

§ 1.166

to the complaint, or to the answer or other pleading, may be made by agreement of the parties or allowed at the discretion of the Judge. In case of an amendment which significantly changes the issues, the hearing shall, on the request of a party, be postponed or adjourned for a reasonable period, if the Judge determines that such action is necessary to avoid prejudice to the party.

§ 1.166 Consent order.

At any time, complainant and respondent may agree to the entry of a consent order. Such order shall be entered by the Judge (prior to a decision) or the Judicial Officer (after a decision by the Judge), and become effective on the date specified therein.

§ 1.167 Conference.

(a) *Purpose.* Upon motion of a party or upon the Judge's own motion, the Judge may direct the parties to attend a conference when the Judge finds that the proceeding would be expedited by discussions on matters of procedure and/or possible stipulations. The conference may include discussions regarding:

- (1) Simplification of the issues;
- (2) Limitation of expert or other witnesses;
- (3) The orderly presentation of evidence; and
- (4) Any other matters that may expedite and aid in the disposition of the proceeding.

(b) *Manner of the Conference.* (1) The conference shall be conducted by telephone or correspondence unless the Judge 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 Judge determines that a conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the conference, the conference shall be conducted by personal attend-

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ance 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.

[60 FR 8457, Feb. 14, 1995]

§ 1.168 Procedure for hearing.

(a) *Time and place.* The oral hearing shall be held at such time and place as specified in the complaint, and not less than 30 days after service thereof. The time and place of the hearing may be changed for good cause, by the Judge, upon motion of either complainant or respondent.

(b) *Manner of hearing.* (1) The Judge shall file with the Hearing Clerk a notice stating whether the hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to attend the hearing and the Judge's determination regarding the manner of hearing shall be made in accordance with paragraphs (b)(3) and (b)(4) of this section. If any change in the manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of the change, which notice 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) 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 counsel or by other representative. Persons who appear as counsel or in a representative

capacity must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(d) *Order of proceeding.* Except as otherwise may be agreed by the parties and approved by the Judge, the complainant shall proceed first at the hearing.

(e) *Failure to appear.* If respondent, after being duly notified, fails to appear at the hearing, and no good cause for such failure is established, complainant shall present a *prime facie* case on the matters denied in the answer.

(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 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.

(g) *Evidence.* (1) The testimony of witnesses at the hearing shall be upon oath or affirmation, transcribed or recorded verbatim, and subject to cross-examination. 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.

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(2) *Objections.* If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination, the party shall briefly state the grounds of such objections, whereupon an automatic exception will follow if the objection is overruled by the Judge. The ruling of the Judge on any objection shall be part of the transcript or recording. Only objections made before the Judge may subsequently be relied upon in the proceeding.

(3) *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, and shall be *prima facie* evidence of the relevant facts stated therein. Such 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.

(4) *Exhibits.* Unless the Judge finds that the furnishing of multiple copies is impracticable, four copies of each exhibit shall be filed with the Judge unless the Judge finds that a greater or lesser number is desirable. A true copy of an exhibit may be substituted for the original.

(5) *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 opposing party shall be given adequate opportunity to show that such facts are erroneously noticed.

(6) *Offer of proof.* Whenever evidence is deleted 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 excluded. 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 and record if the Judicial Officer decides that the Judge's ruling in excluding the evidence was erroneous and prejudicial. The Judge shall not allow the insertion

of such excluded evidence in toto if the taking of such evidence will consume considerable time at the hearing. In the latter event, if the Judicial Officer decides that the Judge's ruling excluding the evidence was both prejudicial and erroneous, the hearing may be reopened to permit the taking of such evidence.

(7) *Affidavits.* Affidavits may be submitted into evidence, in lieu of witness testimony, only to the extent, and in the manner agreed upon by the parties.

(h) *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.

[45 FR 6587, Jan. 29, 1980, as amended at 60 FR 8457, Feb. 14, 1995]

§ 1.169 Post-hearing procedure and decision.

(a) *Corrections to transcript or recording.* (1) At any time, but not later than the time fixed for filing proposed findings of fact, conclusions and order, or briefs, as the case may be, 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,