

## § 28.88

shall be subject to appellate review in the same manner and to the same extent as provided for initial decisions in paragraphs (b), (d) and (g) of this section. If the Board does expressly retain jurisdiction at the time of remand, the single member or panel shall instead render a report to the Board on the remanded matters. Upon receipt of the report, the Board shall determine whether the views of the parties on the content of the report should be obtained in writing and, where necessary, shall fix by order the time for the submission of those views. A decision of the full Board disposing of the proceeding without a remand or, where the Board has expressly retained jurisdiction, following completion of the remand shall be the final decision of the Board and subject to judicial review.

(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:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(2) The initial decision is based on an erroneous interpretation of statute or regulation;

(3) The initial decision is arbitrary, capricious or an abuse of discretion, or otherwise not consistent with law;

(4) The initial decision is not made consistent with required procedures and results in harmful error.

(h) Initial decisions that become final without review by the full Board shall not be binding precedent in any other case.

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

### **§ 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

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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.

(c) Any person and/or the General Counsel may petition the Board for enforcement of a final decision of the Board. The petition shall specifically set forth the reasons why the petitioner believes there is non-compliance.

(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.

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

### **§ 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