

(c) A motion for permission to intervene will be granted where a determination is made by the administrative judge or the Board, where the case is being heard en banc, that the requestor will be affected directly by the outcome of the proceeding. Denial of a motion for intervention may be appealed to the full Board. \* \* \*

#### **§ 28.28 [Amended]**

24. Amend § 28.28 by removing the word “appeal” and adding the word “petition” in its place in paragraph (a).

25. Amend § 28.29 by revising paragraph (a)(2) as follows:

#### **§ 28.29 Consolidation or joinder.**

(a) \* \* \*

(2) Joinder may occur where one person has two or more petitions pending and they are united for consideration. For example, a single petitioner who has one petition pending challenging a 30-day suspension and another petition pending challenging a subsequent dismissal might have the cases joined.

#### **Discovery**

26. Amend § 28.41 by removing the word “appeal” in the first sentence and add in its place the word “review” in paragraph (b).

27. Amend § 28.42 by revising the first sentence of paragraph (d)(5) to read as follows:

#### **§ 28.42 Discovery procedures and protective orders.**

\* \* \* \* \*

(d) \* \* \*

(5) Discovery shall be completed by the time designated by the administrative judge, but no later than 65 days after the service of the notice of filing of a petition. \* \* \*

#### **Subpoenas**

28. Amend § 28.46 as follows:

a. Revise paragraph (b).

b. Remove paragraph (d).

The revision reads as follows:

#### **§ 28.46 Motion for subpoena.**

\* \* \* \* \*

(b) *Motion.* (1) A motion for the issuance of a subpoena requiring the attendance and testimony of witnesses or the production of documents or other evidence under § 28.46(a) shall be submitted to the administrative judge at least 15 days in advance of the date scheduled for the commencement of the hearing.

(2) If the subpoena is sought as part of the discovery process, the motion

shall be submitted to the administrative judge at least 15 days in advance of the date set for the attendance of the witness at a deposition or the production of documents.

\* \* \* \* \*

#### **Hearings**

29. Amend § 28.56 by adding a second sentence in paragraph (f) to read as follows:

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

\* \* \* \* \*

(f) \* \* \* Multiple exhibits shall be indexed and tabbed.

\* \* \* \* \*

30. Amend § 28.57 by revising paragraph (b) to read as follows:

#### **§ 28.57 Public hearings.**

\* \* \* \* \*

(b) At the hearing, the petitioner, the petitioner’s representative, GAO’s legal representative, and a GAO management representative, who is not expected to testify, each have a right to be present. The Agency management representative shall be designated prior to the hearing.

31. Amend § 28.61 as follows:

a. In paragraph (b) introductory text, remove the word “may” and add in its place the word “shall.”

b. Revise the definition of *harmful error* in paragraph (d).

The revision reads as follows:

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

\* \* \* \* \*

(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.

\* \* \* \* \*

32. Redesignate § 28.62 as § 28.63, and add a new § 28.62 to read as follows:

#### **§ 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.

#### **§ 28.63 Closing the record. [Redesignated from § 28.62]**

#### **Evidence**

33. Revise § 28.66 to read as follows:

#### **§ 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.

34. Revise § 28.69 to read as follows:

#### **§ 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.

#### **Board Decisions, Attorney’s Fees and Judicial Review**

#### **§ 28.86 [Removed and reserved]**

35. Remove and reserve § 28.86.

36. Amend § 28.87 by revising paragraphs (a) and (b) and paragraph (g), introductory text, to read as follows:

#### **§ 28.87 Board procedures; initial decisions.**

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

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

(1) Within 10 days of the service of the initial decision, such a party may file and serve a request for reconsideration with the administrative judge or panel rendering that decision. Filing of the request for reconsideration shall toll the commencement of the 15 day period for filing a notice of appeal