

## § 26.43

filed in time to permit the conclusion of discovery 15 days before the date fixed for the hearing. A request for a subpoena to testify at the hearing shall be filed at least 3 days prior to the hearing, unless otherwise allowed by the ALJ for good cause shown.

(c) *Content.* The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(d) *Service and fees.* Subpoenas shall be served, and fees and costs paid to subpoenaed witnesses, in accordance with Rule 45(b)(1) of the Federal Rules of Civil Procedure.

(e) *Motion to quash.* The individual to whom the subpoena is directed or a party may file a motion to quash the subpoena within 10 days after service, or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

## § 26.43 Protective order.

(a) A party, a prospective witness, or a deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, as provided in Rule 26(c) of the Federal Rules of Civil Procedure.

## HEARINGS

### § 26.44 General.

(a) *Time of hearing.* The hearing shall commence not later than 90 days following the Government's filing of the complaint and response under § 26.37, unless the time is extended for good cause. The ALJ shall provide written notice to all parties of the reasons for any extension of time.

(b) *Location of hearing.* The hearing shall be held where the respondent resides or transacts business, or in such other place as may be agreed upon by the parties and the ALJ. Hearings for Program Fraud Civil Remedies Act cases shall be located in accordance with 31 U.S.C. 3803(g)(4).

## 24 CFR Subtitle A (4-1-04 Edition)

(c) *Notice of hearing.* The ALJ shall issue a notice of hearing to all parties specifying the time and location of the hearing, the matters of fact and law to be heard, the legal authority under which the hearing is to be held, a description of the procedures for the conduct of the hearing, and such other matters as the ALJ determines to be appropriate.

(d) *Limitations for Program Fraud Civil Remedies Act cases.* The notice of hearing must be served upon the respondent within 6 years after the date on which the claim or statement is made. If the respondent fails to file a timely response to the Government's complaint, service of a default judgment under § 26.39 shall be regarded as a notice of hearing for purposes of this section. The statute of limitations may be waived by agreement of the parties.

(e) *Burden and standard of proof.* HUD shall prove the respondent's liability and any aggravating factors by a preponderance of the evidence. Respondent shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(f) *Public hearings.* Unless otherwise ordered by the ALJ for good cause shown, the hearing shall be open to the public.

## § 26.45 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. In order to be admissible, any written statement must be provided to all other parties along with the last known address of the witness, in a manner that allows sufficient time for other parties to subpoena the witness for cross-examination at the hearing.

## § 26.46 Evidence.

The ALJ shall admit any relevant oral or documentary evidence that is not privileged. The ALJ may, however, exclude evidence if its probative value is substantially outweighed by confusion of the issues, or by considerations

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of undue delay, waste of time, or needless presentation of cumulative evidence.

### § 26.47 The record.

The hearing will be recorded and transcribed. The transcript of testimony, exhibits, and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary or designee.

### § 26.48 Posthearing briefs.

Posthearing briefs shall be filed only upon order by the ALJ.

### § 26.49 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the relief granted.

(b) The ALJ shall serve the initial decision on all parties within 60 days after either the close of the record or the expiration of time permitted for submission of posthearing briefs, whichever is later. The initial decision shall include a statement of each party's right to file a request for Secretarial review. The ALJ may extend the 60-day period for serving the initial decision in writing for good cause.

(c) If no appeal is timely filed with the Secretary or designee, the initial decision shall become the final agency action.

### § 26.50 Appeal to the Secretary.

(a) Except as otherwise set forth in paragraph (b) of this section, either party may file with the Secretary a petition for review within 30 days after the ALJ issues an initial decision. The Secretary or designee may extend the 30-day period for good cause. If the Secretary or designee does not act upon the petition for review within 90 days of its service, then the initial decision shall become final.

(b) Appeals of Program Fraud Civil Remedies Act decisions (24 CFR part 28). Only the respondent may file a petition for Secretarial review. The petition must be filed within 30 days after the ALJ issues the initial decision. The Secretary or designee may extend the 30-day period for good cause. If the Sec-

retary or designee does not act upon the petition for review within 30 days of its service, then the initial decision shall become final.

(c) *Brief in support of petition.* The petition for review shall be accompanied by a written brief, not to exceed 10 pages, specifying exceptions to the initial decision and reasons supporting the exceptions.

(d) *Service.* The party submitting the petition for review shall serve a copy of the petition and brief in support of the petition on the other parties and on the Chief Docket Clerk.

(e) *Forwarding of the record.* Upon request by the Office of the Secretary, the ALJ shall forward the record of the proceeding to the Secretary or designee.

(f) *Brief in opposition.* Any opposing party may file a brief opposing review, not to exceed 10 pages, within 20 days of receiving the petition for review and accompanying brief. The brief in opposition shall be served on all parties.

(g) *Additional briefs.* If the petition is granted, then the Secretary or designee may order the filing of additional briefs.

(h) There is no right to appear personally before the Secretary or designee.

(i) There is no right to appeal any interlocutory ruling by the ALJ.

(j) In reviewing the initial decision, the Secretary or designee shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(k) The Secretary or designee shall consider only evidence contained in the record forwarded by the ALJ. However, if any party demonstrates to the satisfaction of the Secretary or designee that additional evidence not presented at the hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Secretary or designee shall remand the matter to the ALJ for consideration of such additional evidence.

(l) The prohibitions of ex parte contacts in § 26.30 shall apply to contacts with the Secretary or designee.