

U.S. Department of Labor

Office of Administrative Law Judges
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Cherry Hill, NJ 08002

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Issue Date: 10 March 2016

Case No.: 2014-AIR-00022

In the Matter of

MARK ESTABROOK
Complainant

v.

FEDERAL EXPRESS CORPORATION
Respondent

NOTICE OF HEARING AND PRE-HEARING ORDER

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) which was signed into law on April 5, 2000. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 CFR Part 1979. In accordance with the order issued on February 8, 2016, a pre-hearing telephone conference was held in this matter on March 8, 2016.

In accordance with the telephonic discussions, the hearing in this matter is scheduled as follows:

DATE: MONDAY, JUNE 6, 2016
AND CONTINUING AS NECESSARY

TIME: 9:30 a.m.

PLACE: LOCATION TO BE DETERMINED
MEMPHIS, TENNESSEE

Additional requirements and deadlines are contained in the pre-hearing order below.
Please read it carefully.

PRE-HEARING ORDER

A. APPLICABLE RULES OF PRACTICE

In accordance with 29 C.F.R. part 1979, the “Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges” set forth at 29 C.F.R. part 18, shall apply in this proceeding.¹

Documents sent by FAX to this office are limited to 12 pages, including cover sheet.
29 C.F.R. §§ 18.30(b)(3)(i).

B. DISCOVERY²

The parties are advised that 29 C.F.R. § 1979.107 provides me with broad authority to limit discovery in order to conclude the instant matter expeditiously. **Discovery shall commence immediately and shall be concluded not later April 1, 2016, except for Dr. Bettes’ deposition which must be done by April 8, 2016.**

Per 29 C.F.R. § 18.53, the parties are required to supplement their discovery responses to include information thereafter acquired.

To the greatest extent possible, the parties are expected to resolve discovery matters on their own. If, after a good faith effort, discovery issues remain, the parties may submit a *JOINT* motion identifying what issues remain unresolved, what efforts have been made to reach a resolution, and each parties’ arguments regarding the unresolved issues.

If subpoenas are needed, they should be requested from the undersigned Administrative Law Judge as soon as possible and should include the name of the person or organization to be subpoenaed. (29 C.F.R. § 18.56). If possible, please use the downloadable subpoena form found at the Office of Administrative Law Judges Website at www.oalj.dol.gov/subpoenas.htm. **Subpoenas submitted for signature must contain an appropriate case number and returnable envelop. If the subpoena is not completed as required, it will be returned unsigned. Further note, that if a party is requesting information such as a person’s medical records, subpoenas must include a relevant range of dates, and not simply ask for all records.**

¹ On May 19, 2015, United States Department of Labor published a Final Rule implementing the revised Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. See Final Rule, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 80 FED. REG. 28,767 (May 19, 2015) (hereafter “New Rules”). The effective date and compliance date for these revised rules is June 18, 2015. 80 FED. REG. at 28,768.

The published Final Rule is accessible at the following website:

<https://www.federalregister.gov/articles/2015/05/19/2015-11586/rules-of-practice-and-procedure-for-administrative-hearings-before-the-office-of-administrative-law>.

² See 29 C.F.R. §§ 18.50 – 18.65.

If a party asserts information requested in discovery is privileged, the parties are expected to comply with 29 C.F.R. § 18.51(e) and Fed. R. Civ. Proc. 26(b)(5).

C. SETTLEMENT

The parties are urged to consider alternative means for disposition throughout the course of these proceedings, and are expected to conduct substantive discussions regarding alternative means for resolution of this matter prior to the pre-hearing conference. See 29 C.F.R. § 1979.111(d)(2).

The parties are informed that the United States Department of Labor has a settlement judge program in which, upon the request of the parties, an administrative law judge, trained in alternative dispute resolution, will work with the parties to achieve a negotiated conclusion. See 29 C.F.R. § 18.13. A settlement judge, if requested, will be provided without cost. The parties are urged to consider requesting a settlement judge if they believe that assistance of a neutral third party will assist them in resolving this matter. I have no role in the appointment of a settlement judge. See <http://www.oalj.dol.gov> for details on the Department's settlement judge program.

D. PRE-HEARING STATEMENT

Each party shall file with my office a pre-hearing statement, and shall deliver a copy to the offices of counsel for all other parties to be received not later than, May 20, 2016. Each party's pre-hearing statement shall contain the items set out in 29 C.F.R. § 18.80, and, in addition, will contain the following information:

1. The name and address of each witness who will testify at the hearing; a statement of **precisely** (not generally) what the testimony of each witness will prove; and an estimate of the total time required for the direct examination of each witness.
2. A description of the documentary evidence that each party expects to admit to the record, identified by exhibit number, and a listing of the exhibits.

E. PRE-HEARING CONFERENCE³

The parties shall be available to participate in a pre-hearing conference by telephone on **May 31, 2016 at 12:00 p.m. Eastern Time.**

At the designated time:

1. DIAL **1-866-793-8793**

** YOU MUST USE A TOUCH-TONE PHONE TO PARTICIPATE IN THIS CONFERENCE CALL.

2. WHEN PROMPTED, USE THE *PARTICIPANT* PASSCODE **47228682** FOLLOWED BY A **"#"**

³ 29 C.F.R. § 18.44.

For good cause, counsel for either party may request an informal telephonic pre-hearing conference at any time. All such requests shall be in writing, shall reflect whether opposing counsel concurs with the request for a conference, and shall articulate why a conference is requested. Counsel requesting a conference shall provide at least two different dates, with specific times on each of those dates, when both parties will be available, at least one business day in advance of the first date proposed.

F. MOTIONS⁴ & PROTECTIVE ORDERS

Except for dispositive motions, no motion will be entertained unless the moving party describes the results of consultation with the opposing party or parties. 29 C.F.R. § 18.33(c)(3). Rulings on motions filed after May 2, 2016 will be deferred until the opening of the hearing, absent compelling circumstances. In accordance with 29 C.F.R. § 18.72, motions for summary decision must be made at least 30 days prior to the date set for hearing. However, I request that any dispositive motions be filed no later than April 22, 2016.

I anticipate that, due to the nature of the Respondent's business and the subject matter of the complaint, protective orders regarding evidence may be appropriate. The parties are urged to consider whether protective orders should be issued and are encouraged to submit joint motions whenever possible. If feasible, I will issue protective orders at or before the date of hearing. See 29 C.F.R. § 18.52.

G. HEARING EXHIBITS⁵

By the close of business not later than May 20, 2016, each party shall deliver to the offices of counsel for all other, but not to me, copies of all documentary evidence which will be offered at the hearing. Exhibits for the tribunal will be brought to the hearing. However, the parties shall provide me a copy of their index of proposed exhibits only later than May 20, 2016.

1. All documentary evidence to be offered at the hearing shall be presented in a bound volume, individually numbered by tab, and sequentially numbered overall in the lower right corner of each page. Each volume shall be limited to approximately 100 pages. Items for which protective orders are requested should be marked with a sheet of colored paper as the first page behind the tab.
2. Exhibits shall be paginated and marked appropriately as follows: Complainant - "CX ____" and Respondent - "RX ____."
3. The exhibits shall be accompanied by an exhibit index containing a description of each exhibit by tab number/letter, date and author, immediately followed by a statement of **precisely** (not generally) what the exhibit proves (if the exhibit exceeds 5 pages, the page(s) on which such proof appears shall be specified, and the relevant material

⁴ See generally 29 C.F.R. § 18.33.

⁵ See 29 C.F.R. § 18.82.

highlighted). The exhibit index shall reflect the exhibits for which protective orders have been requested.

4. Attached to each exhibit containing handwritten or difficult to read entries shall be a typed version of any such entry. A party disagreeing with the interpretation of the entry may submit its own typed version at the hearing.
5. A curriculum vitae or equivalent qualifications summary shall be submitted for any expert witness as part of the documentary evidence. No oral direct evidence on the expert's qualifications will be permitted absent a showing of special need.
6. The parties are encouraged to submit exhibits jointly to the greatest extent possible. Exhibits submitted jointly shall be denominated "JX ____," sequentially by letter (not number). If the parties cannot agree on the content of the index, each party may submit a separate index to the Joint Exhibits in which the party describes each exhibit and states what the exhibit proves, as set forth in subparagraph 3, above.
7. No post-hearing deposition testimony or other evidence of any kind shall be accepted, except for good cause shown and with my specific authorization.

H. ELECTRONIC AND DIGITAL EVIDENCE

A party who intends to submit evidence in any electronic or digital form must submit three (3) copies to me (in addition to the copy exchanged with opposing counsel) and must coordinate in advance with my Legal Assistant, Barbara Emmons, for guidance on readable formats.⁶ A party who submits evidence in a non-paper format is also responsible for providing me a means to refer to such evidence during the hearing (e.g., laptop computer).

I. SANCTIONS

Unless good cause is shown, parties will not be permitted to litigate issues, call witnesses, or introduce evidence, except as listed on their pre-hearing statement and served as ordered herein.

Failure to comply fully with this order may result in sanctions. *See* 29 C.F.R. § 18.57.⁷

⁶ *See* 29 C.F.R. § 18.82(b).

⁷ *See generally*, 29 C.F.R. § 18.22(c) and (d).

SO ORDERED.



Digitally signed by Scott R. Morris
DN: CN=Scott R. Morris,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=CHERRY HILL, S=NJ, C=US
Location: CHERRY HILL NJ

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

SERVICE SHEET

Case Name: ESTABROOK_MARK_v_FEDERAL_EXPRESS_CORP_

Case Number: 2014AIR00022

Document Title: NOTICE OF HEARING AND PRE-HEARING ORDER

I hereby certify that a copy of the above-referenced document was sent to the following this 10th day of March, 2016:



Digitally signed by Donna M. Broome
DN: CN=Donna M. Broome, OU=Paralegal
Specialist, O=US DOL Office of
Administrative Law Judges, L=CHERRY
HILL, S=NJ, C=US
Location: CHERRY HILL NJ

Donna M. Broome
Paralegal Specialist

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