

Form FHA 021-4

**UNITED STATES DEPARTMENT OF AGRICULTURE
RURAL DEVELOPMENT
HARRISBURG, PENNSYLVANIA**

TO:
State Office
Area Office
Local Office

**STATE PROCEDURE
NOTICE**

**ISSUE NO. 293
DATE: June 08, 2005**

RURAL DEVELOPMENT MANUAL CHANGE

RD Instruction 2066-A

GENERAL - This instruction 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 instruction also does not apply to Congressional requests or subpoenas for testimony or documents from these employees.

The definition of appearance under 7 CFR, Volume 1, Part 1, Subpart K, Section 1.211 is quite broad. Appearance is defined to mean “testimony or production of documents the request for which arises out of employee’s official duties with USDA or relates to his or her employment with USDA. For purposes of this subpart, appearance also includes an affidavit, deposition, interrogatory or other required written submission.”

Section 1.212 prohibits USDA employees from providing testimony or documents except as authorized by the regulations. Section 1.218 also sets forth that employees who violate the regulations shall be subject to disciplinary action.

**INSERT:
PA PN 293**

RD Instruction 2066-A

§2066.12 Official Leave

- (b) Court leave.
- (2) Official duty status of employee in certain cases.
 - (i) Testifying or producing official records on behalf of the United States or the District of Columbia.

This instruction 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 instruction also does not apply to Congressional requests or subpoenas for testimony or documents from these employees.

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Section 1.212 prohibits USDA employees from providing testimony or documents except as authorized by the regulations. Section 1.218 also sets forth that employees who violate the regulations shall be subject to disciplinary action.

1. In accordance with 7 CFR, Volume 1, Part 1, Subpart K, Appearance of USDA Employees as Witnesses in Judicial or Administrative Proceedings:

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 a 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 instruction providing otherwise.

A Pennsylvania Rural Development employee who receives a valid summons, subpoena, or other compulsory process demanding his or her appearance as a witness on behalf of the United States, must, PRIOR TO HONORING THE REQUEST, inform their supervisor of such request; then submit a copy of the requesting document (subpoena, etc.), a memo specifying, if known, the nature of the judicial or administrative proceeding (specifics and the background of the case), and/or the nature of the testimony or documents requested, to the State Office, ATTN: Human Resources, for the State Director's determination of whether the appearance of an RD employee is in the interest of USDA, and coordination and concurrence from the Office of General Counsel (OGC). The General Counsel has delegated responsibility to Regional Attorneys who may redelegate their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys.

Appearance as a witness on behalf of a party other than the United States where the United States is a party.

An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear or produce documents on behalf of a party other than the United States, in a judicial or administrative proceeding in which the United States is party, shall promptly notify the head of his or her USDA agency.

This situation arises where an employee of the USDA is served with a subpoena by a party other than the United States, in a judicial or administrative proceeding in which the United States is a party.

A Pennsylvania Rural Development employee who receives 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 a party, must, PRIOR TO HONORING THE REQUEST, inform their supervisor of such request; then submit a copy of the requesting document (subpoena, etc.), a memo specifying, if known, the nature of the judicial or administrative proceeding (specifics and the background of the case), and/or the nature of the testimony or documents requested, to the State Office, ATTN: Human Resources, for the State Director's determination of whether the appearance of an RD employee is in the interest of USDA, and coordination and concurrence from the Office of General Counsel (OGC). The General Counsel has delegated responsibility to Regional Attorneys who may redelegate their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys.

An employee may appear or produce records in such proceedings without being served a valid subpoena only if such appearance has been authorized by a representative of the Department of Justice, the United States Attorney's Office or other counsel who is representing the United States in the proceeding. Unless authorized by the attorney representing the USDA, an employee may only appear as a witness or produce records on behalf of the party other than the United States in which the United States is a party, if such appearance or production has been ordered by the service of a valid summons, subpoena or other compulsory process issued by an appropriate court, administrative agency, or other official authorized to compel attendance.

Appearance as a witness in a proceeding where the United States is **NOT** a party.

An employee of USDA served with a valid summons, subpoena, or other compulsory process demanding his or her appearance, or otherwise requested to appear, 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.

A Pennsylvania Rural Development employee who receives 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, must, **PRIOR TO HONORING THE REQUEST**, inform their supervisor of such request; then submit a copy of the requesting document (subpoena, etc.), a memo specifying, if known, the nature of the judicial or administrative proceeding (specifics and the background of the case), and/or the nature of the testimony or documents requested, to the State Office, ATTN: Human Resources, for the State Director's determination of whether the appearance of an RD employee is in the interest of USDA, and coordination and concurrence from the Office of General Counsel (OGC). The General Counsel has delegated responsibility to Regional Attorneys who may redelegate their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys.

An employee in these circumstances may only appear if such appearance has been authorized by the head of his or her USDA agency with the concurrence of the General Counsel, based upon a determination that such appearance is in the interest of USDA. The General Counsel has delegated these responsibilities to Regional Attorneys who may redelegate their responsibilities to Associate Regional Attorneys and Assistant Regional Attorneys.

In determining whether the employee's appearance is in the interest of USDA, the authorized officials must consider: 1) what interest of USDA would be promoted by the employee's testimony; 2) whether the appearance would result in an unnecessary interference with the employee's duties; and 3) whether the employee's testimony would result in the appearance of improperly favoring one litigant over another.

The State Director will review all of the submitted information to determine whether to grant approval to honor the subpoena (or other compulsory process), and a letter will be issued to the employee with his/her decision.

A USDA employee requested to appear as a witness in a proceeding in which the United States is NOT a party, who has NOT been served with a valid summons, may only appear if such appearance has been authorized by the head of his or her agency and approved by the appropriate Assistant Secretary, Under Secretary or other general officer and the General Counsel, based on the determination that such appearance is in the interest of the United States Department of Agriculture. Responsibilities assigned to heads of agencies and the Assistant Secretaries and Under Secretaries may not be redelegated in such a situation.

2. Unless the employee's appearance has been authorized as set forth above or the subpoena has been withdrawn, the employee is required to appear at the stated time and place set forth in the subpoena, produce a copy of the regulations (copies may be obtained from the following website: http://www.access.gpo.gov/nara/cfr/waisidx_01/7cfr1_01.html – **including a copy of the attached memo**) and respectfully decline to give any testimony in the proceedings. The regulations provide that the General Counsel or his or her designee will request the assistance of the Department of Justice or the U.S. Attorney's Office to represent the interests of the employee or the USDA.

3. Subpoenas duces tecum for USDA records in judicial or administrative proceedings in which the United States is NOT a party.

This situation addressed by the regulations deals with the service of a subpoena duces tecum on USDA employees requiring records in a proceeding in which the United States is NOT a party. Section 1.215 sets forth that a subpoena for USDA records in a proceeding in which the United States is NOT a party shall be deemed a request for records under the Freedom of Information Act and shall be handled pursuant to instructions governing public disclosure. Rural Development regulations in this regard are found at RD Instruction 2018-F, Para. 2018.251.

If the employee is served with a subpoena duces tecum compelling the production of records in this regard, he or she should contact the attorney serving the subpoena and inform him or her that these regulations require him or her to deem the request as a Freedom of Information Act request. The attorney should be informed of the appropriate regulations in that regard. If the subpoena is not withdrawn, the employee, after consultation with the State Director and the Regional Attorney, Assistant Regional Attorney or Associate Regional Attorney, shall appear in response to the subpoena and respectfully decline to produce the records on the ground that he or she is prohibited by this section from doing so and state that the production of records involved will be handled in accordance with the Freedom of Information Act regulations.

The regulations set forth that the General Counsel or his or her designee will request the assistance of the Department of Justice or United States Attorney's Office in representing the interest of the employee in this regard.

4. The regulations also authorize the employee to collect travel expenses with regard to his or her appearance if authorized. The USDA employee is also required to collect the authorized fees for the appearance.

An employee who appears or produces documents on behalf of the United States of America is entitled to travel expenses but not witness fees. An employee who appears or produces documents in a proceeding on behalf of a party other than the United States of America, when such appearance is in his or her official capacity or arises out of or relates to his or her USDA employment, is entitled to travel expenses if not paid by the requiring party. Such employee is required to collect any authorized fees and submit them to the agency.