

support a request for a permanent stay in the exercise of a high degree of diligence and, in no event, shall any single temporary stay exceed 60 days except as provided under paragraph (c) of this section for the purpose of allowing time to render a decision.

(e) In determining whether a permanent stay under paragraph (b)(2) of this section should be issued, the Board member, or Board en banc, shall:

(1) Assess the evidence adduced by each side as to whether the proposed personnel action arises out of an alleged prohibited personnel practice as specified by the Board's General Counsel;

(2) Assess the nature and gravity of any harm that could inure to each side if the request for permanent stay is either granted or denied; and

(3) Balance the assessments conducted under paragraphs (e)(1) and (2) of this section.

(f) Any order issued by a member of the Board granting or denying, in whole or in part, a stay request under paragraph (b) shall be subject to review by the Board en banc on the filing and service of a notice of appeal, accompanied by a supporting brief, within 10 days of the service of that order. Responsive briefs shall be filed and served within 10 days of service of the appeal.

(g) A motion to vacate a stay order may be filed at any time. A stay order issued by the Board en banc may not be vacated by a single Board member.

[58 FR 61992, Nov. 23, 1993, as amended at 68 FR 69304, Dec. 12, 2003]

Subpart H—Appeals by Members of the Senior Executive Service

§ 28.140 Personnel actions involving SES members.

Members of the GAO Senior Executive Service (SES) may appeal adverse actions relating to misconduct, malfeasance or similar action to the Board in accordance with Subpart B of this part. Members of the GAO SES who allege that they have been subjected to a personnel action that constitutes a prohibited personnel practice or prohibited discrimination may appeal to the Board in accordance with subpart B or subpart D of this part respectively.

§ 28.141 Performance based actions.

A career appointee removed from SES to a GAO position outside the SES for less than fully successful executive performance shall, upon notice of such removal, be entitled, upon request, to an informal hearing before a member of the Board designated by the Chair of the Board.

(a) At the informal hearing, the career appointee and/or a representative and the agency may appear and present documentary evidence and argument.

(b) The Board member will determine which, if any, witnesses will be allowed to testify. As a general rule, no cross-examination of witnesses will be allowed. The Board member will have discretion to allow cross-examination of witnesses in exceptional circumstances.

(c) The informal hearing shall not give the career appointee the right to initiate an action with the Board under another provision of these rules, nor need the removal action be delayed as a result of the granting of such hearing.

Subpart I—Ex Parte Communications

§ 28.145 Policy.

It is the policy of the Board to regulate strictly ex parte communications between members of the Board and their decision-making personnel and any interested party to a proceeding before the Board.

§ 28.146 Explanation and definitions.

(a) Ex parte communications are oral or written communications between decision-making personnel of the Board and an interested party to a proceeding without providing the other parties to the proceeding a chance to participate. The only ex parte communications that are prohibited are those that involve the merits of the case or those that violate other rules requiring submissions to be in writing. Accordingly, interested parties may make inquiries about such matters as the status of a case, when it will be heard, and the method for transmitting evidence to the Board. Such communications should be directed to the Clerk of the

§ 28.147

Board. Parties may not inquire about such matters as what defense they should use or whether their evidence is adequate, make a submission orally which is required to be in writing, or otherwise inquire as to the merits of a pending case.

(b) In this subpart—

(1) “Interested party” includes:

(i) Any party, including the General Counsel of the Board, or representative of a party involved in a proceeding before the Board;

(ii) Any person desiring to intervene in any proceeding before the Board; or

(iii) Any other person who might be affected by the outcome of a proceeding before the Board.

(2) “Decision-making personnel” means the Board, a panel of Board members, a Board member, an administrative judge, and/or an employee of the Board, who reasonably can be expected to participate in the decision-making process of the Board.

[58 FR 61992, Nov. 23, 1993, as amended at 68 FR 69304, Dec. 12, 2003]

§ 28.147 Prohibited communications.

Ex parte communications concerning the merits of any matter before the Board for adjudication, or which would otherwise violate rules requiring written submissions, are prohibited from the time the interested party involved has knowledge that the matter may be considered by the Board until the Board has rendered a final decision on the case.

§ 28.148 Reporting of communications.

Any communication made in violation of this section shall be made part of the record in the proceeding and an opportunity for rebuttal allowed. If the communication was oral, a memorandum stating the substance of the discussion shall be placed in the record.

§ 28.149 Sanctions.

The following sanctions shall be available for violations of this Subpart:

(a) The Board, a panel of Board members, a Board member or an administrative judge, as necessary, may, in the interest of justice, require the offending party to show cause why his or her claim, interest, motion or petition

4 CFR Ch. I (1–1–11 Edition)

should not be dismissed, denied or otherwise adversely affected.

(b) The Board, a panel of Board members, a Board member or an administrative judge, as necessary, may invoke such sanctions against any offending party as may be appropriate under the circumstances.

Subpart J—Statement of Policy or Guidance

§ 28.155 Statement of policy or guidance.

Upon petition by any person, or on its own motion, the Board may issue statements of policy or guidance. In determining whether to issue such a statement, the criteria to be considered by the Board will include, but not be limited to, the following:

(a) Whether the question presented can more appropriately be resolved by other means;

(b) Where other means are available, whether a Board statement would prevent the proliferation of cases;

(c) Whether the resolution of the question presented would have general applicability;

(d) Whether the question currently confronts the parties as part of their employee-management relationship;

(e) Whether the question is presented jointly by the parties involved; and

(f) Whether the issuance by the Board of a statement of policy or guidance would promote the purposes of the General Accounting Office Personnel Act.

Subpart K—Access to Records

SOURCE: 68 FR 69304, Dec. 12, 2003, unless otherwise noted.

§ 28.160 Request for records.

(a) Individuals may request access to records pertaining to them that are maintained as described in 4 CFR part 83, by addressing an inquiry to the PAB General Counsel either by mail or by appearing in person at the Personnel Appeals Board Office of General Counsel, 820 First Street, NE., Suite 580, Washington, DC 20002, during business hours on a regular business day. Requests in writing should be clearly and