

§ 202.111

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participate in the prehearing conference; or

(iii) Would cost less than conducting the prehearing conference by audio-visual telecommunication.

[43 FR 30510, July 14, 1978, as amended at 60 FR 8466, Feb. 14, 1995]

§ 202.111 Rule 11: Hearing, oral or written.

(a) *When held.* A hearing, oral or written, shall be held unless:

(1) Each respondent admits or is deemed to admit sufficient allegations of the complaint to support the full amount claimed by the complainant as reparation;

(2) Each respondent admits liability to the complainant in the full amount claimed by the complainant as reparation;

(3) Before a hearing has been completed the parties agree in writing that the proceeding may be decided on the basis of the record as it stands at the time such agreement is filed; or

(4) Before a hearing has been completed the parties settle their dispute or the complainant withdraws the complaint.

(b) *Whether oral or written.* The hearing provided for in paragraph (a) of this section shall be oral if:

(1) \$10,000 or more is in controversy and any respondent files a written request for an oral hearing with such respondent's answer; or

(2) \$10,000 or more is in controversy and any complainant files a written request for an oral hearing on or before the 20th day after service on such complainant of notice that no respondent has filed a timely request for an oral hearing; or

(3) Less than \$10,000 is in controversy and the presiding officer determines, upon written request by any party thereto, that an oral hearing is necessary to establish the facts and circumstances giving rise to the controversy. The hearing shall be written if not oral.

(c) *Withdrawal of request.* If \$10,000 or more is in controversy and a party has timely filed a request for oral hearing, such party may withdraw such request at any time prior to completion of an oral hearing. If such a withdrawal leaves no pending request for oral hear-

ing in the proceeding, and if the presiding officer has not decided that the hearing should be oral, each other party shall be served with notice of this and shall be given 20 days to request an oral hearing. If any party files a request for oral hearing in such time, the hearing shall be oral in accordance with paragraph (b) of this section.

(d) *Presiding Officer's recommendation.* The presiding officer may recommend voluntary withdrawal of a request for oral hearing, timely filed. Declining to make such withdrawal shall not affect the rights or interests of any party.

(e) *Representation.* Any party may appear in an oral hearing, or file evidence in a written hearing, in person or by counsel or other representative. For unethical or contumacious conduct in or in connection with a proceeding, the presiding officer may preclude a person from further acting as attorney or representative for any party to the proceeding; any such order of the presiding officer shall be served on the parties; an appeal to the Judicial Officer may be taken from any such order immediately.

[51 FR 42083, Nov. 21, 1986, as amended at 55 FR 41184, Oct. 10, 1990]

§ 202.112 Rule 12: Oral hearing.

(a) *Time, place, and manner.* (1) If and when the proceeding has reached the stage where an oral hearing is to be held, the presiding officer shall set a time, place, and manner for oral hearing. The time shall be set based upon careful consideration to the convenience of the parties. The place shall be set in accordance with paragraph (a)(2) of this section and careful consideration to the convenience of the parties. The manner in which the hearing is to be conducted shall be determined in accordance with paragraphs (a)(3) and (a)(4) of this section.

(2) The place shall be set in accordance with paragraphs (e) and (f) of section 407 of the Act, if applicable. In essence, under paragraphs (e) and (f) of section 407 of the Act, if the complainant and the respondent, or all of the parties, if there are more than two, have their principal places of business or residence within a single unit of

local government, a single geographical area within a State, or a single State, the oral hearing is to be held as near as possible to such places of business or residence, depending on the availability of an appropriate location for conducting the hearing. If the parties have such places of business or residence distant from each other, then paragraphs (e) and (f) of section 407 of the Act are not applicable.

(3) The oral hearing shall be conducted by audio-visual telecommunication unless the presiding officer determines that conducting the oral 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 presiding officer 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 presiding officer 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 presiding officer 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.

(b) *Notice.* (1) A notice stating the time, place, and manner of oral hearing shall be served on each party prior to the time of the oral hearing. The notice shall state whether the oral hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to participate in the hearing.

If any change is made in the time, place, or manner of the oral hearing, a notice of the change shall be served on each party prior to the time of the oral hearing as changed, unless the change is made during the course of an oral hearing and shown in the transcript or on the recording. Any party may waive such notice, in writing, or orally on the record at an oral hearing and shown in the transcript or on the recording.

(2) If the presiding officer orders an 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.

(3) Within 10 days after the presiding officer issues a notice stating the manner in which the hearing is to be conducted, any party may move that the presiding officer 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 presiding officer's notice.

(c) *Failure to appear.* If any party to the proceeding, after being duly notified, fails to appear at the oral hearing in person or by counsel or other representative, such party shall be deemed to have waived the right to add any further evidence to the record in the proceeding, or to object to the admission of any evidence; if the parties who are present are all adverse to such party, they shall have an election to present evidence, in whole or in part, in the form of oral testimony before the presiding officer, affidavits, or depositions.

(d) *Order of proceeding.* Complainant shall proceed first, if present at the commencement of the oral hearing.

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

(f) *Evidence—(1) In general.* The testimony of witnesses at an oral hearing shall be on oath or affirmation and subject to cross-examination. Any witness other than a party may be examined separately and apart from all other witnesses, in the discretion of the presiding officer. The presiding officer shall exclude evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort on which responsible persons are accustomed to rely, insofar as practicable.

(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 or to any other ruling of the presiding officer, such party shall state briefly the grounds of such objection, and the presiding officer shall rule on it. The transcript or recording shall include argument or debates on objections, except as ordered by the presiding officer, and shall include the ruling of the presiding

officer. Objections not made before the presiding officer may not subsequently be relied on in the proceeding.

(3) *Offer of proof.* Whenever evidence is excluded by the presiding officer, the party offering such evidence may make an offer of proof. The offer of proof shall consist of a brief statement, which shall be included in the transcript or recording, describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in full in the transcript or recording. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the record. In either such event, if the judicial officer decides that the presiding officer's ruling in excluding the evidence was erroneous and prejudicial, such evidence shall be considered a part of the record. If the taking of such evidence will consume a considerable length of time at the hearing, the presiding officer shall not allow the insertion of such evidence in full and, if the judicial officer decides that the presiding officer's ruling in excluding the evidence was erroneous and prejudicial, the hearing shall be reopened to permit the taking of such evidence.

(4) *Depositions and affidavits.* Except as is otherwise provided in these rules, admission of the deposition of any witness shall be subject to the provisions of rule 9, § 202.109, and affidavits, and statements under penalty of perjury as provided in 28 U.S.C. 1746, Pub. L. 94-550, may be admitted only if the evidence is otherwise admissible and no party objects.

(5) *Department records.* A true copy of any written entry in any record of the Department, made by an officer or employee of the Department in the course of the official duty of such officer or employee, and relevant to the issues involved in the hearing, shall be admissible as prima facie evidence of the facts stated in the record of the Department, without the production of such officer or employee.

(6) *Exhibits.* (i) For each exhibit offered by a party, copies in addition to the original shall be filed with the presiding officer for the use of all other parties to the proceeding, except where the presiding officer finds that the furnishing of copies is impracticable. The

presiding officer shall tell the parties the number of copies required to be filed, make the proper distribution of the copies, and have this noted on the record.

(ii) If the testimony of a witness refers to any document, the presiding officer shall determine whether it shall be produced at the hearing and made a part of the record as an exhibit, or whether it shall be incorporated in the record by reference.

(iii) If relevant and material matter is embraced in a document containing irrelevant or immaterial matter, such irrelevant or immaterial matter shall be designated by the party offering the document in evidence, and shall be segregated and excluded, insofar as practicable.

(g) *Subpoenas*—(1) *Issuance*. The attendance and testimony of witnesses and the production of documentary evidence, from any place in the United States, on behalf of any party to the proceeding, may be required by subpoena at any designated place for oral hearing. Subpoenas may be issued by the presiding officer, on a written application filed by a party, showing the grounds and necessity thereof, and, with respect to subpoenas for the production of documentary evidence, showing their competency, relevancy, and materiality and the necessity for their production. Subpoenas may be issued on the motion of the presiding officer.

(2) *Service; proof of service*. A subpoena may be served by any natural person over the age of 18 years. The party at whose instance a subpoena is issued shall be responsible for serving it, however, at the request of such party the Secretary will attempt to serve it.

(h) *Oral argument*. The presiding officer shall permit oral argument by the parties or their counsel who are present at an oral hearing, but may limit such argument to any extent that the presiding officer finds necessary for the expeditious or proper disposition of the case.

(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 presiding officer finds that recording the hearing verbatim would expedite the proceeding and the presiding officer orders the hearing to be recorded verbatim. The presiding officer 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 presiding officer determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the presiding officer shall order the verbatim transcription of the recording as requested by the party.

(3) Parties to the proceeding who desire copies of the transcript or recording of the oral hearing may make arrangements with the reporter, who will furnish and deliver such copies direct to such parties, upon receipt from such parties of payment for the transcript or recording, at the rate provided by the contract between the reporter and the Department for such reporting service.

(j) *Filing, and presiding officer's certificate, of the transcript or recording*. As soon as practicable after the close of the oral hearing, the reporter shall transmit to the presiding officer the original transcript or recording of the testimony, and as many copies of the transcript or recording as may be required by paragraph (j) of this section for the area offices of the Agency and as may be required for the Washington office of the Agency. At the same time the reporter shall also transmit a copy of the transcript or recording to each party who shall have arranged and paid for it, as provided in paragraph (h) of this section. Upon receipt of the transcript or recording, the presiding officer shall attach to the original transcript or recording a certificate stating that, to the best of the presiding officer's knowledge and belief, the transcript or recording is a true, correct, and complete transcript or recording of the testimony given at the hearing and that the exhibits mentioned in it are

all the exhibits received in evidence at the hearing, with such exceptions as the certificate shall specify. Such certificate shall be served on each party and a copy thereof shall be attached to each copy of the transcript or recording received by the presiding officer. In accordance with such certificate the presiding officer shall note, on the original transcript or recording, each correction detailed in such certificate by adding or crossing out (but without obscuring the texts as originally transcribed or recorded) at the appropriate places any words necessary to make the text conform to the correct meaning, as certified by the presiding officer. The presiding officer shall send the copies of the transcript or recording to the hearing clerk who shall send them to the Agency.

(k) *Keeping of copies of the transcript or recording.* During the period in which the proceeding has an active status in the Department, a copy of the transcript or recording shall be kept at the area office of the Agency most convenient to the respondent; however, if there are two or more respondents and they are located in different regions, such copy of the transcript or recording shall be kept at the area office of the Agency nearest to the place where the hearing was held. In addition, a copy of the transcript or recording shall be kept at the area office of the Agency most convenient to the complainant. Any such copy shall be available for examination during official hours of business at the area office, but shall remain the property of the Department and shall not be removed from such office.

[43 FR 30510, July 14, 1978, as amended at 55 FR 41184, Oct. 10, 1990; 60 FR 8466, Feb. 14, 1995]

§ 202.113 Rule 13: Written hearing.

(a) *Evidence.* As used in this section, the term “evidence” shall mean depositions, affidavits, or statements under penalty of perjury as provided in 28 U.S.C. 1746, Pub. L. 94-550, of persons having knowledge of the facts, or documents properly identified by such deposition, affidavit, or statement, or otherwise authenticated in such a manner that they would be admissible in evidence at an oral hearing, except as pro-

vided hereinafter. Testimony on deposition, to the extent credible, shall be given greater weight as evidence, than such affidavits or statements. In a case in which a party, entitled to oral hearing as provided in rule 11, §202.111, withdraws such party’s request for oral hearing on condition that only depositions be used if a written hearing is held, only depositions, and documents properly identified therein, shall be made a part of the record as evidence by the parties if a written hearing is held.

(b) *Verification.* Any facts must be verified, by oath or affirmation before a person legally authorized to administer oaths or before a person designated by the Secretary for the purpose (except in the case of a statement under penalty of perjury as provided in 28 U.S.C. 1746, Pub. L. 94-550), by a person who states, in the deposition, affidavit, or statement, that such person has actual knowledge of the facts. Except under unusual circumstances, which shall be set forth in the deposition, affidavit, or statement, any such person shall be one who would appear as a witness if an oral hearing were held.

(c) *Complainant’s evidence.* The complainant shall be served with notice of an opportunity to file evidence. Within 20 days after such service, the complainant may file evidence. What the complainant files in response to that notice shall be served promptly on the respondent.

(d) *Respondent’s evidence.* After expiration of the time for the filing of complainant’s evidence, the respondent shall be served with notice of an opportunity to file evidence. Within 20 days after such service, the respondent may file evidence. What the respondent files in response to that notice shall be served promptly on the complainant.

(e) *Complainant’s rebuttal.* If the respondent files anything pursuant to paragraph (d) of this section, the complainant shall be served with notice of an opportunity to file evidence in rebuttal of what the respondent has filed. Within 20 days after such service, the complainant may file such evidence, which shall be confined strictly to rebuttal of what the respondent has filed. What the complainant files in response