

## Government Accountability Office

## § 28.63

### § 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 shall 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 from the one reached.

*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.

[58 FR 61992, Nov. 23, 1993, as amended at 68 FR 69302, Dec. 12, 2003]

### § 28.62 Decision on the record.

(a) The parties may agree to forego a hearing and request that the matter be decided by the presiding administrative judge based upon the record submitted.

(b) If the parties agree to forego a hearing under this subpart, the record will close on the date that the administrative judge sets as the final date for the receipt or filing of submissions of the parties. Once the record closes, no additional evidence or argument will be accepted unless the party seeking to submit it demonstrates that the evidence was not available before the record closed.

(c) In matters submitted for decision on the record under this section, the parties bear the same burdens of proof set forth in § 28.61.

(d) A decision obtained under this section is a decision on the merits of the case and is appealable as if the matter had been adjudicated in an evidentiary hearing.

[68 FR 69302, Dec. 12, 2003]

### § 28.63 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.

[58 FR 61992, Nov. 23, 1993. Redesignated at 68 FR 69302, Dec. 12, 2003]

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## 4 CFR Ch. I (1–1–12 Edition)

### 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, unduly repetitious or protected by privilege. The administrative judge is not bound by formal evidentiary rules but may rely on the Federal Rules of Evidence for guidance.

[68 FR 69302, Dec. 12, 2003]

#### § 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 matter of common knowledge; or a matter 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.

[68 FR 69302, Dec. 12, 2003]

### INTERLOCUTORY APPEALS

#### § 28.80 Explanation.

An interlocutory appeal is an appeal to the Board of a ruling made by an ad-

ministrative 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