TO BE RESCINDED

4906-7-07 **Discovery.**

(A) Scope of discovery.

(1) The purpose of this rule is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in board proceedings.

(2) Except as otherwise provided in paragraph (A)(7) of this rule, any party to a board proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of that proceeding. It is not grounds for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions and requests for admission. The frequency of using these discovery methods is not limited unless the board orders otherwise under paragraph (H) of this rule.

(3) Any party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify. Thereafter, any party may discovery from the expert or other party facts or data known or opinions held by the expert which are relevant to the stated subject matter. A party who has retained or specially employed an expert may, with the approval of the board, require the party conducting discovery to pay the expert a reasonable fee for the time spent responding to discovery requests.

(4) Discovery responses which are complete when made need not be supplemented with subsequently acquired information unless:

(a) The response fully identified each expert witness expected to testify at the hearing and stated the subject matter upon which each expert was expected to testify.

(b) The responding party later learned that the response was incorrect or otherwise materially deficient.

(c) The response indicated that the information sought was unknown or nonexistent and such information subsequently became known or existent.

(d) An order of the board or agreement of the parties provides for the supplementation of responses.

(e) Requests for the supplementation of responses are submitted prior to the commencement of the hearing.

(5) The supplementation of responses required under paragraph (A)(4) of this rule and requests for supplementation of responses submitted pursuant to paragraph (A)(4)(e) of this rule shall be provided within five business days of discovery of the new information.

(6) Nothing in this rule precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.

(7) A discovery request under this rule may not seek information from any party which is available in prefiled testimony, prehearing data submissions, or other documents which that party has filed with the board in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.

(8) For purposes of this rule, the term "party" includes any person who has filed a notice or petition to intervene which is pending at the time a discovery request or motion is to be served or filed.

(9) The staff shall be deemed a "party" under this rule for purposes of conducting discovery, but no party shall conduct discovery against the staff.

(10) Discovery may not be used to harass or delay existing procedural schedules.

(B) Time period for discovery.

(1) Discovery may begin immediately after an application is filed or a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.

(2) The board or the administrative law judge may shorten or extend the time period for discovery upon their own motion or upon motion of any party for good cause shown.

(C) Filing and service of discovery requests and responses.

Except as otherwise provided in paragraphs (H) and (I) of this rule and unless otherwise ordered for good cause shown, discovery requests shall be served upon the party from whom discovery is sought and filed with the board. Upon a showing of good cause, the board or the administrative law judge may determine that the responding party may recover the reasonable cost of providing copies from the party making the request. For purposes of this rule the term "response" includes written responses or objections to interrogatories, requests for the production of documents or tangible things, requests for permission to enter upon land or other property, and requests for admission.

(D) Interrogatories.

(1) Any party may serve upon any other party written interrogatories, to be answered by the party served. If the party served is a corporation, partnership, association, government agency, or municipal corporation, it shall designate one or more of its officers, agents, or employees to answer the interrogatories, who shall furnish such information as is available to the party. Each interrogatory shall be answered separately and fully, in writing and under oath, unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections shall be signed by the attorney or other person making them. The party upon whom the interrogatories have been served shall serve a copy of the answers or objections upon the party submitting the interrogatories and all other parties within twenty days after the service thereof, or within such shorter or longer time as the board or the administrative law judge may allow. The party submitting the interrogatories may move for an order under paragraph (I) of this rule with respect to any objection or other failure to answer an interrogatory.

(2) Subject to the scope of discovery set forth in paragraph (A) of this rule, interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served. An interrogatory which is otherwise proper is not objectionable merely because it calls for an opinion, contention, or legal conclusion, but the board or the administrative law judge may direct that such interrogatory need not be answered until certain designated discovery has been completed, or until some other designated time. The answers to interrogatories may be used to the extent permitted by the rules of evidence, but such answers are not conclusive and may be rebutted or explained by other evidence.

(3) Where the answer to an interrogatory may be derived or ascertained from public

documents on file in this state, or from documents which the party served with the interrogatory has furnished to the party submitting the interrogatory within the preceding twelve months, it is a sufficient answer to such interrogatory to specify the title of the document, the location of the document or the circumstances under which it was furnished to the party submitting the interrogatory, and the page or pages from which the answer may be derived or ascertained.

(4) Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, and the burden of deriving the answer is substantially the same for the party submitting the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party submitting the interrogatory a reasonable opportunity to examine, audit, or inspect such records.

(E) Depositions.

(1) Any party to a board proceeding may take the testimony of any other party or person, other than a member of the board staff, by deposition upon oral examination with respect to any matter within the scope of discovery set forth in paragraph (A) of this rule. The attendance of witnesses and production of documents may be compelled by subpoena as provided in rule 4906-7-08 of the Administrative Code.

(2) Any party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the deponent, to all parties, and to the board. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient for identification. If a subpoena duces tecum is to be served upon the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the notice.

(3) If any party shows that he or she was unable with the exercise of due diligence to obtain counsel to represent him or her at the taking of a deposition, the deposition may not be used against such party.

(4) The board or the administrative law judge may, upon motion, order that a deposition be recorded by other than stenographic means, in which case the order shall designate the manner of recording the deposition, and may include provisions to assure that the recorded testimony will be accurate and

trustworthy. If such an order is made, any party may arrange to have a stenographic transcription made at his or her own expense.

(5) A party may, in the notice and in a subpoena, name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, and shall set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

(6) Depositions may be taken before any person authorized to administer oaths under the laws of the jurisdiction in which the deposition is taken, or before any person appointed by the board or the administrative law judge. Unless all of the parties expressly agree otherwise, no deposition shall be taken before any person who is a relative, employee, or attorney of any party, or a relative or employee of such attorney.

(7) The person before whom the deposition is to be taken shall put the witness on oath or affirmation, and shall personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness. Examination and cross-examination may proceed as permitted in board hearings. The testimony shall be recorded stenographically or by any other means ordered under paragraph (E)(4) of this rule. If requested by any of the parties, the testimony shall be transcribed at the expense of the party making the request.

(8) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope upon the party taking the deposition, who shall transmit them to the officer, who in turn shall propound them to the witness and record the answers verbatim.

(9) At any time during the taking of a deposition, the board or the administrative law judge may, upon motion of any party or the deponent and upon a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party, order the person conducting the examination to cease taking the deposition, or may limit the scope and manner of taking the deposition as

provided in paragraph (H) of this rule. Upon demand of the objecting party or deponent, the taking of the depositions shall be suspended for the time necessary to make a motion for such an order.

(10) If and when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him or her, unless such examination and reading are expressly waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making the changes. The deposition shall then be signed by the witness unless the signing is expressly waived by the parties or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within ten days after its submission to him or her, the officer shall sign it and state on the record the fact of the waiver or the illness or absence of the witness, or the fact of the refusal to sign together with the reason, if any, given for such refusal. The deposition may then be used as fully as though signed, unless the administrative law judge upon motion to suppress, holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(11) The officer shall certify on the deposition that the witness was duly sworn by him or her and that the deposition is a true record of the testimony given by the witness. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(12) Documents and things produced for inspection during the examination of the witness shall, upon request of any party, be marked for identification and annexed to the deposition, except that:

(a) The person producing the materials may substitute copies to be marked for identification, if all parties are afforded a fair opportunity to verify the copies by comparison with the originals.

(b) If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to deposition.

(13) Depositions may be used in board hearings to the same extent permitted in civil actions in courts of record. Unless otherwise ordered for good cause shown, any depositions to be used as evidence must be filed with the board at least three days prior to the commencement of the hearing.

(14) The notice to a party deponent may be accompanied by a request made in compliance with paragraph (F) of this rule for the production of documents or tangible things at the taking of the deposition.

(F) Production of documents and things, entry upon land or other property.

(1) Subject to the scope of discovery set forth in paragraph (A) of this rule, any party may serve upon any other party a written request to:

(a) Produce and permit the party making the request, or someone acting on his or her behalf, to inspect and copy any designated documents, including writings, drawings, graphs, charts, photographs, or data compilations, which are in the possession, custody, or control of the party upon whom the request is served.

(b) Produce for inspection, copying, sampling, or testing any tangible things which are in the possession, control, or custody of the party upon whom the request is served.

(c) Permit entry upon designated land or other property for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(2) The request shall set forth the items to be inspected either by individual item or by category, and shall describe each category with reasonable particularity. The request shall also specify a reasonable time, place, and manner for conducting the inspection and performing the related acts.

(3) The party upon whom the request is served shall serve a written response within twenty days after the service of the request, or within such shorter or longer time as the board or the administrative law judge may allow. The response shall state, with respect to each item or category, that the inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reason for the objection shall be stated. If an objection is made to part of an item or category, that part shall be specified. The party submitting the request may move for an order under paragraph (I) of this rule with respect to any objection or other failure to respond to a request or any part thereof, or any failure to permit inspection as requested.

(4) Where a request calls for the production of a public document on file in this state, or a document which the party upon whom the request is served has furnished to the party submitting the request within the preceding twelve

months, it is a sufficient response to such request to specify the location of the document or the circumstances under which the document was furnished to the party submitting the request.

(G) Request for admission.

(1) Any party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any specific matter within the scope of discovery set forth in paragraph (A) of this rule, including the genuineness of any documents described in the request. Copies of any such documents shall be served with the request unless they are or have been otherwise furnished for inspection or copying.

(2) Each matter for which an admission is requested shall be separately set forth. The matter is admitted unless, within twenty days after the service of the request, or within such shorter or longer time as the board or the administrative law judge may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection, signed by the party or by his or her attorney. If an objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully make an admission or denial. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only part of the matter of which an admission is requested, the party shall specify that portion which is true and qualify or deny the remainder. An answering party may not give lack of information as a reason for failure to admit or deny a matter unless the party states that he or she has made reasonable inquiry and that information known or readily obtainable is insufficient to enable him or her to make an admission or denial. A party who considers the truth of a matter of which an admission has been requested to be a genuine issue for the hearing may not, on that basis alone, object to the request, but may deny that matter or set forth the reasons why an admission or denial cannot be made.

(3) Any party who has requested an admission may move for an order under paragraph (I) of this rule with respect to any answer or objection. Unless it appears that an objection is justified, the board or the administrative law judge shall order that an answer be served. If an answer fails to comply with the requirements of this rule, the board or the administrative law judge may:

(a) Order that the matter be admitted for purposes of the pending proceeding.

(b) Order that an amended answer be served.

(c) Determine that final disposition of the matter should be deferred until a prehearing conference or some other designated time prior to the commencement of the hearing.

(4) Unless otherwise ordered by the board or the administrative law judge, any matter admitted under this rule is conclusively established against the party making the admission, but such admission may be rebutted by evidence offered by any other party. An admission under this rule is an admission for the purposes of the pending proceeding only and may not be used for any other purposes.

(H) Motions for protective orders.

(1) Upon motion of any party or person from whom discovery is sought, the board or the administrative law judge may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

(a) Discovery not be had.

(b) Discovery may be had only on specified terms and conditions.

(c) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(d) Certain matters not be inquired into.

(e) The scope of discovery be limited to certain matters.

(f) Discovery be conducted with no one present except persons designated by the board or the administrative law judge.

(g) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way;.

(h) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

(2) No motion for a protective order shall be filed under this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order shall be accompanied by:

(a) A memorandum in support, setting forth the specific basis of the motion and citations to any authorities relied upon.

(b) Copies of any specific discovery request which are the subject of the request for a protective order.

(c) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party seeking discovery.

(3) If a request for a protective order is denied in whole or in part, the board or the administrative law judge may require that the party or person seeking the order provide or permit discovery on such terms and conditions as are just.

(4) Upon motion of any party or person filing a document with the board's docketing division relative to a case before the board, the board or the administrative law judge assigned to the case may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where it is determined that both of the following criteria are met: The information is deemed by the board or administrative law judge assigned to the case to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph.

(a) All documents submitted pursuant to paragraph (H) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(b) Three unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the chief of the docketing division, or the chief's designee. Each

page of the allegedly confidential material filed under seal must be marked as "Confidential," "Proprietary", or "Trade Secret".

(c) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

(5) Pending a ruling on a motion filed in accordance with paragraph (H) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered or released pursuant to this rule. The board and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "Confidential", "Proprietary", "Trade Secret", or with any other such marking, will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph (H) of this rule.

(6) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (E)(4) of this rule shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion and shall include a detailed discussion of the need for continued protection from disclosure.

(I) Motions to compel discovery.

(1) Any party, upon reasonable notice to all other parties and any persons affected thereby, may move for an order compelling discovery, with respect to:

(a) Any failure of a party to answer an interrogatory served under paragraph (D) of this rule.

(b) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under paragraph (F) of this rule.

(c) Any failure of a deponent to appear or to answer a question propounded under paragraph (E) of this rule.

(d) Any other failure to answer or respond to a discovery request made under paragraphs (D) to (G) of this rule.

(2) For purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer.

(3) No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought. A motion to compel discovery shall be accompanied by:

(a) A memorandum in support, setting forth:

(i) The specific basis of the motion, and citations of any authorities relied upon.

(ii) A brief explanation of how the information sought is relevant to the pending proceeding.

(iii) Responses to any objections raised by the party or person from whom discovery is sought.

(b) Copies of any specific discovery requests which are the subject of the motion to compel, and copies of any responses or objections thereto.

(c) An affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought.

(4) The board or the administrative law judge may grant or deny the motion in whole or in part. If the motion is denied in whole or in part, the board or the administrative law judge may issue such protective order as would be appropriate under paragraph (H) of this rule.

(5) Any order of the administrative law judge granting a motion to compel discovery in whole or in part may be appealed to the board in accordance with rule 4906-7-15 of the Administrative Code. If no application for review is filed within the time limit set forth in that rule, the order of the administrative law judge becomes the order of the board.

(6) If any party or person disobeys an order of the board compelling discovery, the board may:

(a) Seek appropriate judicial relief against the disobedient person or party under section 4903.04 of the Revised Code.

(b) Prohibit the disobedient party from further participation in the pending proceeding.

(c) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing evidence or conducting cross-examination on designated matters.

(d) Dismiss the pending proceeding if such proceeding was initiated by an application or petition, unless such a dismissal would unjustly prejudice any other party.

(e) Take such other action as the board considers appropriate.

Effective:

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Certification

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