(b) A party may request reconsideration of an EEOC decision issued under § 268.405(a) of this part provided that such request is made within 30 days of receipt of an EEOC decision or within 20 days of receipt of another party's timely request for reconsideration. Such request, along with any supporting statement or brief, shall be submitted to the Commission's Office of Review and Appeals, and to all parties with proof of such submission. All other parties shall have 20 days from the date of service in which to submit to all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request for reconsideration or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the EEOC decision was issued;

(2) The EEOC decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The EEOC decision is of such exceptional nature as to have substantial precedential implications.

(d) A decision on a request for reconsideration by either party is final and there shall be no further right by either party to request reconsideration of an EEOC decision.

Subpart E—Remedies, Enforcement and Civil Actions

§ 268.501 Remedies and relief.

(a) *General procedures.* When the Board finds discrimination when issuing its final decision pursuant to § 268.209 of this part, the Board shall consider the following elements in providing full relief to complainants:

(1) Notification to all employees of the Board of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of law and this part similar to those found unlawful will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the Board shall cease from engaging in the specific unlawful employment practice found in the case.

(b) *Relief for an applicant.* (1) (i) When it is determined in a final decision that an applicant for employment has been discriminated against, the Board shall offer the applicant for employment the position that the applicant for employment would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant for employment would not have been selected even absent the discrimination. The offer to the applicant for employment shall be made in writing. The applicant for employment shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the applicant for employment can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant for employment would have been hired. Back pay, computed in the manner prescribed in 5 CFR 550.805 shall be awarded from the date the applicant for employment would have entered on duty until the date the applicant for employment actually enters on duty unless clear and convincing evidence indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. An applicant for employment shall be deemed to have performed service at the Board during such period for all purposes except for

meeting service requirements for completion of a required probationary period.

(iii) If the offer of employment is declined, the Board shall award the applicant for employment a sum equal to the back pay he or she would have received, computed in the manner prescribed in 5 CFR 550.805 from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The Board shall inform the applicant for employment, in its offer of employment, of the right to this award in the event the offer of employment is declined.

(2) When it is determined in a final decision that discrimination existed at the time the applicant for employment was considered for employment but also by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the Board shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under Title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant for employment.

(c) *Relief for an employee.* When it is determined in a final decision that an employee of the Board was discriminated against, the Board shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed in 5 CFR 550.805 unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under Title VII or the Rehabilitation Act is limited to the two years prior to the date the discrimination complaint was filed;

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the Board shall nevertheless eliminate any discriminatory practice and ensure it does not recur;

(3) Cancellation of an unwarranted personnel action and restoration of the employee;

(4) Expunction from the Board's records of any adverse materials relating to the discriminatory practice; and

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) *Mitigation of damages.* The Board shall not decline to grant relief based upon failure to mitigate damages unless it has clear and convincing evidence that the employee or applicant for employment has failed to mitigate damages. The Board shall have the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) *Attorney's fees or costs*—(1) *Awards of attorney's fees or costs.* The provisions of this paragraph (e) relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. In a notice of final action or a decision, the employee or applicant for employment may be awarded reasonable attorney's fees or costs (including expert witness fees) incurred in the processing of the complaint. In this regard:

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees;

(ii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government; and

(iii) Attorney's fees shall be paid only for services performed after the filing of a written complaint and after the complainant has notified the Board that he or she is represented by an attorney, except that fees allowable for a reasonable period of time prior to the notification of representation for any

services performed in reaching a determination to represent the complainant. Written submissions to the Board that are signed by the representative shall be deemed to constitute notice of representation.

(2) *Amount of awards.* (i) When the attorney's fees or costs are awarded, the complainant's attorney shall submit a verified statement of costs and attorney's fees (including expert witness fees), as appropriate, to the Board within 30 days of receipt of the final decision, unless a request for review or reconsideration is filed. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement among the complainant, the complainant's representative and the Board. Such agreement shall immediately be reduced to writing.

(ii) (A) If the complainant, the complainant's representative and the Board cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the Board's receipt of the verified statement and accompanying affidavit, the Board shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision of the Board shall include the specific reasons for determining the amount of the award. The complainant or the complainant's representative may file a request for review with the Commission of the Board's decision, and the Board's notice to the complainant and his or her representative shall include EEOC Form 573, notice of Appeal/Petition.

(B) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards: The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. This amount may be reduced or increased in consideration of the following factors, although ordinarily many of these factors are subsumed within the calculation set forth in this paragraph (e)(2)(ii)(B): The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in this paragraph (e)(2)(ii)(B).

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

§ 268.502 Compliance with EEOC decisions.

(a) The relief ordered in an EEOC decision, if accepted pursuant to § 268.209 of this part as a final decision, or not acted upon by the Board within the time periods of § 268.209 of this part, shall be binding upon the Board. Failure to implement its final decision, or the EEOC decision in such circumstances, shall be grounds for the complainant to file a civil action under §§ 268.505 and 268.506 of this part.

(b) Notwithstanding paragraph (a) of this section, when the Board requests reconsideration, when the case involves an employee's removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the EEOC decision recommends retroactive restoration, the Board shall comply with the EEOC decision only to