

## General Accounting Office

## § 28.60

the request and shall be granted only upon a showing of good cause. When the parties agree on postponement, motions may be made orally and shall be granted only upon a showing of good cause.

### § 28.56 Hearing procedures, conduct and copies of exhibits.

(a) The Board may designate one or more administrative judges to conduct hearings on appropriate matters.

(b) The hearing will be conducted as an administrative proceeding and, ordinarily, the rules of evidence will not be strictly followed.

(c) Parties will be expected to present their cases in a concise manner limiting the testimony of witnesses and submission of documents to relevant matters.

(d) Any party to a hearing offering exhibits into the record shall submit the original of each such exhibit to the court reporter, two copies to the administrative judge, plus one copy for each opposing party that is separately represented.

(e) Each party to a proceeding shall be responsible for bringing the proper number of copies of an exhibit to the hearing.

(f) Multipage exhibits shall be paginated in the lower right hand corner and the first page shall indicate the total number of pages in the exhibit.

(g) No later than the commencement of the hearing, each party shall submit to the administrative judge, to the court reporter, and to the opposing party: (1) A typed list of the witnesses expected to be called to testify; and (2) a typed list of the acronyms (with definitions) expected to be used by the witnesses.

### § 28.57 Public hearings.

(a) Hearings shall be open to the public. However, the administrative judge at his or her discretion, may order a hearing or any part thereof closed, where to do so would be in the best interests of the petitioner, a witness, the public, or other affected persons. Any order closing the hearing shall set forth the reasons for the administrative judge's decision. Any objections thereto shall be made a part of the record.

(b) Regardless of whether a hearing is open or closed, the GAO technical representative, who is not expected to testify, the GAO representative, the petitioner and the petitioner's representative each has a right to be present at the hearing.

### § 28.58 Transcript.

(a) *Preparation.* A verbatim record made under supervision of the administrative judge shall be kept of every hearing and shall be the sole official record of the proceeding. Upon request, a copy of a transcript of the hearing shall be made available to each party. Additional copies of the transcript shall be made available to a party upon payment of costs. Exceptions to the payment requirement may be granted for good cause shown. A motion for an exception shall be made in writing and accompanied by an affidavit setting forth the reasons for the request and shall be granted upon a showing of good cause. Requests for copies of transcripts shall be directed to the Clerk of the Board. The Clerk of the Board may, by agreement with the person making the request, make arrangements with the official hearing reporter for required services to be charged to the requester.

(b) *Corrections.* Corrections to the official transcript will be permitted. Motions for correction must be submitted within 30 days of service of the transcript upon the party. Corrections of the official transcript will be permitted only when errors of substance are involved and only upon approval of the administrative judge. The administrative judge may make changes at any time with notice to the parties.

### § 28.59 Official record.

The transcript of testimony and the exhibits, together with all papers and motions filed in the proceedings, shall constitute the exclusive and official record.

### § 28.60 Briefs.

(a) *Length.* Principal briefs shall not exceed 60 pages and reply briefs 30 pages, exclusive of tables and pages limited only to quotations of statutes, rules, and the like. Motions to file extended briefs shall be granted only for

**§ 28.61**

**4 CFR Ch. I (1-1-03 Edition)**

good cause shown. Briefs in excess of 10 pages shall include an index and a table of authorities.

(b) *Format.* Every brief must be easily readable. Pages must be 8½×11 inches with margins at least one inch on all sides. Typewritten briefs must have double spacing between each line of text, except for quoted texts which may be single spaced.

(c) *Number of copies.* An original and 3 copies of each brief shall be filed with the administrative judge and one copy served on each party separately represented. When an action is before the full Board, an original and seven copies of each brief must be filed with the Board and one copy served on each party separately represented.

**§ 28.61 Burden and degree of proof.**

(a) In appealable actions, as defined by 5 U.S.C. 7701(a), agency action must be sustained by the Board if:

(1) It is a performance-based action and is supported by substantial evidence; or

(2) It is brought under any other provision of law, rule, or regulation as defined by 5 U.S.C. 7701(a) and is supported by a preponderance of evidence.

(b) Notwithstanding paragraph (a) of this section, the agency's decision may not be sustained if the petitioner:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Shows that the decision was based on any prohibited personnel practice described in 4 CFR 2.5; or

(3) Shows that the decision was not in accordance with law.

(c) In any other action within the Board's jurisdiction, the petitioner shall have the responsibility of presenting the evidence in support of the action and shall have the burden of proving the allegations of the appeal by a preponderance of the evidence.

(d) Definitions. For purposes of this section, the following definitions shall apply:

*Harmful error* means error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the petitioner to show that, based upon

the record as a whole, the error was harmful, i.e., caused substantial harm or prejudice to his or her rights.

*Preponderance of the evidence* means that degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

*Substantial evidence* means that degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

**§ 28.62 Closing the record.**

(a) When there is a hearing, the record shall be closed at the conclusion of the hearing. However, when the administrative judge allows the parties to submit argument, briefs or documents previously identified for introduction into evidence, the record shall be left open for such time as the administrative judge grants for that purpose.

(b) Once the record is closed, no additional evidence or argument shall be accepted into the record except upon a showing that new and material evidence has become available which was not available despite due diligence prior to the closing of the record. However, the administrative judge shall make part of the record any motions for attorney fees, any supporting documentation, and determinations thereon, and any approved correction to the transcript.

EVIDENCE

**§ 28.65 Service of documents.**

Any document submitted with regard to any pleading, motion, or brief shall be served upon all parties to the proceeding.

**§ 28.66 Admissibility.**

Evidence or testimony may be excluded from consideration by the administrative judge if it is irrelevant, immaterial, or unduly repetitious.