

U.S. Merit Systems Protection Board

Information Sheet No. 5

Discovery

Purpose.

The purpose of this information sheet is to provide general guidance and background information. It does not represent an official statement approved by the Board itself, and is not intended to provide legal counsel or to be cited as legal authority. Instead, it is intended only to help the public become familiar with the MSPB and its procedures. In all instances, however, the Board's regulations and current case law control with respect to the matters discussed here.

What is discovery?

Discovery is the procedure by which you may ask questions, or obtain documents or answers from the opposing party or third parties in order to "discover" information that is calculated to lead to the discovery of admissible evidence.

How does discovery work?

A party must make its first discovery request within 25 days following the date of the Board's Acknowledgment Order in the case. Otherwise, the request will be considered untimely (late), and the other party may be excused from having to answer it. Following receipt of a discovery request, a party must respond to it within 20 days after the date of service. If the response is inadequate, or if the discovery request is ignored, the party that made the discovery request may file a "Motion to Compel Discovery" with the administrative judge (AJ). A Motion to Compel Discovery must be filed within 10 days after the objection or nonconforming response is served, or within 10 days after the time limit for response has expired. If the AJ concludes that the discovery request was legally proper, he or she will issue an "Order to Compel Discovery." If the response to this order is inadequate, or if the Order to Compel Discovery is ignored, the party that made the discovery request may file a "Motion for Sanctions" with the AJ. The AJ may, after considering any response to the motion, impose legal sanctions on the party which failed to comply with the order. After the initial discovery request, a party may file follow-up discovery requests within 7 days of the date of service of the prior response.

What types of discovery requests are there?

A party can use any type of discovery authorized by the Federal Rules of Civil Procedure. The most common types are: (1) requests for production of documents, (2) written interrogatories, (3) requests for admission, and (4) depositions.

What is a "Request for Production of Documents?"

This is a written request for specific documents or a class of documents. For example, an appellant who is appealing a suspension for AWOL, might request a copy of the "sign-in, sign-out" sheet the agency maintained to record employee time and attendance for the date in question.

What are "Written Interrogatories?"

These are written questions which must be answered in writing. For example, an appellant who is appealing his removal for fighting with two coworkers in the workplace, could ask: "Explain what disciplinary action, if any, was or is proposed to be taken against Mr. A and Mr. B for the alleged incident, explaining the reasons for the difference in treatment, if any, from how I was treated."

What are "Requests for Admissions?"

These are written requests to a party to admit, deny, or admit with explanation, certain facts. For example, an appellant who is appealing a suspension for misuse of an agency vehicle might ask the agency to admit, deny, or admit with explanation that: "Mr. C, the Chief of Operations, gave verbal permission for me to take the Government sedan to the bank."

What are "Depositions?"

A deposition is the formal questioning of a potential witness under oath. It is usually transcribed by a court-reporter. Depositions often require travel by the participants or witnesses, and because of the court-reporting costs may be expensive. Parties may, but are not required to, agree to modify deposition procedures to reduce expenses, such as allowing a witness to be deposed by telephone, or allowing the deposition to be tape-recorded but not transcribed.

Are there limits to the amount of discovery allowed?

Yes. Because discovery may be quite costly and burdensome, the Board's regulations impose limits on the amount of discovery a party may use without the approval of the AJ. For example, a party may only submit 25 written interrogatories and take 10 depositions. The AJ may, in his or her discretion, authorize discovery beyond these limits.

Do you have any tips on effective discovery?

Read the Board's discovery regulations to make sure you are aware of the time limits for discovery and ensure that your discovery requests and responses comply with the regulations. The most common two reasons a discovery request is improper or unenforceable is that it is either overbroad or irrelevant. A request is overbroad when it asks for a lot of extraneous information, such as when an appellant appealing a suspension for filing a falsified travel voucher asks for copies of all travel vouchers submitted by agency employees for the past two years. Complying with that request would be very burdensome on the agency, would adversely impact on the privacy of other agency employees, and would provide a lot of information not related to that employee's case. Usually a discovery request seeking information about what happened to you, or directly concerning you will be fine. The problem is when the request starts

asking for a lot of information about other people, or about what happened to them.

Do I send copies of my discovery request to the administrative judge?

Do not file copies of initial requests for discovery or responses to discovery with the Board unless it is as an attachment to a motion to compel or as a hearing exhibit or part of your final submission in a case decided on the written record. The Board expects you to cooperate timely and voluntarily in the exchange of information with limited intervention by the administrative judge.

How can I obtain more information about discovery?

You can review the Board's regulations on discovery at 5 C.F.R. §§ 1201.71-75, and the Federal Rules of Civil Procedure. The Board's regulations are available on the Board's website ([Appeals Process page](#)). The Federal Rules are available [here](#).