

## § 28.22

## 4 CFR Ch. I (1–1–08 Edition)

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, an-

swers 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.

[68 FR 69300, Dec. 12, 2003]

### § 28.22 Administrative judges.

(a) *Exercise of authority.* Administrative judges may exercise authority as provided in paragraph (b) of this section upon their own initiative or upon the motion of a party, as appropriate.

(b) *Authority.* Administrative judges shall conduct fair and impartial hearings and take all necessary action to avoid delay in the disposition of all proceedings. They shall have all powers necessary to that end unless otherwise limited by law, including, but not limited to, the authority to:

(1) Administer oaths and affirmations;

(2) Issue subpoenas in accordance with § 28.46;

(3) Rule upon offers of proof and receive relevant evidence;

(4) Rule upon discovery issues as appropriate under §§ 28.42 through 28.45;

(5) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum and exclude from the hearing any disruptive persons;

(6) Exclude from the hearing any witness, except the petitioner(s), whose later testimony might be colored by testimony of other witnesses, or any persons whose presence might have a chilling effect on a testifying witness;

(7) Rule on all motions, witness and exhibit lists and proposed findings;

(8) Require the filing of memoranda of law and the presentation of oral argument with respect to any question of law;

(9) Order the production of evidence and the appearance of witnesses whose

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testimony would be relevant, material and not repetitious;

(10) Impose sanctions as provided under § 28.24 of this part;

(11) Hold prehearing conferences for the settlement and simplification of issues; and

(12) Issue initial decisions, as appropriate.

[58 FR 61992, Nov. 23, 1993, as amended at 68 FR 69301, Dec. 12, 2003]

### § 28.23 Disqualification of administrative judges.

(a) In the event that an administrative judge considers himself or herself disqualified, he or she shall withdraw from the case, stating on the record the reasons therefor, and shall immediately notify the Board of the withdrawal.

(b) Any party may file a motion requesting the administrative judge to withdraw on the basis of personal bias or other disqualification and specifically setting forth the reasons for the request. This motion shall be filed as soon as the party has reason to believe there is a basis for disqualification.

(c) The administrative judge shall rule on the withdrawal motion. If the motion is denied, the party requesting withdrawal may take an appeal to the full Board. The notice of appeal, together with a supporting brief, shall be filed within 15 days of service of the denial of the motion. Upon receipt of the appeal, the Board will determine whether a response from the other party or parties is required, and if so, will fix by order the time for the filing of the response.

### § 28.24 Sanctions.

The administrative judge may impose sanctions upon the parties as necessary to serve the ends of justice, including but not limited to the instances set forth in this section.

(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) Draw an inference in favor of the requesting party on the issue related to the information sought.

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

(3) Permit the requesting party to introduce secondary evidence concerning the information sought.

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(b) *Failure to prosecute or defend.* If a party fails to prosecute or defend a petition, the administrative judge may dismiss the action with prejudice or rule for the petitioner.

(c) *Failure to make timely filing.* The administrative judge may refuse to consider any motion or other action which is not filed in a timely fashion in compliance with this subpart.

[58 FR 61992, Nov. 23, 1993, as amended at 68 FR 69301, Dec. 12, 2003]

## PARTIES, PRACTITIONERS AND WITNESSES

### § 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. Any subsequent changes in representation shall also be in writing, and submitted to the administrative judge and served upon the other parties. Once a party has designated a representative, all documents required by the Board's regulations to be served upon the party shall instead be served upon the representative.

(b) A party may choose any representative so long as the person is willing and available to serve. However, the other party or parties may challenge the representative on the grounds of conflict of interest or conflict of position. This challenge must be made by motion to the administrative judge within 10 days of service of the notice of designation, and shall be ruled upon by the administrative judge prior to any further proceeding in the case. These procedures apply equally to original and subsequent designations of