

§511.37

would have been empowered to make on a motion pursuant to §511.31(d). When making oral examinations, the discovering party shall continue the examination to the extent possible with respect to other areas of inquiry before moving to compel discovery.

§511.37 Sanctions for failure to comply with order.

If a party fails to obey an order to provide or permit discovery, the Presiding Officer may take such action as is just, including but not limited to the following:

(a) Infer that the admission, testimony, document or other evidence would have been adverse to the party;

(b) Order that for the purposes of the proceeding, the matters regarding which the order was made or any other designated facts shall be taken to be established in accordance with the claim of the party obtaining the order;

(c) Order that the party withholding discovery not introduce into evidence or otherwise rely, in support of any claim or defense, upon the documents or other evidence withheld;

(d) Order that the party withholding discovery not introduce into evidence or otherwise use at the hearing, information obtained in discovery;

(e) Order that the party withholding discovery not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(f) Order that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order was issued, be stricken, or that decision on the pleadings be rendered against the party, or both; and

(g) Exclude the party or representative from proceedings, in accordance with §511.42(b).

Any such action may be taken by order at any point in the proceedings.

§511.38 Subpoenas.

(a) *Availability.* A subpoena shall be addressed to any party or any person not a party for the purpose of compelling attendance, testimony and production of documents at a hearing or oral examination.

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(b) *Form.* A subpoena shall identify the action with which it is connected; shall specify the person to whom it is addressed and the date, time and place for compliance with its provisions; and shall be issued by order of the Presiding Officer and signed by the Chief Counsel, or by the Presiding Officer. A subpoena duces tecum shall specify the books, papers, documents, or other materials or data-compilations to be produced.

(c) *How obtained*—(1) *Content of application.* An application for the issuance of a subpoena stating reasons shall be submitted in triplicate to the Presiding Officer.

(2) *Procedure of application.* The original and two copies of the subpoena, marked “original,” “duplicate” and “triplicate,” shall accompany the application. The Presiding Officer shall rule upon an application for a subpoena *ex parte*, by issuing the subpoena or by issuing an order denying the application.

(d) *Issuance of a subpoena.* The Presiding Officer shall issue a subpoena by signing and dating, or ordering the Chief Counsel to sign and date, each copy in the lower right-hand corner of the document. The “duplicate” and “triplicate” copies of the subpoena shall be transmitted to the applicant for service in accordance with these Rules; the “original” copy shall be retained by or forwarded to the Chief Counsel for retention in the docket of the proceeding.

(e) *Service of a subpoena.* A subpoena may be served in person or by certified mail, return receipt requested, as provided in §511.16(b). Service shall be made by delivery of the signed “duplicate” copy to the person named therein.

(f) *Return of service.* A person serving a subpoena shall promptly execute a return of service, stating the date, time, and manner of service. If service is effected by mail, the signed return receipt shall accompany the return of service. In case of failure to make service, a statement of the reasons for the failure shall be made. The “triplicate” of the subpoena, bearing or accompanied by the return of service, shall be returned forthwith to the Chief Counsel after service has been completed.

(g) *Motion to quash or limit subpoena.* Within five (5) days of receipt of a subpoena, the person against whom it is directed may file with the Presiding Officer a motion to quash, modify, or limit the subpoena, setting forth the reasons why the subpoena should be withdrawn or why it should be modified or limited in scope. Any such motion shall be answered within five (5) days of service, and shall be ruled on immediately thereafter. The order shall specify the date, if any, for compliance with the specifications of the subpoena and the reasons for the decision.

(h) *Consequences of failure to comply.* In the event of failure to comply with a subpoena, the Presiding Officer may take any of the actions enumerated in § 511.37 or may order any other appropriate relief to compensate for the withheld testimony, documents, or other materials. If in the opinion of the Presiding Officer such relief is insufficient, the Presiding Officer shall certify to the Administrator a request for judicial enforcement of the subpoena.

[45 FR 81578, Dec. 11, 1980, as amended at 53 FR 26261, July 12, 1988]

§ 511.39 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) A party who desires the issuance of an order requiring a witness to testify or provide other information upon being granted immunity from prosecution under title 18, U.S.C., section 6002, may make a motion to that effect. The motion shall be made and ruled on in accordance with § 511.22, and shall include a showing:

(1) That the testimony or other information sought from a witness or prospective witness may be necessary to the public interest; and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of that individual's privilege against self-incrimination.

(b) If the Presiding Officer determines that the witness' testimony appears necessary and that the privilege against self-incrimination may be invoked, he or she may certify to the Administrator a request that he or she obtain the approval of the Attorney

General of the United States for the issuance of an order granting immunity.

(c) Upon application to and approval of the Attorney General of the United States, and after the witness has invoked the privilege against self-incrimination, the Presiding Officer shall issue the order granting immunity unless he or she determines that the privilege was improperly invoked.

(d) Failure of a witness to testify after a grant of immunity or after a denial of the issuance of an order granting immunity shall result in the imposition of appropriate sanctions as provided in § 511.37.

Subpart E—Hearings

§ 511.41 General rules.

(a) *Public hearings.* All hearings pursuant to this part shall be public unless otherwise ordered by the Presiding Officer. Notice of the time and location of the hearing shall be served on each party and participant, and published in the FEDERAL REGISTER.

(b) *Expedition.* Hearings shall proceed with all reasonable speed, insofar as practicable and with due regard to the convenience of the parties and shall continue without suspension until concluded, except in unusual circumstances.

(c) *Rights of parties.* Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the rights to present evidence, to conduct such cross-examination as may be necessary in the judgment of the Presiding Officer for a full and complete disclosure of the facts, and to be heard by objection, motion, brief, and argument.

(d) *Rights of participants.* Every participant shall have the right to make a written or oral statement of position, file proposed findings of fact, conclusions of law and a posthearing brief, in accordance with § 511.17(b).

(e) *Rights of witnesses.* Any person compelled to testify in a proceeding in response to a subpoena may be accompanied, represented, and advised by counsel or other representative, and may obtain a transcript of his or her testimony at no cost.