

§ 1.781

38 CFR Ch. I (7-1-04 Edition)

pursuant to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) relating to contracts made by (a) the Department of Veterans Affairs or (b) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal.

[47 FR 12340, Mar. 23, 1982, as amended at 54 FR 34980, Aug. 23, 1989]

§ 1.781 Organization and address of the Board.

(a) The Board consists of a Chair, Vice Chair, and other members, all of whom are attorneys at law duly licensed by any State, commonwealth, territory, or the District of Columbia. In general, the appeals are assigned to a panel of at least 3 members who decide the case by a majority vote. Board Members are designated Administrative Judges.

(b) The Board's mailing address is 810 Vermont Avenue, NW., Washington, DC 20420.

§ 1.782 Policy and procedure.

(a) *Rules of procedure.* Appeals to the Board are processed in accordance with Rules of Procedure adopted by the Board in compliance with the guidelines issued by the Office of Federal Procurement Policy under the provisions of the Contract Disputes Act of 1978 (41 U.S.C. 601, 607(h)). There is no further administrative appeal within the Department of Veterans Affairs from final decisions rendered by the Board.

(b) *Application and interpretation of rules.* It is impracticable to articulate a rule to fit every possible circumstance which may be encountered. The rules, therefore, are applied and interpreted to provide, to the fullest extent practicable, informal expeditious, and inexpensive resolution of disputes. For that purpose, the Board is authorized to require contracting officers and other Department of Veterans Affairs officials to furnish the Board with such information, technical data, and other assistance as the Board may require in the performance of its duties.

§ 1.783 Rules of the Board.

(a) *Rule 1; appeals from final decisions and requests for final decisions—(1) No-*

tice of appeal. Notice of an appeal shall be in writing and mailed to or otherwise furnished the Board within 90 days from the date of receipt of a contracting officer's final decision. A copy thereof shall be furnished the contracting officer from whose decision the appeal is taken.

(2) *Failure to issue a final decision.* (i) Where the contractor has submitted a claim of \$50,000 or less to the contracting officer and, in writing, has requested a decision within 60 days from receipt of the request, and the contracting officer has not done so, the contractor may file a notice of appeal as provided in paragraph (a)(1) of this section, citing the failure of the contracting officer to issue a decision.

(ii) Where the contractor has submitted a properly certified claim in excess of \$50,000 to the contracting officer, or pursuant to the Disputes Clause, has requested a decision by the contracting officer which presently involves no monetary amount, and the contracting officer has failed to issue a decision within a reasonable time, taking into account such factors as the size and complexity of the claim, the contractor may file a notice of appeal as provided in paragraph (a)(1) of this section, citing the failure of the contracting officer to issue a decision.

(3) *Stay of proceedings.* Upon the docketing of an appeal filed pursuant to the provisions of paragraph (a)(2) of this section, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as determined by the Board.

(4) *Request for final decision.* In lieu of filing a notice of appeal under paragraph (a)(2) of this section, the contractor, in the event of undue delay or refusal on the part of the contracting officer, may request that the Board direct the contracting officer to issue a decision in a specified period of time, as determined by the Board.

(b) *Rule 2; notice of appeal, contents of.* A notice of appeal should indicate that an appeal is being taken and should identify the contract by number, the department, agency, or bureau involved in the dispute, the decision from which the appeal is taken, and the

amount in dispute, if known. The notice of appeal should be signed by the appellant (the contractor taking the appeal) or by the appellant's duly authorized representative or attorney. The complaint referred to in paragraph (f) of this section (Rule 6) may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

(c) *Rule 3; docketing of appeals.* When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice in writing shall be given to the appellant with a copy of §§ 1.780 through 1.783 and to the contracting officer.

(d) *Rule 4; preparation, content, organization, forwarding, and status of appeal file—(1) Duties of contracting officer.* Within 30 days of receipt of notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board through the Office of General Counsel an appeal file consisting of all documents pertinent to the appeal, including:

- (i) The decision from which the appeal is taken;
- (ii) The contract, including specifications and pertinent amendments, plans, and drawings;
- (iii) All correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;
- (iv) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and
- (v) Any additional information considered relevant to the appeal.

Within the same time above specified, the Office of General Counsel shall furnish the appellant a copy of each document transmitted to the Board, except those in paragraph (d)(1)(ii) of this section. As to the latter, a list furnished appellant indicating specific contractual documents transmitted will suffice.

(2) *Duties of the appellant.* Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall transmit to

the Board any documents not contained therein which are considered to be relevant to the appeal, and shall furnish two copies of such documents to the government trial attorney.

(3) *Organization of appeal file.* Documents in the appeal file may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(4) *Lengthy documents.* Upon request by either party the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when it would be burdensome to do so. At the time a party files with the Board a document as to which such a waiver has been granted the party shall notify the other party that the document or a copy thereof is available for inspection at the office of the Board or of the party filing same.

(5) *Status of documents in appeal file.* Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence in accordance with paragraphs (m) and (t) of this section (Rules 13 and 20).

(6) *Dispensing with appeal file requirements.* Notwithstanding the provisions of paragraph (d)(1) through (5) of this section, the filing of the documents in paragraph (d)(1) and (2) of this section may be dispensed with by the Board either upon request of the appellant in the notice of appeal or thereafter upon stipulation of the parties.

(e) *Rule 5; dismissal for lack of jurisdiction.* Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on

both the merits and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

(f) *Rule 6; pleadings and motions—(1) Appellant.* Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise, and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

(2) *Government.* Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto. The answer shall set forth simple, concise, and direct statements of the Government's defenses to each claim asserted by appellant, including any affirmative defenses available. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

(3) *Motions.* The Board may entertain and rule upon appropriate motions.

(g) *Rule 7; amendments of pleadings or record—(1) More definite statement and reply.* The Board, upon its own initiative or upon application by a party, may order a party to make a more definite statement of the complaint or answer, or to reply to an answer.

(2) *Amendments.* The Board may, in its discretion, and within the proper

scope of the appeal, permit either party to amend its pleadings upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable that party to meet such evidence.

(h) *Rule 8; hearing election.* After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it elects a hearing, as prescribed in paragraphs (q) through (y) of this section (Rules 17 through 25), or whether it elects to submit its case on the record without a hearing, as prescribed in paragraph (k) of this section (Rule 11).

(i) *Rule 9; prehearing briefs.* Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to paragraph (h) of this section (Rule 8). If the Board does not require prehearing briefs, either party may, upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be filed with the Board at least 15 days prior to the date set for hearing, and a copy simultaneously furnished to the other party.

(j) *Rule 10; prehearing or presubmission conference.* (1) Whether the case is to be submitted pursuant to paragraph (k) of this section (Rule 11), or heard pursuant to paragraphs (q) through (y) of this section (Rules 17 through 25), the Board may, upon its own initiative, or upon the application of either party,

arrange a telephone conference or require the parties to appear before an Administrative Judge or examiner of the Board for a conference to consider:

- (i) Simplification, clarification, or severance of the issues;
- (ii) The possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
- (iii) Agreements and rulings to facilitate discovery;
- (iv) Limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;
- (v) The possibility of agreement disposing of any or all of the issues in dispute; and
- (vi) Such other matters as may aid in the disposition of the appeal.

(2) The Administrative Judge or examiner of the Board shall make such rulings and orders as may be appropriate to achieve settlement by agreement of the parties or to aid in the disposition of the appeal. The results of pretrial conferences, including any rulings and orders, shall be reduced to writing by the Administrative Judge or examiner and this writing shall thereafter constitute a part of the record.

(k) *Rule 11; submission without a hearing.* Either party may elect to waive a hearing and submit its case upon the record as settled pursuant to paragraph (m) of this section (Rule 13). Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. In accordance with paragraph (m) of this section (Rule 13), affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the record. The Board may permit such submissions to be supplemented by oral argument (transcribed, if requested), and by briefs filed in accordance with paragraph (w) of this section (Rule 23).

(l) *Rule 12; optional small claims (expedited) and accelerated procedures.* These procedures are available solely at the election of the appellant.

(1) 12.1 *Elections to utilize small claims (expedited) and accelerated procedures.* (i)

In appeals where the amount in dispute is \$50,000 or less, the appellant may elect to have the appeal processed under a small claims (expedited) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election. The details of this procedure appear in paragraph (1)(2) of this section (rule 12). An appellant may elect the accelerated procedure set forth in paragraph (1)(3) of this section (Rule 12) in any appeal eligible for small claims (expedited) procedure.

(ii) In appeals where the amount in dispute is \$100,000 or less, the appellant may elect to have the appeal processed under an accelerated procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election. The details of this procedure appear in paragraph (1)(3) of this section (Rule 12).

(iii) The appellant's election of either the small claims (expedited) procedure or the accelerated procedure may be made by written notice within 60 days after receipt of notice of docketing the appeal unless such period is extended by the Board for good cause. The election may not be withdrawn except with permission of the Board and for good cause.

(iv) In deciding whether the small claims (expedited) procedure or the accelerated procedure is applicable to a given appeal, the Board shall determine the amount in dispute.

(2) 12.2 *The small claims (expedited) procedure.* (i) In cases proceeding under the small claims (expedited) procedure, the following time periods shall apply:

(A) Within 10 days from the Government's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the small claims (expedited) procedure, the Government shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any; remaining documents required under paragraph (d) of this section (Rule 4) shall be submitted in accordance with times specified in that rule unless the Board otherwise directs;

(B) Within 15 days after the Board has acknowledged receipt of appellant's notice of election, the assigned Administrative Judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (1) Identify and simplify the issues; (2) establish a simplified procedure appropriate to the particular appeal involved; (3) determine whether either party wants a hearing and, if so, fix a time and place therefor; (4) require the Government to furnish all the additional documents relevant to the appeal; and (5) establish an expedited schedule for resolution of the appeal.

(ii) Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled or, if no hearing is scheduled, to close the record on a date that will allow decisions within the 120-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under this section 1.783, as necessary to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(iii) Written decisions by the Board in cases processed under the small claims (expedited) procedure will be brief and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge. If there has been a hearing, the Administrative Judge presiding at the hearing may, in the judge's discretion, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under paragraph (cc) of this section (Rule 29).

(iv) Decisions under this procedure shall have no value as precedent and, in the absence of fraud, shall be final and conclusive and may not be appealed or set aside.

(3) 12.3 *The accelerated procedure.* (i) In cases proceeding under the accelerated procedure, the parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs. Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled or, if no hearing is scheduled, to close the record on a date that will allow decision within the 180-day limit. The Board, in its discretion, may shorten time periods prescribed or allowed under this § 1.783, as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the accelerated procedure, and may reserve 30 days for preparation of the decision.

(ii) Written decisions by the Board in cases processed under the accelerated procedure will normally be brief and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge with the concurrence of the Chair, Vice Chair, or other designated Administrative Judge, or by a majority among these two and an additional designated member in case of disagreement. Alternatively, in cases where the amount in dispute is \$10,000 or less as to which the accelerated procedure has been elected and in which there has been a hearing, the single Administrative Judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration under paragraph (cc) of this section (Rule 29).

(4) 12.4 *Motions for reconsideration in cases under paragraph (l) of this section (Rule 12).* Motions for reconsideration of cases decided under either the small claims (expedited) procedure or the accelerated need not be decided within the original 120-day or 180-day limits, but all such motions shall be processed and decided rapidly so as to fulfill the intent of paragraph (l) of this section (Rule 12).

(m) *Rule 13; settling the record.* (1) The record upon which the Board's decision will be rendered consists of the documents furnished under paragraphs (d) and (l) of this section (Rules 4 and 12), to the extent admitted in evidence, and the following items, if any: pleadings prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, posthearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

(2) Except as the Board may otherwise order in its discretion, no evidence shall be received after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(3) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

(n) *Rule 14; discovery—depositions—(1) General policy and protective orders.* The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Such orders may include limitations on the scope, method, time and place for discovery, and provision for protecting the secrecy of confidential information or documents.

(2) *When depositions permitted.* After an appeal has been docketed and complaint filed, the parties may agree to, or the Board may order, upon application of either party, the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(3) *Orders on depositions.* The time, place, and manner of taking depositions shall be as agreed upon by the parties or, failing such agreement, governed by order of the Board.

(4) *Use as evidence.* No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(5) *Expenses.* Each party shall bear its own expenses associated with the taking of any deposition.

(6) *Subpoenas.* Where appropriate, a party may request the issuance of a subpoena under the provisions of paragraph (u) of this section (Rule 21).

(o) *Rule 15; interrogatories to parties, admissions of fact, and production and inspection of documents.* After an appeal has been docketed and complaint filed with the Board, a party may serve on the other party: (1) Written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 30 days after service; (2) a request for the admission of specified facts and/or the authenticity of any documents, to be answered or objected to within 30 days after service, the factual statements and the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and

(3) a request for the production, inspection, and copying of any documents or objects, not privileged, which reasonably may lead to the discovery of admissible evidence, to be answered or objected to within 30 days after service. Any discovery engaged in under this rule shall be subject to the provisions of paragraph (n)(1) of this section (Rule 14(A)) with respect to general policy and protective orders, and paragraph (ii) of this section (Rule 35) with respect to sanctions.

(p) *Rule 16; service of papers other than subpoenas.* Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers, replies, and briefs shall be filed directly with the Board for service. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in paragraph (u) of this section (Rule 21).

(q) *Rule 17; hearings, where and when held.* Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, requirements of paragraph (l) of this section (Rule 12), and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.

(r) *Rule 18; notice of hearings.* The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearing shall be promptly acknowledged by the parties.

(s) *Rule 19; unexcused absence of a party.* The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in paragraph (k) of this section (Rule 11).

(t) *Rule 20; hearings, nature of and examination of witnesses—(1) Nature of hearings.* Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and respondent may offer such relevant evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence, subject, however, to the sound discretion of the presiding Administrative Judge or examiner in supervising the extent and manner of presentation of such evidence. In general, admissibility will depend on relevancy and materiality. Evidence which may not be admissible under the Federal Rules of Evidence may be admitted in the discretion of the presiding Administrative Judge or examiner. The weight to be attached to evidence presented in any particular form will be within the discretion of the Board. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may in any case require evidence in addition to that offered by the parties.

(2) *Examination of witnesses.* Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his or her statements may be subject to the provisions of 18 U.S.C. 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

(u) *Rule 21; subpoenas—(1) General.* Upon written request of either party filed with the Board, or on the Board's own initiative, the Administrative Judge to whom a case is assigned or who is otherwise designated by the Chair may issue a subpoena requiring:

(i) Testimony at a deposition—the deposing of a witness in the city or county where the witness resides or is employed or transacts business in person, or at another location convenient

for the witness that is specifically determined by the Board;

(ii) Testimony at a hearing—the attendance of a witness for the purpose of taking testimony at a hearing; and

(iii) Production of books and papers—in addition to paragraph (u)(1)(i) or (ii) of this section, the production by the witness at the deposition or hearing of books and papers designated in the subpoena.

(2) *Voluntary cooperation.* Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(3) *Requests for subpoenas*—(i) A request for a subpoena shall normally be filed at least:

(A) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought;

(B) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion, the Board may honor requests for subpoenas not made within these time limitations.

(ii) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and papers sought.

(4) *Requests to quash or modify.* Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(5) *Form; issuance*—(i) Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed to attend and give testimony and, if appropriate, to produce speci-

fied books and papers at a time and place therein specified. In issuing a subpoena to a requesting party, the Administrative Judge shall sign the subpoena and may, in his or her discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(ii) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

(6) *Service.* (i) The party requesting issuance of a subpoena shall arrange for service.

(ii) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

(iii) The party at whose request a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the books or papers the witness has produced.

(7) *Contumacy or refusal to obey a subpoena.* In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

(v) *Rule 22; copies of papers.* When books, records, papers, or documents have been received in evidence, true copies thereof, or of such part thereof as may be material or relevant, may be substituted therefor, during the hearing or at the conclusion thereof.

(w) *Rule 23; posthearing briefs.* Posthearing briefs may be submitted upon such terms as may be agreed to by the parties and the presiding Administrative Judge or examiner at the conclusion of the hearing.

(x) *Rule 24; transcript of proceedings.* Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under paragraph (l)(2) of this section (Rule 12.2). Transcripts or copies of the proceedings shall be supplied to the parties at the actual cost of duplication.

(y) *Rule 25; withdrawal of exhibits.* After a decision has become final, the Board may, upon request and after notice to the other party, in its discretion, permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

(z) *Rule 26; representation—the appellant.* An individual appellant may appear before the Board in person; a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any State, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

(aa) *Rule 27; representation—the government.* Government counsel may, in accordance with their authority, represent the interests of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or appellant's attorney in the form specified by the Board from time to time.

(bb) *Rule 28; decisions.* Decisions of the Board will be made in writing and

authenticated copies of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions (except those required for good cause to be held confidential and not cited as precedents) shall be open for public inspection at the office of the Board in Washington, DC. Decisions of the Board will be made solely upon the record, as described in paragraph (m) of this section (Rule 13).

(cc) *Rule 29; motions for reconsideration.* A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to support the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

(dd) *Rule 30; suspension and dismissal without prejudice.* Whenever appellant and the Government counsel are in agreement as to disposition of the controversy, the Board may suspend or terminate further processing of the appeal. If, thereafter, the Board is advised by either party that the controversy has not been disposed of by agreement, the case shall be restored to the Board's calendar without loss of position. In other cases where the Board is unable to proceed with disposition for reasons not within the control of the Board, an appeal may be placed in a suspense status. Where the suspension has continued, or may continue, for an inordinate length of time, the Board, in its discretion, may dismiss such appeal from its docket without prejudice to restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed to be with prejudice.

(ee) *Rule 31; dismissal or default for failure to prosecute or defend.* Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to

Department of Veterans Affairs

§ 1.892

show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to paragraph (ii) of this section (Rule 35). If good cause is not shown, the Board may take appropriate action.

(ff) *Rule 32; remand from court.* Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these rules.

(gg) *Rule 33; time, computation, and extensions.* (1) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extensions of time will be granted. All requests for extensions of time shall be in writing.

(2) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

(hh) *Rule 34; ex parte communications.* No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members nor to ex parte communications concerning the Board's administrative functions or procedures.

(ii) *Rule 35; sanctions.* If any party fails or refuses to obey an order issued by the Board, the Board may make such order as it considers necessary to the just and expeditious conduct of the appeal.

(jj) *Rule 36; effective date and applicability.* These rules shall apply (1)

mandatorily, to all appeals relating to contracts entered into on or after March 1, 1979, and (2) at the contractor's election, to appeals relating to earlier contracts, with respect to claims pending before the contracting officer on March 1, 1979 or initiated thereafter.

[47 FR 12340, Mar. 23, 1982, as amended at 60 FR 48029, Sept. 18, 1995]

PART-TIME CAREER EMPLOYMENT PROGRAM

SOURCE: 44 FR 55172, Sept. 25, 1979, unless otherwise noted.

§ 1.891 Purpose of program.

Many individuals in society possess great productive potential which goes unrealized because they cannot meet the requirements of a standard workweek. Permanent part-time employment also provides benefits to other individuals in a variety of ways, such as providing older individuals with a gradual transition into retirement, providing employment opportunities to handicapped individuals or others who requires a reduced workweek, providing parents opportunities to balance family responsibilities with the need for additional income, and assisting students who must finance their own education or vocational training. In view of this, the Department of Veterans Affairs will operate a part-time career employment program, consistent with the needs of its beneficiaries and its responsibilities.

(Authority: 5 U.S.C. 3401 note)

§ 1.892 Review of positions.

Positions becoming vacant, unless excepted as provided by § 1.897, will be reviewed to determine the feasibility of converting them to part-time. Among the criteria which may be used when conducting this review are:

- (a) Mission requirements.
- (b) Workload.
- (c) Employment ceilings and budgetary considerations.
- (d) Availability of qualified applicants willing to work part time.
- (e) Other criteria based on local needs and circumstances.

(Authority: 5 U.S.C. 3402)