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the record where the determination to exclude the person is made during a hearing. The person must respond to the judge's show cause order within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the order, unless the judge provides a different time limit, or forfeit the right to seek certification of a subsequent exclusion order as an interlocutory appeal to the Board under paragraph (d)(3) of this section.

(3) When, after consideration of the person's response to the show cause order, or in the absence of a response to the show cause order, the judge determines that the person should be excluded from participation in the proceeding, the judge shall issue an order that documents the reasons for the exclusion. The person may obtain review of the judge's ruling by filing, within three days (excluding Saturdays, Sundays, and Federal holidays) of receipt of the ruling, a motion that the ruling be certified to the Board as an interlocutory appeal. The judge shall certify an interlocutory appeal to the Board within one day (excluding Saturdays, Sundays, and Federal holidays) of receipt of such a motion. Only the provisions of this paragraph apply to interlocutory appeals of rulings excluding a person from a proceeding; the provisions of §§ 1201.91 through 1201.93 of this part shall not apply.

(4) A proceeding will not be delayed because the judge excludes a person from the proceeding, except that:

(i) Where the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative; and

(ii) Where the judge certifies an interlocutory appeal of an exclusion ruling to the Board, the judge or the Board may stay the proceeding *sua sponte* or on the motion of a party for a stay of the proceeding.

(5) The Board, when considering a petition for review of a judge's initial decision under subpart C of this part, will not be bound by any decision of the

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judge to exclude a person from the proceeding below.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 62689, Nov. 25, 1997; 62 FR 66815, Dec. 22, 1997; 63 FR 35500, June 30, 1998; 65 FR 5409, Feb. 4, 2000; 68 FR 59862, Oct. 20, 2003; 69 FR 57630, Sept. 27, 2004]

§ 1201.32 Witnesses; right to representation.

Witnesses have the right to be represented when testifying. The representative of a nonparty witness has no right to examine the witness at the hearing or otherwise participate in the development of testimony.

§ 1201.33 Federal witnesses.

(a) Every Federal agency or corporation must make its employees or personnel available to furnish sworn statements or to appear as witnesses at the hearing when ordered by the judge to do so. When providing those statements or appearing at the hearing, Federal employee witnesses will be in official duty status (*i.e.*, entitled to pay and benefits including travel and per diem, where appropriate).

(b) A Federal employee who is denied the official time required by paragraph (a) of this section may file a written request that the judge order the employing agency to provide such official time. The judge will act on such a request promptly and, where warranted, will order the agency to comply with the requirements of paragraph (a) of this section.

(c) An order obtained under paragraph (b) of this section may be enforced as provided under subpart F of this part.

[54 FR 53504, Dec. 29, 1989, as amended at 62 FR 48935, Sept. 18, 1997]

§ 1201.34 Intervenors and amicus curiae.

(a) *Explanation of Intervention.* Intervenors are organizations or persons who want to participate in a proceeding because they believe the proceeding, or its outcome, may affect their rights or duties. Intervenors as a "matter of right" are those parties who have a statutory right to participate. "Permissive" intervenors are those parties who may be permitted to participate if the proceeding will affect

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them directly and if intervention is otherwise appropriate under law. A request to intervene may be made by motion filed with the judge.

(b) *Intervenors as a matter of right.* (1) The Director of the Office of Personnel Management may intervene as a matter of right under 5 U.S.C. 7701(d)(1). The motion to intervene must be filed at the earliest practicable time.

(2)(i) Except as provided in paragraph (b)(2)(ii) of this section, the Special Counsel may intervene as a matter of right under 5 U.S.C. 1212(c). The motion to intervene must be filed at the earliest practicable time.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(c) *Permissive intervenors.* (1) Any person, organization or agency may, by motion, ask the judge for permission to intervene. The motion must explain the reason why the person, organization or agency should be permitted to intervene.

(2) A motion for permission to intervene will be granted where the requester will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may request permission to intervene. A judge's denial of a motion for permissive intervention may be appealed to the Board under §1201.91 of this part.

(d) *Role of intervenors.* Intervenors have the same rights and duties as parties, with the following two exceptions:

(1) Intervenors do not have an independent right to a hearing; and

(2) Permissive intervenors may participate only on the issues affecting them. The judge is responsible for determining the issues on which permissive intervenors may participate.

(e) *Amicus curiae.* An amicus curiae is a person or organization that, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge regarding an appeal. Any person

or organization, including those who do not qualify as intervenors, may, in the discretion of the judge, be granted permission to file an amicus curiae brief.

§ 1201.35 Substituting parties.

(a) If an appellant dies or is otherwise unable to pursue the appeal, the processing of the appeal will only be completed upon substitution of a proper party. Substitution will not be permitted where the interests of the appellant have terminated because of the appellant's death or other disability.

(b) The representative or proper party must file a motion for substitution within 90 days after the death or other disabling event, except for good cause shown.

(c) In the absence of a timely substitution of a party, the processing of the appeal may continue if the interests of the proper party will not be prejudiced.

§ 1201.36 Consolidating and joining appeals.

(a) *Explanation.* (1) Consolidation occurs when the appeals of two or more parties are united for consideration because they contain identical or similar issues. For example, individual appeals rising from a single reduction in force might be consolidated.

(2) Joinder occurs when one person has filed two or more appeals and they are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent dismissal if the same appellant filed both appeals.

(b) *Action by judge.* A judge may consolidate or join cases on his or her own motion or on the motion of a party if doing so would:

(1) Expedite processing of the cases; and

(2) Not adversely affect the interests of the parties.

(c) Any objection to a motion for consolidation or joinder must be filed within 10 days of the date of service of the motion.

§ 1201.37 Witness fees.

(a) *Federal employees.* Employees of a Federal agency or corporation testifying in any Board proceeding or making a statement for the record will be