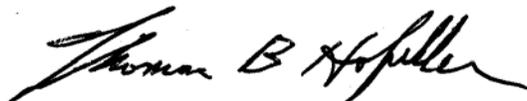


For: FSA Employees

FSA Policy About NAD Cases

Approved by: Acting Administrator



1 Overview

A Background

In 2004, NAD announced that it was posting NAD Director Review and hearing officer decisions on the Internet. In 2005, FSA issued policy about the posted NAD decisions.

Pending issuance of an updated 1-APP amendment, FSA has determined it needs to reiterate its official policy about NAD decisions including those posted on the Internet.

B Purpose

This notice:

- reiterates FSA policy about the legal significance and relevance of NAD Director Review and hearing officer determinations, including those posted on the Internet in other proceedings
- explains FSA’s official receipt and distribution of NAD decisions.

C Contact

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

Disposal Date	Distribution
October 1, 2008	All FSA employees; State Offices relay to County Offices

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

A Explanation

NAD appeal determinations are not precedent setting. NAD is a review authority charged with ensuring that agency determinations are consistent with agency regulations and an agency's generally applicable interpretations of those regulations.

NAD determinations must be based on information from both of the following:

- the case record, including, but not limited to, the entire agency record, hearing record, and information submitted by appellants
- laws and regulations applicable to the matter at issue in the appeal and in effect for the adverse decision.

NAD determinations from other cases and NAD determinations posted on the Internet may generally contain information on how NAD conducted appeals; however, 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 (including, but not limited to, any NAD determinations posted on the Internet) themselves 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. §522a.

Citing other appeal decisions that may have been decided by NAD, in even seemingly or apparently similar type cases, confuses FSA's and NAD's appeal processes. Additionally, referencing other NAD determinations (including, but not limited to, those posted on the Internet) could have adverse implications for USDA being able to certify that an administrative case file record is complete. This could subject the Government to additional legal expense or costs associated with discovery.

B FSA's Official Receipt of NAD Appeal Determinations

As discussed in paragraph 3, ALS receives the official FSA copies of NAD Director Review and hearing officer determinations. Copies of NAD determinations, including those posted on the Internet or received from appellants, are not official copies of NAD determinations for any purpose.

Because only those NAD decisions received according to paragraph 3 are considered official FSA copies, FSA offices shall **not** contact NAD for copies of NAD decisions. FSA offices wanting copies of NAD decisions shall contact ALS.

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3 Receipt and Distribution of FSA Official Copies of NAD Determinations

A Receipt and Distribution of NAD Appeal Determinations

FSA is a party to NAD appeals involving FSA adverse decisions. Under law, FSA has only 15-business day from the date of receipt of a NAD appeal decision to seek NAD Director Review and only 10 calendar days to request NAD Director's reconsideration.

The 15-business day and 10-calendar-day time periods start when any FSA office receives a determination from NAD. The NAD Director has agreed that NAD will provide determinations to ALS only and has instructed NAD employees accordingly. FSA employees, including STC and COC members, **shall not** request copies of determinations from NAD. Direct all requests for copies of NAD determinations to ALS.

The following table describes generally how a NAD appeal determination is received by FSA and how FSA distributes its official copy of that determination.

Step	Action
1	NAD appeal determinations from any of the NAD Regional Offices or the NAD Headquarters' Office are received by FSA in ALS in the National Office. These are usually submitted to FSA by express mail, courier, or internal USDA pouch mail.
2	ALS opens envelopes containing NAD appeal determinations and immediately date stamps each determination.
3	ALS examines the appeal determination and attempts to determine the State from which the appeal decision came. Note: ALS sometimes is unable to properly identify the correct State Office because the only information that may be available to ALS are the addresses of the parties, if provided. In some instances, parties to appeals do not reside in the State from which the appeal arose.
4	ALS FAXes a copy of the date-stamped appeal determination to the State Office. State Offices shall promptly provide copies of the determination to offices and employees. Note: If the NAD decision or NAD appeal summary received in a State Office from ALS shows an incorrect State name, immediately contact ALS by telephone at 202-690-3297 and advise that an incorrect State name was entered.
5	ALS enters the decision in its database.
6	ALS makes an initial determination as to whether the NAD appeal determination finds error on the part of FSA and whether further action is required. See 1-APP, paragraph 204. These initial determinations by ALS are reflected on a NAD appeal summary sent weekly or periodically to State Offices.

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4 Action

A General Prohibition

FSA officials, committees, employees, and representatives shall **not** reference and/or cite NAD Director Review and hearing officer determinations in other agency decisions, NAD appeals, or agency appeals.

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 disregard 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 these references are inappropriate and irrelevant.

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

Language for Objection 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 part of the case record in this appeal confuses the NAD appeal process and complicates any further review.