailable to testify at a hearing. Consideration of availability by telephonic testimony should be addressed before approving a request for deposition. Whether a deposition taken for discovery under this part or as taken pursuant to federal or state civil discovery rules can be admitted as testimony must be considered on a case by case basis.

7. **Judge's Responsibilities**. Among the enumerated powers of an ALJ is the power to order discovery as provided for in Part 20. 33 CFR 20.202(d). This paragraph should be read as a limitation. The ALJ is bound by the provisions of Part 20 in ordering discovery, issuing protective orders, and ordering sanctions. An ALJ should not rely on the Federal Rules of Civil

Procedure for discovery matters. Use of 33 CFR 20.103(b) to waive discovery requirements should not be done routinely and only to prevent undue hardship or manifest injustice.

a. Orders allowing discovery. Before ordering discovery, the ALJ must make the determinations required by 33 CFR 20.601(d). In construing, this section, ALJs are reminded of the general rule of construction for Part 20 in 33 CFR 20.103 (a) to interpret them so as to secure a just, speedy and inexpensive determination. If a motion for discovery does not set out circumstances warranting the discovery that meets the requirements of 33 CFR 20.601(d), an order denying the motion is appropriate.

b. Scheduling Discovery. The ALJ has broad discretion in scheduling discovery. However, scheduling orders should require the exchange of mandatory discovery before further discovery may be sought. If the ALJ believes that the case will warrant further discovery under 33 CFR 20.601(d), a pre-hearing conference should be scheduled to discuss to scope of necessary discovery. The nature of the complaint; the violation charged, the allegation presented and the sanction sought should be considered in determining whether or not further discovery is warranted.

c. Protective Orders. In considering a motion for an order of discovery--or a motion, by a party or other person from whom discovery is sought, to reconsider or amend an order of discovery--the ALJ may enter any order that justice requires, to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. 33 CFR 20.606

d. Sanctions for failure to comply. If a party fails to provide or permit discovery, the ALJ may issue sanctions for failure to comply. The judge may:

- (1) Infer that the testimony, document, or other evidence would have been adverse to the party.
- (2) Order that, for the purposes of the proceeding, designated facts are established.
- (3) Order that the party not introduce into evidence--or otherwise rely upon, in support of any claim or defense--the evidence that was withheld.
- (4) Order that the party not introduce into evidence, or otherwise use in the hearing, information obtained in discovery.
- (5) Allow the use of secondary evidence to show what the evidence withheld would have shown.

33 CFR 20.607

e. Additional Sanctions. It should be noted that section 20.311(d), Withdrawal or Dismissal, provides separate guidance outside of the discovery regulations for failure of another party to:

- (1) Comply with the requirements of this part or any order of the ALJ;
- (2) Show a right to relief based upon the facts or law; or
- (3) Prosecute the proceeding.

However, section 20.311(d) is rarely applied to discovery rules unless extreme cases warrant such a remedy.

8. **Subpoenas.** Subpoenas are more of a device for the production of evidence at a hearing than a pre-hearing discovery tool. Stein, Mitchell, Meinzes, Administrative Law, Sec. 23.03[6]. The ALJ has authority to issue subpoenas to compel the attendance of a person to give testimony, or to produce books, papers, documents, or any other relevant evidence at a hearing. Subpoenas may also be issued during discovery for depositions under 33 CFR 20.605, medical examinations under 33 CFR 20.1313 or to produce documents or things for inspection under 33 CFR 20.604.

(1) Any party seeking a subpoena from the ALJ shall request its issuance by motion.

(2) Since a subpoena is sought by motion, the opposing party may respond. Under the APA, subpoenas on behalf of a private party should be issued only on a showing of relevance and reasonableness. 5 USC 555(d) and 46 USC 7705. This is separate from a motion to quash, which can only be sought by the person to whom the subpoena is addressed. 33 CFR 20.609

(3) The party that requested the subpoena is responsible for witness fees in conjunction with the subpoena. 33 CFR 20.708(b).

(4) The jurisdictional limits of a subpoena are set out in 46 USC 6304 (a), and the limits are that of a district court of the United States in civil matters for the district in which the investigation is conducted. In other words, the judicial district where the CG office bringing the complaint resides will set the jurisdictional limits.

(5) The Coast Guard has separate authority to issue subpoenas under Part 5. 46 CFR 5.301(b).

9. **Party Inquiries.** Assistance to parties whether represented or not in filing discovery documents should be limited to referring the party to the appropriate rules.

10. **FOIA.** Freedom of Information Act (FOIA) requests are separable and outside the scope of discovery. FOIA is not a means to conduct a “fishing expedition [for] investigating matters” within an agency. FOIA GUIDE AND PA REVIEW, U.S. DEP’T OF JUSTICE at 703 (2002). “Freedom of Information cases are to be treated as independent causes operating on a different plane from other litigation. For this reason courts have not allowed the staying or enjoining of civil or criminal actions in which FOIA requested information might prove useful. Parties in other litigation are essentially only entitled to that **discovery** provided by the rules applying to their suit.” Kantor v. Internal Revenue Service, 433 F. Supp. 812, 816 (N.D. Ill. 1977) (citations omitted) (bold in original).

11. **Discovery involving sensitive and classified information.** If information sought is sensitive security information, then ALJs should refer to 49 CFR Part 1520 for guidance. If the request involves other sensitive but unclassified information, DHS directives should be followed. If classified information is sought, then G-CJ should be contacted and only an ALJ and staff with appropriate clearances should have access. Policies for handling classified information are under development and will be issued in a separate policy letter.

12. **Conclusion.** These guidelines are intended as guidance for administrative law judges and employees of the U.S. Coast Guard. They do not constitute rulemaking by the Agency and may

not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person.

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