

General Accounting Office

§ 28.81

§ 28.67 Production of statements.

After an individual has given evidence in a proceeding, any party may request a copy of any prior signed statement made by that individual which is relevant to the evidence given. If the party refuses to furnish the statement, the administrative judge may draw an adverse inference from the failure to produce or may exclude the relevant evidence given by the individual from consideration.

§ 28.68 Stipulations.

The parties may stipulate as to any matter of fact. Such a stipulation will satisfy a party's burden of proving the fact alleged.

§ 28.69 Judicial notice.

The administrative judge on his or her own motion or on motion of a party, may take judicial notice of a fact which is not subject to reasonable dispute because it is either: (a) A matter of common knowledge; or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Judicial notice taken of any fact satisfies a party's burden of proving the fact noticed.

INTERLOCUTORY APPEALS

§ 28.80 Explanation.

An interlocutory appeal is an appeal to the Board of a ruling made by an administrative judge during the course of a proceeding. This appeal may be permitted by the administrative judge if he or she determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention. The Board makes a decision on the issue and the administrative judge acts in accordance with that decision.

§ 28.81 Procedures and criteria for certification.

(a) Interlocutory review by the Board of a ruling by the administrative judge during the course of the proceeding is disfavored and will be permitted only in circumstances where:

(1) The ruling involves an important question of law or policy about which

there is substantial ground for difference of opinion; and

(2) An immediate review of the ruling by the Board will materially advance the completion of the proceeding, or denial will cause undue harm to a party or the public.

(b) The administrative judge may, on motion of a party or on his or her own motion, certify an interlocutory ruling to the Board for its immediate consideration. Any such certification shall explain the basis on which the administrative judge concluded that the standards for interlocutory review have been met. If the Board nevertheless determines that the certification does not meet those standards it may decline to accept the certification.

(c) A motion for certification to the Board of an interlocutory ruling by the administrative judge shall be filed within 10 days after service of the ruling upon the parties. The motion shall include arguments in support of both the certification and the determination to be made by the Board. Responses, if any, shall be filed within 10 days after service of the motion.

(d) The grant or denial of a motion for certification of an interlocutory ruling shall not be appealable. The administrative judge shall promptly bring a denial of such a motion, and the reasons therefor, to the attention of the Board. If, upon its consideration of the motion and the underlying record, the Board believes that interlocutory review is warranted, it may grant the motion sua sponte.

(e) Upon its acceptance of a ruling of the administrative judge for interlocutory review, the Board shall issue an order setting forth the procedures that will be followed in the conduct of that review.

(f) Unless otherwise directed by the Board, the stay of any proceedings during the pendency of either a motion for certification or an interlocutory review itself shall be within the discretion of the administrative judge.

(g) The denial of a motion for certification does not affect the right of the parties to challenge interlocutory rulings in the course of the review by the Board of initial or recommended decisions.

§ 28.86

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BOARD DECISIONS, ATTORNEY'S FEES
AND JUDICIAL REVIEW

§ 28.86 Board procedures; recommended decisions.

(a) *Non-member recommended decisions.* Where an administrative judge who is not a Board member issues a decision, the administrative judge shall transmit to the parties and to the Board a recommended decision.

(b) Exceptions to the recommended decision shall be filed within 30 days from service of the decision. Exceptions may be filed by hand delivery or by mail. Please note that the address to be used differs for the two kinds of filing.

(1) *Filing by hand delivery:* Exceptions may be filed by hand delivery at the office of the Board, Suite 560, Union Center Plaza II, 820 First Street NE., Washington, DC.

(2) *Filing by mail:* Exceptions may be filed by mail addressed to the Personnel Appeals Board, Suite 560, Union Center Plaza II, 441 G Street, NW., Washington DC 20548. When filed by mail, the postmark shall be the exclusive date of filing.

The party filing the exceptions shall serve the Board with an original and 7 copies and shall serve one copy of the exceptions on each of the other parties. The exceptions shall include all supporting material and shall set forth objections to the recommended decision, with references to applicable laws or regulations, and with specific reference to the record. The responding party shall have 30 days from service of the exceptions to file any reply. Additional responsive pleadings may be filed only with the approval of the Board.

(c) Regardless of whether exceptions to a recommended decision are filed with the Board, the Board shall review the recommended decision. In reviewing the recommended decision, the Board shall review the record as though it were making the initial decision. The Board may adopt, reverse, remand, modify or vacate the recommended decision, in whole or in part. Where no party files exceptions to a recommended decision and the Board is considering any action other than adopting the recommended decision in whole as the final decision, the Board

shall provide the parties an opportunity to address the issues it is considering. Where appropriate, the Board shall issue a final decision and order a date for compliance. In reviewing any recommended decision, the Board may:

(1) Issue a single decision which decides the case;

(2) Hear oral arguments;

(3) Require the filing of briefs;

(4) Remand the proceedings to the administrative judge to take further testimony or evidence or make further findings or conclusions; or

(5) Take any other action necessary for final disposition of the case.

(d) The Board shall reject a recommended decision, in whole or in part, on the basis of its own motion or on the basis of exceptions filed by the parties, when the Board finds that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(2) The recommended decision is based on an erroneous interpretation of statute or regulation;

(3) The recommended decision is arbitrary, capricious or an abuse of discretion, or otherwise not consistent with law;

(4) The recommended decision is not made consistent with required procedures and results in harmful error; or

(5) The recommended decision is unsupported by evidence required by the requisite burden of proof as set forth at § 28.61.

(e) The decision of the Board shall be final and subject to judicial review pursuant to § 28.90.

[58 FR 61992, Nov. 23, 1993, as amended at 61 FR 36810, July 15, 1996]

§ 28.87 Board procedures; initial decisions.

(a) When a case is heard in the first instance by a single Board member, or a panel of members, an initial decision shall be issued by that member or panel and served upon the parties.

(b) An aggrieved party may seek review or reconsideration of the initial decision in the following manner:

(1) Within 15 days of the service of the initial decision, such a party may seek review by the full Board by filing