

charge(s) are supported by a preponderance of the evidence. Proof of misconduct or poor performance shall create a presumption that the Secretary's decision to remove or transfer the appellant was warranted. The appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case. The following examples illustrate the application of this rule:

*Example A.* The Secretary determines that the appellant intentionally submitted false data on the agency's provision of medical care and that the misconduct warrants transfer to a General Schedule position. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge by preponderant evidence. The appellant's transfer is presumed to be warranted, absent a showing that such a penalty was unreasonable under the circumstances of the case.

*Example B.* The Secretary determines that the appellant's performance or misconduct warrants removal, but the notice of the decision and the agency's response file do not identify any factual reasons supporting the Secretary's determination. The appellant files an appeal with the Board. The administrative judge may not sustain the removal because the agency, in taking its action, provided no factual reasons in support of its charge(s).

*Example C.* The Secretary determines that the appellant's performance or misconduct warrants removal. The appellant files an appeal with the Board. During the processing of the appeal, the appellant contends that the agency unduly delayed or refused to engage in discovery. If the agency has obstructed the appeal from being adjudicated in a timely fashion, the administrative judge may impose sanctions, up to and including the drawing of adverse inferences or reversing the removal action. Because the administrative judge finds that the agency has not unduly delayed or refused to engage in discovery, he declines to impose sanctions and affirms the removal.

*Example D.* The Secretary decides to remove the appellant based on a charge that the appellant engaged in a minor infraction that occurred outside the workplace. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge and further finds that the appellant established that the penalty of removal was unreasonable under the circumstances of the case. The presumption that the Secretary's decision to remove was warranted is rebutted and the action is reversed.

(b) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, concerning:

- (1) Issues of jurisdiction;
- (2) The timeliness of the appeal; and
- (3) Affirmative defenses.

(c) *Affirmative defenses.* Under 5 U.S.C. 7701(c)(2), the Secretary's determination may not be sustained, even where the agency met the evidentiary standard stated in paragraph (a) of this section, if the appellant shows that:

(1) The agency, in rendering its determination, committed harmful error in the application of its procedures;

(2) The decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) The determination is not otherwise in accordance with law.

(d) *Penalty review.* As set forth in paragraph (a) of this section, proof of the agency's charge(s) by preponderant evidence creates a presumption that the Secretary's decision to remove or transfer the appellant was warranted. An appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case, in which case the action is reversed. However, the administrative judge may not mitigate the Secretary's decision to remove or transfer the appellant.

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**§ 1210.19 Bench decisions.**

(a) *General.* The administrative judge may issue a bench decision at the close of the hearing. A bench decision is effective when issued.

(b) *Transcription of bench decision.* A transcribed copy of the decision will be prepared by the court reporter under the administrative judge's supervision to memorialize the oral decision. The official issuance of a bench decision is the date the administrative judge announces the decision and not the date the administrative judge signs the transcription.