

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) * * *

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.

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■ 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.

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 with the full Board, pending disposition of the request for reconsideration by the administrative judge or panel. The administrative judge or panel shall determine if a response is required, and if so, will fix by order the time for the filing of the response. A motion for reconsideration will not be granted without providing an opportunity for response.

(2) Within 15 days of the service of the initial decision, such a party may appeal to the full Board by filing and serving a notice of appeal to the Board.

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(g) In conducting its examination of the initial decision, the Board may substitute its own findings of fact and conclusions of law, but the Board generally will defer to demeanor-based credibility determinations made in the initial decision. In determining whether some action other than affirmance of the initial decision is required, the Board will also consider whether:

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■ 37. Amend § 28.88 as follows:

■ a. Revise paragraphs (a), (b), and (d).

■ b. Add paragraphs (e) and (f).

The revisions and additions read as follows:

§ 28.88 Board procedures; enforcement.

(a) All decisions and orders of the Board shall be complied with promptly. Whenever a Board decision or order requires a person or party to take any action, the Board may require such person or party to provide the Board and all parties with a compliance report.

(b) When the Board does not receive a report of compliance in accordance with paragraph (a) of this section, the Solicitor shall make inquiries to determine the status of the compliance report and shall report upon the results of the inquiry to the Board.

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(d) Upon receipt of a non-compliance report from its Solicitor or of a petition for enforcement of a final decision, the Board may issue a notice to any person to show cause why there was non-compliance. Apart from remedies available to the parties, the Board may seek judicial enforcement of a decision or order issued pursuant to a show cause proceeding.

(e) If the parties enter into a settlement agreement that has been reviewed and approved by the administrative judge, the Board retains jurisdiction to enforce the terms of such settlement agreement.

(f) Any party to a settlement agreement over which the Board retains jurisdiction may petition the Board for enforcement of the terms of such settlement agreement.

■ 38. Revise § 28.89 to read as follows:

§ 28.89 Attorney's fees and costs.

Within 20 days after service of a final decision by the Board, or within 20 days after the date on which an initial decision becomes final pursuant to § 28.87(d), the petitioner, if he or she is the prevailing party, may submit a request for the award of reasonable attorney's fees and costs. GAO may file a response within 20 days after service of the request. Motions for attorney's fees shall be filed in accordance with § 28.21 of these regulations. Rulings on attorney's fees and costs shall be consistent with the standards set forth at 5 U.S.C. 7701(g). The decision of the administrative judge concerning attorney's fees and costs shall be subject to review and shall become final according to the provisions of § 28.87.

Subpart D—Special Procedures; Equal Employment Opportunity (EEO) Cases

■ 39. Amend § 28.95 by revising paragraphs (a) and (d) to read as follows: