

P. BURDEN OF PROOF

OVERVIEW:

Section [2423.32](#) provides that the GC has the burden of presenting the evidence in support of the complaint and also the burden of proving the allegations of the complaint by a preponderance of the evidence.


OBJECTIVE:

To gain an understanding of the GC's burden of proof and Respondent's burden of proving any affirmative defenses.

1. GC'S BURDEN:

The burden of proof always rests on the GC to present the evidence in support of the complaint, i.e., proving the allegations of the complaint, by a preponderance of the evidence. The burden includes the production of evidence as well as persuading the trier of fact. This burden never shifts to the Respondent.

See Letterkenney Army Depot, 35 FLRA No. 18, 35 FLRA 113 (1990).

 *Where the complaint, the Respondent's answer and pre-hearing documents, and the parties' post-hearing briefs establish that the Respondent never disputed an allegation in the complaint, the GC does **not** have the burden to prove the allegation. An ALJ may not ignore a party's admission of a material fact just as s/he may not resolve issues not encompassed in a complaint. See U.S. Department of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, 55 FLRA No. 159, 55 FLRA 968, 970-71 (1999).*

2. DEFINITION OF PREPONDERANCE OF THE EVIDENCE:

"Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

Black's Law Dictionary 1182 (6th ed. 1990).

3. RESPONDENT'S BURDEN OF PROVING ANY AFFIRMATIVE DEFENSES:

- a. *The burden of persuasion shifts to the Respondent when Respondent raises an affirmative defense.*

See, e.g., Federal Emergency Management Agency, 52 FLRA No. 47, 52 FLRA 486, 490-91 n.2 (1996).

- b. *An affirmative defense is a "matter asserted by [a Respondent] which, assuming the complaint to be true, constitutes a defense to it."*

Black's Law Dictionary 60 (6th ed. 1990).

An example of an affirmative defense raised in a § 7116(a)(2) discrimination case, concerns a Respondent that showed that there was a **legitimate justification** for its action and that the same action would have been taken even in the absence of protected activity. See Department of the Air Force, Warner Robins Air Logistics Center, Warner Robins Air Force Base, Georgia, 52 FLRA No. 58, 52 FLRA 602, 605-06 (1996). Another example of an affirmative defense is the statute of limitations contained in § 7118(a)(4) of the Statute. See U.S. Army Armament Research Development and Engineering Center, Picatinny Arsenal, New Jersey, 52 FLRA No. 50, 52 FLRA 527, 532 (1996).

- c. *Affirmative defenses are waived unless raised in the pleadings or in a required pre-trial disclosure document or at trial (only with proper notice--full and fair opportunity to litigate).*
- d. *If affirmative defense is raised, the Trial Attorney considers:*

- i. Whether defense was raised in answer or in document provided to satisfy pre-hearing disclosure requirements;
- ii. If so, the Trial Attorney had sufficient notice of Respondent's defense. Where possible, Trial Attorney rebuts Respondent's evidence by contradictory or explanatory evidence.
- iii. If not, the Trial Attorney seeks to preclude Respondent from relying upon the defense.

See [Part 2, Chapter J](#) concerning Sanctions for additional discussion.

Q [Part 2, Chapter J concerning Sanctions.](#)

RESERVED