

§ 18.41

ten (10) days after service of the motion, serve opposing affidavits or countermove for summary decision. The administrative law judge may set the matter for argument and/or call for submission of briefs.

(b) Filing of any documents under paragraph (a) of this section shall be with the administrative law judge, and copies of such documents shall be served on all parties.

(c) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(d) The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The administrative law judge may deny the motion whenever the moving party denies access to information by means of discovery to a party opposing the motion.

§ 18.41 Summary decision.

(a) *No genuine issue of material fact.* (1) Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard. Any final decision issued as a summary decision shall conform to the requirements for all final decisions.

(2) An initial decision and a final decision made under this paragraph shall include a statement of:

(i) Findings of fact and conclusions of law, and the reasons therefor, on all issues presented; and

(ii) Any terms and conditions of the rule or order.

29 CFR Subtitle A (7-1-06 Edition)

(3) A copy of any initial decision and final decision under this paragraph shall be served on each party.

(b) *Hearings on issue of fact.* Where a genuine question of material fact is raised, the administrative law judge shall, and in any other case may, set the case for an evidentiary hearing.

§ 18.42 Expedited proceedings.

(a) When expedited proceedings are required by statute or regulation, or at any time after commencement of a proceeding, any party may move to advance the scheduling of a proceeding.

(b) Except when such proceedings are required or as otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, any party filing a motion under this section shall:

(1) Make the motion in writing;

(2) Describe the circumstances justifying advancement;

(3) Describe the irreparable harm that would result if the motion is not granted; and

(4) Incorporate in the motion affidavits to support any representations of fact.

(c) Service of a motion under this section shall be accomplished by personal delivery or by telephonic or telegraphic communication followed by mail. Service is complete upon personal delivery or mailing.

(d) Except when such proceedings are required, or unless otherwise directed by the Chief Administrative Law Judge or the administrative law judge assigned, all parties to the proceeding in which the motion is filed shall have ten (10) days from the date of service of the motion to file an opposition in response to the motion.

(e) Following the timely receipt by the administrative law judge of statements in response to the motion, the administrative law judge may advance pleading schedules, prehearing conferences, and the hearing, as deemed appropriate: provided, however, that a hearing on the merits shall not be scheduled with less than five (5) working days notice to the parties, unless all parties consent to an earlier hearing.

(f) When expedited hearings are required by statute or regulation, such

hearing shall be scheduled within sixty (60) days from the receipt of request for hearing or order of reference. The decision of the administrative law judge shall be issued within twenty (20) days after receipt of the transcript of any oral hearing or within twenty (20) days after the filing of all documentary evidence if no oral hearing is conducted.

§ 18.43 Formal hearings.

(a) *Public.* Hearings shall be open to the public. However, in unusual circumstances, the administrative law judge may order a hearing or any part thereof closed, where to do so would be in the best interests of the parties, a witness, the public or other affected persons. Any order closing the hearing shall set forth the reasons for the decision. Any objections thereto shall be made a part of the record.

(b) *Jurisdiction.* The administrative law judge shall have jurisdiction to decide all issues of fact and related issues of law.

(c) *Amendments to conform to the evidence.* When issues not raised by the request for hearing, prehearing stipulation, or prehearing order are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made on motion of any party at any time; but failure to so amend does not affect the result of the hearing of these issues. The administrative law judge may grant a continuance to enable the objecting party to meet such evidence.

§ 18.44 [Reserved]

§ 18.45 Official notice.

Official notice may be taken of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.

§ 18.46 In camera and protective orders.

(a) *Privileges.* Upon application of any person the administrative law judge may limit discovery or introduction of evidence or issue such protective or other orders as in his or her judgment may be consistent with the objective of protecting privileged communications.

(b) *Classified or sensitive matter.* (1) Without limiting the discretion of the administrative law judge to give effect to any other applicable privilege, it shall be proper for the administrative law judge to limit discovery or introduction of evidence or to issue such protective or other orders as in his or her judgment may be consistent with the objective of preventing undue disclosure of classified or sensitive matter. Where the administrative law judge determines that information in documents containing sensitive matter should be made available to a respondent, he or she may direct the party to prepare an unclassified or nonsensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

(2) If the administrative law judge determines that this procedure is inadequate and that classified or otherwise sensitive matter must form part of the record in order to avoid prejudice to a party, he or she may advise the parties and provide opportunity for arrangements to permit a party or a representative to have access to such matter. Such arrangements may include obtaining security clearances or giving counsel for a party access to sensitive information and documents subject to assurances against further disclosure.

§ 18.47 Exhibits.

(a) *Identification.* All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered.

(b) *Exchange of exhibits.* When written exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and one copy to the administrative law judge, unless the parties previously have been furnished with copies or the administrative law judge directs otherwise. If the administrative law judge has not fixed