

§ 26.41

any objection to the granting of the motion.

(c) *Motions for extensions.* Either party may file a motion for extension. At the discretion of the ALJ, a motion for an extension of time may be granted for good cause at any time, notwithstanding an objection or any reply to the motion, consistent with § 26.32(f). The ALJ may waive the requirements of this section as to motions for extensions of time or any page limits.

(d) *Right to reply.* The moving party shall have no right to reply, except as permitted by the ALJ.

(e) *Oral Argument.* Either party may request oral argument on any motion, but such argument shall be available at the sole discretion of the ALJ.

(f) *Motions for summary judgment.* (1) A party claiming relief or a party against whom relief is sought may timely move, with or without supporting affidavits, for summary judgment on all or part of the claim.

(2) Objections in the consideration of summary judgment motions or answers thereto based upon a failure to strictly comply with the provisions of Rule 56 of the Federal Rules of Civil Procedure may, at the discretion of the ALJ, be overruled.

(g) *Motions for dismissal.* When a motion to dismiss the proceeding is granted, the ALJ shall make and file a determination and order in accordance with the provisions of § 26.50.

§ 26.41 Default.

(a) *General.* The respondent may be found in default, upon motion, for failure to file a timely response to the Government's complaint. The motion shall include a copy of the complaint and a proposed default order, and shall be served upon all parties. The respondent shall have 10 days from such service to respond to the motion.

(b) *Default order.* The ALJ shall issue a decision on the motion within 15 days after the expiration of the time for filing a response to the default motion. If a default order is issued, it shall constitute the final agency action.

(c) *Effect of default.* A default shall constitute an admission of all facts alleged in the Government's complaint and a waiver of respondent's right to a hearing on such allegations. The pen-

24 CFR Subtitle A (4-1-14 Edition)

alty proposed in the complaint shall be set forth in the default order and shall be immediately due and payable by respondent without further proceedings.

DISCOVERY

§ 26.42 Discovery.

(a) *General.* The parties are encouraged to engage in voluntary discovery procedures, which may commence at any time after an answer has been filed. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the ALJ may order discovery of any matter relevant to the subject matter of the action. To be relevant, information need not be admissible at the hearing, if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Each party shall bear its own expenses associated with discovery.

(b) *Discovery in Program Fraud Civil Remedies Actions.* (1) Upon receipt of a complaint, the defendant may, upon written request to the Office of General Counsel, review any relevant and material nonprivileged documents, including any exculpatory documents, that relate to the allegations set out in the complaint. Exculpatory information that is contained in a privileged document must be disclosed; however, the privileged document need not be provided.

(2) With the exception of the limited discovery permitted under paragraph (b)(1) of this section, unless agreed to by the parties, discovery shall be available only as ordered by the ALJ. The ALJ shall order only that discovery that he or she determines is necessary for the expeditious, fair, and reasonable consideration of the issues, is not unduly costly or burdensome, and will not unduly delay the proceeding. Discovery of privileged information shall not be permitted. The request for approval sent to the Attorney General from the General Counsel or designee, as described in 31 U.S.C. § 3803(a)(2), is

not discoverable under any circumstances. The ALJ may grant discovery subject to a protective order under § 26.44.

(c) *Authorized discovery.* The following types of discovery are authorized:

(1) *Requests for production of documents.* (i) Any party may serve upon any other party a written request to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of § 26.42(a) and which are in the possession, custody, or control of the party upon whom the request is served.

(ii) The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(iii) The party upon whom the request is served shall serve a written response within 20 days after the service of the request. A shorter or longer time may be directed by the ALJ or, in the absence of such an order, agreed to in a written document by the parties, which shall be submitted to the ALJ in a timely manner. The response shall state, with respect to each item or category, whether inspection and related activities will be permitted as requested. If there are any objections to any requests, including objections to the requested form or forms for producing electronically stored information, the response shall state the reasons for such objections. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

If objection is made to the requested format for producing electronically stored information—or if no format was specified in the request—the responding party must state the format it intends to use. The party submitting the request may move for an order under paragraph (e) of this section with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(iv) Unless the parties otherwise agree, or the ALJ otherwise orders:

(A) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(B) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a format in which it is ordinarily maintained or in a format that is reasonably usable; and

(C) A party need not produce the same electronically stored information in more than one form.

(2) *Requests for admissions.* Any party may serve upon any other party a written request for the admission of the genuineness of any documents described in the request or of the truth of any relevant matters of fact. Copies of documents shall be delivered with the request unless copies have already been furnished. Each requested admission shall be considered admitted, unless, within 30 days after service of the request, or within such other time as the parties may agree to or the ALJ determines, the party from whom the admission is sought serves upon the party making the request either:

(i) A statement, which:

(A) Denies specifically the relevant matters for which an admission is requested, or sets forth in detail the reasons why the party can neither truthfully admit nor deny them;

(B) Fairly meets the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party specifies as much of it as is

§ 26.42

true and qualifies or denies the remainder; and

(C) Does not assert lack of information or knowledge as a reason for failure to admit or deny, unless the party states that the party has made reasonable inquiry, and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny; or

(ii) Written objections to a requested admission, which state the grounds for the objection and which object to a requested admission, if necessary, either in whole or in part, on the basis of privilege or relevance. Responses to the request for admission on matters to which objections have been made may be deferred until each objection is ruled upon, but if written objections are made only to a part of a request, a response to the remainder of the request shall be provided.

(iii) Any matter admitted under this rule is conclusively established unless the ALJ, on motion, permits withdrawal or amendment of the admission. Admissions obtained pursuant to this procedure may be used in evidence only for the purposes of the pending action. The use of obtained admissions as evidence is permitted to the same extent and subject to the same objections as other evidence.

(3) *Written interrogatories*—(i) *Service of written interrogatories*. Any party may serve upon any other party written interrogatories, not exceeding 25 in number, including all discrete subparts, unless additional interrogatories are agreed to by the parties or leave to serve additional interrogatories is granted by the ALJ.

(ii) *Response to interrogatories*. Within 20 days after service of the request, the party upon whom the interrogatories are served shall serve a written response, unless the parties agree in a written document submitted to the ALJ or the ALJ determines that a shorter or longer period is appropriate under the circumstances. The response shall specifically answer each interrogatory separately and fully in writing, unless it is objected to, in which event the objecting party shall state the reasons for objection with specificity. Any ground not stated in a timely objection is waived unless the party's failure to

24 CFR Subtitle A (4–1–14 Edition)

object is excused by the ALJ for good cause shown. If objection is made to only part of an interrogatory, the objectionable part shall be specified and the party shall answer to the extent the interrogatory is not objectionable.

(iii) *Option to produce business records*. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(4) *Depositions*. (i) A party may take the oral deposition of any person. Reasonable written notice of deposition shall be served upon the opposing party and the deponent. The attendance of a deponent may be compelled by subpoena where authorized by law or other order by the ALJ.

(ii) Each person testifying on oral deposition shall be placed under oath by the person before whom the deposition is taken. The deponent may be examined and cross-examined. The questions and the answers, together with all objections made, shall be recorded by the person before whom the deposition is to be taken or under that person's direction.

(iii) *Objections*. Objection may be made to questions or answers for any reason that would require the exclusion of the testimony under § 26.47 as if the witness were present and testifying at hearing. Objections shall be in short form, stating every ground for objection. Failure to object to any question

or answer shall be considered a waiver of objection, unless the parties agree otherwise. Rulings on any objections shall be made by the ALJ at hearing, or at such other time as is requested by motion. The examination shall proceed, with the testimony being taken subject to the objections; a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the ALJ, or to present a motion under § 26.44.

(iv) *Submission to deponent.* A transcript of the deposition shall be submitted to the deponent for examination and signature, unless submission is waived by the deponent and the parties. Any changes in form or substance that the deponent desires to make shall be entered upon the transcript by the person before whom the deposition was taken, with a statement of reasons given by the deponent for making them. The transcript shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill, cannot be found, or refuses to sign. If the transcript is not signed, the person before whom the deposition was taken shall sign it and state on the record the reason that it is not signed by the deponent.

(v) *Certification and filing.* The person before whom the deposition was taken shall make a certification on the transcript as to its accuracy. Interested parties shall make their own arrangements with the person recording the testimony for copies of the testimony and the exhibits.

(vi) *Deposition as evidence.* Subject to appropriate rulings by the ALJ on objections, the deposition or any part may be introduced into evidence for any purpose if the deponent is unavailable. Only that part of a deposition that is received in evidence at hearing shall constitute a part of the record in the proceeding upon which a decision may be based. Nothing in this rule is intended to limit the use of a deposition for impeachment purposes.

(vii) *Payment of fees.* Fees shall be paid by the person upon whose application the deposition is taken.

(d) *Supplementation of responses.* A party who has responded to a request for discovery by providing a response is

under a duty to timely amend any prior response to an interrogatory, request for production, or request for admission if so ordered by the ALJ, or if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to all other parties during the discovery process or in writing.

(e) *Motions to compel.* (1) In connection with any discovery procedure, by motion addressed to the ALJ and upon a showing of a good faith attempt to resolve the issue without the ALJ's intervention, either party may file a motion to compel a response with respect to any objection or other failure to respond to the discovery requested or to any part thereof, or any failure to respond as specifically requested. An evasive or incomplete answer to a request for discovery is treated as a failure to answer.

(2) The motion shall describe the information sought, cite the opposing party's objection, and provide arguments supporting the motion.

(3) The opposing party may file a response to the motion, including a request for a protective order in accordance with § 26.44.

(4) Orders compelling discovery shall be issued only where such discovery will not compel the disclosure of privileged information, unduly delay the hearing, or result in prejudice to the public interest or the rights of the parties, and upon a showing of good cause.

(5) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the ALJ may nonetheless order discovery from such sources if the requesting party shows good cause or, when the party's refusal to provide the information sought is solely due to undue expense, the party seeking the discovery agrees to bear the expense associated with the request.

§ 26.43

(f) *Refusal to honor discovery order.* When a party refuses to honor a discovery order, the ALJ may issue such orders in regard to the refusal as justice shall require, including the imposition of sanctions pursuant to § 26.34.

§ 26.43 Subpoenas.

(a) *General.* Upon written request of a party, the ALJ may issue a subpoena requiring the attendance of a witness at a deposition or hearing, and/or the production of documents. The request shall specify any documents to be produced and shall list the names and addresses of the witnesses.

(b) *Time of request.* A request for a subpoena in aid of discovery shall be 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.

§ 26.44 Protective orders.

(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) Protective orders may be issued by an ALJ if the ALJ determines such an order is necessary to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense because:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that

24 CFR Subtitle A (4–1–14 Edition)

is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(3) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

HEARINGS

§ 26.45 General.

(a) *Time of hearing.* The hearing shall commence not later than 90 days following the date of the Government's filing of the complaint and response with the Docket Clerk under § 26.38, 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 in a place most convenient for the respondent and witnesses, or in such other place as may be agreed upon by the parties and the ALJ.

(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) *Exceptions for Program Fraud Civil Remedies Act matters.* For Program Fraud Civil Remedies actions, the hearing is commenced by the issuance of a notice of hearing and order by the ALJ, as set forth in 31 U.S.C. 3803(d)(2)(B). Hearings for Program Fraud Civil Remedies Act matters shall be located in accordance with 31 U.S.C. 3803(g)(4).

(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.