

## Food and Nutrition Service, USDA

## § 283.7

(1) File an answer, in accordance with § 283.6, not later than 60 days after the State agency submits its appeal petition and;

(2) Advise the Hearing Clerk if FNS wishes to have an oral hearing.

(i) *Oral hearing not requested.* If no oral hearing has been requested, the appeal shall proceed in accordance with the procedures set forth under subpart C of this part.

### § 283.5 Motion to dismiss.

(a) *Filing of motion to dismiss.* Prior to or at the same time as filing the answer, FNS may file a motion to dismiss. The appeal may be challenged on the basis that the notice of appeal was not filed within 10 days or as that time may have been extended by the ALJ, the appeal petition was not filed in accordance with § 283.4, or that the appeal petition is substantially incomplete and could not be quickly and easily cured by amendment. The motion must be accompanied by clear and convincing proof of any of these factors alleged as grounds for dismissal.

(b) *Service of motion to dismiss.* FNS shall serve the State agency with a copy of the motion to dismiss. The State agency will have 10 days from date of service to submit objections to the motion.

(c) *Ruling on a motion to dismiss.* The ALJ will rule on the motion to dismiss before any further action proceeds on the basis of the merits of the appeal. The basis of the ruling will be clearly documented and will become part of the official record. If the ALJ denies the motion, FNS shall file its answer in accordance with § 283.6 within 60 days of service of the ALJ's ruling, unless there is a motion for reconsideration filed pursuant to § 283.17(d) or review by the Judicial Officer is sought pursuant to § 283.20.

(d) *Dismissal of appeal.* If the ALJ finds the basis for the motion to have merit, the appeal may be dismissed. The initial decision of the ALJ shall become final and effective 30 days after service in accordance with § 283.17(c)(2) unless either party pursues the options as discussed in §§ 283.17(d) and 283.20.

(e) *Waiver.* Failure to file for dismissal of the appeal by the time the answer is required to be filed will re-

sult in waiver of the right to request dismissal.

### § 283.6 Answer.

(a) *Filing and service.* Not later than 60 days after the State agency submits its appeal petition, or within 60 days following service of a ruling in accordance with § 283.5, FNS shall file an answer signed by the FNS Administrator or authorized representative or the attorney of record in the appeal. The attorney may file an appearance of record prior to or simultaneously with the filing of the answer.

(b) *Contents.* The answer shall clearly admit, deny, or explain each of the allegations of the appeal petition and shall:

(1) Clearly set forth any defense asserted by FNS; or

(2) State that FNS admits all the facts alleged in the appeal petition; or

(3) State that FNS admits the jurisdictional allegations of the appeal petition and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file a timely answer shall be deemed, for purposes of the appeal, an admission of the allegations in the appeal petition and failure to deny or otherwise respond to an allegation of the appeal petition shall be deemed for purposes of the appeal, an admission of said allegation, unless FNS and the State agency have agreed to a consent decision pursuant to § 283.10.

### § 283.7 Procedures upon failure to file an answer.

The failure by FNS to file an answer shall constitute a waiver of hearing. Upon such failure to file, the State agency shall file a proposed decision, along with a motion for adoption thereof, both of which shall be served upon FNS by the State agency. Within 10 days after service of such motion and proposed decision, FNS may file objections thereto. If the ALJ finds that meritorious objections have been filed, the State agency's motion shall be denied with supporting reasons. If meritorious objections are not filed, the ALJ shall issue an initial decision without further procedures or hearing.

## § 283.8

Copies of the initial decision or denial of the State agency's motion shall be served on each of the parties and shall be included as part of the official record. Where the decision as proposed by the State agency is adopted as the ALJ's initial decision, such decision of the ALJ shall become final and effective 30 days after service in accordance with § 283.17(c)(2) unless reconsideration or review by the Judicial Officer is sought as discussed in §§ 283.17(d) and 283.20.

### § 283.8 Rebuttal or amendment of appeal or answer.

(a) Not later than 30 days after FNS submits an answer in accordance with § 283.6, the State agency may submit rebuttal evidence.

(b) At any time prior to the filing of a motion for a hearing pursuant to § 283.15(b), the appeal petition or the answer may be amended without prior authorization by the ALJ. Thereafter, such an amendment may only be made as authorized by the ALJ upon a showing of cause.

### § 283.9 Withdrawal of appeal.

At any time before the ALJ files an initial decision, the State agency may withdraw its appeal and agree to pay the full amount of the claim. By withdrawing an appeal, the State agency waives all opportunity to appeal or seek further administrative or judicial review on the claim or related matters.

### § 283.10 Consent decision.

At any time before the ALJ files an initial decision, FNS and the State agency may agree to entry of a consent decision. Such decision shall be filed in the form of a decision signed by the parties with appropriate space for signature by the ALJ and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The ALJ shall enter such decision without further procedures, unless an error is apparent on the face of the document. Such decision shall be final and shall take effect 30 days after the date of the delivery or service of

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such decision and is not subject to further administrative or judicial.

### § 283.11 Prehearing conference and procedure.

(a) *Time and place.* The ALJ shall direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to the hearing. The prehearing conference shall be held at the U.S. Department of Agriculture, Washington, DC. Reasonable notice of the time, place of the prehearing conference and if personal attendance will be necessary shall be given. Prehearing conferences may be conducted telephonically. The ALJ shall order each of the parties to furnish at the prehearing conference or at another time prior to the hearing the following:

(1) An outline of the appeal or defense;

(2) The legal theories upon which the party will rely;

(3) Copies of or a list of documents that the party anticipates relying upon at the hearing; and

(4) A list of witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way, such as a short statement of the type of evidence they will offer.

(b) *Procedures.* The ALJ shall not order any of the foregoing procedures that a party can show are inappropriate or unwarranted under the circumstances of the particular appeal.

(c) *Matters to be considered.* At the prehearing conference, the following matters shall be considered:

(1) The simplification of issues;

(2) The necessity of amendments to pleadings;

(3) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(4) The limitation of the number of expert or other witnesses;

(5) Negotiation, compromise, or settlement of issues;

(6) The exchange of copies of proposed exhibits;