

(c) The presiding officer does not have the authority to find Federal statutes or regulations invalid.

[52 FR 39498, Oct. 22, 1987, as amended at 54 FR 600, Jan. 9, 1989]

§ 1264.118 Prehearing conferences.

(a) The presiding officer may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the presiding officer shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The presiding officer may use prehearing conferences to discuss the following:

- (1) Simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;
- (3) Stipulations and admissions of fact or as to the contents and authenticity of documents;
- (4) Whether the parties can agree to submission of the case on a stipulated record;
- (5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objections of other parties) and written arguments;
- (6) Limitation of the number of witnesses;
- (7) Scheduling dates for the exchange of witness lists and of proposed exhibits;
- (8) Discovery;
- (9) The time and place for the hearing; and
- (10) Such other matters, including settlement, as may tend to expedite the fair and just disposition of the proceedings.

(d) The presiding officer may issue an order containing all matters agreed upon by the parties or ordered by the presiding officer at a prehearing conference.

[52 FR 39498, Oct. 22, 1987, as amended at 54 FR 600, Jan. 9, 1989]

§ 1264.119 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other

materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 1264.103(b) are based unless such documents are subject to a privilege under Federal law. Upon payment of a reasonable fee for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 1264.104 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the presiding officer following the filing of an answer pursuant to § 1264.108.

§ 1264.120 Discovery.

(a) The following types of discovery are authorized:

- (1) Requests for production of documents for inspection and copying;
- (2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;
- (3) Written interrogatories; and
- (4) Depositions.

(b) For the purpose of this section and §§ 1264.121 and 1264.122, the term *documents* includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the presiding officer considers relevant and material to the hearing. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the presiding officer. The presiding officer shall regulate the timing of discovery.

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(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the presiding officer. Such a motion shall be accompanied by a copy of the discovery request or, in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within 10 days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in §1264.123.

(3) The presiding officer may grant a motion for discovery only if he/she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The presiding officer may grant discovery subject to a protective order under §1264.123.

(e) *Depositions.* (1) If a motion for deposition is granted, the presiding officer shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in §1264.107.

(3) The deponent may file with the presiding officer a motion to quash the subpoena or a motion for a protective order within 10 days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 1264.121 Exchange of witness lists, statements, and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the presiding officer, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing

exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with paragraph (b) of §1264.132. At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the presiding officer, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the presiding officer shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party, in accordance with paragraph (a) of this section, unless the presiding officer finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the presiding officer, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 1264.122 Subpoena for attendance at hearing.

(a) A party wishing the appearance and testimony of any individual at the hearing may request that the presiding officer issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the presiding officer for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in §1264.107. A subpoena on a party or upon an individual under the control of