

visual telecommunication would measurably increase the United States Department of Agriculture's cost of 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 Judge 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.

(d) *Order.* Actions taken as a result of a conference shall be reduced to a written appropriate order, unless the Judge concludes that a stenographic report shall suffice, or, if the conference takes place within 7 days of the beginning of the hearing, the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

(e) *Related matters.* Upon motion of a respondent, the Judge may order the attorney for the complainant to produce and permit the respondent to inspect and copy or photograph any relevant written or recorded statements or confessions made by such respondent within the possession, custody or control of the complainant.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995]

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. A petition for review shall be deemed a request for a hearing. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. Waiver of hearing shall not be deemed to be a waiver of

the right to request oral argument before the Judicial Officer upon appeal of the Judge's decision. In the event the respondent denies any material fact and fails to file a timely request for a hearing, the matter may be set down for hearing on motion of the complainant or upon the Judge's own motion.

(b) *Time, place, and manner.* (1) If any material issue of fact is joined by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties. The Judge shall file with the Hearing Clerk a notice stating the time and place of the hearing.² 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. The Judge's determination regarding the manner of the hearing shall be made in accordance with paragraphs (b)(3) and (b)(4) of this section. If any change in the time, place, or manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of such change, which notice shall be served upon 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.

²The place of hearing in a proceeding under the Packers and Stockyards Act shall be set in accordance with the Packers and Stockyards Act (7 U.S.C. 228(e) and (f)). In essence, if there is only one respondent, the hearing is to be held as near as possible to the respondent's place of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent and they have their places of business or residence within a single unit of local government, a single geographical area within a State, or a single State, the hearing is to be held as near as possible to their places of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent, and they have their places of business or residence distant from each other, 7 U.S.C. 228(e) and (f) have no applicability.

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(2)(i) If any material issue of fact is joined by the pleadings and the matter is at issue and is ready for 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 Judge issues a notice stating the manner in which the hearing is to be conducted, any party may move that the Judge 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 Judge's notice.

(3) The hearing shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the hearing by personal attendance of any individual who is expected to participate in 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 Judge 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 Judge 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 Judge 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.

(c) *Appearances.* The parties may appear in person or by attorney of record in the proceeding. Any person who appears as attorney must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(d) *Debarment of attorney.* (1) Whenever a Judge finds that a person acting as attorney for any party to the proceeding is guilty of unethical or contumacious conduct, in or in connection with a proceeding, the Judge may order that such person be precluded from further acting as attorney in the proceeding. An appeal to the Judicial Officer may be taken from any such order, but no proceeding shall be delayed or suspended pending disposition of the appeal: *Provided*, That the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney.

(2) Whenever it is found, after notice and opportunity for hearing, that a person, who is acting or has acted as attorney for another person in any proceeding before the United States Department of Agriculture, is unfit to act as such counsel because of such unethical or contumacious conduct, such person will be precluded from acting as counsel in any or all proceedings before the Department as found to be appropriate.

(e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in

part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

(2) If the petitioner in the case of a Petition for Review of a determination of responsibly connected status within the meaning of 7 U.S.C. 499a(b)(9), having been duly notified, fails to appear at the hearing without good cause, such petitioner shall be deemed to have waived the right to a hearing and to have voluntarily withdrawn the petition for review.

(f) *Order of proceeding.* Except as may be determined otherwise by the Judge, the complainant shall proceed first at the hearing.

(g) *Written statements of direct testimony.* (1) Except as provided in paragraph (g)(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 Judge 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 Judge's notice stating the time of the hearing.

(h) *Evidence—(1) In general.* (i) The testimony of witnesses at a hearing

shall be on oath or affirmation and subject to cross-examination.

(ii) Upon a finding of good cause, the Judge may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

(2) *Objections.* (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Judge, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge 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 § 1.148.

(4) *Exhibits.* Unless the Judge finds that the furnishing of copies is impracticable, four copies of each exhibit shall be filed with the Judge: *Provided*, That, where there are more than two parties in the proceeding, an additional copy shall be filed for each additional party. A true copy of an exhibit may be substituted for the original.

(5) *Official records or documents.* An official government record or document or entry therein, if admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be prima facie evidence of the relevant facts stated therein. Such

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record or document shall be evidenced by an official publication thereof or by a copy certified by a person having legal authority to make such certification.

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

(7) *Offer of proof.* Whenever evidence is excluded by the Judge, 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 excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript or recording in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record. In either event, the evidence shall be considered a part of the transcript or recording and hearing record if the Judicial Officer, upon appeal, decides the Judge's ruling excluding the evidence was erroneous and prejudicial. If the Judicial Officer decides the Judge's ruling excluding the evidence was erroneous and prejudicial and that it would be inappropriate to have such evidence considered a part of the hearing record, the Judicial Officer may direct that the hearing be reopened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

(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 Judge finds that recording the hearing verbatim would expedite the proceeding and the Judge orders the hearing to be recorded verbatim. The Judge shall certify that to the best of his or her knowledge and belief any recording

made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

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

(3) Recordings or transcripts of hearings shall be made available to any person at actual cost of duplication.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995; 61 FR 11504, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

§ 1.142 Post-hearing procedure.

(a) *Corrections to transcript or recording.* (1) Within the period of time fixed by the Judge, any party may file a motion proposing corrections to the transcript or recording.

(2) Unless a party files such a motion in the manner prescribed, the transcript or recording shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript or recording of the testimony given at the hearing and to contain an accurate description or reference to all exhibits received in evidence and made part of the hearing record, and shall be deemed to be certified without further action by the Judge.

(3) As soon as practicable after the close of the hearing and after consideration of any timely objections filed as to the transcript or recording, the Judge shall issue an order making any corrections to the transcript or recording which the Judge finds are warranted, which corrections shall be entered onto the original transcript or recording by the Hearing Clerk (without obscuring the original text).

(b) *Proposed findings of fact, conclusions, orders, and briefs.* Prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. A copy of each such document filed by a party shall be served upon each of the other parties.