

determinations are not negatively impacted, in the final rule we made substantial changes to these proposed provisions which address the concerns regarding credibility raised by the commenters. The final rule provides that hearings conducted under the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules shall be conducted by audio-visual telecommunication unless the person conducting the proceeding determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing: (1) Is necessary to prevent prejudice to a party; (2) is necessary because of a disability of any individual expected to participate in the hearing; or (3) would cost less than conducting the hearing by audio-visual telecommunication.

The person conducting the proceeding may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone only if the person conducting the proceeding finds that a hearing conducted by telephone: (1) Would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing. (See 7 CFR 1.141(b) (3) and (4), 1.168(b) (3) and (4), 47.15(c) (3) and (4), and 47.49(f) (2) and (3) and 9 CFR 202.112(a) (3) and (4) in this final rule.)

We do expect that, after the effective date of this final rule, a number of hearings will be conducted by telephone based upon a finding by the person conducting the proceeding that a hearing conducted by telephone will provide a full and fair evidentiary hearing; will not prejudice any party; and will cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

Numerous courts have found that hearings conducted by telephone do not increase the risk of error because witness demeanor cannot be viewed. In *Casey v. O'Bannon*, 536 F. Supp. 350 (E.D. Pa. 1982), the court determined that plaintiffs failed to prove that the constitution compels face-to-face hearings and that there is a risk of an erroneous deprivation by virtue of the telephone procedures as they currently exist. The court was influenced by testimony at trial showing that "hearing examiners can effectively judge credibility over the phone by noting

voice responses, pauses, levels of irritation and other factors" and a survey showing that 82% of examiners who have presided over telephone hearings believe they can judge credibility in hearings conducted by telephone. *Id.*, at 353-54, citing *Attitudes Towards the Use of the Telephone in Administrative Fair Hearings, The California Experience*, 31 Admin. L. Rev. 247 (1979).

Further, in *Utica Mutual Ins. Co. v. Vincent*, 375 F.2d 129, 131 (2d Cir. 1967), the Second Circuit stated, "Utica finds in the due process clause of the Fifth Amendment a requirement that when there are issues of credibility, as was assumed to be true here, no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to the credibility by another who has * * *. We discern no such absolute in the history laden words of the Fifth Amendment; Utica would freeze what is usually a sensible rule of judicial administration into a constitutional imperative." The court further noted that when the Constitution was adopted the settled practice in the English chancery courts was to take evidence almost wholly by deposition. *Id.*, at 131 n. 3. *Utica* was cited as support in at least two other federal cases involving the fact finder's inability to observe demeanor. See *Moore v. Ross*, 687 F.2d 604, 609-10 (2nd Cir. 1982), cert. denied, 459 U.S. 1115 (1983); *Blake v. Ambach*, 691 F.Supp. 651, 655-56 (S.D.N.Y. 1988).

Numerous state courts have also upheld the use of telephone hearings under circumstances in which the issue of demeanor and credibility was raised. In *Babcock v. Employment Division*, 696 P.2d 19, 21 (Or. App 1985), the court considered credibility the most difficult issue for unemployment compensation telephone hearings, yet stated that while "[p]hysical appearance can be a clue to credibility, * * * of equal or greater importance is what a witness says and how she says it." The Oregon appellate court was satisfied "that the audible indicia of a witness' demeanor are sufficient for a referee to make an adequate judgment as to believability." *Id.*

In *State, ex. rel. Human Services Department v. Gomez*, 657 P.2d 117, 124 (N.M. 1983), the court rejected Gomez's contention that the telephonic hearing was not meaningful because his efforts to remain on welfare depended upon his credibility and the hearing officer could not judge credibility without seeing him. The court did state that credibility may be a minimal factor in disability determination, but "a

requirement that the hearing officer also see Gomez testify * * * would impose the rigidities of judicial procedure on what is supposed to be an informal proceeding." *Id.*, at 124-25.

5. Exchange of Direct Testimony of Each Witness a Party Will Call

We proposed to amend the Uniform Rules, the Capper-Volstead Rules, the PACA Reparation Rules, the PACA Responsibly Connected Rules, and the P&S Reparation Rules to provide that unless the hearing is scheduled to begin less than 20 days after the person conducting the proceeding issues a notice stating the time of the hearing, each party must exchange, in writing, with all other parties, a verified narrative statement of the direct testimony of each witness that the party will call to provide oral direct testimony at the hearing. (See proposed 7 CFR 1.141(g), 1.168(f), 47.15(f), and 47.58(a) and 9 CFR 202.112(e).)

One commenter objected to the exchange of direct testimony of each witness. Two commenters stated that they had no objection to the exchange of direct testimony as long as each witness is required "to appear in court for cross-examination."

The requirement that parties exchange the written narrative statements of the direct testimony of witnesses the parties intend to call at a hearing may, in some instances, necessitate a significant expenditure of time and resources. Based on our past experience, many administrative proceedings conducted under the rules of practice which we are amending are settled just prior to the scheduled date of hearing. In these circumstances, the preparation and exchange of a written verified narrative statement of the oral direct testimony of each witness the parties intend to call would constitute an unnecessary expenditure of time and resources. One of the purposes of this final rule is to make adjudicatory proceedings conducted by the Department as efficient as possible. Therefore, this final rule limits the provisions regarding the exchange of written verified narrative statements of the oral direct testimony of witnesses the parties intend to call to hearings to be conducted by telephone. Except as discussed below, we have retained the provision regarding the exchange of written verified narrative statements of oral direct testimony prior to hearings conducted by telephone to expedite these hearings, prevent surprise, ensure that all parties have a full opportunity to participate in the hearing and cross-examine witnesses, and assist the