

## § 1.200

the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request that the adjudicative officer order further proceedings under this section shall identify specifically the information sought or the disputed issues, and shall explain specifically why the additional proceedings are necessary to resolve the issues.

(c) In the event that an evidentiary hearing is held, it shall be conducted pursuant to §§ 1.130 through 1.151 of this part, except that any hearing in a proceeding covered by § 1.183(a)(1)(ii) of this part shall be conducted pursuant to Rules 17 through 25 of the Board of Contract Appeals contained in § 24.21 of this title.

### § 1.200 Decision.

The adjudicative officer or Board of Contract Appeals shall issue an initial decision on the application as expeditiously as possible after completion of proceedings on the application. Whenever possible, the decision shall be made by the same administrative judge or panel that decided the contract appeal for which fees are sought. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. This decision also shall include, if at issue, findings on whether the position of the Department was substantially justified, whether the ap-

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plicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

### § 1.201 Department review.

(a) Except with respect to a proceeding covered by § 1.183(a)(1)(ii) of this part either the applicant or agency counsel may seek review of the initial decision on the fee application, in accordance with the provisions of §§ 1.145(a) and 1.146(a) of this part or in accordance with any delegation made pursuant to § 1.189 of this part. If neither the applicant nor agency counsel seeks review, the initial decision on the fee application shall become a final decision of the Department 35 days after it is served upon the applicant. If review is taken, it will be in accord with the provisions of §§ 1.145(b) through (i) and 1.146(b) of this part, or

(b) With respect to a proceeding covered by § 1.183(a)(1)(ii) of this part, either party may seek reconsideration of the decision on the fee application in accordance with Rule 29 of the Board of Contract Appeals contained in § 24.21 of this title. In addition, either party may appeal a decision of the Board of Contract Appeals to the Court of Appeals for the Federal Circuit in accordance with 41 U.S.C. 607.

### § 1.202 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

### § 1.203 Payment of award.

An applicant seeking payment of an award shall submit to the head of the agency administering the statute involved in the proceeding a copy of the final decision of the Department granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been

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sought by the applicant or any other party to the proceeding.

### Subpart K—Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings

SOURCE: 55 FR 42347, Oct. 19, 1990, unless otherwise noted.

#### § 1.210 Purpose.

This subpart sets forth procedures governing the appearance of USDA employees as witnesses in order to testify or produce official documents in judicial or administrative proceedings when such appearance is in their official capacity or arises out of or is related to their employment with USDA. These regulations do not apply to appearances by USDA employees as witnesses in judicial or administrative proceedings which are purely personal or do not arise out of or relate to their employment with USDA. This subpart also does not apply to Congressional requests or subpoenas for testimony or documents.

#### § 1.211 Definitions.

(a) *Administrative proceeding* means any proceeding pending before any federal, state, or local agency and undertaken for the purpose of the issuance of any regulations, orders, licenses, permits, or other rulings, or the adjudication of any matter, dispute, or controversy.

(b) *Appearance* means testimony or production of documents the request for which arises out of an employee's official duties with USDA or relates to his or her employment with USDA. For the purpose of this subpart, an appearance also includes an affidavit, deposition, interrogatory, or other required written submission.

(c) *Judicial proceeding* means any case or controversy pending before any federal, state, or local court.

(d) *Travel expenses* means the amount of money paid to a witness for reimbursement for transportation, lodging, meals, and other miscellaneous expenses in connection with attendance at a judicial or administrative proceeding.

(e) *USDA* means the United States Department of Agriculture.

(f) *USDA agency* means an organizational unit of USDA whose head reports to an official within the Office of the Secretary of Agriculture.

(g) *Valid summons, subpoena, or other compulsory process* means an order that is served properly and within the legal authority and the jurisdictional boundaries of the court or administrative agency or official that has issued it.

(h) *Witness fees* means the amount of money paid to a witness as compensation for attendance at a judicial or administrative proceeding.

#### § 1.212 General.

No USDA employee may provide testimony or produce documents in a judicial or administrative proceeding unless authorized in accordance with this subpart.

#### § 1.213 Appearance as a witness on behalf of the United States.

An employee of USDA may appear as a witness on behalf of the United States in any judicial or administrative proceeding without the issuance of a summons, subpoena, or other compulsory process. Employees should obtain permission for such an appearance from their immediate supervisor unless the USDA agency or General Counsel has issued instructions providing otherwise.

#### § 1.214 Appearance as a witness on behalf of a party other than the United States where the United States is not a party.

(a) An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear on behalf of a party other than the United States in a judicial or administrative proceeding in which the United States is not a party, shall promptly notify the head of his or her USDA agency of the existence and nature of the order compelling his or her appearance, or of the document requesting his or her attendance. He or she shall also specify, if that is known, the nature of the judicial or administrative proceeding and the nature of the testimony or documents requested.