

§ 26.18

(2) Stipulations and admissions of fact and of the contents and authenticity of documents;

(3) The disclosure of the names of witnesses;

(4) Matters of which official notice will be taken;

(5) Other matters as may aid in the orderly disposition of the proceeding, including disclosure of the documents or other physical exhibits that will be introduced into evidence in the course of the proceeding.

(b) *Recordation of prehearing conference.* The prehearing conference shall, at the request of any party, be recorded or transcribed.

(c) *Order on prehearing conference.* The hearing officer shall enter in the record an order that states the rulings upon matters considered during the conference, together with appropriate directions to the parties. The order shall control the subsequent course of the proceeding, subject to modifications upon good cause shown.

§ 26.18 Discovery.

(a) *General.* The parties are encouraged to engage in voluntary discovery procedures, which may commence at any time after an answer has been filed. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the hearing officer may order discovery of any matter relevant to the subject matter involved in the action. To be relevant, information need not be admissible at the hearing, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Each party shall bear its own expenses associated with discovery. Discovery may include:

(1) Requests for production of documents as set forth in § 26.19;

(2) Depositions as set forth in § 26.20;

(3) Written interrogatories as set forth in § 26.21; and

(4) Requests for admissions as set forth in § 26.22.

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(b) *Supplementation of responses.* A party who has responded to a request for discovery with a response is under a duty to timely amend a prior response to an interrogatory, request for production, or request for admission if so ordered by the hearing officer, or if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(c) *Requesting an order.* In connection with any discovery procedure, by motion addressed to the hearing officer and upon a showing of a good faith attempt to resolve the issue without the hearing officer's intervention, either party may:

(1) Request an order compelling a response with respect to any objection to or other failure to respond to the discovery requested or any part thereof, or any failure to respond as specifically requested, or

(2) Request a protective order limiting the scope, methods, time and place for discovery, and provisions for protecting privileged information or documents.

(d) *Limitations.* (1) By order, the hearing officer may set or alter limits on the number of document requests, depositions, and interrogatories, or the length of depositions.

(2) Orders compelling discovery shall be issued only where such discovery will not compel the disclosure of privileged information, unduly delay the hearing, or result in prejudice to the public interest or the rights of the parties, and upon a showing of good cause.

(3) Protective orders may be issued by a hearing officer if the hearing officer determines such an order is necessary to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense because:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in

the action to obtain the information sought; or

(iii) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(4) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the hearing officer may nonetheless order discovery from such sources if the requesting party shows good cause or, when the party's refusal to provide the information sought is solely due to undue expense, if the party seeking the discovery agrees to bear the expense associated with the request.

(e) *Refusal to honor discovery order.* When a party refuses to honor a discovery order, the hearing officer may issue such orders in regard to the refusal as justice shall require.

§ 26.19 Request for production of documents.

(a) *Request to produce.* Any party may serve upon any other party a written request to produce, and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of § 26.18(a) and which are in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure.* The request shall set forth, either by individual item or by

category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(c) *Response to request to produce.* The party upon whom the request is served shall serve a written response within 20 days after service of the request. A shorter or longer time may be directed by the hearing officer, or in the absence of such an order, agreed to by the parties in a written document that shall be timely submitted to the hearing officer. The response shall state, with respect to each item or category, whether inspection and related activities will be permitted as requested. If there are any objections to any requests, including objections to the requested form or forms for producing electronically stored information, the response shall state the reasons for such objections. If objection is made to part of an item or category, the part shall be specified and inspection of the remaining parts shall be permitted. If objection is made to the requested format or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under § 26.18(c)(1) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(d) *Form of production.* Unless the parties otherwise agree, or the hearing officer otherwise orders:

(1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) If a request does not specify the format or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form