

**§ 28.68**

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 administrative 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 record, the Board believes that interlocutory review is warranted, it may grant the motion sua sponte.

(e) Upon its acceptance of a ruling of the administrative judge for interlocutory review, the Board shall issue an order setting forth the procedures that will be followed in the conduct of that review.

(f) Unless otherwise directed by the Board, the stay of any proceedings during the pendency of either a motion for certification or an interlocutory review itself shall be within the discretion of the administrative judge.

(g) The denial of a motion for certification does not affect the right of the parties to challenge interlocutory rulings in the course of the review by the Board of initial or recommended decisions.

## Government Accountability Office

## § 28.87

### BOARD DECISIONS, ATTORNEY'S FEES AND JUDICIAL REVIEW

#### § 28.86 [Reserved]

#### § 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.

(c) Within 25 days following the filing of a notice of appeal to the full Board, the appellant shall file and serve a supporting brief. That brief shall identify with particularity those findings or conclusions in the initial decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or regulations that assertedly support each assignment of error. Within 25 days following the service of the appellant's brief, the appellee may file and serve a responsive brief. Within 10 days following the service of the appellee's responsive brief, the appellant may file and serve a reply brief.

(d) In the absence of a timely appeal, the initial decision shall become the final decision of the Board 30 days following its issuance or the date of the

administrative judge's or panel's disposition of a request for reconsideration (whichever comes later) unless, prior to the expiration of the 30 day period, the parties are notified in writing that the full Board intends to review the initial decision in whole or in part on its own motion. Such review sua sponte will normally be conducted only if a majority of the Board concludes that one or more issues of law addressed in the initial decision are of such importance as to warrant consideration by the full Board notwithstanding the absence of appeal. Issues so qualifying shall be identified in the Board's notice and the parties shall be provided an opportunity to brief them prior to the Board's decision.

(e) Oral argument on an appeal or in connection with a sua sponte review shall be held in the discretion of the Board. Any party may request that the Board exercise its discretion in that regard.

(f) Upon appeal or following its review sua sponte, the Board may affirm, reverse, modify or vacate the initial decision in whole or in part. If deemed warranted, the Board may remand the proceeding to the single member or panel for further action, including the reopening of the record for the taking of additional evidence. Unless the full Board expressly retains jurisdiction, the single member or panel shall render, on completion of the remand, a supplemental initial decision which 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.