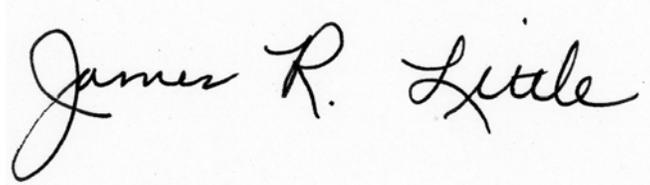


For: All FSA Offices

FSA Policy Concerning National Appeals Division (NAD) Appeal Cases Available on the Internet

Approved by: Administrator



1 Overview

A Background

In September 2004, NAD published a notice in the Federal Register (69 FR 57254, September 24, 2004), announcing NAD’s decision to modify the routine uses for NAD’s system of records. NAD stated that for “educational purposes” it would post NAD Director Review and Hearing Officer determinations on the Internet. Once posted, USDA program participants, agency personnel, and the general public have access to these decisions (with certain identifying information removed with the intent of preserving individual privacy as required under the Privacy Act, 5 U.S.C. § 552a) and will be able to conduct full text searches.

The availability of NAD Director and Hearing Officer determinations on the Internet creates a need for clarification of FSA policy regarding the significance and relevance of these determinations to other FSA:

- administrative decisions
- appeals.

B Purpose

This notice sets forth FSA policy regarding the legal significance and relevance of NAD Director and Hearing Officer determinations posted on the Internet in other proceedings.

C Contact

Direct any questions about this notice to the Appeals and Litigation Staff (ALS), at 202-690-3297.

Disposal Date

July 1, 2006

Distribution

All FSA Offices and Employees, State Offices
relay to County Offices

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2 FSA's Official Position Concerning NAD Decisions, Including Those Posted on the Internet

A Explanation

Appeal determinations by NAD are not precedent setting. NAD is a review authority charged with ensuring that NAD determinations are consistent with agency regulations and an agency's generally applicable interpretations of those regulations. All determinations of NAD must be based on information from the case record, laws applicable to the matter at issue, and applicable regulations in effect on the date of the adverse decision **7 CFR §11.10**. While determinations published by NAD on the Internet may be public information about how NAD conducts appeals, NAD Rules of Procedure are clear that these informative determinations are **not** precedent setting and should be disregarded by all parties as irrelevant to other appeals.

Any mention of NAD determinations (including, but not limited to any NAD determinations published on the Internet) in the course of other appeals is inappropriate because NAD determinations posted on the Internet do not reflect the full case record in those other appeals (which must remain closed to inspection under the Privacy Act, 5 U.S.C. §552a). Citing other appeal decisions that may have been decided by NAD in response to a different set of facts and case file record confuses FSA's and NAD's appeal processes. Further, referencing other NAD determinations posted on the Internet in the course of other appeals or agency decisions could have adverse implications for USDA's being able to certify that an administrative case file record is complete. This could subject the Government to additional legal expenses or costs associated with discovery.

B FSA's Official Receipt of NAD Appeal Determinations

ALS receives the official FSA copies of NAD Director and Hearing Officer determinations. NAD determinations posted to the Internet are informational only and are not to be deemed official copies of NAD determinations for any purpose or date of receipt.

3 Action

A General Prohibition

FSA officials, committees, employees, and representatives shall not reference and/or cite NAD Director and Hearing Officer determinations in other agency decisions or appeals. This policy shall remain in effect until further notice.

B FSA Response to Other Parties Referencing Other NAD Decisions

In response to anyone citing other NAD decisions in other cases, FSA officials, committees, employees, and representatives shall regard the references as both inappropriate and irrelevant. In addition, employees and representatives shall object on the record and advise NAD and others of FSA's view that such references are inappropriate and irrelevant.

Note: Use the language contained in Exhibit 1 when making written or verbal objections on the record.

Language for Objections to Parties Referencing NAD Cases in Other Decisions

The following language shall be used when making written or verbal objections on the record.

The NAD appeals process provides participants in covered agency programs an opportunity to obtain review of an adverse agency decision by an independent decision-maker before the decision becomes a final determination of USDA.

All determinations of NAD must be based on information from the case record, laws applicable to the matter at issue, and applicable regulations in effect on the date of the adverse decision. (7 CFR §11.10)

NAD must make any determination of agency error on the basis of the agency record and other evidence submitted during the proceedings in the instant appeal and must, independently, determine whether FSA committed material factual error in rendering its administrative decision or erred in applying its rules to a correct set of facts reaching an incorrect conclusion.

Even if cited appeals purport to deal with matters similar to those present in an appellant's appeal, the appeals, though publicized by NAD on its Web site, do not reflect the full case record in those appeals (which must remain closed to inspection under the Privacy Act, 5 U.S.C. § 552a).

Citing other appeal decisions that may have been decided by NAD in response to a different set of facts and an administrative record that will never be made a part of the case record in this appeal confuses the NAD appeal process and complicates any further review.