

The Basics of the USDA National Appeals Division

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The purpose of this article is to very briefly outline the procedures of the U. S. Department of Agriculture's National Appeals Division (NAD). The NAD is governed by statute codified at 7 U.S.C. §§6991–7002 and by regulations codified at Part 11 of Title 7 of the Code of Federal Regulations (7 C.F.R.). The National Appeals Division reports to the Secretary of Agriculture and is an independent body within the USDA. NAD conducts evidentiary administrative appeal hearings and reviews arising from adverse determinations of the Farm Service Agency; the Risk Management Agency; the Natural Resources and Conservation Service; the Commodity Credit Corporation; the Federal Crop Insurance Corporation; the Rural Housing Service; the Rural Business-Cooperative Service and certain programs of the Rural Utilities Service. 7 U.S.C. §6991(2) and 7 C.F.R. §11.1.3.

NAD has no jurisdiction to consider challenges to agency regulations. NAD may only decide whether an agency has complied with applicable laws and regulations. NAD has no authority to enforce its determinations. Rather, implementation of final determinations is the responsibility of the head of the agency involved. 7 U.S.C. §7000 and 7 C.F.R. §11.12. NAD final determinations are reviewable and enforceable in federal court. 7 U.S.C. §6999 and 7 C.F.R. §11.13(a).

The appeal process usually begins when a participant receives an adverse determination issued by an agency. Note that an adverse determination is required to contain all rights of review, (i.e., appeal rights). 7 USCA 6994. However, it is not unusual for a USDA agency to issue a determination without including rights or review, or including incomplete/erroneous information regarding rights of review. A prudent practitioner will not rely on the agency oversight to delay submitting any request for appeal, but may consider using such oversight to justify a late-filed appeal.

An adverse decision also exists when an agency fails to act on a participant's request within specified time frames or within a reasonable time if time frames are not specified. An adverse decision is deemed either appealable or nonappealable by the agency, but the director or his delegate may review the agency's determination. The director or his delegate's appealability decision is final and not appealable. 7 C.F.R. §11.6(a). Note: Depending on your jurisdiction, this step may be necessary for exhaustion of administrative remedies if the appellant later seeks judicial review. If an adverse decision is made by an employee of a Farm Service Agency (FSA) county or area committee, the appellant must seek an informal review by the county or area committee before appealing to NAD.

What Is Appealable?

A decision by an agency that is adverse to a participant is appealable to NAD. 7 C.F.R. §11.6. However, decisions that

are considered to be "matters of general applicability" are not appealable.

If an agency determines that a decision is not appealable, that agency must notify the participant of his right to seek review of that determination from NAD. An appealability review will determine whether the decision is matter of general applicability and therefore not appealable. An appealability determination is final and cannot be appealed. Note: A prudent practitioner will seek an appealability determination before seeking juridical review to insure that all administrative remedies have been exhausted.

A participant who has been notified by an agency of its opinion that an adverse decision is not appealable may file a request for an appealability review no later than 30 days after receipt of the agency notice. 7 C.F.R. §11.6(a)(1), §11.14. An appealability determination issued by NAD is a final determination and is not appealable. 7 C.F.R. §11.6(a)(2).

If an appellant requests mediation after the notification of appeal rights, but before filing a request for appeal, the 30-day period for requesting an appeal stops running when the mediation request is made. If mediation concludes unsuccessfully, the appellant has the balance of the 30 days within which to file an appeal request, if desired, as specified in 7 C.F.R. 15 §11.5(c)(1). If mediation or alternative dispute resolution is requested more than 30 days after receipt of the adverse decision, and no appeal has been requested, the adverse decision cannot be appealed.

How to Perfect an Appeal?

An appeal is perfected when it is 1) received by NAD; 2) timely; 3) with a copy of the adverse determination; and 4) is personally signed by the appellant. 7 C.F.R. §11.1 and §11.3(a). (If the appeal is based on an agency's failure to act, the appellant must identify the request upon which the agency has failed to act.) An appeal must be requested no later than 30 days from the day the participant receives the adverse decision. Where there is no adverse decision, the appeal must be requested no later than 30 days from the time the participant knew or reasonably should have known that the agency had not acted within the time frames specified by regulations or, where no time frame is specified, no later than 30 days after the participant reasonably should have known of the agency's failure to act. (See 7 C.F.R. §11.14.) Note: NAD tends to view the timeliness of the filing as jurisdiction and late-filed appeal requests will usually be dismissed. However, a regional assistant director may accept a late-filed appeal upon a showing of good cause why the appeal was filed late. An appeal request is considered filed when postmarked if sent by mail or if sent by facsimile, when delivered to NAD.

A representative must also file a declaration, in accordance with 28 U.S.C. 1746, with NAD that the participant has



authorized representation for purposes of appealing the specified adverse decision. 7 C.F.R. §11.6(c). The declaration must also include, as an attachment, the representative's written authorization signed by the participant. Note: An attorney's signature is not sufficient to perfect an appeal.

The Prehearing Conference

The NAD appeal process generally begins with a prehearing conference. 7 C.F.R. §11.8(c)(4). Prehearing conferences are almost always by telephone. During the prehearing conference, the parties may clarify issues; define the dispute; determine if there is another pending matter that may bear on the appeal (e.g., bankruptcy or litigation); stipulate to facts or expected testimony; identify third parties; schedule witnesses; ensure that all relevant information will be available; determine the need for accommodations for persons with disabilities; discuss hearing options (conference call, in person, or record review), and address related concerns. NAD's jurisdiction to hear the appeal may also be addressed, if necessary (see 7 C.F.R. §11.1).

The Hearing

The appellant has the right to a hearing in his or her state of residence or at a location convenient to the appellant and NAD (7 C.F.R. §11.8(c)(3)); a telephone hearing may be conducted at the request of the appellant. 7 C.F.R. §11.15(b). Alternately, an appellant may request an appeal determination based on a review of the agency record and any additional submissions by the parties. 7 C.F.R. §11.8(c).

Parties must have 14 days notice of the hearing (7 C.F.R. §11.8), unless all parties waive their rights to notice. In most cases, the hearing will be held in or very close to the town where the appellant resides. A neutral site will be used that may be a library or other governmental (but non-USDA) facility. The appellant has the right to a hearing within 45 days of receipt of the appeal request, but may waive that right as specified in 7 C.F.R. §11.5(c)(2) and §11.8(c)(1). Note, it is often in the best interest of the appellant to waive the 45-day requirement to arrange for evidence and testimony and in most cases, NAD hearing officers are very flexible in accommodating scheduling conflicts.

The Federal Rules of Evidence do not apply to NAD hearings. 7 C.F.R. §11.4(b). Evidence that is otherwise inadmissible may be considered. 7 C.F.R. §11.8(c)(5)(ii). The hearing officer has discretion in determining what evidence to consider. Note, the hearing officer will rarely, if ever, exclude evidence. Rather, the hearing officer will admit the evidence and then determine what, if any, weight to give to that evidence.

All hearings are recorded. The parties may obtain copies of the recording at no expense by submitting a written request. Parties to a hearing may, at their own expense, retain a court reporter to transcribe the hearing, or provide a transcript of the audio recording. 7 C.F.R. §11.8(c)(5)(iii).

The hearing officer begins the hearing with an opening statement that includes general information, including: the hearing officer's name and title; the date, time, and location of hearing; the identity of appellant, agency, third parties, or interested parties; an announcement that the hearing is being recorded and that parties may request copies of the recording free of charge; a description of the authority for the hearing, the NAD case number, and the adverse decision on appeal, request that everyone present identify themselves and state in what capacity they are attending; a description of the hearing process, explanation of the procedures and elements of the hearing and the rights of the parties; a request for any preliminary questions; the acceptance of the agency record; the administration of the oath; and any stipulations. The hearing officer shall swear in witnesses, including any party testifying. Note: The agency representative is usually sworn in and usually provides testimony.

Each party may then make an opening statement to summarize positions and arguments. In general, the appellant presents the first opening statement, unless the hearing officer believes it beneficial to hear the agency first.

The appellant has the burden of proving that the agency's adverse decision was erroneous by a preponderance of the evidence. 7 C.F.R. §11.8(e). However, division appeals are de

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novo, or “new,” examinations of an issue. The hearing officer is not limited to the information in the agency record or to evidence known to the agency at the time the adverse decision was made as specified in 7 C.F.R. §11.8(b)(3), nor is the hearing officer bound by previous findings of facts on which the agency’s adverse decision was based. 7 C.F.R. §11.10(a).

Any evidence may be received by the hearing officer without regard to whether that evidence could be admitted in judicial proceedings as specified in 7 C.F.R. §11.8(c)(5)(ii).

The parties are entitled to present witnesses to provide relevant oral and documentary evidence. Parties to the appeal have the right to question all witnesses as specified in 7 C.F.R. §11.8(c)(5)(ii). Parties may submit information in support of their positions. Any relevant document may be submitted and provided to the hearing officer and to all other parties. A witness statement may be introduced if the witness is not available for questioning.

A hearing officer may, with the concurrence of the director, issue subpoenas for witnesses or documents. A subpoena will not be issued unless the information sought cannot be obtained without it. 7 C.F.R. §11.8(a)(2) and (3). Note: A request for a subpoena must be submitted well in advance of any hearing. Requests are rarely granted.

The Determination

An appeal determination is based on: the case record; laws applicable to the matter at issue; applicable regulations published in the Federal Register and in effect on the date the agency issued its adverse decision or the date on which the acts that gave rise to the adverse decision occurred, whichever is appropriate under the applicable agency program, as specified in 7 C.F.R. §11.10(c); and, generally applicable interpretations of regulations and laws, which may include, but are not limited to: (1) court decisions interpreting a particular program provision; or (2) a handbook or other official document interpreting an agency’s regulations.

Agency handbooks that are consistent with its laws and regulations may be considered. The hearing officer is responsible for determining whether agency handbook and guide citations considered are consistent with applicable laws and regulations. Appeals may not challenge regulations. 7 C.F.R. §11.8(f). Note, it is not unusual for an agency handbook to conflict with the applicable regulations. A prudent practitioner will review not only the agency handbook, but also the regulation upon which it is based and argue for application of whichever is more favorable to the appellant.

Unless an extension is granted, an appeal determination will be issued within 30 days after the hearing record is closed. A record review determination requested by the appellant will be issued within 45 days of receipt of a record review request.

Request for Director Review

The participant or the agency may request that the director of NAD review the appeal determination. Requests for director

review must be personally signed C.F.R. §11.9(a)(1)–(2), explain why the appeal determination is wrong, and be served on all parties 7 C.F.R. §11.9(a)(3). An appellant has 30 calendar days from receipt of the determination to request a director review; an agency has 15 business days. 7 C.F.R. §11.8(f) and §11.9(a). All parties to the appeal have an opportunity to submit a written response to the request for director review within five business days of receipt of a copy of the request for review 7 C.F.R. §11.9(c). Note: The request for director review is vital to the exhaustion of administrative remedies should the appellant later seek judicial review of the decision.

Request for Reconsideration

A party may request reconsideration of a director review determination within 10 days of receipt of a director review determination. A request for reconsideration must allege, in detail, a material error of fact made in the determination, or that determination is contrary to statute or regulation, which would justify reversal or modification of the determination. NAD then notifies the parties of whether the request for reconsideration meets the criteria and, if the criteria are met, provides a copy of the request for reconsideration to the other parties, who may file a response to the request within five days of receipt of notice from the director. Note, for the purpose of exhaustion of administrative remedies, most if not all jurisdictions consider this step optional.

When Is the Determination Final?

A hearing officer’s determination is final unless a party timely files a request for director review. If no director review is requested, the appeal determination becomes final 30 days after the appellant receives it. A director review determination that remands a case to a hearing officer is not. A director review determination that upholds, reverses, or modifies an appeal determination is final when issued. 7 C.F.R. §11.9(d).

Judicial Review Considerations

At each step of the process, the practitioner must be cognizant of building the record for judicial review. Except in very rare circumstances, the appellant will not be able to supplement the records with documentary or testimonial evidence on judicial review of the determination.

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