

#### § 47.14

or other question to the Secretary, but not both.

[10 FR 2209, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946, as amended at 38 FR 30445, Nov. 5, 1973; 60 FR 8459, Feb. 14, 1995]

#### § 47.14 Prehearing conferences.

(a) In any proceeding in which it appears that a conference will expedite the proceeding, the examiner, at any time prior to or during the course of the oral hearing, may request the parties or their counsel to appear at a conference before the examiner to consider:

- (1) The simplification of the issues;
- (2) The necessity or the desirability of amendments to the pleadings;
- (3) The possibility of obtaining stipulations of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert or other witnesses; or
- (5) Such other matters as may expedite and aid in the disposition of the proceeding.

(b) No transcript or recording of the conference shall be made. If the conference is conducted by correspondence, the examiner shall forward copies of letters and documents to the parties as circumstances require. The correspondence in connection with a conference shall not be part of the record. The examiner shall prepare and file for the record a written summary of the action agreed upon or taken at the conference, which shall incorporate any written stipulations or agreements made by the parties at the conference or as a result of the conference.

(c) *Manner of the Conference.* (1) The conference shall be conducted by telephone or correspondence unless the examiner determines that conducting the conference by audio-visual telecommunication:

- (i) Is necessary to prevent prejudice to a party;
- (ii) Is necessary because of a disability of any individual expected to participate in the conference; or
- (iii) Would cost less than conducting the conference by telephone or correspondence. If the examiner determines that a conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of

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conducting the conference, the conference shall be conducted by personal attendance of any individual who is expected to participate in the conference, by telephone, or by correspondence.

(2) If the conference is not conducted by telephone or correspondence, the conference shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the conference by personal attendance of any individual who is expected to participate in the conference:

- (i) Is necessary to prevent prejudice to a party;
- (ii) Is necessary because of a disability of any individual expected to participate in the conference; or
- (iii) Would cost less than conducting the conference by audio-visual telecommunication.

[60 FR 8460, Feb. 14, 1995]

#### § 47.15 Oral hearing before the examiner.

(a) *When permissible.* (1) Where the amount of the damages claimed, either in the complaint or in the counterclaim, does not exceed \$30,000 (excluding interest), an oral hearing shall not be held, unless deemed necessary or desirable by the Fruit and Vegetable Programs or unless granted by the examiner as defined in § 47.2(i)(1), upon application of complainant or respondent setting forth the peculiar circumstances making an oral hearing necessary for a proper presentation of the case.

(2) Where the amount of damages claimed, either in the complaint or in the counterclaim, is in excess of \$30,000 (excluding interest), the procedure provided in this section (except as provided in § 47.20(b)(2)) shall be applicable.

(b) *Request for hearing.* Any party may request an oral hearing on the facts by including such request in the complaint. Failure to request an oral hearing within the time allowed for filing of the reply, or within 10 days after the expiration of the time allowed for filing an answer, shall constitute a waiver of such hearing, and any party so failing to request an oral hearing will be deemed to have agreed that the proceeding may be decided upon a

record formed under the documentary procedure provided in § 47.20.

(c) *Time, place, and manner.* (1) If and when the proceeding has reached the stage of oral hearing, the examiner, giving careful consideration to the convenience of the parties, shall set a time for hearing and shall file with the Hearing Clerk a notice stating the time and place of hearing. Unless the parties otherwise agree, the place of the hearing shall be the place in which the respondent is engaged in business. This notice shall state whether the hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to participate in the hearing and the examiner's determination regarding the manner of the hearing shall be made in accordance with paragraphs (c)(3) and (c)(4) of this section. If any change in the time, place, or manner of the hearing is made, the examiner shall file with the Hearing Clerk a notice of the change. The notice of any change in the time, place, or manner of the hearing shall be served on the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

(2)(i) If and when the proceeding has reached the stage of oral hearing, any party may move that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing rather than by audio-visual telecommunication. Any motion that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than by audio-visual telecommunication.

(ii) Within 10 days after the examiner issues a notice stating the manner in which the hearing is to be conducted, any party may move that the examiner reconsider the manner in which the hearing is to be conducted. Any motion for reconsideration must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other

than in accordance with the examiner's notice.

(3) The hearing shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the hearing by personal attendance of any individual expected to attend the hearing:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the hearing; or

(iii) Would cost less than conducting the hearing by audio-visual telecommunication. If the examiner determines that a hearing conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.

(4) The examiner may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone if the examiner finds that a hearing conducted by telephone:

(i) Would provide a full and fair evidentiary hearing;

(ii) Would not prejudice any party; and

(iii) Would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

(d) *Appearances*—(1) *Representation.* In any proceeding under the Act, the parties may appear in person or by counsel or other representative.

(2) *Failure to appear.* If any party to the proceeding, after being duly notified, fails to appear at the hearing, the party shall be deemed to have waived the right to an oral hearing in the proceeding. In the event that a party appears at the hearing and no party appears for the opposing side, the examiner may determine whether the party who is present shall present his or her evidence, in whole or in part, in the form of affidavits or by oral testimony.

(3) *Debarment of counsel or representative.* (i) Whenever, while a proceeding is

pending before him or her, the examiner finds that a person acting as counsel or representative for any party to the proceeding is guilty of unethical or unprofessional conduct, the examiner may order that such person be precluded from further acting as counsel or representative in such proceeding. An appeal to the Secretary may be taken from any such order, but the proceeding shall not be delayed or suspended pending disposition of the appeal: *Provided*, That the examiner may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(ii) In case the examiner has issued an order precluding a person from further acting as counsel or representative in the proceeding, the examiner, within a reasonable time thereafter, shall submit to the Secretary a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Secretary should take respecting the appearance of such person as counsel or representative in other proceedings before the Secretary. Thereafter, the Secretary may, after notice and an opportunity for hearing, issue such order respecting the appearance of such person as counsel or representative in proceedings before the Secretary as the Secretary finds to be appropriate.

(e) *Order of proceeding.* The complainant shall proceed first at the hearing and shall have the burden of proof, except that a party asserting a set-off or counterclaim shall have the burden of proof on such issue.

(f) *Written statements of direct testimony.* (1) Except as provided in paragraph (f)(2) of this section, each party must exchange with all other parties a written narrative verified statement of the oral direct testimony that the party will provide at any hearing to be conducted by telephone; the direct testimony of each employee or agent of the party that the party will call to provide oral direct testimony at any hearing to be conducted by telephone; and the direct testimony of each expert witness that the party will call to provide oral direct testimony at any hearing to be conducted by telephone. The written direct testimony of witnesses

shall be exchanged by the parties at least 10 days prior to the hearing. The oral direct testimony provided by a witness at a hearing conducted by telephone will be limited to the presentation of the written direct testimony, unless the examiner finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

(2) The parties shall not be required to exchange testimony in accordance with this paragraph if the hearing is scheduled to begin less than 20 days after the examiner's notice stating the time of the hearing.

(g) *Evidence—(1) In general.* (i) The testimony of witnesses at a hearing shall be upon oath or affirmation, subject to cross-examination, and shall be reported verbatim.

(ii) Any witness may, in the discretion of the examiner, be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) The examiner shall exclude, insofar as practicable, evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely.

(2) *Objections.* (i) If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, the party shall state briefly the grounds of such objections, whereupon an automatic exception will follow if the objection is overruled by the examiner. The transcript or recording shall not include argument or debate thereon except as ordered by the examiner. The ruling of the examiner on any objection shall be a part of the transcript or recording.

(ii) Only objections made before the examiner may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness shall be admitted in the manner provided in and subject to the provisions of § 47.16.

(4) *Affidavits.* Except as is otherwise provided in these rules, affidavits may be admitted only if the evidence is otherwise admissible and the parties agree (which may be determined by their

failure to make timely objections) that affidavits may be used.

(5) *Proof and authentication of official records or documents.* An official record or document, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same. Such record or document shall be evidenced by an official publication thereof or by a copy attested by the person having legal authority to make such attestation. The person attesting the copy shall make a certificate showing such authority.

(6) *Exhibits.* (i) All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon a satisfactory showing of the admissibility of the contents thereof, be numbered as exhibits, received in evidence, and made a part of the record. Unless the examiner finds that the furnishing of copies is impracticable, a copy of each exhibit shall be filed with the examiner for the use of each other party to the proceeding. The examiner shall advise the parties as to the exact number of copies which will be required to be filed.

(ii) If the testimony of a witness refers to a statute, a report, document, recording, or transcript, the examiner, after inquiry relating to the identification of such statute, report, document, recording, or transcript, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference. If relevant and material matter offered in evidence is embraced in a report, document, recording, or transcript containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall, insofar as practicable, be designated by the party and segregated and excluded.

(7) [Reserved]

(8) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript or recording. The offer of proof shall consist of a brief statement describing the evidence to be offered. If the evidence consists of a

brief oral statement or of an exhibit, it shall be inserted into the transcript or recording in toto. In such event, it shall be considered a part of the transcript or recording if the Secretary decides that the examiner's ruling in excluding the evidence was erroneous. The examiner shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if the Secretary decides that the examiner erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to permit the taking of such evidence.

(h) *Oral argument before examiner.* The examiner may permit the parties or their counsel to argue orally at the hearing or at some other time prior to the transmittal of the record to the Secretary as provided in this part. Such argument may be limited by the examiner to any extent that the examiner finds necessary for the expeditious or proper disposition of the proceeding.

(i) *Transcript or recording.* (1) Hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual who is expected to participate in the hearing shall be transcribed, unless the examiner finds that recording the hearing verbatim would expedite the proceeding and the examiner orders the hearing to be recorded verbatim.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the examiner determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the examiner shall order the verbatim transcription of the recording as requested by the party.

(3) If a reporter transcribes or records the testimony at a hearing, the reporter shall deliver the original transcript or recording, with exhibits thereto attached, to the examiner, who will retain such copy for the official file and for use in preparing his or her report. The reporter will also deliver to the examiner such other copy or copies as may be ordered by the Department,

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which copy or copies the examiner will forward to the Hearing Clerk.

(4) Parties to the proceeding, or others, who desire a copy of the transcript or recording of the hearing may place orders at the hearing with the reporter, who will furnish and deliver such copies direct to the purchaser upon payment of the applicable rate.

[10 FR 2213, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946, as amended at 24 FR 10055, Dec. 12, 1959; 27 FR 12398, Dec. 14, 1962; 38 FR 30445, Nov. 5, 1973; 47 FR 21234, May 18, 1982; 60 FR 8460, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§47.16 Depositions.

(a) *Application for taking deposition.* Upon the application of a party to the proceeding, the examiner as defined in §47.2(i)(1) may, except as provided in paragraph (b) of this section, at any time after the filing of the moving papers, order, over the facsimile signature of the Secretary, the taking of testimony by deposition. The application shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

(1) The name and address of the proposed deponent; (2) the name and address of the person (referred to hereinafter in this section as the "officer"), qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made; (3) the proposed time of the deposition which, unless otherwise agreed, shall be at least 30 days after the date of the mailing of the application; (4) the proposed place of the deposition; (5) the proposed manner in which the deposition is to be conducted (telephone, audio-visual telecommunication, or by personal attendance of the individuals who are expected to participate in the deposition); and (6) the reasons for taking the deposition.

(b) *Examiner's order for taking deposition.* (1) If, after examination of the application, the examiner is of the opinion that the deposition should be taken, or if the parties are using depositions in lieu of affidavits pursuant to §47.20(b)(2), the examiner shall order the taking of the deposition. In no case, except for good cause shown, may the examiner order the taking of a deposition less than 10 days prior to the designated date of deposition. The

order shall be filed with the Hearing Clerk upon the parties in accordance with §47.4.

(2) The order shall state:

(i) The time of the deposition (which unless otherwise agreed shall not be less than 20 days after the filing of the order);

(ii) The place of the deposition;

(iii) The manner of the deposition (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition);

(iv) The name of the officer before whom the deposition is to be made; and

(v) The name of the deponent.

(3) The deposition shall be conducted in the manner (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition) agreed to by the parties.

(4) If the parties cannot agree on the manner in which the deposition is to be conducted:

(i) The deposition shall be conducted by telephone unless the examiner determines that conducting the deposition by audio-visual telecommunication:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone.

(ii) If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone or audio-visual telecommunication.

(c) *Qualification of officer.* The deposition shall be made before the examiner or before an officer authorized by the law of the United States or by the law