

Rules and Regulations

Federal Register

Vol. 68, No. 239

Friday, December 12, 2003

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GENERAL ACCOUNTING OFFICE

4 CFR Parts 27, 28 and 29

Personnel Appeals Board; Procedural Rules

AGENCY: General Accounting Office, Personnel Appeals Board.

ACTION: Final rule.

SUMMARY: The General Accounting Office Personnel Appeals Board (PAB) has authority with respect to employment practices within the General Accounting Office (GAO or agency), pursuant to the General Accounting Office Personnel Act of 1980. The PAB revises its procedural regulations. The changes are intended to clarify the meaning of some sections, to correct a few provisions affected by changes in law or agency structure, and to refine certain procedures.

DATES: Effective date: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Beth Don, Executive Director, or Susan Inzeo, Solicitor, 202-512-6137.

SUPPLEMENTARY INFORMATION: The General Accounting Office Personnel Appeals Board is authorized by Congress, pursuant to 31 U.S.C. 751-755, to hear and decide cases brought by GAO employees concerning various personnel matters including adverse or performance-based actions, claims of discrimination, alleged prohibited personnel practices, and labor-management relations. The Board also exercises oversight authority over equal employment opportunity at the agency, and has authority to consider, decide, and order corrective action in labor-management representation matters. The Board's current procedural regulations applicable to GAO appear at 4 CFR parts 27 and 28. The Board is revising these regulations for the purpose of clarifying the meaning of some sections, correcting a few provisions affected by changes in law or

agency structure, and streamlining certain procedures. The proposed changes were published for comment in the **Federal Register** at 68 FR 41742, July 15, 2003. The significant changes were summarized and explained in the supplementary information section of the published proposed rules. The Board will not repeat all that explanatory material here.

Comments on Proposed Revisions

The only comments received during the sixty-day comment period were submitted by the Personnel Appeals Board General Counsel. The Board has fully considered these comments and responds as follows.

The General Counsel raised concern regarding the changes to § 27.3 (The General Counsel). The Board's revision deletes the phrase "unless to do so would create a conflict of interest for the General Counsel" following the summary statement of the General Counsel's statutory responsibility, at Board request, to "investigate matters under the jurisdiction of the Board, and otherwise assist the Board in carrying out its functions." The revision more closely tracks the language of the statute and the deleted language is superfluous.

The General Counsel also raised concern about § 28.98(c) (Individual charges in EEO cases; Special rules for adverse and performance-based actions). Specifically, the comment raised the possibility of confusion concerning the provision's applicability to performance-related actions that do not rise to the level of removal. The Board considers that the provision is clear in reference to performance-based removals and actions that rise to the level of adverse actions. Moreover, paragraph (c) of § 28.98 was not proposed for revision at this time.

The General Counsel objected to the reference in the revised § 28.133 (Stay proceedings) that a stay may be requested by the Office of General Counsel rather than the General Counsel. The final version of this provision reflects the Board's acceptance of this comment.

List of Subjects in 4 CFR Parts 27, 28, and 29

Administrative practice and procedures, Equal employment opportunity, Government employees, Labor management relations.

For the reasons stated in the preamble, the General Accounting Office Personnel Appeals Board amends 4 CFR chapter I, subchapter B, parts 27, 28, and 29 as follows:

PART 27—GENERAL ACCOUNTING OFFICE PERSONNEL APPEALS BOARD; ORGANIZATION

- 1. The authority citation for part 27 continues to read as follows:

Authority: 31 U.S.C. 753.

§ 27.1 [Amended]

- 2. Amend § 27.1 as follows:
 - a. Remove the words "parts 28 and 29" in the second sentence and add in their place "part 28".
 - b. In the third sentence, remove the word "reconsideration" and add in its place the word "review".
- 3. Amend § 27.3 by revising the last sentence to read as follows:

§ 27.3 The General Counsel.

* * * The General Counsel, at the request of the Board, shall investigate matters under the jurisdiction of the Board, and otherwise assist the Board in carrying out its functions.

PART 28—GENERAL ACCOUNTING OFFICE PERSONNEL APPEALS BOARD; PROCEDURES APPLICABLE TO CLAIMS CONCERNING EMPLOYMENT PRACTICES AT THE GENERAL ACCOUNTING OFFICE

- 4. The authority citation continues to read as follows:

Authority: 31 U.S.C. 753.

Subpart A—Purpose, General Definitions, and Jurisdiction

- 5. Amend § 28.1 by revising paragraphs (a), (b), and the first sentence of paragraph (c) to read as follows:

§ 28.1 Purpose and scope.

(a) The regulations in this part implement the Board's authority with respect to employment practices within the General Accounting Office (GAO), pursuant to the General Accounting Office Personnel Act of 1980 (GAOPA), 31 U.S.C. 751-755.

(b) The purpose of the rules in this part is to establish the procedures to be followed by:

- (1) The GAO, in its dealings with the Board;

(2) Employees of the GAO or applicants for employment with the GAO, or groups or organizations claiming to be affected adversely by the operations of the GAO personnel system;

(3) Employees or organizations petitioning for protection of rights or extension of benefits granted to them under subchapters III and IV of Chapter 7 of title 31, United States Code; and

(4) The Board, in carrying out its responsibilities under Subchapters III and IV of chapter 7 of title 31, United States Code.

(c) The scope of the Board's operations encompasses the investigation and adjudication of cases arising under 31 U.S.C. 753. * * *

* * * * *

■ 6. Amend § 28.2 by revising paragraph (a) introductory text, and paragraphs (b)(1) and (b)(3) to read as follows:

§ 28.2 Jurisdiction.

(a) The Board has jurisdiction to hear and decide the following:

* * * * *

(b) * * *

(1) An officer or employee petition involving a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days;

(2) * * *

(3) The appropriateness of a unit of employees for collective bargaining;

* * * * *

■ 7. Revise § 28.3 to read as follows:

§ 28.3 General definitions.

In this part—

Administrative judge means any individual designated by the Board to preside over a hearing conducted on matters within its jurisdiction. An administrative judge may be a member of the Board, an employee of the Board, or any individual qualified by experience or training to conduct a hearing who is appointed to do so by the Board. When a panel of members or the full Board is hearing a case, the Chair shall designate one of the members to exercise the responsibilities of the administrative judge in the proceedings.

Appeal means a request filed with the full Board for review of an initial decision.

Board means the General Accounting Office Personnel Appeals Board as established by 31 U.S.C. 751 and explained in 4 CFR 27.1.

Charge means any request filed with the PAB Office of General Counsel to investigate any matter within the jurisdiction of the Board, under the

provisions of Subchapter IV of chapter 7 of Title 31, United States Code.

Charging Party means any person filing a charge with the PAB Office of General Counsel for investigation.

Clerk of the Board means the Clerk of the Personnel Appeals Board.

Comptroller General means the Comptroller General of the United States.

Days means calendar days.

Director of EEO Oversight means the Personnel Appeals Board Director of EEO Oversight.

Executive Director means the Executive Director of the Personnel Appeals Board.

GAO means the General Accounting Office.

General Counsel means the General Counsel of the Board, as provided for under 31 U.S.C. 752.

Initial Decision means the adjudicatory statement of a case that is issued by an administrative judge who is a member of or appointed by the Board.

Notice of Appeal means a pleading requesting that the full Board review an initial decision.

Person means an employee, an applicant for employment, a former employee, a labor organization or the GAO.

Petition means any request filed with the Board for action to be taken on matters within the jurisdiction of the Board, under the provisions of Subchapter IV of Chapter 7 of title 31, United States Code.

Petitioner means any person filing a petition for Board consideration.

Pleading means a document that initiates a cause of action before the Board, responds to a cause of action, amends a cause of action, responds to an amended cause of action, requests reconsideration of a decision, responds to such a request, requests appellate review by the full Board or responds to such a request.

Request for Reconsideration means a request, filed with the administrative judge who rendered the initial decision, to reconsider that decision in whole or part.

Solicitor means the attorney appointed by the Board to provide advice and assistance to the Board in carrying out its adjudicatory functions and to otherwise provide assistance as directed by the Board.

Workforce Restructuring Action (WRA) means the release of an employee from a job group by separation, demotion, reassignment requiring displacement, or furlough for more than 30 days when the cause of action is lack of work, shortage of funds, insufficient

personnel ceiling, reorganization or realignment, an individual's exercise of reemployment or reinstatement rights, correction of skills imbalances, or reduction of high-grade supervisory, or managerial positions.

■ 8. Amend § 28.4 by adding paragraph (d) to read as follows:

§ 28.4 Computation of time.

* * * * *

(d) No written submission shall be accepted by the Clerk of the Board after 4 p.m., Monday through Friday.

Subpart B—Procedures

■ 9. Amend § 28.8 by revising paragraph (a) to read as follows:

§ 28.8 Informal procedural advice.

(a) Persons may seek informal advice on all aspects of the Board's procedures by contacting the Board's Executive Director, Director of EEO Oversight, Solicitor, General Counsel or the Clerk of the Board.

* * * * *

■ 10. Amend § 28.10 by revising the heading and the first sentence of paragraph (a) and paragraph (b)(1) to read as follows:

§ 28.10 Notice of petition rights.

(a) The GAO shall be responsible for ensuring that employees are routinely advised of their rights to petition the Board and that employees who are the object of an adverse or performance-based action are, at the time of the action, adequately advised of their rights to petition the Board. * * *

(b) * * *

(1) Time limits for filing a petition with the Board and the address of the Board;

* * * * *

■ 11. Amend § 28.11 by revising the heading and paragraphs (c), (d)(2) and the last sentence of paragraph (e) to read as follows:

§ 28.11 Filing a charge with the Office of General Counsel.

* * * * *

(c) *How to file.* Charges may be filed with the Office of General Counsel by personal delivery (including commercial carrier) or by mail. The address to be used differs for the two kinds of filing.

(1) A charge may be filed by personal delivery at the Office of General Counsel, Personnel Appeals Board, GAO, Suite 580, Union Center Plaza II, 820 First Street, NE., Washington, DC 20002.

(2) A charge may be filed by mail addressed to the Office of General

Counsel, Personnel Appeals Board, Suite 580, Union Center Plaza II, 441 G Street, NW., Washington, DC 20548 or Office of General Counsel, Personnel Appeals Board, GAO, Suite 580, Union Center Plaza II, 820 First Street, NE., Washington, DC 20002. When filed by mail, the postmark shall be the date of filing for all submissions to the Office of General Counsel.

(d) * * *

(2) The names and titles of persons, if any, responsible for actions the charging party wishes to have the Office of General Counsel investigate;

* * * * *

(e) * * * When attorney fees are the only issue raised in a charge to the Office of General Counsel, the General Counsel shall transmit the charge to the Board for processing under §§ 28.18 through 28.88 as a petition.

■ 12. Amend § 28.12 as follows:

- a. Revise paragraphs (c), (d), and (g).
- b. Add new paragraphs (h) and (i).

The additions and revisions read as follows:

§ 28.12 General Counsel procedures.

* * * * *

(c) Following the investigation, the Office of General Counsel shall provide the charging party with a Right to Petition Letter. Accompanying this letter will be a statement of the General Counsel advising the charging party of the results of the investigation. This statement of the General Counsel is not subject to discovery and may not be introduced into evidence before the Board.

(d)(1) If the General Counsel determines that there are reasonable grounds to believe that the charging party's rights under subchapters III and IV of chapter 7 of title 31, United States Code, have been violated, then the General Counsel shall represent the charging party unless the charging party elects not to be represented by the Office of General Counsel.

(2) If, following the investigation, the General Counsel determines that there are not reasonable grounds to believe that the charging party's rights under subchapters III and IV of chapter 7 of title 31, United States Code, have been violated, then the General Counsel shall not represent the charging party. The charging party may nonetheless file a petition with the Board in accordance with § 28.18.

(3) Any charging party may represent him- or herself or obtain other representation.

* * * * *

(g) If 180 days have elapsed since the filing of the charge, and the Office of

General Counsel has not completed the investigation and issued a Right to Petition Letter, the charging party may bring his or her case directly to the Board by filing a petition in accordance with § 28.18. If a charging party exercises this option to file a petition with the Board without waiting for the completion of the investigation, the Office of General Counsel shall not represent the charging party in proceedings before the Board. The charging party may represent him- or herself or obtain other representation. The Office of General Counsel shall close the investigation of the charge upon being notified by the Clerk of the Board that the charging party has filed a petition with the Board under this paragraph (g).

(h) Office of General Counsel settlement: Where the General Counsel under paragraph (a) of this section transmits a settlement which has been agreed to by the parties, the settlement agreement shall be the final disposition of the case.

(i) Confidentiality: (1) It is the Office of General Counsel's policy to protect against the disclosure of documents obtained during the investigation, as a means of ensuring that Office's continuing ability to obtain all relevant information. However, if the Office of General Counsel files a petition with the Personnel Appeals Board on behalf of a charging party pursuant to this section, that Office may disclose the identity of witnesses and a synopsis of their expected testimony. Documents to be offered into evidence at the hearing may be disclosed as required by the prehearing disclosure requirements of § 28.56.

(2) Unless so ordered by a court of competent jurisdiction, no employee of the Personnel Appeals Board Office of General Counsel shall produce or disclose any information or records acquired as part of the performance of his/her official duties or because of his/her official status. Before producing or disclosing such information or records pursuant to court order, an employee shall notify the General Counsel.

■ 13. Revise § 28.13 to read as follows:

§ 28.13 Special procedure for Workforce Restructuring Action.

In the event of a Workforce Restructuring Action (WRA) resulting in an individual's separation from employment, an aggrieved employee may choose to file a petition directly with the Personnel Appeals Board, without first filing the charge with the PAB's Office of General Counsel pursuant to § 28.11. Pursuant to § 28.98, individuals raising discrimination

issues in connection with a WRA action need not file a complaint with GAO's Office of Opportunity and Inclusiveness before pursuing a WRA challenge alleging discrimination, either by filing directly with the PAB or by filing a charge with the Board's Office of General Counsel.

Hearing Procedures for Cases Before the Board—General

§ 28.15 [Amended]

■ 14. Amend § 28.15 by removing the word "appeals" and adding in its place the word "petitions" in the first sentence.

■ 15. Amend § 28.17 by revising the heading, paragraphs (a)(2) and (a)(3), paragraphs (b)(1) and (b)(2) and paragraphs (c)(1), (c)(2), and (c)(3) to read as follows:

§ 28.17 Internal petitions of Board employees.

(a) * * *

(2) When an employee of the Board believes that he or she has been denied his or her right to equal employment opportunity, the employee shall bring this matter to the attention of the Board's Executive Director or General Counsel. If the matter cannot be resolved within 10 days, the Executive Director shall notify the employee of his or her right to file an EEO complaint. The employee may consult with either the Board's Solicitor or General Counsel and seek advice with regard to procedural matters concerning the filing of an EEO charge. The employee shall have 20 days from service of this notice to file an EEO charge with the PAB Office of General Counsel. Upon receipt of an EEO charge, the General Counsel shall arrange with the Executive Director for processing in accordance with paragraph (b) of this section. If the EEO allegations involve challenge to a WRA-based separation, the employee may choose to expedite the procedures by filing a petition directly with the Board.

(3) When an employee of the Board wishes to raise any other issue that would be subject to the Board's jurisdiction, the employee shall file a charge with the General Counsel and the General Counsel shall arrange with the Executive Director for processing in accordance with paragraph (b) of this section. If the challenged action is a WRA-based separation from employment, the employee may choose to expedite the procedures by filing a petition directly with the Board.

(b) * * *

(1) If agreed to by the Office of Special Counsel or the EEOC, as appropriate,

that body will appoint and detail a person from among its attorneys to perform the functions of the General Counsel.

(2) If the Special Counsel or the EEOC does not agree to such a procedure, an appointment of an attorney will be sought from the Federal Mediation and Conciliation Service (FMCS).

(3) * * *
(c) * * *

(1) If agreed to by the MSPB or the EEOC, as appropriate, that body will appoint and detail one of its administrative law judges (ALJ) or administrative judges (AJ) to perform the Board's adjudicative functions.

(2) If neither the MSPB nor the EEOC agrees to such a procedure, an appointment of an arbitrator will be sought from the FMCS.

(3) In any event, whoever is so appointed shall possess all of the powers and authority possessed by the Board in employee cases. The decision of the administrative law judge, administrative judge or arbitrator shall be a final decision of the Board. The procedure for judicial review of the decision shall be the same as that described in § 28.90.

* * * * *

■ 16. Amend § 28.18 by revising the heading and paragraphs (a), (b), (c), (d) introductory text, (e) and (f) to read as follows:

§ 28.18 Filing a petition with the Board.

(a) *Who may file.* Any person who is claiming to be affected adversely by GAO action or inaction that is within the Board's jurisdiction under subchapter IV of chapter 7 of title 31, United States Code, or who is alleging that GAO or a labor organization engaged or is engaging in an unfair labor practice, may file a petition if one of the following is met:

(1) The person has received a Right to Petition Letter from the Board's Office of General Counsel; or

(2) At least 180 days have elapsed from the filing of the charge with the Board's Office of General Counsel and that Office has not issued a Right to Petition Letter; or

(3) The person was separated due to a Workforce Restructuring Action and chooses to file a petition directly with the Board, without first filing with the Board's Office of General Counsel, as provided in § 28.13.

(b) *When to file.* (1) Petitions filed pursuant to paragraph (a)(1) of this section must be filed within 30 days after receipt by the charging party of the Right to Petition Letter from the Board's Office of General Counsel.

(2) Petitions filed pursuant to paragraph (a)(2) of this section may be filed at any time after 180 days have elapsed from the filing of the charge with the Board's Office of General Counsel, provided that that Office has not issued a Right to Petition Letter concerning the charge.

(3) Petitions filed pursuant to paragraph (a)(3) of this section must be filed within 30 days after the effective date of the separation due to a Workforce Restructuring Action.

(c) *How to file.* (1) A petition may be filed by hand delivery at the office of the Board, Suite 560, Union Center Plaza II, 820 First Street NE., Washington, DC 20002. It must be received by 4 p.m., Monday through Friday, on the date that it is filed.

(2) A petition may be filed by mail addressed to the Personnel Appeals Board, GAO, Suite 560, Union Center Plaza II, 441 G Street NW., Washington, DC 20548 or Personnel Appeals Board, GAO, Suite 560, Union Center Plaza II, 820 First Street NE., Washington, DC 20002. When filed by mail, the postmark shall be the date of filing for all submissions to the Board.

(d) *What to file.* The petition shall include the following information:

* * * * *

(e) *Failure to raise a claim or defense.* Failure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties or unduly delay the proceedings.

(f) *Non-EEO class actions.* One or more persons may file a petition as representatives of a class in any matter within the Board's jurisdiction. For the purpose of determining whether it is appropriate to treat a petition as a class action, the administrative judge will be guided, but not controlled, by the applicable provisions of the Federal Rules of Civil Procedure. See § 28.97 for EEO class actions.

■ 17. Revise § 28.19(a) to read as follows:

§ 28.19 Content of response by charged party.

(a) Within 20 days after service of a copy of a petition, the GAO or other charged party shall file a response containing at least the following:

(1) A statement of the position of the charged party on each allegation set forth therein, including admissions, denials or explanations. If the petition contains numbered paragraphs, the responses should reference the paragraph numbers. If the petition does not contain numbered paragraphs, the responses should quote or otherwise clearly identify the specific allegations of the petition.

(2) Any other defenses to the petition.
(3) Designation of, and signature by, the representative authorized to act for the charged party in the matter.

* * * * *

■ 18. Amend § 28.20 by revising the first and last sentences of paragraph (b)(1) and the first two sentences of paragraph (b)(2) to read as follows:

§ 28.20 Number of pleadings, service and response.

* * * * *

(b) *Service.* (1) The Board will serve copies of a petition upon the parties to the proceeding by mail and/or by facsimile. * * * The Board will not serve copies of any pleadings, motions, or other submissions by the parties after the initial petition.

(2) The parties shall serve on each other one copy of all pleadings other than the initial petition. Service shall be made by mailing, by facsimile or by delivering personally a copy of the pleading to each party on the service list previously provided by the Board.

* * *

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■ 19. Revise § 28.21 to read as follows:

§ 28.21 Amendments to petitions and motions practice.

(a) *Amendments to petitions.* The Board, at its discretion, may allow amendments to a petition as long as all persons who are parties to the proceeding have adequate notice to prepare for the new allegations and if to do so would not prejudice the rights of the other parties or unduly delay the proceedings.

(b) *Motions practice.* (1) When an action is before an administrative judge, motions of the parties shall be filed with the Clerk of the Board and shall be in writing except for oral motions made during the hearing. An original and 3 copies of written motions shall be filed with the Clerk of the Board. An original and 3 copies of responses in opposition to written motions must be filed with the Clerk of the Board within 20 days of service of the motion unless the administrative judge requires a shorter time.

(2) When an action is before the full Board, an original and 7 copies of any motion shall be filed with the Clerk of the Board. An original and 7 copies of any responses in opposition to motions must be filed with the Clerk of the Board within 20 days of service of the motion unless the Board requires a shorter time.

(3) A party filing a motion for extension of time, a motion for postponement of a hearing, or any other procedural motion must first contact the

other party to determine whether there is any objection to the motion and must state in the motion whether the other party has any objection.

(4) No motions, responses or other submissions will be accepted for filing by the Clerk of the Board after 4 p.m., Monday through Friday. All written submissions shall be served simultaneously upon the other parties to the proceeding. A certificate of service must be attached showing service by mail, facsimile or personal delivery of the submission to the other parties. Further submissions by either party may be filed only with the approval of the administrative judge or full Board.

(5) All written motions and responses thereto shall include a proposed order, where applicable.

(6) Motions for extension of time will be granted only upon a showing of good cause.

(7) *Oral argument.* The administrative judge may allow oral argument on the motion at his or her discretion.

(c) *Motions for summary judgment.* (1) Either party may move for summary judgment by filing a written motion no later than 14 days prior to the commencement of the hearing or as otherwise ordered by the administrative judge.

(2) Motions for summary judgment must be accompanied by a statement of material facts for which there is no genuine dispute and a statement of reasons in support of the motion. The motion may be supported by documents, affidavits, or other evidence.

(3) Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, admissions, affidavits, if any, and other documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

(4) A party moving for summary judgment must make a showing sufficient to establish the existence of each element essential to that party's cause of action and for which that party bears the burden of proof.

(5) When a party moves for summary judgment, the Board will evaluate the motion on its own merits, resolving all reasonable inferences against the moving party.

§ 28.22 [Amended]

■ 20. Amend § 28.22 by removing the words "File recommended or" and adding the word "Issue" in their place in paragraph (b)(12).

■ 21. Amend § 28.24 as follows:

■ a. Revise paragraph (a) introductory text and paragraph (a)(2).

■ b. In paragraph (b), remove the words "an appeal" and add the words "a petition" in their place.

The revision reads as follows:

§ 28.24 Sanctions.

(a) *Failure to comply with an order or subpoena.* When a party fails to comply with an order or subpoena (including an order for the taking of a deposition, for the production of evidence within the party's control, for an admission, or for production of witnesses), the administrative judge may:

(1) * * *

(2) Prohibit the party failing to comply with such order or subpoena from introducing, or otherwise relying upon, evidence relating to the information sought.

* * * * *

Parties, Practitioners and Witnesses

■ 22. Revise the first two sentences of paragraph (a) of § 28.25 to read as follows:

§ 28.25 Representation.

(a) All parties to a petition may be represented in any matter relating to the petition. The parties shall designate their representatives, if any, in the petition or responsive pleading. * * *

* * * * *

■ 23. Amend § 28.27 by revising the first two sentences of paragraph (c) to read as follows:

§ 28.27 Intervenors.

* * * * *

(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) to read 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

§ 28.41 [Amended]

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

■ 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 read 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) * * *

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.

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.

* * * * *

(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:

* * * * *

■ 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.

* * * * *

(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:

§ 28.95 Purpose and scope.

* * * * *

(a) Section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-16), prohibiting discrimination based on race, color, religion, sex or national origin;

* * * * *

(d) Title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*) and sections 501 and 505 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794a) prohibiting discrimination on the basis of disability; or

* * * * *

■ 40. Amend § 28.97 by revising paragraph (b) introductory text, the first sentence of paragraph (c), paragraphs (d), and (e) to read as follows:

§ 28.97 Class actions in EEO cases.

* * * * *

(b) An appeal from GAO's disposition of any EEO class complaint may be submitted to the Board at the following times:

* * * * *

(c) In EEO class actions, employees shall not file charges with the Board's Office of General Counsel and that Office shall not undertake an independent investigation of a class complaint that has been filed with GAO.

(d) An appeal of a GAO disposition of an EEO class complaint shall be decided by the Board based upon a review of the administrative record, including any recommended findings and conclusions, developed in the GAO class complaint process. In such cases, the Board will employ the same standards of review set forth in § 28.87.

(e) The parties to an EEO class complaint do not have a right to a de novo evidentiary hearing before the Board. However, either the class representative or GAO may file a motion requesting an evidentiary hearing, rather than having the Board decide the case upon review of the administrative record already developed by GAO. The Board, in its discretion, may grant such motion or, upon its own review of the administrative record, may direct that a new hearing be conducted. If the Board orders a new evidentiary hearing, the class representative shall file a petition on behalf of the class and the case shall be adjudicated before an administrative judge of this Board pursuant to the procedures applicable to an individual EEO complaint processed under § 28.98 of these regulations. For the purpose of determining whether it is appropriate to treat a petition as a class action, the administrative judge will be guided, but not controlled, by the applicable

provisions of the Federal Rules of Civil Procedure.

■ 41. Amend § 28.98 by revising paragraphs (d) and (e)(1) to read as follows:

§ 28.98 Individual charges in EEO cases.

* * * * *

(d) *Special rules for WRA based actions.* An individual alleging discrimination issues in connection with a WRA-based separation may follow the procedures outlined above in paragraph (c) of this section for adverse and performance based actions, or may choose instead a third option. In accordance with the provisions of § 28.13, such an individual may challenge that action by filing directly with the PAB, thus bypassing both the Office of Opportunity and Inclusiveness and the Board's Office of General Counsel.

(e)(1) The charging party shall file the charge with the Board's Office of General Counsel in accordance with § 28.11. That Office shall investigate the charge in accordance with § 28.12.

* * * * *

§ 28.99 [Amended]

■ 42. Amend § 28.99 as follows:

■ a. Remove "for review" in the heading.

■ b. In paragraph (b)(1), add "Agency" after "Provision for."

■ 43. Revise § 28.101 to read as follows:

§ 28.101 Termination of Board proceedings when suit is filed in Federal District Court.

Any proceeding before the Board shall be terminated when an employee or applicant who is alleging violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, the Age Discrimination in Employment Act, 29 U.S.C. 633a, or the Rehabilitation Act, 29 U.S.C. 791, files suit in Federal District Court on the same cause of action pending before the Personnel Appeals Board.

■ 44. Amend § 28.112 by revising paragraph (a)(3) to read as follows:

§ 28.112 Who may file petitions.

(a) * * *

(3) The GAO if it has a good faith reason to doubt that a majority of employees in the bargaining unit wish to be represented by the labor organization which is currently the exclusive representative of those employees;

* * * * *

■ 45. Amend § 28.113 by revising paragraph (a)(7), the second sentence of

paragraph (b), and the first sentence of paragraph (c) to read as follows:

§ 28.113 Contents of representation petitions.

(a) * * *

(7) Membership cards, dues records, or signed statements by employees indicating their desire to support the petition of the labor organization, or similar evidence acceptable to the Board, showing that at least 30 percent of the employees in the proposed unit support the representation petition.

(b) * * * Additionally, a petition under § 28.112(a)(2) shall include evidence satisfactory to the Board that at least 30 percent of the employees in the unit support the petition to determine whether the employees wish to continue to be represented by the labor organization currently having bargaining rights.

(c) The contents of petitions filed under § 28.112(a)(3) shall conform to those provided in petitions under paragraph (a) of this section except that the information required by paragraphs (a)(4) and (a)(7) of this section need not be supplied. * * *

* * * * *

Subpart F—Special Procedures; Unfair Labor Practices**§ 28.121 [Amended]**

■ 46. Amend § 28.121(c) as follows:

■ a. Remove "for review" after the word "petition".

■ b. Remove the term "14b" and add in its place the term "15e".

■ c. Add the words "Office of" before the phrase "General Counsel".

§ 28.122 [Amended]

■ 47. Amend § 28.122 as follows:

■ a. Remove ";compelling need" from the heading.

■ b. In paragraph (e) remove "\$ 28.86-28.87" and in its place add "\$ 28.87".

■ 48. Amend § 28.123 as follows:

■ a. Revise paragraph (a)(4).

■ b. In paragraph (c), remove the words "Labor/Management Relations" and add the words "Employment Standards" in their place.

The revision reads as follows:

§ 28.123 Standards of conduct for labor organizations.

(a) * * *

(4) Fiscal integrity.

* * * * *

Subpart G—Corrective Action, Disciplinary and Stay Proceedings**§ 28.131 [Amended]**

■ 49. Amend paragraph (d) of § 28.131 by removing the words "for review" after

“petition” in both sentences, and adding the words “Board’s Office of” before the phrase “General Counsel”.

§ 28.132 [Amended]

- 50. Amend § 28.132 by removing the first sentence in paragraph (e).
- 51. Amend § 28.133 by revising paragraphs (a), (b), (c), (d), and (e) to read as follows:

§ 28.133 Stay proceedings.

(a) Prior to the effective date of any proposed personnel action, the Board’s General Counsel may request, ex parte, the issuance of an initial stay of the proposed personnel action for a period not to exceed 30 days if the General Counsel believes that the proposed personnel action arises out of a prohibited personnel practice. The request shall be in writing and shall specify the nature of the action to be stayed and the basis for the General Counsel’s belief. The Board’s Office of General Counsel shall serve a copy of the request on the GAO. Within three business days of its filing, the request shall be granted by the Board member designated by the Board Chair to entertain the request unless that Board member determines that the request either:

- (1) Fails to satisfy the requirements of this paragraph or
- (2) On its face, conclusively establishes that the proposed personnel action did not arise out of an alleged prohibited personnel practice as specified by the General Counsel.

(b) The Board’s General Counsel may request the issuance of either:

- (1) Further temporary stays for the purpose of allowing additional time to pursue its investigation or
- (2) A permanent stay for the purpose of staying the proposed personnel action until a final decision is rendered.

(c) Requests for stays under paragraph (b) of this section shall be received by both the Board and the GAO no less than 10 days before the expiration of any stay then in effect. Any response from GAO to the request shall be received by both the Board and the Board’s Office of General Counsel no less than three days before the expiration of any stay then in effect. Any request for stay under this paragraph shall be decided by the Board member who issued the prior stay under paragraph (a) of this section, unless the Board Chair determines that it should be decided by the Board en banc. The Board member, or Board en banc, may require further briefing, oral argument, submission of affidavits or other documentary evidence, or may conduct an evidentiary hearing before rendering

a decision. Any stay then in effect may be extended, sua sponte, for a period not to exceed 30 days to enable the Board member, or Board en banc, a reasonable opportunity to render a decision.

(d) A temporary stay under paragraph (b)(1) of this section may be issued if the Board member, or Board en banc, determines that under all of the circumstances the interests of justice would be served by providing more time for the Board’s Office of General Counsel to pursue the investigation. However, the duration of any single temporary stay shall not exceed the amount of time reasonably necessary to acquire sufficient information to support a request for a permanent stay in the exercise of a high degree of diligence and, in no event, shall any single temporary stay exceed 60 days except as provided under paragraph (c) of this section for the purpose of allowing time to render a decision.

(e) In determining whether a permanent stay under paragraph (b)(2) of this section should be issued, the Board member, or Board en banc, shall:

- (1) Assess the evidence adduced by each side as to whether the proposed personnel action arises out of an alleged prohibited personnel practice as specified by the Board’s General Counsel;
- (2) Assess the nature and gravity of any harm that could inure to each side if the request for permanent stay is either granted or denied; and
- (3) Balance the assessments conducted under paragraphs (e)(1) and (2) of this section.

* * * * *

Subpart I—Ex Parte Communications

- 52. Amend § 28.146 by revising the second sentence of paragraph (a) to read as follows:

§ 28.146 Explanation and definitions.

(a) * * * The only ex parte communications that are prohibited are those that involve the merits of the case or those that violate other rules requiring submissions to be in writing.

* * *

* * * * *

- 53. Add subpart K, consisting of §§ 28.160 and 28.161 to read as follows:

Subpart K—Access to Records

Sec.

28.160 Request for records.

28.161 Denial of access to information—Appeals.

Subpart K—Access to Records

§ 28.160 Request for records.

(a) Individuals may request access to records pertaining to them that are maintained as described in 4 CFR part 83, by addressing an inquiry to the PAB General Counsel either by mail or by appearing in person at the Personnel Appeals Board Office of General Counsel, 820 First Street, NE., Suite 580, Washington, DC 20002, during business hours on a regular business day.

Requests in writing should be clearly and prominently marked “Privacy Act Request.” Requests for copies of records shall be subject to duplication fees set forth in 4 CFR 83.17.

(b) Individuals making a request in person shall be required to present satisfactory proof of identity, preferably a document bearing the individual’s photograph. Requests by mail or submitted other than in person should contain sufficient information to enable the General Counsel to determine with reasonable certainty that the requester and the subject of the record are one and the same. To assist in this process, individuals should submit their names and addresses, dates and places of birth, social security number, and any other known identifying information such as an agency file number or identification number and a description of the circumstances under which the records were compiled.

(c) *Exemptions from disclosure.* The Personnel Appeals Board General Counsel and the Personnel Appeals Board, in deciding what records are exempt from disclosure, will follow the policies set forth in 4 CFR part 83.

§ 28.161 Denial of access to information—Appeals.

(a) If a request for access to information under § 28.160 is denied, the General Counsel shall give the requester the following information:

- (1) The General Counsel’s name and business mailing address;
- (2) The date of the denial;
- (3) The reasons for the denial, including citation of appropriate authorities; and
- (4) The individual’s right to appeal the denial as set forth in paragraphs (b) and (c) of this section.

(b) Any individual whose request for access to records of the PAB General Counsel has been denied in whole or part by the General Counsel may, within 30 days of receipt of the denial, challenge that decision by filing a written request for review of the decision with the Personnel Appeals Board, 820 First Street, NE., Suite 560, Washington, DC 20002.

- (c) The appeal shall describe:
- (1) The initial request made by the individual for access to records;
 - (2) The General Counsel's decision denying the request; and
 - (3) The reasons why that decision should be modified by the Board.
- (d) The Board, en banc, may in its discretion render a decision based on the record, may request oral argument, or may conduct an evidentiary hearing.

PART 29—[REMOVED AND RESERVED]

■ 54. Remove and reserve part 29.

Anne M. Wagner,

Chair, Personnel Appeals Board, U.S. General Accounting Office.

[FR Doc. 03-30698 Filed 12-11-03; 8:45 am]

BILLING CODE 1610-02-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA-2003-16505; Airspace Docket No. 03-ACE-89]

Modification of Class E Airspace; Cherokee, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action modifies the Class E airspace areas at Cherokee, IA. A review of controlled airspace for Cherokee Municipal Airport indicates it does not comply with the criteria for 700 feet Above Ground Level (AGL) airspace required for diverse departures as specified in FAA Order 7400.2E, Procedures for Handling Airspace Matters. The review also revealed a discrepancy in the airport reference point (ARP) for Cherokee Municipal Airport. The ARP is used in the legal description for the Cherokee, IA Class E airspace area. This action enlarges the Class E airspace at Cherokee, IA to conform to the criteria in FAA Order 7400.2E. It also modifies the airspace area by adapting it to the revised Cherokee Municipal Airport APR and incorporates the revised ARP into the Class E airspace legal description.

DATES: This direct final rule is effective on 0901 UTC, April 15, 2004. Comments for inclusion in the Rules Docket must be received on or before January 23, 2004.

ADDRESSES: Send comments on this proposal to the Docket Management

System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590-0001. You must identify the docket number FAA-2003-16505/Airspace Docket No. 03-ACE-89, at the beginning of your comments. You may also submit comments on the Internet at <http://dms.dot.gov>. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Docket Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1-800-647-5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

FOR FURTHER INFORMATION CONTACT:

Kathy Randolph, Air Traffic Division, Airspace Branch, ACE-520C, DOT Municipal Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329-2525.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 modifies the Class E airspace area extending upward from 700 feet above the surface of the earth at Cherokee, IA. An examination of controlled airspace for Cherokee Municipal Airport reveals it does not meet the criteria for 700 AGL airspace required for diverse departures as specified in FAA Order 7400.2E. The criteria in FAA Order 7400.2E for an aircraft to reach 1200 feet AGL is based on a standard climb gradient of 200 feet per mile plus the distance from the ARP to the end of the outermost runway. Any fractional part of a mile is converted to the next higher tenth of a mile. The examination also revealed a discrepancy in the Cherokee Municipal Airport ARP. This amendment enlarges the radius of the controlled airspace area around Cherokee Municipal Airport, corrects the discrepancy in the Cherokee Municipal Airport ARP and brings the legal description into compliance with FAA Order 7400.2E. This area will be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous

actions of this nature have not been controversial and have not resulted in adverse comments or objection. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will published a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Interested parties are invited to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2003-16505/Airspace Docket No. 03-ACE-89." The postcard will be date/time stamped and returned to the commenter.

Agency Findings

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a "significant