

Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Director, Bureau of Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Bureau of Administration, 800 Independence Ave., SW., Room 802, Washington, DC 20594.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §807.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant,

he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4579, Feb. 5, 1986, as amended at 51 FR 4579, Feb. 5, 1986]

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

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AUTHORITY: 49 U.S.C. 1101-1155, 44701-44723, 46301; unless otherwise noted.

SOURCE: 40 FR 30243, July 17, 1975, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 821 appear at 65 FR 42639, July 11, 2000.

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Subpart A—General Provisions

§ 821.1 Definitions.

As used in this part:

Administrator means the Administrator of the Federal Aviation Administration (FAA);

Airman certificate means any certificate issued by the FAA to an airman and shall include medical certificates required for an airman;

Appeal from an initial decision means a request to the Board to review a law judge's decision;

Appeal to the Board means a request to the Board for the review by a law judge of an order of the Administrator;

Board means the National Transportation Safety Board;

Certificate means any certificate issued by the Administrator under 49 U.S.C. Chapter 447;

Chief Law Judge means the administrative law judge in charge of the Office of Administrative Law Judges;

Complaint means an order of the Administrator from which an appeal to the Board has been taken pursuant to sections 501(e)(2), 49 U.S.C. 44709, 611(c), or 901 of the Act.

Emergency order means an order of the Administrator issued pursuant to 49 U.S.C. 44709, which recites that an emergency exists and that safety in air commerce or air transportation and the public interest require the immediate effectiveness of such order;

Flight engineer means a person who holds a flight engineer certificate issued under part 63 of title 14 of the Code of Federal Regulations.

Initial decision means the law judge's decision on the issue remaining for disposition at the close of a hearing before him or her and/or an order that has the effect of terminating the proceeding, such as one granting a motion to dismiss in lieu of an answer, as provided in §821.17, and one granting a motion for summary judgment. *Initial decision* does not include cases where the record is certified to the Board, with or without a recommended decision, orders partly granting a motion to dismiss and requiring an answer to any remaining allegations, or rulings by the law judge on interlocutory matters appealed to the Board under §821.16;

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Law judge means the administrative law judge assigned to hear and preside over the respective proceedings;

Mechanic means a person who holds a mechanic certificate issued under part 65 of title 14 of the Code of Federal Regulations.

Order means the document (sometimes also called a complaint) in which the Administrator seeks to impose a civil penalty or amend, modify, suspend or revoke a certificate.

Petition for review means a petition filed pursuant to 49 U.S.C. 44709 for review of the Administrator's denial of an application for issuance or renewal of an airman certificate;

Petitioner means a person who has filed a petition for review;

Pilot means a person who holds a pilot certificate issued under part 61 of title 14 of the Code of Federal Regulations.

Repairman means a person who holds a repairman certificate issued under part 65 of Title 14 of the Code of Federal Regulations.

Respondent means the holder of a certificate who has appealed to the Board from an order of the Administrator imposing a civil penalty or amending, modifying, suspending, or revoking a certificate.

Terms defined in 49 U.S.C. Chapters 11, 447, and 463 are used as so defined.

[40 FR 30243, July 17, 1975, as amended at 58 FR 11380, Feb. 25, 1993; 59 FR 59046, Nov. 15, 1994; 65 FR 42639, July 11, 2000]

§ 821.2 Applicability and description of part.

The provisions of this part govern all air safety proceedings, including proceedings involving airman medical certification, before a law judge on petition for review of the denial of any airman certificate or on appeal from any order of the Administrator amending, modifying, suspending or revoking any certificate. The provisions of this part also govern all proceedings on appeal from an order of the Administrator imposing a civil penalty on a flight engineer, mechanic, pilot, or repairman, or a person acting in that capacity, where the underlying violation occurred on or after August 26, 1992, and all pro-

ceedings on appeal to the Board from any order or decision of a law judge.

[59 FR 59054, Nov. 15, 1994]

§ 821.3 Description of docket numbering system.

In addition to sequential numbering of cases as received, each case formally handled by the Board receives a letter prefix. These letter prefixes reflect the case type: "SE" for the safety enforcement (suspension/revocation) docket; "SM" (safety medical) for an enforcement case involving a medical application; "SR" for a case involving safety registration issues under 49 U.S.C. 44101 *et seq.*; "CD" for certificate denial (see 49 U.S.C. 44703); "CP" for cases in which the Administrator seeks a civil penalty; and "EAJA" for applications seeking Equal Access to Justice Act awards.

[59 FR 59046, Nov. 15, 1994, as amended at 65 FR 42639, July 11, 2000]

Subpart B—General Rules Applicable to Petitions for Review, Appeals to the Board, and Appeals From Initial Decisions

§ 821.6 Appearances and rights of witnesses.

(a) Any party to a proceeding may appear and be heard in person or by attorney or other representative designated by him or her. No register of persons who may practice before the Board is maintained, and no application for admission to practice is required. Upon hearing, and for good cause shown, the Board may suspend or bar any person from practicing before it.

(b) Any person appearing in person in any proceeding governed by this part, may be accompanied, represented, and advised by counsel and may be examined by his or her own counsel or representative.

(c) Any person who submits data or evidence in a proceeding governed by this part, may by timely request procure a copy of any document submitted by him or her, or a copy of any transcript made of his or her testimony on payment of reasonable costs. Original documents or data or evidence may be retained by a party upon permission of

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the law judge or the Board, upon substitution of a copy thereof.

(d) Any party to a proceeding who is represented by an attorney or party representative shall notify the Board of the name and address of that attorney or representative. In the event of a change in attorney or representative of record, a party shall notify the Board, in the manner provided in § 821.7(a), and the other parties to the proceeding, prior to the attorney or representative participating in any way, including the filing of documents, in any proceeding.

[40 FR 30243, July 17, 1975, as amended at 49 FR 28249, July 11, 1984; 59 FR 59046, Nov. 15, 1994]

§ 821.7 Filing of documents with the Board.

(a) *Filing address, date and method of filing.* Generally, documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, S.W., Washington, DC 20594-2000, and addressed to the assigned law judge, if any. Subsequent to the filing of a notice of appeal from a law judge's initial decision or order terminating the proceeding (written or oral), or a decision permitting an interlocutory appeal, all documents should be directed to the Office of General Counsel, also at the above address. Filing of any document shall be by personal delivery, by U.S. Postal Service first class mail, or by overnight mail delivery service. Except as provided in § 821.57, facsimile filing is permitted as a convenience to the parties only. It does not substitute for filing requirements in this part, and any fax transmission to the Board must be followed, no later than the following business day, by a confirmation copy, clearly marked as such, sent by a method of service authorized in this paragraph. Unless otherwise shown to be inaccurate, documents shall be deemed filed on the date of personal delivery, on the send date shown on the facsimile (provided a confirmation copy is properly served), and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evi-

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dence if there is no certificate of service and no postmark.

(b) *Number of copies.* An executed original and 3 copies of each document shall be filed with the Board. Copies need not be signed, but the name of the person signing the original shall be shown.

(c) *Form.* Petitions for review or appeals to the Board and appeals from initial decisions may be in the form of a letter to the Board signed by the petitioner or the party appealing and shall be typewritten or in legible handwriting.

(d) *Contents.* Each document shall contain a concise and complete statement of the facts relied upon and the relief sought.

(e) *Subscription.* The original of every document filed shall be signed by the person filing it or his or her duly authorized representative.

(f) *Designation of person to receive service.* The initial document filed shall state on the first page the name and post office address of the person or persons who may be served with documents in the proceeding.

(g) *Motions, requests, and documents.* All motions, requests, and documents in connection with petitions for review and appeals to the Board shall be filed with the chief law judge, until such time as he or she assigns a law judge to preside over the proceeding.

[40 FR 30243, July 17, 1975, as amended at 49 FR 28249, July 11, 1984; 56 FR 56172, Nov. 1, 1991; 59 FR 59046, Nov. 15, 1994]

§ 821.8 Service of documents.

(a) *Who must be served.* (1) Copies of all documents filed with the Board must be served on all parties to the proceeding by the person filing them. A certificate of service shall accompany all documents when they are tendered for filing and shall certify concurrent service on the Board and the parties. Certificates of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing document(s) on the following parties' counsel or designated representatives [or on the party, if without counsel or representative] at the address indicated by [specify the method of service: first class mail, personal service, etc.] [indicate names and addresses here]

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Dated at _____, this ____ day of _____, 19____.

(Signature) _____
For (on behalf of) _____”

(2) Service shall be made on the person designated in accordance with §821.7(f) to receive service. If no such person has been designated, service shall be made on the party.

(b) *Method of service.* Except as set forth in paragraph (c) and (d) of this section and as required by §821.57(b), the method of service is the same as that set forth in §821.7(a) for filing of documents. The Board will serve orders, notices of hearing, and written initial decisions on attorneys or representatives designated under §821.7(f) or, if no attorney or representative, on the party itself, and will do so by certified mail, except that service on the Administrator will be by first-class mail.

(c) *Where service shall be made.* Except for personal service, addresses for service of documents shall be those in the official record or, if none in the case of the Federal Aviation Administration, the Office of the Chief Counsel, Washington, DC 20591. In the case of an agent designated by an air carrier under 49 U.S.C. 46103(a), service of any sort may be accomplished only at the agent's office or usual place of residence.

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When acknowledgement of receipt is by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under §821.7(f); or

(2) When a properly addressed envelope, sent to the most current address in the official record by regular, registered, or certified mail, has been returned as undelivered, unclaimed, or refused.

(e) *Date of service.* The date of service shall be determined in the same manner as the filing date is determined under §821.7(a).

[59 FR 59047, Nov. 15, 1994, as amended at 65 FR 42639, July 11, 2000]

§ 821.9 Intervention and amicus appearance.

(a) *Intervention.* Any person may move for leave to intervene in a proceeding and may become a party thereto, if it is found that such person may be bound by any order to be entered in the proceeding, or that such person has a property, financial, or other legitimate interest that will not be adequately represented by existing parties, and that such intervention will not unduly broaden the issues or delay the proceedings. Except for good cause shown, no motion for leave to intervene will be entertained if filed less than 10 days prior to hearing. The extent to which an intervenor may participate in the proceedings is within the law judge's discretion, and depends on the above criteria.

(b) *Amicus curiae briefs.* A brief of *amicus curiae* in matters on appeal from initial decisions may be filed if accompanied by written consent of all the parties, or if, in the opinion of the Board's General Counsel, the brief will not unduly broaden the matters at issue or unduly prejudice any party to the litigation. A brief may be conditionally filed with motion for leave. The motion shall identify the interest of the movant and shall state the reasons why a brief of *amicus curiae* is desirable. Such brief and motion shall be filed within the time allowed the party whose position as to affirmance or reversal the brief would support, unless cause for late filing is shown, in which event the General Counsel may provide an opportunity for response as a condition of acceptance.

[59 FR 59047, Nov. 15, 1994]

§ 821.10 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice or order of the Board or a law judge, or by any applicable statute, the date of the act, event, or default after which the designated period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday for the Board, in which event the period runs until the end of the next day which is neither a Saturday,

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Sunday, nor legal holiday. In all cases, Saturdays, Sundays, and legal holidays for the Board shall be included in the computation of time, except they shall not be included in computations of time respecting petitions for review of determinations as to the existence of emergencies under § 821.54 in subpart I of this part.

[65 FR 42639, July 11, 2000]

§ 821.11 Extension of time.

(a) Upon written request filed with the Board and served on all parties, or by oral request with any extension granted confirmed in writing and served on all parties, and for good cause shown, the chief judge, the law judge, or the Board may grant an extension of time to file any document except a petition for reconsideration.

(b) The Board's General Counsel is authorized to grant unopposed extensions on timely oral request without a showing of good cause in cases appealed to the Board from a decision of a law judge. Written confirmation of such a grant must promptly be sent by the requesting party to the Board and served on other parties.

(c) Extensions of time to file petitions for reconsideration will be granted only in extraordinary circumstances.

[59 FR 59047, Nov. 15, 1994]

§ 821.12 Amendment and withdrawal of pleadings.

(a) *Amendment.* At any time more than 15 days prior to the hearing, a party may amend his or her pleadings by filing the amended pleading with the Board and serving copies on the other parties. After that time, amendment shall be allowed only at the discretion of the law judge. In the case of amendment to an answerable pleading, the law judge shall allow the adverse party a reasonable time to object or answer. Amendments to complaints shall be consistent with the requirements of 49 U.S.C. 44709(c) and 44710(c).

(b) *Withdrawal.* Except in the case of withdrawal of an appeal to the Board, withdrawal of a petition for review, withdrawal of a complaint, or withdrawal of an appeal from an initial decision, a party may withdraw pleadings

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only on approval of a law judge or the Board.

[59 FR 59047, Nov. 15, 1994]

§ 821.13 Waivers.

Waivers of any rights provided by statute or regulation shall either be in writing, or by stipulation made at a hearing and entered into the record, and shall set forth their precise terms and conditions.

§ 821.14 Motions.

(a) *General.* An application to the Board or to a law judge for an order or ruling not otherwise provided for in this part shall be by motion. Prior to the assignment of a law judge, all motions shall be addressed to the chief law judge. Thereafter, and prior to the expiration of the period within which an appeal from the law judge's initial decision may be filed, or the certification of the record to the Board, all motions shall be addressed to the law judge. At all other times, motions shall be addressed to the Board, Office of General Counsel. All motions not specifically provided for in any other section of this part shall be made at an appropriate time, depending on the nature thereof and the relief requested.

(b) *Form and contents.* Unless made during a hearing, motions shall be made in writing, shall state with particularity the grounds for the relief sought, and the relief sought, and shall be accompanied by affidavits or other evidence relied upon. Motions introduced during hearings may be made orally on the record, unless the law judge directs otherwise.

(c) *Answers to motions.* Except when a motion is made during a hearing, any party may file an answer in support of or in opposition to a motion, accompanied by such affidavits or other evidence as he or she desires to rely upon, provided that the answer is filed with 15 days after the motion has been served upon him or her, or such other period as the Board or a law judge may fix. Where a motion is made during a hearing, the answer and the ruling thereon may be made at the hearing, or orally or in writing within such time as the law judge may fix.

(d) *Oral argument; briefs.* No oral argument will be heard on motions unless the Board or the law judge directs otherwise. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the positions taken.

(e) *Disposition of motions.* Except as provided in paragraph (c) of this section for rulings on motions made at a hearing, the law judge shall pass upon all motions properly addressed to him or her, unless he or she finds that a prompt decision by the Board is essential to the proper conduct of the proceeding, in which case he or she may refer such motion to the Board for decision.

(f) *Effect of pendency of motions.* Except as provided in §§ 821.17(a) and 821.18, the filing or pendency of a motion shall not automatically alter or extend the time fixed in this part (or any extension granted thereunder) to take action by the parties.

[40 FR 30243, July 17, 1975, as amended at 54 FR 12203, Mar. 24, 1989; 59 FR 59047, Nov. 15, 1994]

§ 821.15 Motion to disqualify a Board Member.

A motion requesting a Board Member to disqualify himself shall be filed with the Board, supported by an affidavit setting forth grounds for disqualification. In nonemergency proceedings, where an appeal from an initial decision is filed, such motion shall be filed on or before the date on which the reply brief is due, pursuant to § 821.48(d). In emergency proceedings, where a notice of appeal has been filed, such motion shall be filed on or before the date the reply brief is due, pursuant to § 821.57(b). Failure to file a timely motion shall be deemed a waiver of any claim of disqualification. Application for leave to file an untimely motion may be made, accompanied by an affidavit setting forth in detail why the facts relied upon as grounds for disqualification were not known and could not have been discovered with reasonable diligence within the prescribed time.

§ 821.16 Appeals from law judge's interlocutory rulings and motions.

Rulings of law judges on motions may not be appealed to the Board prior to its consideration of the entire proceeding, except in extraordinary circumstances and with the consent of the law judge who made the ruling. An appeal shall be disallowed unless the law judge finds, either on the record or in writing, that to allow such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to any party. If an appeal is allowed, any party may file a brief with the Board within such time as the law judge directs. No oral argument will be heard unless the Board directs otherwise. The rulings of the law judge on motion may be reviewed by the Board in connection with its appellate action in the proceeding, irrespective of the filing of an appeal from the motion or any action taken thereon.

§ 821.17 Motion to dismiss and for judgment on the pleadings.

(a) *General.* A motion to dismiss may be filed within the time limitation for filing an answer, except as otherwise provided in paragraph (d) of this section. If the motion is not granted in its entirety, the answer shall be filed within 10 days of service of the law judge's order on the motion.

(b) *Judgment on the pleadings.* A party may file a motion for judgment on the pleadings where no answer has been filed or where there are no issues to be resolved.

(c) *Appeal of dismissal orders and grants of motions for judgment on the pleadings.* When a law judge grants a motion for judgment on the pleadings or a motion to dismiss in lieu of an answer and terminates the proceeding without a hearing, an appeal of such order to the Board may be filed pursuant to the provisions of § 821.47. When a law judge grants a motion to dismiss in part, § 821.16 is applicable.

(d) *Motions to dismiss for lack of jurisdiction.* A motion to dismiss on the ground that the Board lacks jurisdiction may be made at any time.

[49 FR 28249, July 11, 1984]

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§ 821.18 Motion for more definite statement.

(a) A party, in lieu of an answer, may file a motion requesting that the allegations in the complaint or the petition be made more definite and certain. The motion shall point out the defects complained of and the details desired. If the motion is granted and the law judge's order is not complied with within 15 days after notice, the law judge shall strike the allegation or allegations in any complaint or petition to which the motion is directed. If the motion is denied, the moving party shall file an answer within 10 days after the denial.

(b) A party may file a motion to clarify an answer in the event that it fails to respond clearly either to the complaint or to the petition for review. Such a motion may be granted at the discretion of the law judge.

[49 FR 28249, July 11, 1984]

§ 821.19 Depositions and other discovery.

(a) *Initiation of discovery.* After a petition for review or a complaint is filed, any party may take the testimony of any person, including a party, by deposition, upon oral examination or written questions, without seeking prior Board approval. Reasonable notice shall be given in writing to the other parties of record stating the name of the witness and the time and place of the taking of the deposition. A copy of any notice of deposition shall be served on the Office of Administrative Law Judges. In other respects, the taking of any deposition shall be in compliance with the provisions of 49 U.S.C. 46104.

(b) *Exchange of information by parties.* At any time before hearing, at the instance of either party, the parties or their representatives may exchange information, such as witness lists, exhibit lists, curricula vitae and bibliographies of expert witnesses, and other data. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned) may issue an order directing compliance with any ruling made with respect to discovery. Any party may also use written interrogatories, requests to

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admit, or other discovery tools. Copies of discovery requests and responses shall be served on the law judge assigned to the proceeding.

(c) *Use of the Federal Rules of Civil Procedure.* Those portions of the Federal Rules of Civil Procedure that pertain to depositions and discovery may be used as a general guide for discovery practice in proceedings before the Board where appropriate. The Federal Rules and the case law that construes them shall be considered by the Board and its law judges as instructive rather than controlling.

(d) *Failure to provide or preserve evidence.* The failure of any party to comply with an order of an administrative law judge compelling discovery or to cooperate in a timely request for the preservation of evidence may result in a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, or dismissal.

[49 FR 28250, July 11, 1984, as amended at 59 FR 59047, Nov. 15, 1994; 65 FR 42639, July 11, 2000]

§ 821.20 Subpoenas, witness fees, and appearances of Board Members, officers, or employees.

(a) *Subpoenas.* Subpoenas requiring the attendance of witnesses or the production of documentary or tangible evidence for the purpose of taking depositions or at a hearing may be issued by the chief law judge prior to the assignment of a law judge, or by the law judge to whom the case is assigned, upon application by any party. The application shall show the general relevance and reasonable scope of the evidence sought. Any person upon whom a subpoena is served may, within 7 days after service but in any event prior to the return date thereof, file with the chief law judge or the law judge, as the case may be, a motion to quash or modify the subpoena, and such filing shall stay the subpoena pending final action by the chief law judge or the law judge on the motion.

(b) *Witness fees.* Witnesses shall be entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. The fees shall be paid by the party at whose instance the witness is subpoenaed or appears. The

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Board may decline to process a proceeding further should a party fail to compensate a witness pursuant to this paragraph.

(c) *Board Members, officers, or employees.* In order to encourage a free flow of information to the Board's accident investigators, the Board disfavors the use of its personnel in enforcement proceedings. Therefore, the provisions of paragraph (a) of this section are not applicable to Board Members, officers, or employees, or the production of documents in their custody. Applications for the attendance of such persons or the production of such documents at hearing shall be addressed to the chief law judge or the assigned law judge, as the case may be, in writing, and shall set forth the need of the moving party for such testimony, and a showing that such testimony is not now, or was not otherwise, reasonably available from other sources. The law judge shall not permit such testimony or documentary evidence to include any opinion testimony, or any account of statements of a respondent, made during the Board's investigation of any accident.

[40 FR 30243, July 17, 1975, as amended at 59 FR 59048, Nov. 15, 1994]

§ 821.21 Official notice.

Where the law judge or the Board intends to take official notice of a material fact not appearing in the evidence in the record, notice shall be given to all parties, who may within 10 days file a petition challenging such fact. Upon the filing of such petition, the party or parties shall be given reasonable opportunity to controvert the fact.

Subpart C—Special Rules Applicable to Proceedings Under 49 U.S.C. 44709

§ 821.24 Initiation of proceedings.

(a) *Petition for review.* Where the Administrator has denied an application for the issuance or renewal of an airman certificate, the applicant may file with the Board a petition for review of the Administrator's action within 60 days from the time the Administrator's action was served on petitioner. The petition shall contain a short statement of the facts on which petitioner's

case depends and a statement of the requested action, and may be in letter form.

(b) *Filing petition with the Board.* The petition for review shall be filed with the Board and the date of filing shall be determined in the same manner as prescribed by § 821.7(a) for other documents.

(c) *Answer to petition.* The Administrator shall file an answer to the petition for review within 20 days of service upon him or her by the petitioner of the petition for review. Failure to deny the truth of any allegation or allegations of the petition may be deemed an admission of the truth of the allegation or allegations not answered.

(d) *Stay of proceeding pending request for special issuance (restricted certificate).* The Board lacks authority to review special issuances, or to direct that they be issued. Where a request for special issuance (restricted certificate) has been filed with the Administrator pursuant to the Federal Aviation Regulations, the Board will hold a petition for review in abeyance pending final action by the Administrator or for 180 days from the date of the Administrator's initial certificate denial, whichever occurs first.

(e) *New evidence.* If petitioner has undergone medical testing or evaluation in addition to that already submitted or known to the Administrator, and wishes to introduce the results into the record, the new medical evidence must be served on the Administrator at least 30 days before the hearing. Absent good cause, failure timely to serve any new evidence will result in its exclusion from the record. The Administrator may amend his or her answer within 10 days from the date the new evidence is served to respond to such new evidence.

[40 FR 30243, July 17, 1975, as amended at 43 FR 60473, Dec. 28, 1978; 49 FR 28250, July 11, 1984, 59 FR 59048, Nov. 15, 1994]

§ 821.25 Burden of proof.

In proceedings under 49 U.S.C. 44709, the burden of proof shall be upon the petitioner.

[40 FR 30243, July 17, 1975, as amended at 65 FR 42639, July 11, 2000]

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§ 821.26 Motion to dismiss petition for review for lack of standing.

Upon motion by the Administrator within the time limitation for filing an answer, a petition for review shall be dismissed for lack of standing in either of the following instances:

(a) If the petitioner's certificate at the time of the denial or renewal thereof was under an order of suspension; or

(b) If the petitioner's certificate had been revoked within one year of the date of the denial or renewal thereof, unless the order revoking such certificate provided otherwise.

Subpart D—Special Rules Applicable to Proceedings Under 49 U.S.C. 44709

§ 821.30 Initiation of proceedings.

(a) *Appeal.* A certificate holder may file with the Board an appeal from an order of the Administrator amending, modifying, suspending, or revoking a certificate. The appeal shall be filed with the Board within 20 days from the time of service of the order and be accompanied with proof of service on the Administrator.

(b) *Contents.* Each appeal shall contain a concise but complete statement of the facts relied on and the relief sought. It shall identify the Administrator's order and any certificate affected and shall recite the Administrator's action from which the appeal is sought. It shall also contain proof of service on the Administrator.

(c) *Effect of timely appeal with the Board.* Timely filing with the Board of an appeal from an order of the Administrator shall postpone the effective date of the order until final disposition of the appeal by the law judge or the Board, except in emergency proceedings.

[58 FR 11381, Feb. 25, 1993, as amended at 59 FR 59048, Nov. 15, 1994]

§ 821.31 Complaint procedure.

(a) *Filing, time of filing, and service on respondent.* The order of the Administrator from which an appeal has been taken shall serve as the complaint. The complaint shall be filed by the Administrator with the Board within 10 days

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after the service date of the notice of appeal.

(b) *Contents of complaint.* If the Administrator claims that respondent lacks qualification as an airman, the order filed as the complaint, or an accompanying statement shall recite on which of the facts pleaded this contention is based.

(c) *Answer to complaint.* The respondent shall file an answer to the complaint within 20 days of service of the complaint upon him or her by the Administrator. Failure to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered. Respondent's answer shall also include any affirmative defense that respondent intends to raise at the hearing. A respondent may amend his or her answer to include any affirmative defense in accordance with the requirements of § 821.12(a). In the discretion of the law judge, any affirmative defense not so pleaded may be deemed waived.

[40 FR 30243, July 17, 1975, as amended at 49 FR 28250, July 11, 1984, 59 FR 59048, Nov. 15, 1994]

§ 821.32 Burden of proof.

In proceedings under 49 U.S.C. 44709, the burden of proof shall be upon the Administrator.

[40 FR 30243, July 17, 1975, as amended at 65 FR 42639, July 11, 2000]

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under 49 U.S.C. 44709, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

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(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

(3) If the law judge wishes some clarification as to the Administrator's factual assertions of good cause, he or she shall obtain this from the Administrator in writing, with due service made upon the respondent, and proceed to an informal determination of the good cause issue without a hearing. A hearing to develop facts as to good cause shall be held only where the respondent raises an issue of fact in respect of the Administrator's good cause issue allegations.

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he or she shall proceed to a hearing on the lack of qualification issue only, and he or she shall so inform the parties. The respondent shall be put on notice that he or she is to defend against lack of qualification and not merely against a proposed remedial sanction.

[40 FR 30243, July 17, 1975, as amended at 54 FR 12203, Mar. 24, 1989; 65 FR 42639, July 11, 2000]

Subpart E—Law Judges

§ 821.35 Assignment, duties, and powers.

(a) *Assignment of law judge and duration of assignment.* The chief law judge shall assign a law judge to preside over the proceeding. Until such assignment, motions, requests, and documents shall be addressed to the Docket Section, Office of Administrative Law Judges, for handling by the chief law judge, who may handle these matters personally or who may delegate all or any of them

to other law judges for decision. After assignment, all motions, requests, and documents shall be addressed to that law judge. The authority of the assigned law judge shall terminate upon certification of the record to the Board, or upon expiration of the period within which appeals from initial decisions may be filed, or upon the law judge's withdrawal from the proceeding.

(b) *Powers of law judges.* Law judges shall have the following powers:

(1) To give notice of and to hold pre-hearing conferences and hearings and to consolidate proceedings which involve a common question of law or fact;

(2) To administer oaths and affirmations;

(3) To examine witnesses;

(4) To issue subpoenas and to take or cause depositions to be taken;

(5) To receive evidence and rule upon objections and offers of proof;

(6) To rule upon motions in assigned cases;

(7) To regulate the conduct of the hearing;

(8) To hold conferences, before or during the hearing for the settlement or simplification of issues;

(9) To dispose of procedural requests or similar matters; and

(10) To make initial decisions, and, if so directed by the Board, to certify records with or without recommended decisions.

(c) *Disqualification of a law judge.* A law judge shall withdraw from the proceedings if at any time he or she deems himself disqualified. If, prior to the initial decision, there is filed an affidavit of personal bias or disqualifications, with substantiating facts, and the law judge does not withdraw, the Board will determine the matter as a part of the record and decision in the proceeding, if an appeal from the law judge's initial decision is filed. The Board will not otherwise consider any claim of bias or disqualification as to the law judge's assignment to conduct the hearing. The Board, in its discretion, may order a hearing on a charge of bias or disqualification.

[40 FR 30243, July 17, 1975, as amended at 59 FR 59048, Nov. 15, 1994]

Subpart F—Hearings

§ 821.37 Notice of hearing.

(a) *Notice.* The chief law judge (or his or her law judge delegate) or the law judge to whom the case is assigned shall set a reasonable date, time and place for the hearing. The notice of the hearing shall be served at least 30 days in advance thereof, and shall include notice of the nature of the hearing. The law judge may set the hearing fewer than 30 days after the notice of hearing is served if the parties agree to an earlier hearing date. In setting the hearing date, due regard shall be given to any need for discovery. In setting the place of the hearing, due regard shall be given to the convenience of the parties and to conservation of Board funds. The location of the witnesses and the suitability of a site served by a scheduled air carrier are added factors to be considered in setting the hearing location, as is Board policy that foreign-held hearings are appropriate only in the most extraordinary circumstances.

(b) *Hearings in several sessions.* Where appropriate, the law judge may determine that a hearing will be held in one or more sessions at the same or different places.

[40 FR 30243, July 17, 1975, as amended at 49 FR 28250, July 11, 1984, 59 FR 59048, Nov. 15, 1994]

§ 821.38 Evidence.

(a) Every party shall have the right to present a case-in-chief or defense by oral or documentary evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Hearsay evidence (including hearsay within hearsay where there are acceptable circumstantial indicia of trustworthiness) is admissible.

(b) All material and relevant evidence should be admitted, but a law judge may exclude unduly repetitious evidence pursuant to 5 U.S.C. 556(d) (Administrative Procedure). Any evidence that is offered and excluded may be described (via an “offer of proof”),

and that description should be made a part of the record.

[59 FR 59048, Nov. 15, 1994, as amended at 65 FR 42639, July 11, 2000]

§ 821.39 Argument and submissions.

At the hearing, the law judge shall give the parties adequate opportunity for the presentation of arguments in support of, or in opposition to, motions, objections, and rulings. Prior to the initial decision, the parties shall be afforded a reasonable opportunity to submit for consideration proposed findings and conclusions and supporting reasons therefor.

§ 821.40 Record.

The transcript of testimony and exhibits, together with all papers, requests, and rulings filed in the proceeding shall constitute the exclusive record of the proceeding. The record shall also include any proceeding upon an affidavit of personal bias or disqualification of a law judge. Copies of the transcript may be obtained by any party upon payment of the reasonable cost thereof. A copy may be examined at the National Transportation Safety Board Public Reference Room No. 806D, at 800 Independence Avenue, SW., Washington, DC 20594.

§ 821.41 Certification to the Board.

At any time prior to the close of the hearing, the Board may direct the law judge to certify any question or the entire record in the proceeding to the Board for decision, except an interlocutory ruling. In cases where the record is certified to the Board, the law judge shall not render an initial decision but shall only recommend to the Board a decision as provided in 5 U.S.C. 557 (Administrative Procedure).

Subpart G—Initial Decision

§ 821.42 Initial decision by law judge.

(a) *Written or oral decision.* The law judge may render his or her initial decision orally at the close of the hearing, or he or she may render such decision in writing at a later date, except as provided in § 821.56(b).

(b) *Contents.* The initial decision shall include a statement of findings

and conclusions, and the grounds therefor, upon all material issues of fact, credibility of witnesses, law, or discretion presented on the record, the appropriate order, and the reasons therefor.

(c) *Furnishing copy of oral decision and issuance date.* If the initial decision is rendered orally, a copy thereof, excerpted from the transcript of the record, shall be furnished the parties by the Office of Administrative Law Judges. Irrespective of the date of mailing of such copy, the issuance date of the decision shall be the actual date of the rendering of the oral decision.

[40 FR 30243, July 17, 1975, as amended at 59 FR 59049, Nov. 15, 1994]

§ 821.43 Effect of law judge's initial decision and filing of an appeal therefrom.

If an appeal from the initial decision is not timely filed with the Board by a party, the initial decision shall become final but shall not be precedent binding on the Board. The filing of a timely appeal shall stay the initial decision.

[59 FR 59049, Nov. 15, 1994]

Subpart H—Appeals from Initial Decisions

§ 821.47 Notice of appeal.

(a) A party may appeal from a law judge's order or from the initial decision by filing with the Board and serving on the other parties (pursuant to § 821.8) a notice of appeal within 10 days after an oral initial decision has been rendered or a written decision or a final or appealable (see § 821.16) order has been served. At any time before the date for filing an appeal from an initial decision or order has passed, the law judge or the Board may, for good cause shown, extend the time within which to file an appeal, and the law judge may also reopen the case for good cause on notice to the parties.

(b) A law judge may not reconsider his or her initial decision once the time for appealing to the Board from the initial decision has expired or once an appeal with the Board has been filed. However, a timely request for reconsideration by the law judge of his or her decision, filed before an appeal to

the Board has been taken, will stay the deadline for appealing to the Board until 10 days after the date the law judge serves his or her decision on the request. For the purpose of this section, a request for reconsideration submitted on the same date as a notice of appeal will be deemed to have been filed first.

[59 FR 59049, Nov. 15, 1994]

§ 821.48 Briefs and oral argument.

(a) *Appeal briefs.* Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his or her appeal by filing a timely brief.

(b) *Contents of appeal brief.* Each appeal brief shall set forth in detail the objections to the initial decision, and shall state whether such objections are related to alleged errors in the law judge's findings of fact and conclusions or alleged errors in his or her order. It shall also state the reasons for such objections and the relief requested.

(c) *Waiver of objections on appeal.* Any error contained in the initial decision which is not objected to may be deemed to have been waived. Where any objection is based upon evidence of record, such objection need not be considered by the Board unless specific record citations to the pertinent evidence are furnished in the appeal brief.

(d) *Reply brief.* A brief in reply to the appeal brief may be filed by the other party within 30 days after the appeal brief has been served upon him or her. A copy of the reply brief shall be served upon the party who has appealed from the initial decision. Where the reply brief relies upon evidence of record, specific record citations to the pertinent evidence shall be furnished in the reply brief.

(e) *Other briefs.* Subsequent to brief filing, parties may file citations to supplemental authorities. This procedure may be used only for identifying new, relevant decisions, not to correct omissions in briefing or to respond to a

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reply. No argument may be included in such filings. Parties shall submit, with any decision, a reference to the page of the brief to which the decision pertains. Any response shall be filed within 10 days and shall be similarly limited. With this exception, no further briefs may be filed, except with specific permission of the Board and on a showing of good cause.

(f) *Oral argument.* Oral argument before the Board will normally not be held in proceedings under this part. However, when need therefor appears, the Board may permit oral argument, either on its own initiative or on motion of a party.

[40 FR 30248, July 17, 1975, as amended at 49 FR 28250, July 11, 1984, 59 FR 59049, Nov. 15, 1994; 60 FR 25620, May 12, 1995]

§ 821.49 Issues on appeal.

(a) On appeal, the Board will consider only the following issues:

(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?

(2) Are conclusions made in accordance with law, precedent, and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?

(b) If the Board determines that the law judge erred in any respect or that his or her order in his or her initial decision should be changed, the Board may make any necessary findings and may issue an order in lieu of the law judge's order or may remand the case for such purposes as the Board may deem necessary. The Board on its own initiative may raise any issue, the resolution of which it deems important to a proper disposition of the proceedings. If necessary or appropriate, a reasonable opportunity shall be afforded the parties to comment.

[59 FR 59049, Nov. 15, 1994]

§ 821.50 Petitions for rehearing, reargument, reconsideration, or modification of an order of the Board.

(a) *General.* Any party to a proceeding may petition for rehearing, reargument, reconsideration, or modification of a Board order on appeal from an initial decision. Any such petitions shall be served on all other parties

to the proceeding within 30 days after service of the Board's order on appeal from the initial decision. Initial decisions that have become final because they were not appealed may not be the subject of petitions under this section.

(b) *Timing and service.* The petition shall be filed with the Board and served on the parties within 30 days after service of the Board's order on appeal from the initial decision.

(c) *Contents.* The petition shall state briefly and specifically the matters of record alleged to have been erroneously decided, the ground or grounds relied upon, and the relief sought. If the petition is based, in whole or in part, on allegations as to the consequences that would result from the order of the Board, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, upon new matter, it shall set forth such new matter and shall contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation why such substantiation is unavailable, and shall explain why such new matter could not have been discovered by the exercise of due diligence prior to the date of the hearing.

(d) *Grounds for dismissal.* Repetitious petitions will not be entertained by the Board and will be summarily dismissed.

(e) *Reply to petition.* Within 15 days after the service of the petition upon an adverse party, he or she may reply thereto by filing a copy of the reply with the Board, with proof of service upon the petitioner.

(f) *Stay of effective date of order.* The filing of a petition under this section shall operate to stay the effective date of the Board order, unless otherwise ordered by the Board.

[40 FR 30243, July 17, 1975, as amended at 54 FR 12203, Mar. 24, 1989; 59 FR 59049, Nov. 15, 1994]

Subpart I—Rules Applicable to Emergency Proceedings and Other Immediately Effective Orders

SOURCE: 65 FR 42639, July 11, 2000, unless otherwise noted.

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§ 821.52 General.

(a) *Applicability.* This subpart shall apply to any order issued by the Administrator under 49 U.S.C. 44709: as an emergency order; as an order not designated as an emergency order, but later amended to be an emergency order; and any order designated as immediately effective or effective immediately.

(b) *Effective date of emergency.* The procedure set forth herein shall apply as of the date when written advice of the emergency character of the Administrator's order is first received and docketed by the Office of Administrative Law Judges or the Board.

(c) *Computation of time.* Time shall be computed in accordance with the provisions of § 821.10.

§ 821.53 Appeal.

(a) *Time within which to appeal.* The certificate holder may appeal within 10 days after the service of the Administrator's emergency or other immediately effective order. The certificate holder shall file an original and 3 copies of the appeal with the Office of Administrative Law Judges, and shall serve a copy of the appeal on the Administrator.

(b) *Form and content of appeal.* The appeal may be in letter form. It shall identify the Administrator's order and the certificate affected, shall recite the Administrator's action and indicate that an emergency or other immediately effective order is being appealed, and shall identify the issues of fact or law on which the appeal is based, and the relief sought. A copy of the order shall be attached to the appeal.

§ 821.54 Review of Administrator's determination of emergency.

(a) *Time within which to file petition.* The certificate holder may, within 2 days after receipt of the Administrator's emergency or other immediately effective order, petition the Board for review of the Administrator's determination that an emergency, requiring the issuance of an immediately effective order, exists. This 2 day deadline is statutory and the Board has no authority to extend it. If the certificate holder has not previously filed an appeal

from the emergency or other immediately effective order, the petition shall also be considered a simultaneously filed appeal from the order under § 821.53.

(b) *Form, content, and service of petition.* The petition may be in letter form. It shall identify the order from which review of the Administrator's exercise of emergency authority is sought, and a copy of the order shall be attached to the petition. The petition shall enumerate the specific grounds on which the certificate holder challenges the Administrator's determination that an emergency exists. In the event that the petition fails to set forth the specific grounds for the certificate holder's challenge to the Administrator's emergency determination, the petition shall be dismissed. The petition shall be served on both the Board and the Administrator via overnight delivery or facsimile.

(c) *Reply to petition.* Within 2 days after service of the petition, the Administrator may file a reply to the petition in support of his or her determination as to the existence of an emergency requiring the order to be effective immediately. Such reply shall be served on both the Board and the certificate holder via overnight delivery or facsimile. No written submissions other than the petition and reply shall be filed, except in accordance with paragraph (d) of this section.

(d) *Hearing.* No hearing shall be held on a petition for review of an emergency determination. However, a law judge may, on his or her own initiative, solicit from the parties additional information to supplement that provided in the petition and reply.

(e) *Disposition.* Within 5 days after receipt of the petition, the chief judge (or, if the case has been assigned, the law judge to whom the case is assigned) shall dispose of the petition by written order, finding whether the Administrator abused his or her discretion in determining that there exists an emergency requiring the order to be immediately effective, based on the acts and omissions alleged in the Administrator's order, assuming the truth of such factual allegations.

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(f) *Effect of law judge's ruling.* If the law judge grants the petition, the effectiveness of the Administrator's order will be stayed until final disposition of the respondent's appeal by the law judge or the Board. In such cases, the remaining provisions of this subpart (§§ 821.55-821.57) shall continue to apply, and their applicability may not be waived by the respondent without the consent of the Administrator. If the petition is denied, the Administrator's order shall remain in effect, and the remaining provisions of this subpart shall continue to apply, unless respondent waives their applicability. The law judge's ruling on the petition shall be final, and is not appealable to the Board.

§ 821.55 Complaint, answer to complaint, motions, and discovery.

(a) *Complaint.* Within 3 days after receipt of the appeal, or within 3 days after service of a law judge's order disposing of a petition for review of the Administrator's emergency determination, whichever is later, the Administrator shall file with the Board via overnight delivery or facsimile, an original and 3 copies of the emergency or other immediately effective order as the complaint, and serve a copy on the respondent by the same means.

(b) *Answer to the complaint.* Within 5 days after service of the complaint upon respondent, he or she shall file an answer thereto, and serve a copy of the answer on the Administrator. Failure to deny any allegation or allegations of the complaint may be deemed an admission of the allegation or allegations not answered.

(c) *Motion to dismiss and motion for more definite statement.* No motion to dismiss or for a more definite statement shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms.

(d) *Discovery.* Discovery is authorized in emergency or other immediately effective proceedings, and, given the short time available, parties are directed to cooperate to ensure timely

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completion prior to the hearing. Discovery requests shall be served as soon as possible after initiation of the proceeding. Motions to compel production shall be expeditiously filed, and will be promptly decided. Time limits for compliance with discovery requests shall accommodate and not conflict with the schedule set forth in this subpart. The provisions at § 821.19 shall apply, modified as necessary to reflect applicable deadlines.

§ 821.56 Hearing and initial decision.

(a) *Notice of hearing.* Within 5 days of the receipt of respondent's appeal, or immediately upon the issuance of a law judge's order disposing of a petition for review of the Administrator's emergency determination (if later), the parties will be notified of the date, time and place of the hearing. The hearing shall be set for a date no later than 30 days after the filing of the appeal. To the extent not inconsistent with this section, the provisions of § 821.37(a) also apply.

(b) *Initial decision.* The initial decision shall be made orally on the record at the termination of the hearing and after opportunity for oral argument. The provisions of § 821.42(b) and (d) shall be applicable (covering content, furnishing a copy of the initial decision excerpted from the record, and issuance date).

(c) *Conduct of hearing.* The provisions of §§ 821.38, 821.39, and 821.40, covering evidence, argument and submissions, and record, shall be applicable.

(d) *Effect of law judge's initial decision.* If no appeal to the Board by either party, by motion or otherwise, is filed within the time allowed, the law judge's initial decision shall become final but shall not be deemed to be a precedent binding on the Board.

§ 821.57 Procedure on appeal.

(a) *Time within which to file a notice of appeal and content.* Within 2 days after the initial decision has been orally rendered, either party to the proceeding may appeal therefrom by filing with the Board and serving upon the other parties a notice of appeal. The time limitations for the filing of documents are not extended by the unavailability of the hearing transcript.

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(b) *Briefs and oral argument.* Unless otherwise authorized by the Board, all briefs in emergency cases shall be served via overnight delivery or facsimile confirmed by first-class mail. Within 5 days after the filing of the notice of appeal, the appellant shall file a brief with the Board and serve a copy on the other parties. Within 7 days after service of the appeal brief, a reply brief may be filed, with copies served (as provided above) on other parties. The briefs shall comply with the requirements of §821.48 (b) through (g). Appeals may be dismissed by the Board on its own initiative or on motion of a party, notably in cases where a party fails to perfect the notice of appeal by filing a timely brief. When a request for oral argument is granted, the Board will give notice of such argument.

(c) *Issues on appeal.* The provisions of §821.49 shall apply to issues on appeal. However, the Board may upon its own initiative raise any issue, the resolution of which it deems important to a proper disposition of the proceeding. If necessary or appropriate, the parties shall be afforded a reasonable opportunity to comment.

(d) *Petitions for reconsideration, rehearing, reargument, or modification of order.* The only petitions for reconsideration, rehearing, reargument, or modification of an order which the Board will entertain are petitions based on the ground that new matter has been discovered. Such petitions must set forth the following:

- (1) The new matter;
- (2) Affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
- (3) A statement that such new matter could not have been discovered by the exercise of due diligence prior to the date the case was submitted to the Board.

Subpart J—Ex Parte Communications

AUTHORITY: Sec. 4, Government in the Sunshine Act, Pub. L. 94-409, amending 5 U.S.C. 556(d) and 5 U.S.C. 557; Title VI, Federal Aviation Act of 1958, as amended, 49 U.S.C. 1421 et seq.; Independent Safety Board Act of

1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.).

SOURCE: 42 FR 21613, Apr. 28, 1977, unless otherwise noted.

§ 821.60 Definitions.

As used in this subpart:

Board decisional employee means a Board Member, administrative law judge, or other employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part.

§ 821.61 Prohibited ex parte communications.

(a) The prohibitions of this section shall apply from the time a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of the acquisition of such knowledge.

(b) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding.

Ex parte communications regarding solely matters of board procedure or practice are not prohibited by this section.

§ 821.62 Procedures for handling ex parte communication.

A Board employee who receives or who makes or knowingly causes to be made a communication prohibited by §821.61 shall place on the public record of the proceeding:

- (a) All such written communications;
- (b) Memoranda stating the substance of all such oral communications; and

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(c) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (a) and (b) of this section.

§ 821.63 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of § 821.61, the Board, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) The Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes it administers, consider a violation of this subpart sufficient grounds for a decision adverse to a party who has knowingly committed or knowingly caused a violation to occur. Alternatively, the Board may impose sanction, including suspension of the privilege of practice before the Board, on the party's attorney or representative, where an infraction has been committed by that attorney or representative and penalizing the party represented is not in the interest of justice.

[42 FR 21613, Apr. 28, 1977, as amended at 59 FR 59050, Nov. 15, 1994]

Subpart K—Judicial Review of Board Orders

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by filing a petition for review with the appropriate United States court of appeals within 60 days of the date of entry (service date) of the Board's order. Under the Federal Aviation Act, as amended, any party may appeal the Board's decision. The Board itself does not typically participate in the judicial review of its action. In matters appealed by the FAA, respondents should

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anticipate the need to make their own defense.

(b) *Stay pending judicial review.* No petition for stay pending judicial review will be entertained if it is received by the Board after the effective date of the Board's order. If a stay action is to be timely, any petition must be filed sufficiently in advance of the effective date of the Board's order to allow for the possibility of a reply and to allow for Board review.

[59 FR 59050, Nov. 15, 1994, as amended at 65 FR 42641, July 11, 2000]

PART 825—RULES OF PROCEDURE FOR MERCHANT MARINE APPEALS FROM DECISIONS OF THE COMMANDANT, U.S. COAST GUARD

Sec.

- 825.1 Applicability.
- 825.5 Notice of appeal.
- 825.10 Referral of record.
- 825.15 Issues on appeal.
- 825.20 Briefs in support of appeal.
- 825.25 Oral argument.
- 825.30 Action by the Board.
- 825.35 Action after remand.
- 825.40 Ex parte communications.

AUTHORITY: Sec. 304(a)(9)(B), Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2169 (49 U.S.C. 1903(a)(9)(B)).

SOURCE: 40 FR 30248, July 17, 1975, unless otherwise noted.

§ 825.1 Applicability.

The provisions of this part govern all proceedings before the National Transportation Safety Board (Board) on appeals taken from decisions, on or after April 1, 1975, of the Commandant, U.S. Coast Guard, sustaining orders of an administrative law judge, revoking, suspending, or denying a license, certificate, document, or register in proceedings under:

- (a) R.S. 4450, as amended (46 U.S.C. 239);
- (b) Act of July 15, 1954 (46 U.S.C. 239a-b); or
- (c) Section 4, Great Lakes Pilotage Act (46 U.S.C. 216(b)).

§ 825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision sustaining an