

## ADMINISTRATIVE INVESTIGATION BOARDS AND FACTFINDINGS

1. **REASON FOR ISSUE:** This Department of Veterans Affairs (VA) handbook revises the procedures to implement the objectives and requirements of VA Directive 0700, Administrative Investigation Boards (AIBs) and Factfindings. It promotes effectiveness and uniformity in the conduct and reporting of covered administrative investigations within VA and enhances the usefulness of investigative reports.
2. **SUMMARY OF CONTENTS/MAJOR CHANGES:** This handbook revises the operational requirements and procedures for convening, conducting, reporting and reviewing AIBs and Factfindings within the VA. The appendices to this handbook provide definitions, work-aids and advisory materials.
3. **RESPONSIBLE OFFICE:** Office of General Counsel. Questions should be referred to the District Offices of Chief Counsel or to the Office of the General Counsel, Personnel Law Group.
4. **RELATED DIRECTIVE:** VA Directive 0700, Administrative Investigation Boards and Factfindings.
5. **RESCISSIONS:** VA Handbook 0700, dated July 31, 2002.

**CERTIFIED BY:**

**BY DIRECTION OF THE SECRETARY  
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**DISTRIBUTION:** Electronic only

**ADMINISTRATIVE INVESTIGATIVE BOARDS AND FACTFINDINGS**

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## **CHAPTER 1. GENERAL PROVISIONS**

### **1. PURPOSE AND SCOPE.**

- a. The purpose of this handbook is to establish procedures and guidance to implement the objectives and requirements of VA Directive 0700, Administrative Investigation Boards and Factfindings, and to standardize and enhance the efficiency and usefulness of these types of administrative investigations within VA. This handbook does not duplicate the information in VA Directive 0700.
- b. The provisions of this handbook are mandatory, except where the text or context indicates otherwise. The Appendices to this handbook include various materials such as work-aids, forms and sample documents, intended to promote effective Administrative Investigation Boards (AIB) and Factfindings. The material in these appendices is generally advisory but includes discussions of important external constraints on administrative investigations.
- c. This handbook promotes useful, effective evidence-gathering and reliable, efficient fact-finding in a wide array of circumstances. It provides VA officials with enough flexibility and discretion so that, to the extent practicable, Convening/Initiating Authorities may tailor an administrative investigation to effectively meet diverse requirements and informational needs.
- d. This handbook does not create rights for any individual. However, individual rights or obligations may arise under other policies, regulations, laws or governing collective bargaining agreements. (See, e.g., Chapter (Ch.) 5, § 2; Ch. 6, § 2).
- e. Specific policies or regulations govern investigations into many types of matters. (See Ch. 2, §3). Such a specific policy or regulation, if issued by an Under Secretary, Assistant Secretary or higher authority, will take precedence over a contrary provision of this handbook. This includes but is not limited to the following types of investigations, which this handbook does not govern:
  - (1) Investigations involving quality assurance documents or information protected by 38 U.S.C. § 5705 such as those listed in Veterans Health Administration (VHA) Directive 1320, Quality Management and Patient Safety Activities that Can Generate Confidential Documents.
  - (2) Investigations into complaints of discrimination conducted by the Office of Resolution Management Diversity and Inclusion (ORMDI) pursuant to the regulations of the Equal Employment Opportunity Commission. Note that even when ORMDI is processing such a complaint, additional parallel administrative investigations can be, and in many cases should be, conducted by management into allegations of a hostile work environment or harassment as needed to ensure prompt and effective corrective action where necessary. Those management investigations are governed by VA Directive 0700 and this handbook and VA Directive and Handbook 5979.

- (3) Investigations conducted by the Office of the Inspector General (OIG) or the Office of the Medical Inspector (OMI) pursuant to VHA Directive 1038.
- (4) Reviews, inspections and investigations conducted by the Office of Research Oversight (ORO) pursuant to 38 U.S.C. §§ 7307(a)(2), (d)(1) and (d)(3).
- (5) Investigations by VA police officers conducted pursuant to VA Directive and Handbook 0730.
- (6) Tort (personal injury, medical malpractice, property damage) claims investigations conducted by or under guidance from the Office of General Counsel (OGC). For investigation and processing claims of \$2,500.00 or less under the Federal Tort Claims Act, see VA's Guidebook for Processing Small Tort Claims. OGC investigates and processes all other tort claims against VA under 38 C.F.R. §§ 14.600 – 14.601. The results of investigations by OGC may be subject to protections as attorney work product.
- (7) Investigations involving allegations of whistleblower retaliation by a VA supervisor or allegations of senior leader misconduct, retaliation or poor performance. These allegations are investigated by the Office of Accountability and Whistleblower Protection (OAWP) pursuant to VA policy in the 0500 series.
- (8) Investigations into allegations of insider threat or employee behavioral threat conducted by the Office of Operations, Security and Preparedness's Insider Threat Program pursuant to Executive Order 13587 or Employee Threat Assessment Teams (ETAT) pursuant to any relevant directive.

## **2. DEFINITIONS.**

The following definitions and acronyms apply for purposes of this handbook:

### **a. ADMINISTRATIVE INVESTIGATION**

The investigative process of gathering evidence and ascertaining facts about matters, conducted primarily to enhance administrative effectiveness and efficiency. AIBs and Factfindings are both types of administrative investigations which VA can utilize and rely upon when taking administrative actions, including disciplinary actions under VA Directive and Handbook 5021. (See Ch. 2, § 3(a)).

### **b. ADMINISTRATIVE INVESTIGATION BOARD (AIB)**

A type of administrative investigation under VA Directive 0700 and relevant portions of this handbook for collecting and analyzing evidence, ascertaining facts and documenting complete and accurate information regarding matters of interest to VA. This type of administrative investigation requires the most documentation and has substantial procedural requirements.

c. AFFIDAVIT

A written statement sworn to or affirmed before a person authorized to administer oaths.

d. AUTHORIZATION LETTER

The document (including amendments) that appoints a Factfinder and authorizes the Factfinder to investigate. An Authorization Letter may not be necessary for every Factfinding; for example, it likely is not necessary if the Initiating Authority also serves as the Factfinder.

e. CHARGE LETTER

The document (including amendments) that appoints members to an AIB and authorizes the AIB to conduct an administrative investigation. A Charge Letter is required for every AIB.

f. CONVENING AUTHORITY

The authority responsible for convening and coordinating AIBs. Convening Authorities include the heads of VA Administrations and Staff Offices, chief executives of VA facilities and authorities senior to any of them in the VA organization. VA Administrations and Staff Offices may further define, clarify or limit this authority.

g. EVIDENCE

Evidence is any information considered by an investigator or those using an investigative report for decision-making that makes a particular matter or asserted fact more or less likely to be true. Evidence comes in many forms, including:

- (1) Testimony: A witness statement, prepared for and provided orally or in writing to an investigator.
- (2) Documents: Written or recorded evidence such as correspondence, business records, photographs, social media or other records prepared for purposes other than an investigation.
- (3) Physical: Things presented to the Factfinder whose existence or condition tends to prove or disprove relevant matters.
- (4) Demonstrative: Devices, images, models or documents which are intended to clarify the facts or aid in understanding, which may not be direct evidence (e.g., diagrams, maps of the office area, photographs of the area where the incident occurred, graphs).

See *also* definition of Material Evidence below.

h. FACTFINDER

The person(s) appointed by an Initiating Authority to conduct a Factfinding. In some instances, the Initiating Authority may be the same person as the Factfinder.

i. **FACTFINDINGS**

A type of administrative investigation under VA Directive 0700 and relevant portions of this handbook for collecting and analyzing evidence, ascertaining facts and documenting complete and accurate information of interest to the initiating authority. This type of administrative investigation is the most flexible and has the least required procedures. While it is less formal, it is a VA administrative investigation which can be utilized in the same manner as an AIB.

j. **INITIATING AUTHORITY**

The authority responsible for initiating and coordinating Factfindings. Initiating authorities include supervisors, heads of service lines, business offices or divisions, the heads of VA Administrations and Staff Offices, chief executives of VA facilities and authorities senior to any of them in the VA organization. The Initiating authority could serve as the factfinder, or they may appoint others to conduct the factfinding.

k. **INVESTIGATOR**

As used in this handbook and VA Directive 0700, it refers to both members of AIBs and Factfinders.

l. **INVESTIGATIVE FILE**

The full collection of materials related to or gathered during an administrative investigation. This includes, but is not limited to, evidence gathered, correspondence and notes related to the investigation, research materials and other administrative materials. All such materials should be preserved in the investigative file. Some materials included in the investigative file may not be referenced or relied upon in the investigative report, such as administrative documents regarding the investigation. (See Ch. 5, § 4; Ch. 7; Ch. 8).

m. **INVESTIGATIVE REPORT**

The standard format for conveying the results of an AIB or Factfinding, designed to enhance clarity and to facilitate review and decision-making. The essential components of an investigative report are Findings of Fact, Conclusions and Exhibits. These components are defined and explained in Chapters 7 and 8.

n. **ISSUE**

The questions within the scope of the investigation that the AIB or Factfinder is responsible for answering. Issues generally include the “who, what, where, when and why” of the incident prompting the investigation. Specific issues may be identified by the Convening/Initiating Authority or in applicable policies, and new issues may be raised by information acquired in the course of the investigation. Any new issues the AIB or Factfinder appointed by a Convening/Initiating Authority identifies should be brought to the attention of the Convening/Initiating Authority.

o. **MATERIAL EVIDENCE**

Evidence is material to an investigation if the matter it tends to prove or disprove is logically connected to the investigation’s issues, and it does not unnecessarily

duplicate other evidence tending to prove or disprove the same matter.

p. MEMBERS

The person(s) appointed by a Convening Authority to comprise an AIB and conduct an administrative investigation.

q. PREPONDERANCE OF THE EVIDENCE

The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find a contested fact is more likely true than untrue (i.e., greater than 50%). Preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.

r. PRELIMINARY INQUIRY

An informal process to obtain and assemble readily available information about an incident, the results of which are used for various purposes, including to determine the need for an AIB or a Factfinding.

s. SCOPE

The subject matter into which the AIB or Factfinder is authorized to inquire by the Convening/Initiating Authority.

t. SENIOR LEADER

Senior leader refers to an individual who is:

(1) An individual in a senior executive position.

(2) An individual employed in a confidential, policy-making, policy-determining, or policy-advocating position in the Department; or

(3) A supervisory employee, if the allegation involves retaliation against an employee for making a whistleblower disclosure. See 38 U.S.C. § 323(c)(1)(H). Senior leader is further defined in VA Directive 0500, Section 2.

u. SUBJECT OF AN INVESTIGATION

An individual, event or topic which is at issue in the investigation and which may be grounds for eventual action.

v. SUBSTANTIAL EVIDENCE

The degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

w. UNSWORN DECLARATION UNDER PENALTY OF PERJURY

A declaration under 28 U.S.C. § 1746, which is an unsworn written statement treated as equivalent to an affidavit. To have this effect, the declaration must be

dated and signed by the person making the statement, and it must include words to the effect of, "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)."

### **3. AIBS AND FACTFINDINGS.**

VA Directive 0700 and this handbook provide two options for conducting an administrative investigation: AIBs and Factfindings. Each process serves a different purpose, and Chapter 2, Determining the Need for AIBs or Factfindings, provides guidance on selecting which process to utilize. Further, Convening/Initiating Authorities can tailor each of these processes to fit their needs, as discussed herein. AIBs and Factfindings are both types of administrative investigations which VA may utilize and rely upon when taking administrative actions, including disciplinary actions under VA Directive and Handbook 5021. (See, e.g., Ch. 2, § 3(a)). AIBs and Factfindings are not required in a variety of circumstances. Often, everyday information-gathering processes are sufficient to meet VA's needs. AIBs and Factfindings are VA's primary tools when a more systematic and thorough analysis is needed.

#### **a. AIBS**

An AIB is a formal administrative investigation. The purposes of an AIB include, but are not limited to, ascertaining the facts of an issue or incident; identifying and interviewing witnesses and summarizing and recording their statements; gathering material and relevant evidence needed to assess an issue; analyzing and assessing the gathered evidence; and, if requested, providing recommendations. An AIB has more procedural requirements than a Factfinding, which typically results in a longer investigatory period, but produces a more substantive investigative report and assessment of the issue or incident under review. Interviews for AIBs will typically be conducted under oath or affirmation and use court reporters to transcribe most testimony. (See *also* Ch. 6, § 1(b)). AIB procedures are covered in Chapters 3 and 7.

#### **b. FACTFINDINGS**

A Factfinding is a less formal administrative investigation. The purposes of a Factfinding include ascertaining the magnitude of a problem; gathering and analyzing evidence; identifying and interviewing witnesses; summarizing and recording witness statements; determining whether to initiate more extensive investigations; and, if warranted, assisting in determining the scope of such investigation. A Factfinding may result in action meant to remedy the problem investigated. However, a Factfinding may also result in the need to conduct an AIB under the provisions of this handbook. A Factfinding has fewer procedural requirements than an AIB, is generally conducted more quickly, and results in a less thorough investigative report and review. Generally, interviews for Factfindings will not be conducted under oath. Factfinding procedures are covered in Chapters 4 and 8.

#### **4. RESPONSIBILITIES OF CONVENING/INITIATING AUTHORITIES.**

##### **a. GENERAL RESPONSIBILITIES**

(1) Convening/Initiating Authorities are responsible for ensuring compliance with VA Directive 0700, this handbook, and with other governing laws, regulations or policies in the conduct of AIBs and Factfindings. Convening/Initiating Authorities shall determine the need for administrative investigations for matters within their authority and whether to initiate an AIB or Factfinding in accordance with Chapter 2, Determining the Need for an AIB or Factfinding.

(2) The Convening/Initiating Authority may perform the duties of this handbook through appropriate staff. Convening/Initiating Authorities (including acting Authorities and principal assistants who are redelegated authority pursuant to VA Directive 0700) must sign Charge/Authorization Letters, amendments and certifications.

b. **CONFLICTS OF INTEREST.** The decision whether to convene an AIB or initiate a Factfinding cannot be made by an official whose actions (or failure to act) are likely to be a subject of the investigation or who has or appears to have a personal stake in or bias regarding the matter to be investigated. VA Directive 0700 requires the official involved to notify the next higher supervisory authority within the organization of the nature of the matter, the potential need for an administrative investigation and the potential conflict of interest precluding the original Convening/Initiating Authority from making the determination. That higher-level authority assumes responsibility as Convening/Initiating Authority for the matter. Further, Convening/Initiating Authorities are responsible for ensuring that members of AIBs and Factfinders are also free from such conflicts of interests. In such circumstances, it is likely that a Factfinding may not be appropriate, as the allegations involve a management official and may be more complex. Questions regarding whether such a personal stake or bias exists or appears to exist can be addressed with OGC.

c. **CONVENING AUTHORITIES: AIB, COORDINATION AND SUPPORT.** With respect to the AIBs they convene, Convening Authorities shall:

(1) Select members who are impartial and objective with respect to the subject matter of the investigation and who can conduct the investigation effectively.

(2) Coordinate, as necessary, participation by members and necessary support staff.

(3) Provide clear guidance to the AIB regarding the subject matter into which the AIB is authorized to inquire (i.e., the scope of the investigation), applicable policies and other aspects of the investigation in a Charge Letter and related documents.

- (4) Specifically eliminate from the scope of the investigation any subject matter into which the AIB should not inquire, including a statement of any related subject matters addressed by a different investigative entity. (See Ch. 1, § 1(e); Ch. 2, § 3).
  - (5) Provide any necessary financial, personnel or other support for the investigation.
  - (6) Coordinate investigation activities with those of other VA organizations and non-VA entities (See Ch. 1, § 7).
  - (7) Coordinate the activities of the AIB to ensure an objective and effective investigation, providing supplemental guidance, as necessary.
  - (8) Upon receipt of the AIBs investigative report and investigative file, the Convening Authority must review the report and certify completion of the investigation in accordance with VA Directive 0700 and Ch. 7, § 4, of this handbook. The Convening Authority shall take any necessary action based on the results of the investigation, including appropriate dissemination of the results of the report to other officials within VA. The Convening Authority has discretion to determine what action is necessary.
- d. INITIATING AUTHORITIES: FACTFINDING, COORDINATION AND SUPPORT.  
With respect to Factfindings, the Initiating Authority shall:
- (1) Determine the level of subject matter expertise required by a Factfinder and appoint qualified person(s) to perform the Factfinding. Depending on the circumstances, the Initiating Authority can elect to conduct the Factfinding themselves, in which case they would be both the Initiating Authority and the Factfinder.
  - (2) Provide clear guidance to the Factfinder regarding the subject matter into which the Factfinder is authorized to inquire (i.e., the “scope” of the investigation), applicable policies and other aspects of the investigation in an Authorization Letter and related documents, as necessary. In some cases, an Authorization Letter is not needed (See Ch. 4, § 4).
  - (3) Coordinate investigation activities with those of other VA organizations and non-VA entities (See Ch. 1, § 7).
  - (4) Receive and/or take appropriate action regarding the findings of the Factfinding.
- e. TRAINING REQUIREMENTS
- (1) Convening/Initiating Authorities must ensure that assigned AIB Members and Factfinders have adequate training, skill or experience. The skills required for a successful administrative investigation are often not innate in most VA

employees. Therefore, demonstrated skill, experience or training is critical. The level of skill, experience or training required to conduct a Factfinding is generally less intensive than the training needed to conduct an AIB. Convening/Initiating Authorities are responsible for determining if any skill, experience or training by potential investigators is adequate and should consult with OGC on any questions.

- (2) *AIB Members*: To serve as an AIB Member, employees must have documentation of completing at least one of the following forms of training:
  - (a) Attendance at an in-person AIB training within the past 5 years hosted by OGC, Office of the Chief Human Capital Officer (OCHCO), Office of Human Resources and Administration/Operations, Security and Preparedness (HRA/OSP) or any other recognized training expert intimately familiar with AIBs.
  - (b) Viewed the one-hour video hosted on VA's Talent Management System (TMS), course number 4557027 or successor number; or
  - (c) Possesses any other specialized training in investigative techniques, such as forensic investigations, witness interview technique, law enforcement investigation or the like.
- (3) *Factfinders*: The Factfinding Initiating Authority may use discretion to determine the training level required for such duties. Factfinders need a minimum of an hour of training in a program approved by OGC, which includes the one-hour video hosted on TMS, course number 4557027.

## **5. RESPONSIBILITIES OF MEMBERS APPOINTED TO AN AIB.**

Participation in an AIB is a high priority assignment. Supervisors of AIB members must adjust workloads and responsibilities to allow timely completion of AIB duties. AIB members shall:

- a. Maintain objectivity, impartiality and professionalism, both in fact and in appearance, and preserve the confidentiality of the information obtained throughout the investigation process;
- b. Identify the specific issues for investigation within the scope of investigation established by the Convening Authority, including new issues raised by evidence or information obtained in the course of the investigation, and raising them to the Convening Authority;
- c. Coordinate their investigative activities with any other investigative authorities, under the direction of the Convening Authority;
- d. Collect, preserve and secure material evidence;

- e. Identify and interview subjects of the investigation and other witnesses, accord them any rights provided by law, regulation or governing collective bargaining agreements, and properly document such interviews;
- f. Comply with other applicable law, regulations and policies, including VA Directive 0700, this handbook and any other policies identified in the Charge Letter (See, e.g., Ch. 2, § 3; Appendix H);
- g. Request assistance or determinations by the Convening Authority, Human Resources or legal counsel when necessary;
- h. Objectively, carefully, and skillfully analyze evidence to determine the facts that are not subject to reasonable dispute and draw conclusions regarding other issues to the extent justified by the available evidence;
- i. Providing an investigative report to the Convening Authority that clearly communicates the Findings of Fact, the Conclusions reached regarding disputed facts and the evidence upon which they are based. The investigative report should comply with the requirements of Chapter 7; and
- j. Other duties as directed by the Convening Authority.

## **6. RESPONSIBILITIES OF FACTFINDERS.**

Participation in Factfindings is a high priority assignment. Supervisors of Factfinders must adjust workloads and responsibilities to allow timely completion of the Factfinding. This is particularly true as Factfindings are ideally the fastest type of administrative investigations. Factfinders shall:

- a. Maintain objectivity, impartiality and professionalism, both in fact and in appearance, and preserve the confidentiality of the information obtained throughout the investigation process;
- b. Identify the specific issues for investigation (and for matters with Authorization Letters, ensure they are within the scope of investigation established by the Initiating Authority and raise new issues to the Initiating Authority);
- c. Coordinate their investigative activities with any other investigative authorities, under the direction of the Initiating Authority;
- d. Collect, preserve and secure material evidence;
- e. Identify and interview subjects of the investigation and other witnesses, accord them any rights provided by law, regulation or governing collective bargaining agreements and properly document such interviews. For Factfindings, most witnesses will not be placed under oath;

- f. Comply with other applicable law, regulations and policies, including VA Directive 0700, this handbook and any other policies identified in any Authorization Letter (See, e.g., Ch. 2, § 3; Appendix H);
- g. Request assistance or determinations by the Initiating Authority, Human Resources or OGC when necessary;
- h. Objectively, carefully, and skillfully analyze evidence to determine the facts that are not subject to reasonable dispute and draw conclusions regarding other issues to the extent justified by the available evidence;
- i. Prepare an investigative report and providing it to the Initiating Authority, if that individual is not the Factfinder, that clearly communicates the Findings of Fact, the Conclusions reached regarding disputed facts and the evidence upon which they are based. The investigative report should comply with the requirements of Chapter 8; and
- j. Other duties as directed by the Initiating Authority.

## **7. COORDINATING INVESTIGATIONS.**

- a. A variety of VA organizations, other Federal agencies and state agencies may have jurisdiction over matters that could also be the subject of an AIB or Factfinding. Such authorities may include federal and state law enforcement authorities, administrative agencies, VA OIG, ORMDI, OMI, ORO, OAWP and Police and Security units at VHA facilities.
- b. The Convening/Initiating Authority is primarily responsible for coordinating the activities of an AIB or Factfinding with such other investigations or inquiries, to the extent possible. Other investigative entities may have restrictions regarding their ability to discuss details of an ongoing investigation. The Convening/Initiating Authority will need to accept such restrictions and make a good faith effort to avoid infringing on other investigations. AIB members and Factfinders must be alert to potential conflicts and coordinate appropriately with the Convening/Initiating Authority and other investigators. OGC can provide guidance and assistance in this area.
- c. To the extent practicable and permitted by applicable law, policy and agreements between investigative entities, investigative efforts should be combined into a single investigation or otherwise coordinated to reduce duplication of effort and to enhance effectiveness. The Convening/Initiating Authority and Investigators should observe the following specific requirements:

### *(1) Investigations Involving Possible Criminal Activity*

- (a) During an investigation, an investigator may encounter evidence of possible

criminal activity. Unless properly coordinated, administrative investigation of such matters may jeopardize effective prosecution of criminal conduct. Therefore, when encountering allegations or evidence of potentially criminal conduct, the Convening/Initiating Authority must coordinate with law enforcement authorities, including the VA OIG, VA Police and Security Units and OGC as appropriate, before an administrative investigation proceeds. See VA Directive 0730, Referral of Allegations of Fraud and Notification of Other Criminal Conduct, and 38 C.F.R. §§ 14.560, 1.200 - 1.205. OGC can provide guidance and assistance in this area.

- (b) Upon discovering possible criminal activity, AIB Members and Factfinders shall suspend any activities that may interfere with law enforcement investigations and inform the Convening/Initiating Authority. Investigators shall not conduct additional interviews or discussions with witnesses until directed to resume the investigation by a law enforcement authority listed above or the Convening/Initiating Authority. If the Factfinder is not the Initiating Authority, consult with the Initiating Authority before resuming a Factfinding. If the Factfinder is the Initiating Authority, consult with OGC and the law enforcement authorities listed above before resuming the Factfinding. Investigators shall immediately report the information discovered and the action taken to the Convening/Initiating Authority. In suspending their activities, AIBs and Factfinders shall take special care to avoid alerting witnesses, subjects or others regarding the criminal investigation.
- (c) The Convening/Initiating Authority should not resume the investigation until OGC has advised on proceeding. The requirement for law enforcement notification and review does not preclude Investigators or VA officials taking appropriate actions to safeguard and care for persons and property.

(2) *Coordination with Office of the Medical Inspector*

OMI monitors the quality of care provided by VHA on behalf of the Under Secretary for Health and may conduct investigations of matters within its areas of responsibility. Policy regarding cooperation with OMI is in VHA Directive 1038, Cooperation with the Medical Inspector.

(3) *Coordination with Office of Research Oversight*

Pursuant to 38 U.S.C. § 7307 and VHA Directive 1058 ("The Office of Research Oversight"), ORO monitors, reviews, and investigates matters of VA research compliance and impropriety pertaining to the protection of human research subjects, laboratory animal welfare, research safety, research laboratory security, research information security and research misconduct. If, during a Factfinding or AIB, an investigator identifies a research-related incident reportable under VHA Directive 1058.01 ("Research Compliance Reporting Requirements"), the incident must be reported to the appropriate VA medical facility research oversight committee, ORO or other entity, as appropriate, in

accordance with the requirements of that directive.

*(4) Coordination with Office of Accountability and Whistleblower Protection*

OAWP investigates allegations of whistleblower retaliation by a VA supervisor or allegations of senior leader misconduct, retaliation, or poor performance. OAWP also receives whistleblower disclosures, as defined in 38 U.S.C. § 323(g)(3) and may refer those to VA Administrations or Staff Offices for investigation pursuant to VA policy in the 0500 series. If, during a Factfinding or AIB, an investigator identifies allegations of senior leader misconduct, retaliation or poor performance or allegations of whistleblower retaliation by a VA supervisor, they must notify the Convening/Initiative Authorities, who shall notify OAWP of the allegations. The AIB or Factfinder can continue investigating only the issues that are not within OAWP's investigative authority, and the Initiating/Convening Authority shall coordinate with OAWP.

*(5) Protected Quality Assurance Documents and Information*

Inquiries within the Quality Assurance program, such as focused reviews and root cause analyses, may involve information protected from disclosure within and outside VA pursuant to 38 U.S.C. § 5705 and its implementing regulations. (See 38 C.F.R. § 17.501; VHA Directive 1320). AIBs and Factfindings are conducted separately and apart from Quality Assurance inquiries and with due regard to preventing unauthorized disclosure of protected quality assurance documents. Individuals with knowledge of confidential quality assurance information specific to the matter under investigation by an AIB or Factfinder may not serve on the AIB, as a Factfinder, or disclose such information to the AIB or Factfinder.

## **CHAPTER 2. DETERMINING THE NEED FOR ADMINISTRATIVE INVESTIGATION BOARDS OR FACTFINDINGS**

### **1. INTRODUCTION.**

Convening/Initiating Authorities who receive reports, allegations or evidence of the types of incidents listed below must inquire into the matter to determine whether to initiate an administrative investigation, the appropriate scope of the investigation and the most effective and efficient procedure for conducting such an investigation. In determining the need for an investigation, or the appropriate scope or type of investigation, Convening/Initiating Authorities should consult with experienced Convening/Initiating Authorities and OGC.

### **2. INCIDENT REPORTS.**

- a. Information indicating a possible need for an administrative investigation can come from various sources, including reports, complaints, allegations from VA employees, beneficiaries or the public. Such information may also come from other review procedures, including those involving protected quality assurance information. Carefully observe any restrictions on the use of information or the activities of personnel involved in such processes or reports. For example, although a Convening Authority who receives protected quality assurance information may use that information in deciding to convene an AIB, they cannot disclose protected quality assurance documents to AIB members or include them in AIB files.
- b. Reports of the following types of matters require a case-by-case determination as to whether an administrative investigation is necessary (or whether it is a matter covered by another process):
  - (1) Evidence or allegations of significant misconduct, neglect of duty, prohibited personnel practices or violation of statutes, regulations, policies or individual rights by VA employees;
  - (2) Criminal or violent acts at VA facilities;
  - (3) Reports of serious mismanagement of funds or resources;
  - (4) Potential claims in favor of, or against, VA or its employees in their official capacity (see below regarding investigation of tort claims);
  - (5) Suspected threats, abuse or deliberate injury to employees, patients, other beneficiaries or visitors;
  - (6) Reports of unsafe conditions;
  - (7) Significant damage to government property, especially where the cause is unknown; and

- (8) Any matter that generates or is likely to generate significant and potentially adverse public, media or governmental interest.
- c. A Convening/Initiating Authority who receives a report or other information raising these types of matters must take reasonable steps within their authority to preserve evidence, such as prohibiting access to an area, securing documents and computer files and photographing physical evidence, until deciding how to proceed.

### **3. MATTERS COVERED BY OTHER PROCESSES.**

Specific VA policies govern many types of matters and establish specific requirements for incident reporting and investigations. These policies may affect the decision to conduct an administrative investigation, the scope of the investigation and investigative procedures. (See Ch. 1, § 1(e), listing issues not governed by VA Directive 0700 and this handbook). There are additional types of matters covered by other processes including:

- a. **DISCIPLINARY ACTION INVOLVING VA EMPLOYEES.** VA Directive and Handbook 5021 and other applicable human resources guidance provides direction for assessing the evidence in cases involving potential disciplinary action. It is important to note that while investigators may utilize a preponderance of the evidence standard in administrative investigations under this handbook, a different burden of proof, such as substantial evidence, may be applicable in certain disciplinary actions. Administrative investigations conducted under this handbook are utilized to gather evidence in these matters (although they may be based on investigations or information gathering conducted under another process). However, proposing and deciding officials should refer to the above-referenced policy and guidance regarding the proper use and assessment of the investigative reports in assessing disciplinary matters. Such officials should also confer with their respective human resources specialist(s) regarding adverse actions.
- b. **WHISTLEBLOWER DISCLOSURES.** Pursuant to 38 U.S.C. § 323, OAWP receives whistleblower disclosures from VA employees and applicants for employment at VA. If a whistleblower disclosure, as defined by 38 U.S.C. § 323(g)(3), received by OAWP does not pertain to whistleblower retaliation by a VA supervisor or senior leader misconduct, retaliation or poor performance, OAWP may refer the whistleblower disclosures to VA Administrations and Staff Offices for investigation. VA Administrations and Staff Offices who receive whistleblower disclosures referred by OAWP for investigation, shall conduct the investigation using the processes detailed in VA Directive and Handbook 0700 unless OAWP has provided more specific instructions or guidance. VA employees or applicants for employment at VA may submit a potential whistleblower disclosure directly to OAWP and are not required to include or inform their supervisor or chain of command.

- c. **ALLEGATIONS OF WHISTLEBLOWER RETALIATION.** Pursuant to 38 U.S.C. § 323, OAWP receives, reviews, and investigates allegations of whistleblower retaliation by VA supervisors or senior leaders, as defined in VA Directive 0500. If a VA manager, supervisor or official receives allegations of whistleblower retaliation, they should submit the allegations to OAWP pursuant to VA Directive 0500 and any other applicable policy instead of initiating their own administrative investigation. OAWP will then review the matter and determine whether it is within OAWP's investigative scope and investigate the matter, if appropriate.
- d. **ALLEGATIONS OF SENIOR LEADER MISCONDUCT OR POOR PERFORMANCE.** Pursuant to 38 U.S.C. § 323, OAWP receives, reviews and investigates allegations of senior leader misconduct or poor performance, as those terms are defined in Section 2 of VA Directive 0500. If a VA manager, supervisor or official receives allegations of senior leader misconduct or poor performance, they should submit the allegations to OAWP pursuant to VA Directive 0500 and any other applicable policy, instead of initiating their own administrative investigation. OAWP will then review the matter and determine whether it is within OAWP's investigative scope.
- e. **ALLEGATIONS OF CRIMINAL BEHAVIOR.** Please refer to Ch. 1, § 7(c)(1) for guidance on addressing potentially criminal behavior, which is generally addressed by OIG or law enforcement.
- f. **HATCH ACT MATTERS.** Allegations of a violation of the Hatch Act are under the jurisdiction of the Office of Special Counsel (OSC) and should therefore be referred to the OGC Ethics Specialty Team (EST). The EST will refer the allegations to the responsible program office or facility to decide what type of investigation is necessary, to determine whether there is sufficient evidence to refer the allegation to OSC and to conduct such investigation. An AIB will not likely be used in such cases.
- g. **POSSIBLE RESEARCH MISCONDUCT.** Current VA policy governing investigation and processing of cases involving possible research misconduct is in VHA Directive 1058.02, Research Misconduct.
- h. **PATIENT SAFETY PROGRAM AND ROOT CAUSE ANALYSES.** See VHA Handbook 1050.01, VHA National Patient Safety Improvement Handbook, for guidance on addressing patient safety issues. Please note that information gathered under the processes described in VHA Handbook 1050.1 may be protected as confidential medical quality-assurance records under 38 U.S.C. § 5705.
- i. **REPORTS TO STATE LICENSING BOARDS.** For matters that may affect a health-care professional's eligibility for a state-issued license, requirements for reports to state licensing boards are in VHA Directive 1100 and Handbook 1100.18.
- j. **PEER REVIEW FOR QUALITY MANAGEMENT.** See VHA Directive 1190 for

guidance on addressing peer review issues. Information gathered under the processes described in VHA Directive 1190 may be protected as confidential medical quality assurance records under 38 U.S.C. § 5705.

- k. **ALLEGATIONS OF HARASSMENT BASED ON PROTECTED CHARACTERISTICS.** VA Directive and Handbook 5979 provides specific direction for the processing of investigations into allegations of harassment based on protected characteristics, which includes reporting requirements and required timelines for action. These matters allege harassment based on Equal Employment Opportunity (EEO) related protected characteristics (i.e., race, color, national origin, religion, age, sex, sexual orientation, disability, genetic information or reprisal for EEO activity). VA Administrations and Staff Offices who receive such allegations shall conduct the investigation using the processes detailed in VA Directive and Handbook 0700 unless VA Directive and Handbook 5979 and/or ORMDI has provided more specific instructions or guidance.

#### **4. PRELIMINARY INQUIRY.**

- a. Due to the timeliness concerns discussed in Ch. 3, § 1 and Ch. 4, § 2, a Convening/Initiating Authority must act promptly to determine whether to convene an AIB or a Factfinding.
- b. In determining whether an administrative investigation is necessary and, if so, the best procedures to utilize, Convening/Initiating Authorities may direct a Preliminary Inquiry. (See Ch. 1, § 2(r)). The Convening/Initiating Authority may utilize the basic evidence gathering techniques described in Chapters 5 and 6 of this handbook to gather this information. This Preliminary Inquiry should occur promptly and quickly and is not intended to be a lengthy process. Witness rights discussed in Ch. 6, § 2 will likely also apply to such Preliminary Inquiries. The results of a Preliminary Inquiry can be provided to the potential Convening/Initiating Authority verbally or in a short memorandum summarizing the information found, with copies of relevant documents and statements attached. Convening/Initiating Authorities may use the results of Preliminary Inquiries to determine whether to initiate an administrative investigation, the best process to utilize and the appropriate scope of the investigation. If, after a Preliminary Inquiry, an Initiating Authority believes an AIB may be appropriate but does not have authority to convene one, they should contact a Convening Authority within their organization. An individual conducting a Preliminary Inquiry may serve as a member of a subsequent AIB or as a Factfinder, if otherwise qualified.
- c. A Preliminary Inquiry is not needed in every instance. It will be evident that some matters require or do not require an administrative investigation without going through the Preliminary Inquiry process.
- d. Information gathered during a Preliminary Inquiry must be provided to the investigator(s) should an AIB or Factfinding be pursued, unless prohibited, as in matters involving protected quality assurance information).

## **5. DECISION FACTORS FOR CONDUCTING AN ADMINISTRATIVE INVESTIGATION.**

Consider the following factors (in no particular order) when determining whether to conduct an administrative investigation:

- a. Impact of the matter on the facility, VA, government, Veterans and public interests generally, including financial impact;
- b. Risk of adverse consequences from recurrence of the alleged misconduct or other activity;
- c. The complexity of the matters to be investigated;
- d. Need for objective, expert review and analysis;
- e. Seriousness of any suspected misconduct, neglect, etc.;
- f. Degree to which the cause and essential facts of the matter are unknown or disputed;
- g. The potential for an investigation to determine additional relevant information;
- h. Need for evidence to support corrective or disciplinary action or claims for or against VA;
- i. Potential for adverse public, governmental or media interest;
- j. Other investigations conducted into the same or closely related subject matter, and the availability and adequacy of those investigations to meet VA's informational needs; and/or
- k. The allocation of facility resources in proportion to the gravity of the matter investigated.

## **6. DECISION FACTORS FOR THE TYPE OF ADMINISTRATIVE INVESTIGATION.**

If the Convening/Initiating Authority determines, based on these factors, the information readily available and/or a Preliminary Inquiry, to initiate an administrative investigation, they must then determine which process will best serve the organization's needs. The more the factors above apply, the more likely an AIB is needed. The less the factors above apply, the more likely a Factfinding is sufficient. For example, if a matter has a significant impact on the facility or public interest and is likely to garner governmental or media interest, an AIB may be the best process to ensure well-developed documentation of the matter; however, if a matter concerns less serious suspected misconduct and is unlikely to affect wider public interests, a Factfinding may be the most efficient process.

A Convening/Initiating Authority may consult with their servicing human resources specialist(s) and/or the OGC when determining whether to initiate an administrative investigation and the best process to utilize. While there is no clearly defined or unambiguous rule or standard for when to use each process, utilize the following guidance in making the decision:

- a. AIBS. Generally, AIBs are appropriate for issues that are more complex, sensitive, serious, out of the ordinary or significantly disputed. Examples of matters that may be appropriate for an AIB:
  - (1) Patient abuse allegations;
  - (2) Alleged theft of VA property, patient money or anything of value. (Note: this may uncover criminal activity, which is referred to the appropriate law enforcement authority as described in Ch. 1, § 7(c)(1));
  - (3) Non-medical system or process failure caused by faulty practice or procedure, lapses in policy enforcement or lack of adequate policy or procedure;
  - (4) Allegations of harassment/hostile work environment based EEO protected characteristics. This includes allegations of sexual harassment;
  - (5) Unsafe acts related to patient safety. See VHA Handbook 1050.1 for specific guidance;
  - (6) Matters involving facility-wide issues; or
  - (7) Formal investigations of allegations of research misconduct conducted by local VA medical facility personnel in accordance with VHA Directive 1058.02.
- b. FACTFINDINGS. Generally, Factfindings are appropriate for issues that are less complex, less sensitive, routine or which are not in significant dispute. A Factfinding is appropriate if the matter or issue can be addressed with a less formulaic investigative report and requires only routine or minimal factual development. Examples of Matters that may be appropriate for a Factfinding:
  - (1) Allegations of hostile work environment/harassment unconnected to EEO related protected characteristics;
  - (2) Disputes between coworkers;
  - (3) Leave abuse affecting one or a few employees;
  - (4) Supervisor/supervisee disputes;
  - (5) Inappropriate behavior in the workplace; or

(6) Misuse of government electronic equipment or government vehicles.

**NOTE:** *Allegations of a hostile work environment/harassment may require a Preliminary Inquiry to determine whether they are based on EEO related protected characteristics. If related to such protected characteristics, it is important to take prompt action and the matter will need to be coordinate with ORMDI/Harassment Prevention Program (HPP). For example, investigations into allegations of sexual harassment may be done via a Factfinding for timeliness purposes and then be followed up with an AIB for a more thorough review. Such investigations need to be coordinated with ORMDI/HPP pursuant to VA Directive 5979 and will have additional specific reporting and timeline requirements. Consultation with OGC is recommended.*

## **CHAPTER 3. CONVENING ADMINISTRATIVE INVESTIGATION BOARDS**

### **1. TIMELINESS.**

- a. A Convening Authority must act promptly to determine whether to convene an AIB and to issue the Charge Letter.
- b. The Convening Authority should establish strict timelines for completion of the investigation and submission of the investigation report. Generally, resources should be provided and deadlines set to ensure that the completed investigative report can be delivered to the Convening Authority within 45 calendar days of the date the AIB is convened. Adjust this timeframe as the urgency and complexity of the matter requires. Once established, however, the Convening Authority should extend deadlines only when justified (e.g., for unforeseen circumstances). Summarize the reasons for extensions in an amendment to the Charge Letter or in the Preliminary Statement of the investigative report.

### **2. SELECTING AIB MEMBERS AND STAFF.**

- a. **NUMBER OF MEMBERS.** The AIB will generally be comprised of one to three members, but larger boards are permitted. The AIB should have an odd number of members to facilitate decision-making. A single-member AIB is permissible and is often an effective and efficient option where the complexity of the matter allows (i.e., where the investigation can be effectively completed by a single person promptly).
- b. **QUALIFICATIONS OF MEMBERS.** The credibility of an administrative investigation is heavily dependent on both the real and perceived competence and objectivity of the AIB members and of the staff assigned to assist them. Convening Authorities shall therefore select individuals to conduct and assist in investigations based primarily on their abilities and objectivity, both actual and perceived. If there are no qualified personnel to appoint as an AIB member within a facility or organization, the Convening Authority may seek qualified members from other VA organizations or locations.
  - (1) *Ability.* The Convening Authority must ensure that AIB members have sufficient expertise and capability to address the issues investigated or that the AIB is otherwise able to obtain the required expertise. The requisite abilities include knowledge of how to conduct the investigation and report the findings of the AIB, the subject matter of the investigation, potential sources of evidence and how to analyze the evidence. Including at least one member on the AIB with training and experience similar to that of the subject of the investigation can enhance the quality and credibility of the investigation.
  - (2) *Objectivity.* The members must be objective and impartial. At least one member appointed to the AIB should be senior or equal in standing (i.e., grade level or organizational level) to the subject of the investigation. Members should

not have a personal interest or other bias concerning the investigation, direct involvement in matters investigated or a supervisory or personal relationship with the subject of the investigation. Do not assign members who have access to protected medical quality assurance information, such as a focused review or root cause analysis, which may be evidence in the investigation. If a potential member has a personal involvement in the matter, personal or significant social relationship with the parties involved, a personal or professional interest in the outcome of the investigation or has knowledge of relevant confidential quality assurance information, they should inform the Convening Authority and recuse themselves.

(3) *Training*. AIB members must have documentation of adequate training as described in Ch. 1, § 4(e)(1)-(2).

- c. **STAFF SUPPORT**. When appropriate, the Convening Authority may detail staff directly to support the AIB. Detailed staff are under the AIB Chair's direct supervision and are not voting members of the AIB. Detailed staff may include professional investigators, technical experts and administrative support. If technical or specific subject matter expertise is needed (e.g., medical knowledge, engineering, supervision), the Convening Authority should arrange to detail personnel with that expertise to assist the AIB. If administrative support is not detailed to support the AIB, the Convening Authority should identify the offices that will provide the necessary support to the AIB.
- d. **LEGAL SUPPORT**. OGC will provide any necessary legal advice to the Convening Authority and the Members. OGC attorneys may serve as AIB legal counsel to advise on issues, evidence and analysis or to assist in questioning witnesses, working with witness counsel or reviewing the investigative report prior to submission to the Convening Authority. Consult with your local OGC office or the OGC Personnel Law Group in VA Central Office (VACO) for assistance.

### **3. AIB CHARGE LETTERS.**

- a. **PURPOSE OF THE AIB CHARGE LETTER**. The Charge Letter is how a Convening Authority formally appoints members to an AIB. It defines the scope of the investigation and documents the members' authority to investigate on behalf of the Convening Authority.
- b. **FORM OF AIB CHARGE LETTERS**. Address the Charge Letter to the members and any detailed staff. Notice should be separately provided to the supervisors of members and detailed staff; such notice should only indicate that the individual is participating in the AIB and the expected dates. The subject line of the Charge Letter shall not include the name or personal identifier of any individual. (See Appendix A, Sample AIB Charge Letter). The Charge Letter shall:

(1) Identify the chair and members appointed to the AIB and any staff detailed to the AIB;

- (2) State clearly the scope of the investigation, including the general matter to be investigated and any special requirements or limitations on the investigation;
- (3) Delegate any necessary authority for the duration of the investigation, including the authority to administer oaths. VA Directive 0700 delegates the Secretary's authority to administer oaths under 38 U.S.C. § 5711 to Convening Authorities and permits redelegation to AIB members for the duration of the investigation. Appendix A includes suggested language for accomplishing this redelegation in the Charge Letter;
- (4) Refer to VA Directive 0700 and this handbook for policy and guidance, and identify any other regulations or policy known to be relevant to the matter (identify any authorized deviations from such policies in the Charge Letter);
- (5) Specify the time for completion of the investigative report, usually 45 calendar days;
- (6) Include, as appropriate: specific issues to be addressed; identification of any needed support (technical or administrative support, legal advice, interpreter, court reporting services, etc.); coordination instructions regarding any other investigations into the matter; authorization of Recommendations or a summary report format; requirements for an executive summary; or other specific details as necessary; and
- (7) Specify any waiver of procedural requirements. Any Convening Authority designated in VA Directive 0700 above the field facility level or equivalent may waive the procedures established by this handbook for the conduct of administrative investigations or the contents of investigative reports. This applies to investigations being conducted by that Convening Authority or a subordinate Convening Authority. Such waivers must be granted on a case-by-case basis, upon a determination that requiring compliance with such requirements would not be cost-effective or for other good cause. Waivers should be documented in the Charge Letter with a statement of the reasons for the modification. This provision does not authorize waiver of matters required by law, governing collective bargaining agreements or by other regulations and policies. Nonwaivable issues include the need for witness testimony and a written report. Convening Authorities should consult with OGC before waiving procedural requirements.

#### **4. SCOPE OF THE INVESTIGATION AND ISSUE IDENTIFICATION.**

The statement of the investigation's scope in the Charge Letter provides the outer boundaries of the investigation. A well-written statement of the scope gives the AIB latitude to pursue significant lines of inquiry and guidance to deter expansion of the investigation into unnecessary or inappropriate matters. Identification of specific issues or other requirements ensures the AIB focuses its investigation on matters of

significant interest to VA. For example, the Convening Authority may focus the AIB on certain alleged misconduct or may require a more expansive analysis of the various root causes of an incident. The Convening Authority may provide additional direction to the AIB during the investigation. Document all changes in the investigation's scope by an amendment to the Charge Letter.

## **5. AUTHORIZING A SUMMARY FORMAT FOR THE AIB INVESTIGATIVE REPORT.**

This handbook authorizes two different formats for the AIB's investigative report: a standard report format and a summary report format. These formats are described and distinguished in Chapter 7 of this handbook. Use standard reports unless the Convening Authority authorizes a summary report. The standard report format is for investigations that require detailed documentation and analysis of conflicting or disputed evidence to determine the facts or resolve issues, particularly where a report requires technical or legal review. For example, investigations into significant or high-level matters and matters likely to draw substantial media or Congressional scrutiny should use a standard format. The Convening Authority should consider authorizing a summary format report where the facts and issues are uncomplicated, extensive evidence is likely unnecessary and any reviewers of the report will be able to readily determine the evidentiary basis for the Findings of Fact and Conclusions without specific citations. The Convening Authority or a senior authority may order a standard report at any time. If so, amend the Charge Letter to reflect this change.

## **6. REQUIRING OR PERMITTING RECOMMENDATIONS BY AIBs.**

- a. Investigative reports shall not include Recommendations unless required or permitted by the Convening Authority in the Charge Letter. Additional information regarding AIB Recommendations is in Ch. 7, § 2(c)(2).
- b. AIB Recommendations are never binding and are limited to matters within the scope of the investigation. AIB Recommendations that are well-founded and well-focused may be helpful in some circumstances, particularly when the AIB includes technical experts and the Recommendations relate to their field of expertise. As an alternative, the Convening Authority may require the AIB to provide Conclusions on specified questions but leave Recommendations to other appropriate advisors. Examples of Recommendations include, but are not limited to:
  - (1) Discipline as appropriate;
  - (2) Training as appropriate;
  - (3) Revising or implementing policy or procedure; or
  - (4) Additional administrative investigations into matters discovered during the investigation.

## **7. AMENDING CHARGE LETTERS.**

A Convening Authority may amend the Charge Letter at any time and for any permissible reason (e.g., change Board membership, limit or increase the scope of the investigation, provide additional instructions, extend a deadline or terminate the investigation). Amendments should be made through a letter from the Convening Authority specifically referencing the Charge Letter and stating the nature of the amendments. Distribute amendments in the same manner as the Charge Letter. Amendments should be included as exhibits to the investigative report.

## **8. SUSPENDING AND TERMINATING AIBs.**

The AIB terminates when the Convening Authority certifies completion of the investigation. (See Appendix N, Sample Completion Certificate for AIBs). If the reasons prompting an investigation no longer exist, the Convening Authority may order the investigation terminated at any time. If there is a need or basis for delaying the investigation, with reason to believe that it may be necessary to resume it in the future, the Convening Authority may order the investigation suspended until a date certain or until further notice. The termination or suspension of an investigation is completed via a written amendment to the Charge Letter stating the reasons for the action and disposition of evidence obtained.

## **CHAPTER 4: INITIATING FACTFINDINGS**

### **1. DISTINCTION FROM AIBs.**

- a. **PROCESS.** There are four primary process distinctions between a Factfinding and an AIB:

- (1) Witness interviews are *not* conducted under oath;
- (2) A Factfinding is usually done by one investigator;
- (3) There is no court reporter recording testimony. Instead, testimony is either written by the witness or by the Factfinder; and
- (4) Factfinders use either a basic memo format for their investigation report or the Sample Factfinding Report. (See Ch. 8; Appendix O).

A Factfinding is a less formal process of investigation than an AIB; however, it is simply a different type of administrative investigation, and the results, reports and evidence can be used by the VA to take further administrative actions (process improvement, discipline, etc.).

- b. **INITIATING AUTHORITY.** An Initiating Authority is the entity that determines, based on an event(s), to initiate a Factfinding. A Factfinding can be initiated as follows:

- (1) *Third-party initiated Factfinding:* The Initiating Authority authorizes someone else to conduct a Factfinding. This is usually a program manager, service line director or chief. It may also be a facility director, but an investigation initiated at that level is likely to be an AIB. This process should be used to initiate a factfinding when:

- (a) Particular expertise is required to complete a thorough investigation;
- (b) The issues to be investigated involve more than one service or one business unit;
- (c) Qualified Factfinders are not available within the business unit or office and are obtained from another VA organization or office; or
- (d) The Factfinding will be conducted by more than one Factfinder.

- (2) *Self-initiated Factfinding:* This is the most common type of Factfinding. In this process, the Factfinder and the Initiating Authority are the same individual. This is typically done by a first-line supervisor to investigate a matter within their own business unit or office.

- c. **QUALIFICATIONS OF FACTFINDERS.** A Factfinding can be conducted by any qualified supervisor, employee relations or human resources staff, Quality Assurance staff, privacy staff, Compliance Officer or other subject matter expert, as determined by the Initiating Authority. The training level required to conduct a Factfinding is less intensive than the training needed to conduct an AIB. However, Factfinders must have the minimum amount of training as described in Ch. 1, § 4(e)(1) and (3). If the Factfinder is in the same chain of command as the subject of the investigation, the Factfinder should be at or above the grade or organizational level of the subject. In the event that there are no appropriate personnel to appoint as Factfinder within a facility or organization, the Initiating Authority may seek qualified Factfinders from other VA organizations or locations.
- d. **SUBJECT MATTERS.** Factfindings typically address issues that are less sensitive and complex than those investigated by an AIB. However, there is no clearly defined or unambiguous rule or standard to make this determination, and Convening/Initiating Authorities have discretion to determine if an administrative investigation should be conducted and whether it should be conducted as a Factfinding or AIB. Examples of issues that might be suitable for Factfinding investigations are:
  - (1) Absence without leave issues;
  - (2) Medication errors;
  - (3) Coworker disputes;
  - (4) Supervisor/Supervisee disputes; or
  - (5) Hostile work environment/harassment claims that are unrelated to a protected class (i.e., race, age, color, national origin, religion, sex, disability, etc.).

**NOTE:** *Investigations into allegations of sexual harassment are often done by Factfinding for timeliness purposes but may be more amenable to AIB investigation. Consultation with OGC on investigating these claims is recommended.*

## **2. TIMELINESS.**

A Factfinding should be completed as promptly as possible. Depending on the subject matter of the investigation and the complexity of the issue, Factfindings usually can be accomplished in as short a period as one day but can take up to two to three weeks. If the matter requires a longer period to investigate, consideration should be given to whether the subject matter is complex enough to warrant an AIB.

## **3. FACTFINDERS.**

- a. **NUMBER OF FACTFINDERS.** Most Factfindings are conducted by one investigator; however, additional Factfinders are permitted, as needed.

b. IDENTIFYING APPROPRIATE FACTFINDERS

- (1) A Factfinding can be conducted by any qualified supervisor, employee relations or human resources staff, Quality Assurance staff, privacy staff, Compliance Officer or other relevant subject matter expert, as determined by the Initiating Authority. For less sensitive and lower complexity issues that involve issues or allegations within a single work unit, the first-line supervisor of that work unit is usually the Factfinder.
- (2) Issues involving multiple work units or allegations against a supervisor require a manager at a higher level or at the Initiating Authority level to identify an appropriate investigator. The identified Factfinder should have no involvement in or pre-existing personal knowledge of the allegations at issue in the investigation. If a potential Factfinder has a personal involvement in the matter, a personal or significant social relationship with the parties involved or a personal or professional interest in the outcome of the investigation (i.e. if the allegations alleged misconduct on their part, etc.), they should inform the Initiating Authority, or if it is a self-initiated Factfinding, an official at the next higher level in the organization. The Initiating Authority or higher-level official will determine how to proceed with the investigation and may consult with OGC if needed.
- (3) When allegations are made against a service chief or similar level manager or involve multiple organizational units, the Factfinder should be selected by an Initiating Authority at the next highest level.
- (4) EEO Managers and Harassment Prevention Coordinators (unless related to their normal, non-collateral duty, and unrelated to accusations of harassment) should *not* be utilized to conduct Factfindings. Instead, EEO Managers should be made available as a resource for Factfinders.
- (5) A Factfinder may not be selected if they have knowledge about the subject matter being investigated that stems from a prior investigation conducted under the Quality Assurance Program (i.e., Root Cause Analysis, focused review, peer review or other medical quality assurance procedure).

c. STAFF/LEGAL SUPPORT

- (1) Human Resources, Risk Management, Compliance Officers, EEO Managers and other subject matter experts can be utilized by Factfinders for technical expertise or logistical purposes as needed.
- (2) OGC should be contacted for any questions regarding legal issues, evidence or other issues related to an investigation.

#### **4. AUTHORIZATION LETTERS.**

- a. An Authorization Letter is required for a third-party initiated Factfinding. Authorization Letters are not required in self-initiated Factfindings.
- b. The Authorization Letter should identify the issues or allegations to be investigated, the time frame for completion and the management official(s) who should receive the final report and evidence. Initial evidence gathered and witness suggestions might also be included with the letter. (See Ch. 8, Factfinding Investigative Report). Appendix O provides a Sample Factfinding Report format, which includes the requisite language for an Authorization Letter.
- c. An Authorization Letter may be amended. The Initiating Authority who issued the Authorization Letter (or their successor) is the only official who may amend the Authorization Letter, which must be done in writing and included in the investigative report. Some examples of why an Authorization Letter might be amended are: to expand or narrow the scope of investigation; to add an additional investigator; or to extend the timeframe of the investigation.

#### **5. SUSPENDING OR TERMINATING A FACTFINDING.**

- a. A Factfinding may be terminated at any time if the Initiating Authority determines that the reasons or allegations initiating the investigation are resolved.
- b. In some instances, a Factfinding may be initiated, and either the Factfinder or Initiating Authority determines - upon preliminary investigation - that the matter should be investigated by an AIB. In those circumstances, a recommendation should be made to a Convening Authority to initiate an AIB. Upon approval, the Factfinding should be terminated, and any investigation materials collected must be turned over to the AIB.

## **CHAPTER 5: INVESTIGATION PROCEDURES**

**NOTE:** *Unless otherwise indicated, the provisions of this Chapter apply to both AIBs and Factfindings.*

### **1. PLANNING.**

- a. Administrative investigations, including AIBs and Factfindings, typically involve interdependent processes of issue identification, evidence collection, analysis and documentation, along with administrative requirements. Planning by the AIB or Factfinder, including frequent reevaluation based on current information, is extremely important to completing a thorough, objective and useful investigation. For example, without adequate planning, evidence collection and witness interviews will be less productive, and the investigation may unnecessarily disrupt the functioning of the affected organization.
- b. The Convening/Initiating Authority may require specific planning documents at various stages of the investigation. Appendices B through K of this handbook provide work-aids to assist investigators in planning their investigations, as applicable.

### **2. COLLECTING EVIDENCE.**

#### **a. GENERALLY**

- (1) Evidence is information that tends to prove or disprove a purported fact, allegation or assertion. Administrative Investigations described within this handbook are not judicial and therefore not bound by judicial rules of evidence. Investigators should accept as evidence anything that a reasonable person would consider relevant and material to an issue and anything that may reasonably lead to the discovery or development of material evidence, unless specifically prohibited. For example, the investigator may consider hearsay testimony. Evidence need not be formally authenticated (i.e. testimony that verifies the document or evidence is genuine and what it purports to be). Evidence is given the weight warranted by circumstances (i.e., hearsay testimony will likely not be given as much weight as firsthand testimony). Evidence is relevant if it makes a fact of consequence, such as one needed to draw Conclusions or make Findings of Fact, more or less probable.
- (2) There are four categories of evidence: testimony, documents, physical and demonstrative evidence. (See Ch. 1, § 2(g)).
- (3) Within each evidence category, there are several types of evidence, including:
  - (a) *Direct evidence*, which is evidence that establishes or proves a fact without inference or presumption. Direct evidence is based on direct knowledge or observation, such as when a witness testifies to what they directly saw (e.g.,

“I saw Jane take John’s lunch out of the office refrigerator”).

- (b) *Circumstantial, or indirect, evidence*, which is evidence based on inference(s) drawn from other proven facts and which is not based on personal knowledge or observation. It implies a fact but does not directly prove it. Circumstantial evidence is used alone or in combination with other evidence to establish a fact. (e.g., “I heard the patient cry out in pain and saw Nurse Johnson exit the patient’s room immediately after. There was no one else in the room at the time”).
- (c) *Hearsay*, which is testimony given by a witness who relates not what they know personally but what others have told them or what the witness has heard others say. (e.g., “Mary said that Michael arrived 15 minutes late on that date”).

b. COLLECTING EVIDENCE FROM THE SUBJECT OF AN INVESTIGATION

- (1) To the extent practicable, an investigator should obtain evidence from the subject of the investigation, which typically includes:
  - (a) Interviewing the subject and requesting any material evidence that they can provide; and
  - (b) Doing so before seeking other evidence on that matter from third parties, to the extent practicable and consistent with the effectiveness and efficiency of the investigation.
- (2) Here are some factors to consider in assessing the practicability of seeking evidence from a subject of the investigation:
  - (a) Existing agency records and documents are obtained and reviewed prior to seeking information from the subject;
  - (b) A need to clarify allegations or the basis of allegations often justifies collecting evidence from a reporting source and eyewitnesses before seeking information from the subject;
  - (c) Interviewing the subject early may effectively narrow the issues for investigation and reduce the need for discussing the case with third parties, thus reducing the potential for rumor, disruption of agency processes, unjustified harm to individual and organizational reputations and overall costs of investigation. For example, the subject may admit to certain alleged facts, identify essential witnesses and evidence and provide explanations for actions that can then be effectively either corroborated or refuted; and
  - (d) A real, fact-based concern that the subject may intentionally or unintentionally influence or intimidate witnesses, or may otherwise limit their

complete and truthful testimony, may justify questioning those witnesses or taking other investigative action before interviewing the subject or before informing the subject that the investigation is in progress.

- (3) To the extent an investigation may be used to discipline or take an adverse action against an individual (e.g. investigations into employee misconduct), any applicable provisions of VA Directive and Handbook 5021 and any other human resources guidance regarding the collection of evidence from subjects must be complied with.

c. COLLECTING EVIDENCE FROM VA EMPLOYEES

- (1) VA employees must cooperate with administrative investigations, subject to the constitutional right against compulsory self-incrimination regarding a crime. (See 38 C.F.R. § 0.735-12(b); VA Directive 0700; Appendix H; Appendix I).
- (2) VA Directive 0700 requires employees to refrain from disclosing information related to their testimony or the investigation, when so directed by Convening/Initiating Authorities, AIB members or Factfinders. This prevents witnesses from influencing the testimony of others or otherwise jeopardizing the investigative process. It does not prohibit disclosures required for official purposes or disclosures permitted by law, such as under the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8) or the Veterans Affairs Accountability and Whistleblower Protection Act (VAAWPA), 38 U.S.C. §323.
- (3) AIB members and Factfinders generally have no authority to directly compel action or cooperation by VA employees or others involved in an investigation unless delegated such authority (for example, in the Charge/Authorization Letter). AIB members and Factfinders should refrain from taking actions suggesting otherwise. However, it is appropriate for the investigator to inform the witness of their obligation to participate in the investigation pursuant to 38 C.F.R. §0.735-12(b) and VA Directive 0700. (See Appendix H; Appendix I). If the AIB or Factfinder is unable to obtain cooperation by request or persuasion, it should report uncooperative behavior to, and work through, the Convening/Initiating Authority or other appropriate authority, such as the witness's supervisor, to secure the needed cooperation. Ultimately, non-cooperation is a potential disciplinary matter addressed by the non-cooperative employee's supervisory chain. In self-initiated Factfindings, the Factfinder may be the non-cooperative employee's supervisor, and, in those circumstances, may be able to directly address the non-cooperation in their supervisory capacity. Investigators should confer with OGC on questions regarding addressing a refusal to testify.

- d. COLLECTING EVIDENCE FROM INDIVIDUALS WHO ARE NOT VA EMPLOYEES. Individuals who are not VA employees generally have no obligation to cooperate with an AIB or a Factfinder (unless required to do so by a contract, applicable regulation or other legal authority). While AIBs and Factfinders should seek

relevant evidence from such persons and encourage their cooperation, they should avoid suggesting that such an obligation exists unless specifically provided for in a contract, regulation or legal authority. If you believe such an obligation exists, consult with OGC for guidance.

e. **USING SPECIALIZED INVESTIGATIVE PROCEDURES**

(1) Use of specialized investigative techniques such as covert (undercover) operations, surveillance, polygraphs, identification lineups and similar procedures as part of an administrative investigation is seldom necessary or appropriate. Such techniques are used in law enforcement investigations, and if law enforcement officials completed them, the results may be considered as evidence if made available to an AIB or Factfinder. However, any such techniques should only be used by qualified law enforcement personnel, in accordance with applicable law, and with the concurrence of the Convening/Initiating Authority, based upon the advice of OGC.

(2) Polygraph (“lie detector”) examinations require special considerations. Regulation 38 C.F.R. § 0.735-12(b) does not require VA employees to submit to polygraph examinations. While statements made by a witness in the course of polygraph examinations may be considered as evidence, polygraph results cannot be considered as evidence by an AIB or Factfinder unless the examination was conducted by, and the results certified or confirmed by, a properly authorized Federal or state government official. In addition, polygraph results are not considered conclusive proof of the truth or falsity of any statement. OGC should be consulted prior to utilizing any such information.

f. **DISCOVERING ISSUES OUTSIDE THE SCOPE OF INVESTIGATION.** AIBs and Factfinders often discover information about issues that may merit action or further inquiry but that are outside of the scope of the original investigation. AIBs and Factfinders should provide such information promptly to the Convening/Initiating Authority for appropriate action, including but not limited to expanding the scope of the investigation, conducting a separate investigation or referring the matter to another authority. If the Factfinder is also the Initiating Authority, they can make such determinations and should document their decision within the investigative report.

**3. RESTRICTIONS ON INFORMATION USE AND DISCLOSURE.**

a. All information obtained in an investigation may only be used by the AIB members or Factfinder for the official purpose of the investigation. Disclosure by AIB members or Factfinders outside of the investigation process is not permitted. Please note that there may be VA employees who in their official VA capacity, will need access to AIB files in order to perform a job function. Please confer with OGC as needed prior to making a disclosure to these employees to determine if the requested disclosure is necessary and authorized.

b. Some information relevant to an investigation may not be available to AIB members or Factfinders or may be subject to specific restrictions on disclosure or use. Generally, an individual with custody or possession of such information is responsible for preventing unauthorized disclosure. Disagreements regarding an AIB's or Factfinder's access to and use of such information are resolved by the Convening/Initiating Authority or appropriate privacy staff, such as information policy staff or OGC. The following are examples of information sources that are subject to specific regulations or directives governing disclosure to, and use by, AIBs and Factfinders:

- (1) *Information Protected by the Privacy Act.* An AIB or Factfinder's duties includes finding and evaluating material evidence. They often need access to records protected by the Privacy Act and found in a system of records. Although the Privacy Act generally prohibits disclosure of information about an individual from a system of records, it does contain an exception authorizing disclosure to agency personnel who have a need for that information in the performance of their duties. AIBs and Factfindings are "other duties as assigned." Thus, the Privacy Act is not an obstacle to the disclosure of information to AIB members or Factfinders who have a need for that information in the performance of their duties. Disclosure to AIBs or Factfinders may nevertheless be subject to specific administrative requirements. Keeping in mind that information is only disclosed to AIBs and Factfinders for a limited purpose under the need to know exception, AIBs and Factfinders must refrain from disclosing information derived from a Privacy Act systems of records to other individuals who do not need to now the information to perform their own job duties.
- (2) *Confidential Quality Assurance Records.* Documents protected from disclosure by 38 U.S.C. § 5705 (certain records generated as part of VA healthcare quality assurance reviews, including focused reviews, root cause analyses, etc.) are generally not available to AIBs or Factfinders. Do not review, rely upon or include information which qualifies as a quality assurance record in investigative files or reports. AIB members or Factfinders exposed to such information related to the matter under investigation shall report the exposure to the Convening/Initiating Authority for appropriate action. (See 38 C.F.R. § 17.500 – 17.511; VHA Directive 1320; VA Handbook 0700, Ch. 1, § 7(c)(5)).
- (3) *Patient Medical Records from VHA Privacy Act Systems of Record.* The Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (45 C.F.R. Part 160 and 45 C.F.R. Part 164), requires patient consent, unless there is an exception, for the access to and disclosure of individually identifiable health information. If consent is needed, use VA form 10-5345 to request access to medical records. Redact all medical records utilized by an investigator and included in an investigative report to reveal only the minimum information necessary for its intended use.
- (4) *Employee Health and Employee Assistance Program Records.* See VA

Handbook 5019, Occupational Health Services, Part V, Paragraph 1 (Health Records) and Part VI, Paragraph 10, (Employee Assistance Program Records) regarding use and disclosure of these records. Please note the employee health records maintained in any VA electronic health record will be subject to protection under the HIPAA Privacy Rule, Privacy Act and other applicable VA confidentiality statutes.

- (5) *Patient Records Relating to Drug Abuse, Alcoholism or Alcohol Abuse, HIV or Sickle Cell Anemia*. Such records are protected in accordance with 38 U.S.C. § 7332 and 38 C.F.R. §§ 1.460- 1.496.
  - (6) *Documents Pertaining to Veterans Claims*. See 38 U.S.C. § 5701 limiting the use and disclosure of this information.
  - (7) *National Security (Classified) Information*. Investigations involving such matters are handled as provided in governing regulations and directives. See, e.g. 50 U.S.C. § 435 and implementing executive orders.
  - (8) *Sensitive Law Enforcement Information*. AIB members and Factfinders may be restricted from access to or disclosure of certain law enforcement information.
  - (9) *Drug-Free Workplace Records*. See Human Resources Management Letter (HRML) 05-18-09 and memo issued by the VA Secretary dated August 22, 2018 for guidance on the release of information related to VA Handbook 5383.
- c. AIB members, Factfinders and Convening/Initiating Authorities should confer with OGC as needed whenever issues related to the obtaining or disclosure of information like that described above arise.

#### **4. INVESTIGATIVE FILE: PROTECTING EVIDENCE AND RECORD KEEPING.**

- a. Organize all evidence and information gathered during the investigation in an indexed investigative file. (See Appendix D). Unless otherwise directed or impractical, the evidence should be retained electronically. Examples of when a piece of evidence might be retained non-electronically include:
  - (1) Documents that are too voluminous to scan and do not already exist in electronic form;
  - (2) Documents where preserving the original signature is crucial;
  - (3) Any evidence where the authenticity of the document or evidence is reasonably in question; and
  - (4) Physical evidence; in this instance, consider taking a photograph of the item for inclusion in the list of evidence, while retaining the piece of physical evidence (e.g., a broken chair).

- b. If the investigator takes in items of physical evidence or personal property, document receipt and track custody using VA Form 0206 Evidence Control and Tracking Record.

**NOTE:** *An investigator does not have a right to demand surrender of personal property. Surrender must be voluntary. If personal property is voluntarily surrendered, the individual should be informed that the item might be retained during the duration of any ensuing investigation, and possibly after that. OGC should be consulted regarding any questions on the voluntary surrender of personal property as evidence.*

- c. Most, but not all, of the evidence and information in the investigative file will be cited and/or included as exhibits in the investigative report. The investigative file should include all exhibits, significant correspondence about the investigation, administrative records regarding the investigation, complete copies of items from which information is extracted or summarized for the exhibits and any other information or documents obtained during the investigation. Store the investigative file in a secure location appropriate to the nature of the material included. For guidance as to which investigative file materials should be provided in the investigative report, see Chapters 7 and 8.

## **5. RELEASING INFORMATION.**

- a. During an investigation, AIB members or Factfinders may receive requests for information about the investigation from other investigative organizations, Congress, unions, the media or the public. Forward requests for release of information pertaining to AIBs or Factfindings, or for investigative reports to the Convening/Initiating Authority for action by appropriate staff.
- b. If this is a self-initiated Factfinding, consult with the facility Privacy Officer. In any instance, these issues are addressed by the facility office responsible for responding to requests for release or disclosure of records and information, with advice as needed from OGC. The AIB or Factfinder should never release any information to anyone other than the Convening/Initiating Authority or their designee.

## **CHAPTER 6. WITNESS INTERVIEWS**

**NOTE:** *Unless otherwise indicated, the provisions of this Chapter apply to both AIBs and Factfindings.*

### **1. FORMS OF TESTIMONY AND DOCUMENTATION REQUIREMENTS.**

AIBs and Factfinders may consider any type of testimonial evidence, including documents regarding prior statements or testimony (including statements in email), witness statements, transcripts and notes of prior discussions or interviews, prepared by anyone present (i.e., other investigators or assistant notetakers), in making their Findings of Fact and Conclusions. However, the more relevant the testimony is to the issues of the investigation, the more important it is that the testimony be complete and reliably documented. Do not allow witnesses to make “off the record” statements, as the goal of any investigation is to gather evidence for use in subsequent proceedings.

- a. **SWORN OR AFFIRMED TESTIMONY.** Witness testimony can be affirmed or taken under oath. Affirmed testimony is taken under an affirmation stating that the information provided is true, to the best of the witness’s knowledge and belief, subject to the penalties for perjury, before a person authorized to administer oaths. An oath is identical to an affirmation except that it includes the words, “so help me God.” Testimony provided under oath or affirmation is called sworn testimony. There are also unsworn declarations under penalty of perjury, described in more detail below. These types of testimony are equally reliable.

Oaths and affirmations for witness testimony (including affidavits) are administered by a notary public (which generally would include court reporters) or by any person delegated the Secretary’s authority to administer oaths under 38 U.S.C. § 5711, which is delegated to Convening Authorities in VA Directive 0700. The Convening Authority can redelegate this authority to AIB Members in the Charge Letter. This authority remains in effect for the duration of the investigation. (See Appendix A). There is no such delegation of this authority to Initiating Authorities or Factfinders.

- b. **DIFFERENCE IN TESTIMONY COLLECTION BETWEEN AIBS AND FACTFINDINGS**

- (1) For AIBs only, all testimony must be sworn, affirmed or given under penalty of perjury and must be documented via a verbatim transcript, an affidavit or an unsworn declaration under penalty of perjury as described below. Provide witnesses an opportunity to review transcripts or summaries of their own testimony, to submit transcription corrections (errata sheets) and to explain or supplement their testimony by submitting an affidavit or declaration.
- (2) For Factfindings, unless good cause is shown, testimony under oath or affirmation or a verbatim transcript of the testimony is usually not required. If the Factfinder determines such formal witness testimony is needed, the Initiating Authority should consider referring the matter to a Convening

Authority for an AIB. Nevertheless, Factfindings should contain reasonable documentation of witness testimony or statements. This includes written statements, unsworn declarations under penalty of perjury or information provided by witnesses through more informal means, such as emails describing the issue or incident, as described below. Witnesses should be allowed to review their own testimony or statements, to submit corrections and to explain or supplement their testimony or statements by submitting a declaration or other form of written testimony.

- c. **FORMS OF TESTIMONY.** In an AIB, testimony from key or essential witnesses should be transcribed by a court reporter. For Factfindings, testimony is generally obtained via witness interviews, which are then reduced to writing. For example, a Factfinder can interview a witness, take detailed notes and draft the information into a written form for the witness to review, correct as needed and sign. Alternatively, statements can consist of written questions for the witness to respond to in writing. However, that method should only be used when the information being provided is very straightforward and will not need follow up or clarifying questions (i.e., when asking a subject matter expert to provide information on a policy or technical issue). All documentation of witness testimony is preserved in the investigative file (including drafts of witness testimony) and, if material, attached to the investigative report as an exhibit as described in Chapters 7 and 8.

There are several available forms and options for documenting testimony, and samples are provided in Appendix K. The forms of testimony, beginning with the most formal and continuing to the least formal, are:

- (1) *Sworn or Affirmed Verbatim Testimony.* This is a verbatim record of sworn testimony, also referred to as a transcribed interview. A court reporter participates and transcribes the interview. A written transcript is prepared and should be provided to the witness to review and submit any transcription corrections (errata sheet). This form of testimony should be used in AIBs, particularly for interviews of the most important or material witnesses. As noted above, this is not used in Factfindings.
- (2) *Affidavits.* An affidavit is a written statement under oath or affirmation administered by a person authorized to do so. This authorized person will typically sign the document to affirm that they have observed the witness sign the document. This form of testimony should be used in AIBs, for less important or collateral witnesses. This is not typically used in Factfindings. (See Appendix K3).
- (3) *Unsworn Declarations under Penalty of Perjury.* This is a written statement by a witness signed under the provisions of 28 U.S.C. § 1746. Such a declaration contains a statement signed by the witness that, “I declare (or certify, verify or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).” This form of testimony is appropriate for both AIBs and Factfindings and does not require any authorization to issue an oath. Generally, it is used for minor witnesses in an AIB or for the

most important or relevant witnesses in a Factfinding. (See Appendix K2).

- (4) *Written Statements or Declarations*. This is a written statement signed by a witness that is not sworn or taken under penalty of perjury. It is the same as an unsworn declaration but does not require the witness to sign the statement regarding the penalty of perjury. This form of testimony is appropriate for Factfindings. (See Appendix K1).
  - (5) *Summaries of Witness Interviews*. This is a written summary of an interview conducted by an investigator, which can be compiled based upon the notes of anyone present for the interview (i.e., designated notetakers, etc.), which is not reviewed or signed by the witness. This form of testimony is appropriate for Factfindings when the issue is minor or the witness has limited information. It should not be used if a witness's testimony is central to analyzing the issue at hand.
  - (6) *Informal Descriptions from Witnesses*. This is an informal written description directly from witnesses and is appropriate for Factfindings into simple or minor issues. For example, for a non-serious coworker dispute that occurred in front of several coworkers, a Factfinder can ask everyone who was present to email them a full description of what they observed during a dispute. These are also used in Preliminary Inquiries.
  - (7) Audio recordings of witnesses, other than those taken by court reporters, should not be used as evidence, as written testimony is most efficient for administrative investigations.
- d. **PRELIMINARY INTERVIEWS**. In some circumstances, it may be beneficial to hold a preliminary interview with potential witnesses. It can be useful to meet with a witness prior to a transcribed testimonial interview, to determine the extent of a witness's knowledge of material facts, to provide notices, to determine whether the witness will exercise any applicable rights and/or to schedule subsequent interviews. During Factfindings, such a preliminary interview could be used to determine if a full interview is needed (i.e., to assess if the witness has relevant knowledge or information). Depending on the complexity of the information provided, the preliminary interview may provide a basis for a declaration (or other written testimony). Preliminary interviews also build rapport, save time and costs and reduce digressions in a subsequent testimonial interview. Preliminary interviews may also obviate the need for more formal transcribed testimony elicited by an AIB (i.e., if it becomes evident the witness has no relevant information). Preliminary interviews may not be appropriate if the investigator is concerned about a witness improperly influencing the testimony of other witnesses, changing testimony or for other reasons.

Preliminary interviews trigger the witness obligations and protections described in Section 2 below.

## 2. PROCEDURE FOR WITNESS INTERVIEWS.

- a. **WITNESS OBLIGATIONS AND PROTECTIONS.** Investigators are responsible for affording witnesses any rights they are entitled to under law, regulation, policy or collective bargaining agreements during the investigation, as summarized below. (See Appendix H; Appendix I). Refer questions regarding witness obligations, protections and related matters to OGC.
- (1) *Obligations to Cooperate.* VA employees are required to provide testimony as discussed at Ch. 5, § 2(c)(1).
  - (2) *Witness Rights and Protections.* Administrative investigations are not a substitute for due process requirements, such as those for personnel actions. Witnesses do not have the due process rights that apply to such proceedings, even if they are the subject of an investigation. For example, they generally have no right to review, challenge or present evidence, to challenge AIB members or Factfinders or to cross-examine witnesses. Witnesses do not have the right to review the substance of the complaints against them or to “confront their accuser” during the investigation. Certain rights and protections established by law, regulations, policies or collective bargaining agreements nevertheless may affect the investigation’s procedure. These include:
    - (a) Rights established under collective bargaining agreements for covered employees;
    - (b) The statutory right under 5 U.S.C. § 7114 of an employee covered by a collective bargaining agreement who reasonably believes interview responses may result in disciplinary action against him or her to have the assistance of a union representative at the interview (i.e., Weingarten rights);
    - (c) Rights under the WPA, VAAWPA and other Federal laws that prohibit reprisal for disclosure of information evidencing violations of law or regulations, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public health or safety;
    - (d) The requirement under VA Directive 0700 for Convening/Initiating Authorities to protect witnesses from reprisal for lawful cooperation with an administrative investigation; and
    - (e) Witnesses are not required to provide self-incriminating testimony that could be used to prove criminal charges. If a witness refuses an interview or to respond to certain questions, invoking their right against self-incrimination or by “pleading the fifth,” the AIB or Factfinder should contact OGC for guidance. A witness can be compelled to give such self-incriminating testimony in an administrative interview with assurances that such testimony will not be used in any criminal proceeding, commonly referred to

as a *Kalkines* warning. However, this assurance typically requires approval from a U.S. Attorney and must be coordinated with OGC. (See Appendix H).

- b. **NOTICE AND ADVICE REGARDING WITNESS RIGHTS AND OBLIGATIONS.** The investigator is responsible for ensuring that witnesses receive any required notice concerning their participation in the investigation. (See Appendix I, Sample Notice of Witness Obligations, Protections and Privacy Act Matters). Provide a copy of Appendix I or a similar notice to each witness who provides signed or sworn testimony and obtain a signed copy from the witness (or a record of any refusal to sign) to retain in the investigative file.
- c. **EVIDENCE FROM VA PATIENTS.** VA patients who are witnesses to, or subjects of, alleged staff misconduct, patient safety incidents or other incidents triggering the need for the AIB or Factfinding are not required to cooperate in the administrative investigation. Their participation is voluntary, and clinical factors will impact patient interviews. If a witness is both an employee and a VA patient, their role in the issue or event at hand is determinative (i.e., if the witness's treatment as a patient is at issue or if they observed an incident while in the facility as a patient, then follow these provisions, but if the issue involves the witness's conduct or observations while in their role as an employee as described in Ch. 6, § 2(a)(1) above applies).

Prior to interviewing any VA patient, the investigator should request from the patient's treating provider (or other appropriate provider): (1) confirmation that the patient is clinically stable; and (2) clearance to approach the patient for an interview. The treating provider should not provide this information if their alleged misconduct is the subject of the investigation. In these cases, another provider should give the needed clinical clearance and may, if needed, consult with the Chief of Staff.

Any questions or concerns regarding obtaining testimony should be directed to OGC.

- d. **RELIABILITY OF PATIENT WITNESS TESTIMONY.** The AIB or Factfinder needs to be particularly mindful of a patient-witness's ability to accurately observe, recall and report observations. If the AIB or Factfinder has reason to believe that a willing and stable patient-witness has a medical condition that substantially affects the patient's ability to accurately observe, recall and report facts, a written opinion should be provided from the treating provider (or other appropriate provider, if the treating provider is the subject of the investigation) on the patient's ability to do so. Investigators may still consider the patient's testimony but must factor in any limitations on the patient's ability to observe, recall and report in making credibility determinations, and in affording the testimonial evidence appropriate weight. If a patient is not stable (including from a mental health status) or lacks decision-making capacity, then the patient would not be considered reliable and should not be asked to participate, and neither the patient's legal representative nor the patient's surrogate health care decision-maker may provide the needed consent on behalf of the patient.

- e. **USE OF PRIOR WITNESS TESTIMONY OR STATEMENTS.** Although obtaining direct witness testimony is preferable, the investigator may use any previous statements of a witness as evidence on factual issues. Prior testimony can almost always be used, regardless of whether: the testimony was taken as part of a prior investigation or administrative or judicial proceeding; the witness is available to testify in the current investigation; the prior testimony was sworn or unsworn, oral or written, etc.; or the testimony was collected during a previous stage of the current investigation, such as during a Preliminary Inquiry. The weight of the prior testimonial evidence will vary depending on the circumstances. Consistency and/or inconsistency in testimony over time can be considered as evidence, particularly when assessing witness credibility.
  
- f. **REQUESTS FOR REPRESENTATION AT INTERVIEWS**
  - (1) Except for employees covered by a collective bargaining agreement as discussed above, witnesses have no right to the assistance of representatives, attorneys or advisors (collectively, representatives) at witness interviews. The AIB or Factfinder determines who may be present for interviews. AIBs or Factfinders should generally grant requests for a representative from witnesses who may be subjects of the investigation, unless granting such a request will significantly prolong or disrupt the investigation, impair the factfinding process, result in significantly increased costs, or there is other good cause for denial.
  
  - (2) Give witnesses reasonable opportunities to consult with their representatives to help them present and review their testimony and statements. Representatives cannot interrupt answers to questions, answer for the witness, obstruct the interview or review information other than that provided to the witness. Ideally, the AIB or Factfinder should contact the representative prior to the interview to ensure a mutual understanding of their limited role, specifically that they are there to advise, not to testify on behalf of the witness, and that the representative does not have the right to object to questions posed, unless it concerns an issue of attorney-client privilege or the right against self-incrimination.
  
  - (3) The investigator shall require the witness to designate a representative in writing, and representatives must agree to be bound by the witness's obligations against disclosure. (See Appendix J, Sample Designation of Advisor/Union Representative). Witnesses, and others involved in the investigation or the matter investigated, may not serve as representatives. The witness bears all costs of providing a representative except that a VA union representative official may be entitled to Official Time in accordance with current law, policy or collective bargaining agreement.

### **3. INVESTIGATIVE FILE: DOCUMENTING TESTIMONY.**

- a. As noted in Ch. 5, § 4, all evidence gathered during the investigation should be kept in an indexed investigative file. (See Appendix D, Sample Investigative File

Index). This includes all records of materials related to witnesses' testimony, including but not limited to correspondence between the investigator and the witness, drafts of statements and revisions made by the witnesses, any documents submitted by the witnesses and notes taken during interviews by the investigators. Store the investigative file in a secure location appropriate to the nature of the material included.

- b. Generally, only the final witness transcript or written statements, as described in Chapter 6, should be an exhibit to the investigative report, which is described in Chapters 7 and 8.

#### **4. RELEASING WITNESS TESTIMONY.**

- a. Factfinders and AIBs should not release or share witness testimony outside of the submission of the investigative report to the Initiating/Convening authority. Do not provide witnesses with transcripts of other witnesses' testimony or declarations. Investigators can and should interview witnesses about information that they obtained from others but should not provide them with copies outside of the interview room or allow them to make copies. Best practice is to read the prior witness statement to the current witness and ask for a response.
- b. If AIB members or Factfinders receive requests for information about witness statements from other investigative organizations, Congress, unions, the media, witnesses, the subject or the public, they should forward requests for release of the testimony to the Convening/Initiating Authority for action by appropriate staff. In a self-initiated fact finding, consult with the facility privacy officer. In any instance, these issues are addressed by the facility office responsible for responding to requests for release or disclosure of records and information, with advice as needed from OGC. The AIB or Factfinder should never release any information to anyone other than the Convening/Initiating authority or their designee.

## **CHAPTER 7: AIB INVESTIGATIVE REPORTS**

### **1. GENERAL.**

- a. The investigative report is the primary end-product of an AIB. The evidence gathered and the analysis done by the AIB can only be used effectively if it is incorporated into a report that objectively addresses the issues under investigation by presenting the relevant Findings of Fact and Conclusions, supported by the included evidence.
- b. Use the standard format for the investigative report unless the Convening Authority authorizes a summary format. Sample reports of investigation have been provided in Appendix L (Summary Format) and Appendix M (Standard Format). See discussion below in Sections 2 and 3.
- c. Unless the Convening Authority specifies otherwise, present the investigative report electronically using Adobe Acrobat or any similar portable document format (PDF) program which provides for bookmarking and a table of contents. Send the investigative report to the Convening Authority electronically using encryption or any other suitable method to ensure the security of the document. The Convening Authority is responsible for ensuring that the AIB has access to the technology necessary to produce and securely share the investigative report.

### **2. INVESTIGATIVE REPORT – STANDARD FORMAT.**

- a. **GENERAL ORGANIZATION.** The AIB should organize and prepare the report to effectively convey the Findings of Fact and Conclusions, and the evidence upon which they are based, to the Convening Authority and other potential readers. Arrange material chronologically, by topic or issue or in another logical manner. Identify each Finding of Fact and Conclusion clearly as such and appropriately number (or letter) each for cross-referencing and citation.
- b. **REQUIRED CONTENT.** The investigative report is a memorandum to the Convening Authority, which shall include, at a minimum, the following:
  - (1) *Subject Line.* The subject line shall succinctly identify the matter investigated and will usually be the same as that of the Charge Letter. The subject line **shall not** identify individuals who are subjects of investigation by name, social security number or another personal identifier.
  - (2) *Preliminary Statement.* The preliminary statement shall identify the authority for conducting the investigation (i.e., the Charge Letter), the scope of the investigation (including any limitations or restrictions), a list or summary of the witnesses interviewed and other information necessary for the reader to understand the nature of the investigation. It should also alert the reader to significant procedural matters and to any important evidence.

(3) *Findings of Fact*

- (a) Findings of Fact are factual statements, relevant to the issues under investigation, that the AIB has determined to be true or false and that are not subject to reasonable dispute. A statement is “factual” if it describes an event or thing in a manner that does not require substantial interpretation or characterization. Examples are objective statements of things seen, heard, touched, smelled, tasted, thought, believed, measured or determined by established scientific or mathematical processes.
- (b) A statement is not subject to reasonable dispute if it is:
  - i. Supported by evidence objectively establishing its truth;
  - ii. Not substantially contradicted by other evidence; and
  - iii. Free from inferences or interpretations (including credibility determinations) that are reasonably disputed.

Determinations by the AIB that do not meet all these criteria are Conclusions, as described below.

- (c) Findings of Fact shall be specific with respect to times, places, persons and events. Each Finding of Fact shall specifically cite to the exhibit number containing the evidence upon which it is based. Citations to transcripts and exhibits shall include the page numbers. Examples of Findings of Fact are in Appendices L and M.

(4) *Conclusions*

- (a) AIBs resolve disputed issues in the Conclusions, which must be supported by a preponderance of the evidence. In other words, Conclusions require interpretation or assessment of conflicting evidence, including credibility issues. Essentially, Conclusions are the AIB’s findings on disputed facts or issues. State each Conclusion clearly and include a concise statement of the basis for that Conclusion, including the facts, supporting evidence, applicable standard, VA policy or other factors upon which the Conclusion is based. The AIB investigative report should identify any evidence that materially conflicts with the AIB’s Conclusion and discuss the AIB’s process in resolving of the conflict (i.e., it should describe why the AIB found the Conclusion to be more reasonable than any feasible alternatives).
- (b) Conclusions should primarily resolve disputed facts material to the issues. The AIB need not, and in most cases should not, draw ultimate legal conclusions regarding such matters as litigation risk, whether an act constituted negligence, whether VA or an individual is financially liable or entitled to remedies and similarly complex legal issues. Including such

legal conclusions in an investigative report can jeopardize important Governmental interests. If such determinations are needed, the Convening Authority should request a separate legal analysis from OGC. Examples of Conclusions are in Appendices L and M.

**NOTE:** *Certain adverse actions may be based on substantial evidence, which is a lower burden of proof. Therefore, the conclusions made by AIBs that an issue is not substantiated under the preponderance of the evidence standard are not determinative in those adverse actions. Nonetheless, the evidence in the AIB's investigative report may be utilized to support a disciplinary or adverse action. Proposing and deciding officials should refer to the applicable human resources policy and guidance, including VA Directive and Handbook 5021, and confer with their servicing human resources specialist regarding disciplinary matters. (See Ch. 2, § 3(a)).*

*In matters which may lead to adverse actions, i.e. investigations involving employee misconduct, the AIB investigative report should include the following language after the conclusions in their report:*

**NOTE:** *These conclusions were made under a preponderance of the evidence standard of proof. Certain adverse actions may be based upon a different, and lower, burden of proof, substantial evidence. Therefore, the conclusions made by AIBs under the preponderance of the evidence standard are not determinative in those adverse actions. Nonetheless, the evidence in the AIB's investigative report may be utilized to support a disciplinary or adverse action. Proposing and deciding officials should refer to the applicable human resources policy and guidance, including VA Directive and Handbook 5021, and confer with their servicing human resources specialist regarding disciplinary matters. (See VA Handbook 0700, Ch. 2, § 3(a)).*

*(See Appendix L; Appendix M).*

- (5) **Signature.** Each member of the AIB shall sign the report; an electronic signature is preferred. Include a statement in the investigative report explaining why any member did not sign, which should only occur in extraordinary circumstances. The signature indicates that the report accurately reflects the investigation and that each Finding of Fact, Conclusion and Recommendation (if included) reflects the view of a majority of the AIB members.
- (6) **Exhibits.** For any material evidence considered or otherwise referred to in the Findings of Fact or Conclusions, the AIB shall attach a separately numbered evidentiary exhibit to the report, consisting of a copy, photograph or description of the evidence relied upon. Also include declarations, affidavits and transcripts of testimony as exhibits. Include an index identifying each exhibit by number, description and source. (See Appendix L; Appendix M).

c. OPTIONAL CONTENT

- (1) *Separate Opinions.* Any member who disagrees with a material part of the report may prepare and attach a signed separate opinion, identifying those matters with which the member disagrees, the specific reasons therefor and any evidence relied upon.
- (2) *Recommendations.* Only include Recommendations in an investigative report if specifically authorized by the Convening Authority. (See Ch. 3, § 6). If authorized to make Recommendations regarding disciplinary action, an AIB may recommend only “appropriate disciplinary action” and should specify the acts of misconduct which warrant disciplinary action. The AIB shall not recommend a specific disciplinary level or penalty, specific charge or type of punishment, as those issues will be determined pursuant to VA Directive and Handbook 5021 or other applicable human resources policy. Any Recommendations:
  - (a) Shall be firmly based on the evidence, Findings of Fact and Conclusions in the investigative report;
  - (b) Shall clearly state the evidence, Findings of Fact or Conclusions upon which they are based; and
  - (c) Shall be stated in terms such that the Convening Authority can implement them (e.g., if the proposed action is beyond the authority of the Convening Authority, the AIB will recommend that the Convening Authority propose the action to the appropriate authority or office within VA).
- (3) *Executive Summary.* The AIB may summarize the investigation’s scope, issues, Findings of Fact and Conclusions in an executive summary, which can be used as a transmittal letter for the investigative report. Such a summary is particularly helpful for investigations with complex Findings or Conclusions. Executive summaries do not constitute the formal Findings of Fact or Conclusions of the AIB.
- (4) *Explanatory Material.* The AIB should consider including helpful diagrams and charts, organizational charts and witness identification lists with the report as exhibits.
- (5) *Important correspondence.* Include important correspondence about the investigation, such as objections by witnesses or their representatives or coordinating letters regarding investigations, as exhibits to the investigative report.

### 3. INVESTIGATION REPORT – SUMMARY FORMAT.

The summary report format differs from the standard report format as follows:

	<b>STANDARD FORMAT REPORT</b>	<b>SUMMARY FORMAT REPORT</b>
<b>Authority</b>	Used unless summary format is specifically authorized by Convening Authority in the Charge Letter.	May only be used if specifically authorized by Convening Authority in the Charge Letter.
<b>Preliminary Statement</b>	The preliminary statement must include authority, scope, list of witnesses and all significant problems and procedural matters.	The preliminary statement must identify the Charge Letter but need not restate the scope of the investigation or address procedural matters if documented by exhibits.
<b>Issues</b>	AIB must determine and address all issues within the scope of the investigation, even if not specified in the Charge Letter.	The report is not required to address issues other than those specified in the Charge Letter.
<b>Findings of Fact</b>	Each Finding of Fact must identify and cite to the exhibits upon which it is based.	Findings of Fact do not have to cite the evidence supporting each individual finding; however, the supporting evidence must still be included with the report. Findings of Fact are still distinguished from Conclusions.
<b>Conclusions</b>	Each Conclusion is supported by an analysis showing the evidence, facts, standards or other information upon which it is based.	Conclusions do not have to include the supporting analysis if the basis for the Conclusion is reasonably apparent from the Findings of Fact and attachments.
<b>Exhibits</b>	Evidence upon which the Findings of Fact and Conclusions are based is included in attached exhibits.	Exhibits include both evidence and administrative documents.

#### **4. FORWARDING, REVIEWING AND CERTIFYING THE INVESTIGATIVE REPORT.**

- a. **FORWARDING TO THE CONVENING AUTHORITY.** Forward the investigative report to the Convening Authority within the time prescribed in the Charge Letter. (See Ch. 7, § 1(c)).
- b. **REVIEW BY THE CONVENING AUTHORITY.** When received, the Convening Authority shall review the report and exhibits for compliance with the Charge Letter and this handbook. The Convening Authority may request legal or other technical reviews of the report and may return the investigative report to the AIB for further investigation or clarification as needed.
- c. **CERTIFICATION BY THE CONVENING AUTHORITY.** Within 30 calendar days of receiving the initial or supplemental investigative report, or as soon as practicable thereafter, the Convening Authority shall certify the investigation complete. The certificate shall state that the report was reviewed for compliance with VA Directive 0700 and this handbook, and that the subject of the report was thoroughly investigated. If more than 30 calendar days have elapsed since receipt of the report, the Convening Authority shall document in the certificate any reasons for the delay (e.g. time required for additional investigation, legal review, etc.). In the certificate of completion, the Convening Authority may add, delete, otherwise modify or comment upon the Findings of Fact, Conclusions or other matters in the report, and may append additional exhibits or attachments. Any modification of the report shall include a concise statement of the reasons for the change. The Convening Authority may also note in the certificate any action taken regarding the matter investigated as of the date of the certification. However, specific disciplinary or adverse action taken shall not be associated with an employee's name or unique identifier associated with the employee. Completion of the investigation does not preclude further inquiry or action based on the matter reported. Once the investigation is certified complete, the Convening Authority should provide written notice that the investigation is complete to AIB members, subjects of the investigation, other addressees of the Charge Letter and other interested persons or organizations as appropriate. (See Appendix N, Sample Completion Certificate for AIBs).
- d. **FAILURE OR REFUSAL TO CERTIFY.** If for good reason shown, the Convening Authority either fails to or specifically determines not to sign the Certificate certifying completion, the AIB report and all exhibits remain pre-decisional for purposes of Freedom of Information Act (FOIA) disclosure.
- e. **SUBSEQUENT REVIEW.** AIBs are closed when the investigative report is certified complete by the Convening Authority. At that point, shred or delete all materials retained by the Board members (the investigative file should be maintained as described below). Any authority senior to the Convening Authority in the supervisory chain may forward the report for further review or action and may direct the Convening Authority to take further action, including but not limited to reopening

or expanding the scope of the investigation, conducting supplemental investigations or responding to specific questions.

## **5. FILING AND RETENTION.**

- a. **RETENTION PERIOD.** Retain AIB investigative files for a minimum of seven (7) years. Retain the files for a longer period if an adverse action is taken and/or appealed or otherwise challenged. OGC can provide information regarding timeframes for such claims or appeals.
- b. **ORIGINAL INVESTIGATIVE FILES AND REPORTS ARE NOT SUBJECT TO THE PRIVACY ACT**
  - (1) The original investigative files and reports focus on issues described in the Charge Letter and collect evidence about individuals only to the extent that such evidence appears to be material to the issues of the investigation. These original investigative files are not included in a VA Privacy Act systems of records from which information is retrieved by names or unique personal identifiers (i.e. “systems of records” subject to the Privacy Act).
  - (2) An analysis of how much information can be disclosed from the original investigative file should start from the identification as to what is minimally necessary to accomplish the investigative or fact-finding objective which led to the request for the original investigative file information. Please note that a disclosure from the original investigative file may lead to the original file information disclosed ultimately ending up in a Privacy Act system of records (e.g., a human resource’s file) and thus subject to all Privacy Act requirements.
  - (3) If you have any questions about a disclosure from an original investigative file, please refer your questions to the appropriate Privacy Officer.

## **CHAPTER 8: FACTFINDING INVESTIGATIVE REPORTS**

### **1. GENERAL.**

- a. The investigative report is the end-product of a Factfinding. The evidence gathered and the analysis done by a Factfinder is only effective if incorporated into a report that objectively addresses the issues under investigation by presenting the Findings of Fact and Conclusions supported by the included evidence. However, Factfinding investigative reports do not require most of the formalities associated with AIB investigative reports. There are no strict requirements for the content and form of a Factfinding investigative report; it can be tailored as needed to fit the circumstances. It must contain full documentation of the evidence gathered.
- b. Appendix O provides a sample of a completed Factfinding investigative report and a fillable form with space for all information that an Initiating Authority and a Factfinder needs to include will be available from OGC.
- c. If not utilizing the report format provided in Appendix O, present the investigative report electronically using Adobe Acrobat or any similar PDF program which provides for bookmarking and a table of contents. Send the investigative report to the Initiating Authority, if there is one, electronically using encryption or any other suitable method for ensuring the security of the document. The Initiating Authority is responsible for ensuring that the Factfinder has access to the technology necessary to produce and securely share the investigative report.

### **2. FORMAT AND CONTENT OF INVESTIGATIVE REPORT.**

- a. **GENERAL ORGANIZATION.** There is no standard required format or organization for Factfinding investigative reports. The investigative report must be in writing and contain the full documentation of the evidence gathered. Organize the investigative report in a manner which is easily understandable to the reader and which clearly identifies the evidence gathered and relied upon. For most Factfindings, the investigative report format at Appendix O will be the most efficient manner to document the investigation.
- b. **REQUIRED CONTENT**
  - (1) *Findings of Fact.* Findings of Fact are factual statements, relevant to the issues under investigation, that the Factfinder has determined to be true or false, and that are not subject to reasonable dispute. A statement is “factual” if it describes an event or thing in a manner that does not require substantial interpretation or characterization. Examples are objective statements of things seen, heard, touched, smelled, tasted, thought, believed, measured or determined by established scientific or mathematical processes.
    - (a) A statement is not subject to reasonable dispute if it is:

- i. Supported by evidence objectively establishing its truth;
  - ii. Not substantially contradicted by other evidence; and
  - iii. Free from inferences or interpretations (including credibility determinations) that are reasonably disputed.
- (b) Determinations by the Factfinder that do not meet all these criteria are listed as Conclusions, described below.
- (c) Findings of Fact shall be specific with respect to times, places, persons and events.
- (d) Each Finding of Fact may cite to the exhibits containing the evidence upon which it is based. Citations to transcripts and exhibits by number shall include the page numbers of the evidence.

## (2) *Conclusions*

- (a) Factfinders resolve disputed issues in the Conclusion supported by a preponderance of the evidence. In other words, Conclusions require interpretation or assessment of conflicting evidence, including credibility issues. Essentially, Conclusions are the Factfinder's findings on disputed facts or issues. State each Conclusion clearly and accompany it with a concise statement of the basis for that Conclusion, including the facts, supporting evidence, applicable standard, VA policy or other factors upon which the Conclusion is based. The investigative report should identify any evidence that materially conflicts with the Factfinder's Conclusion and discuss the Factfinder's process of resolving the conflict (i.e., it should describe why the Factfinder found the Conclusion to be more reasonable than any feasible alternatives).
- (b) Conclusions should primarily resolve disputed facts material to the issues. The Factfinder should not draw ultimate legal conclusions regarding such matters as litigation risk, whether an act constituted negligence, whether VA or an individual is financially liable or entitled to remedies and similarly complex legal issues. Including such conclusions in an investigative report can jeopardize important interests of the United States. If such determinations are needed, the Initiating Authority should confer with OGC and assess whether the issues are complex enough to warrant an AIB. Examples of Conclusions are provided in Appendix O.

**NOTE:** *Certain adverse actions may be based upon substantial evidence, which is a lower burden of proof. Therefore, the conclusions made by Factfinders that an issue is not substantiated under the preponderance of the evidence standard are not determinative in those adverse actions. Nonetheless, the evidence in the investigative report may be utilized to support a disciplinary or adverse action. Proposing and deciding*

*officials should refer to the applicable human resources policy and guidance, including VA Directive and Handbook 5021, and confer with their servicing human resources specialist regarding disciplinary matters. (See Ch. 2, § 3(a)).*

*In matters which may lead to adverse actions, i.e. investigations involving employee misconduct, the investigative report should include the following language after the conclusions in their report:*

**NOTE:** *These conclusions were made under a preponderance of the evidence standard of proof. Certain adverse actions may be based upon a different, and lower, burden of proof, substantial evidence. Therefore, the conclusions made by the Factfinder under the preponderance of the evidence standard are not determinative in those adverse actions. Nonetheless, the evidence in the investigative report may be utilized as evidence in a disciplinary or adverse action. Proposing and deciding officials should refer to the applicable human resources policy and guidance, including VA Directive and Handbook 5021, and confer with their servicing human resources specialist regarding disciplinary matters. (See VA Handbook 0700, Ch. 2, § 3(a)).*

*(See Appendix O).*

- (3) *Signature.* The Factfinder shall electronically sign the report. A signature indicates that the report accurately reflects the investigation and that each Finding of Fact and Conclusion reflects the view of the Factfinder.
- (4) *Exhibits.* For any material evidence considered or otherwise referred to in the Findings of Fact or Conclusions, the Factfinder shall include a separately numbered evidentiary exhibit with the report, consisting of a copy, photograph or description of the evidence relied upon. Also include declarations, affidavits and transcripts of testimony as exhibits. Examples of exhibits and an exhibit index can be found in Appendix O.

### **3. COMPLETION OF FACTFINDING.**

The Factfinder's signature on the final investigative report indicates that the report is complete and that the Factfinding is closed.

### **4. FILING AND RETENTION.**

- a. **RETENTION PERIOD.** Retain Factfinding investigative files for a minimum of seven (7) years. Retain the files for a longer period if corrective action is taken. This includes appeals of any disciplinary action or claims for or against VA. OGC can provide information regarding timeframes for claims or appeals.
- b. **ORIGINAL INVESTIGATIVE REPORTS ARE NOT SUBJECT TO THE PRIVACY ACT**

- (1) The original investigative files and reports focus on issues described in the Authorization Letter and collect evidence about individuals only to the extent that such evidence appears to be material to the issues of the investigation. These original investigative files are not included in a VA Privacy Act systems of records from which information is retrieved by names or unique personal identifiers (i.e. “systems of records” subject to the Privacy Act).
- (2) An analysis of how much information can be disclosed from the original investigative file should start from the identification as to what is minimally necessary to accomplish the investigative or fact-finding objective which led to the request for the original investigative file information. Please note that a disclosure from the original investigative file may lead to the original file information disclosed ultimately ending up in a Privacy Act system of records (e.g., a human resource’s file) and thus subject to all Privacy Act requirements.
- (3) If you have any questions about a disclosure from an original investigative file, please refer your questions to the appropriate Privacy Officer.

**APPENDICES**

**APPENDIX A. SAMPLE AIB CHARGE LETTER**

**APPENDIX B. ADMINISTRATIVE INVESTIGATION BOARD CHECKLIST**

**APPENDIX C. TIPS FOR EFFECTIVE ADMINISTRATIVE INVESTIGATIONS**

**APPENDIX D. SAMPLE INVESTIGATIVE FILE INDEX**

**APPENDIX E: ISSUE ANALYSIS WORKSHEET**

**APPENDIX F. WITNESS PLANNING WORKSHEET**

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**APPENDIX L. SAMPLE AIB INVESTIGATIVE REPORT –SUMMARY FORMAT**

**APPENDIX M. SAMPLE AIB INVESTIGATIVE REPORT –STANDARD FORMAT**

**APPENDIX N. SAMPLE COMPLETION CERTIFICATE FOR AIBs**

**APPENDIX O. SAMPLE FACT FINDING REPORT**

## APPENDIX A. SAMPLE AIB CHARGE LETTER

**NOTE:** *Language in italics should be included or adapted as appropriate.*

**Date:** [Date]  
**From:** [Convening Authority, Facility Name]  
**Subject:** Administrative Investigation Board (AIB regarding [e.g., "Alleged Conduct Unbecoming."])  
**To:** [Names of AIB members]

1. You are hereby appointed to an Administrative Investigation Board (AIB). \_\_\_\_\_ *shall serve as chair of the AIB.* The AIB shall conduct a thorough investigation into the facts and circumstances *regarding an allegation that [identify the scope of the matter to be investigated, including the nature of the conduct alleged, the approximate date, location and individuals involved, and any documents describing the matter].*
2. This memorandum authorizes you to inquire into all aspects of this matter; to require VA employees to cooperate with you, as provided in VA Handbook 0700, Ch. 5, § 2; to require all employees having any knowledge of the complaint to furnish testimony under oath or affirmation without a pledge of confidentiality; to obtain voluntary sworn testimony from other individuals; to administer oaths and affirmations; and to gather other evidence that you determine is necessary and relevant. These authorities are delegated for the purposes and duration of this investigation only. Conduct and report your investigation in accordance with VA Directive 0700 and VA Handbook 0700 (Administrative Investigation Boards and Factfindings), *and [List other specific governing policies and other pertinent laws, policies, regulations or collective bargaining agreements].*
3. Preparations for the investigation should begin *[immediately]*. Your investigation should begin within *two weeks* of the date of this memorandum. You shall submit your completed report and investigative file to me within *[45]* calendar days of this memorandum's date, unless an extension is granted.
4. *Include any specific guidance/limitations for investigation or report contents; e.g. "You shall coordinate your investigation with the concurrent investigation of the Office of the Inspector General into \_\_\_\_\_ (related matter); You need not inquire into \_\_\_\_\_, which is being investigated separately.*
5. *Your report [may/shall] be submitted in [standard/summary] format, as described in VA Handbook 0700, Ch. 7. Your report shall specifically include Findings of Fact and Conclusions regarding the following issues: \_\_\_\_\_.*
6. *You may/ shall make any appropriate Recommendations/ you shall make Recommendations regarding the following matters only: \_\_\_\_\_.*
7. *The following personnel are detailed as staff to the investigation:*
  - a. *NAME, PHONE NUMBER, EMAIL, FUNCTION*

*b. NAME, PHONE NUMBER, EMAIL, FUNCTION*

8. *Please contact \_\_\_ at \_\_\_\_\_ to make travel arrangements. Contact \_\_\_\_\_ for any other administrative support required. For any necessary legal support, contact General Counsel at \_\_\_\_\_. For matters requiring my personal attention, please contact [Identify point of contact or “me directly”] at \_\_\_\_\_.*

*[Convening Authority’s Signature block]*

*Attachments: [E.g. statements, prior reports, etc.]*

*CC: [Detailed staff, contacts identified, other organizations as appropriate]*

**APPENDIX B. ADMINISTRATIVE INVESTIGATION BOARD CHECKLIST**

**NOTE:** *The following checklist provides a generic approach to planning a complex, multi-member Administrative Investigation Board and should be adapted by the Members or chair as necessary for the needs of a particular matter.*

**1. LEARN ABOUT AIBs, THE ISSUES FOR YOUR AIB AND YOUR ROLE.**

- Read the Charge Letter (and any attachments) and VA Directive and Handbook 0700 (including appendices).
- Review any other policies, regulations, etc., applicable to this investigation, which may include requirements for or information relevant to the investigation.
- Coordinate with the Convening Authority to obtain any available reports, documents and other information relevant to your investigation.
- Familiarize yourself with the above information. Sketch out a tentative timeline, diagram or summary of events, alleged or documented, personnel involved, etc., based on these materials so that you can put any evidence in context.
- Read Appendix C, Tips for Effective Administrative Investigations. Make sure you have a clear understanding of the scope of the investigation, your duties and deliverables, particularly the investigative report.

**2. MAKE INITIAL ADMINISTRATIVE ARRANGEMENTS.**

- Identify points of contact for:

**Name / Location**

**Phone/Fax/Email**

Convening Authority:

Issues:

Administrative, Logistics and Financial Support:

Legal Support:

HR/Labor Issues:

Members and Staff:

- Establish target dates for investigation:

- Date of Charge Letter: \_\_\_\_\_

- Complete initial planning: \_\_\_\_\_
  - Commence investigation (on-site, if appropriate): \_\_\_\_\_
  - Conclude investigation/ begin drafting investigative report: \_\_\_\_\_
  - Deliver Complete investigative report: \_\_\_\_\_
- Confer with members and staff to discuss schedules and functions:
- Introductions of members and staff.
  - Discuss scope, general approach and goals of investigation.
  - Discuss division of workload among members and staff.
  - Assign responsibilities for administrative tasks, such as maintaining and securing the investigative file, arranging interviews, etc.
  - Schedule on-site investigation and/or witness interviews to allow for timely completion of the report.
- Make any travel arrangements for members or staff.
- Arrange for office and interview space.
- Determine any local procedures for interviews and transcription; arrange for court reporter.
- Set up investigative file.

### 3. IDENTIFY ISSUES AND EVIDENCE

- Prepare detailed list of issues (consult technical experts as necessary), using Appendix E, Issue Analysis Worksheet.
- Identify information sources and potential witnesses for each issue.

**NOTE:** Update this list when you develop new leads and cross items off as you obtain them or find that they are not needed. Be aware that new evidence or information may open new issues at any point in the investigation.

### 4. COLLECT AVAILABLE DOCUMENTS AND OTHER EVIDENCE

- Begin by collecting evidence already available within VA.
- Some documents may have been provided with the Charge Letter.

- If OIG or another investigative body has investigated the matter, they may be able to provide the evidence they collected for your use, even if they cannot provide their full report.
- Request files and records (e.g. personnel and correspondence records) to determine whether they include relevant evidence. (*But see* VA Handbook 0700, Ch. 5, § 3, Restrictions on Information Use and Disclosure).

**WARNING: If evidence is subject to special protections (such as Privacy Act, HIPAA, classified information or confidential quality assurance information), you must ensure compliance with the requirements for that material.**

- Review investigative procedures and witness information in VA Handbook 0700, Chapters 5 and 6, and Appendices H, Summary of Witness Obligations and Rights.
- Collect available documentary and physical evidence in the investigative file. Record its source, date received and description as you receive it. Assign exhibit numbers as the item is used in testimony (See VA Handbook 0700, Ch. 5; Appendix D, Sample Investigative File Index).
  - For evidence that cannot be obtained for the file (e.g. physical evidence or original documents needed elsewhere) substitute copies, photographs or descriptions of the actual item.
  - Maintain security for the evidence collected (e.g. keep it in a locked room or container when not in use).

## 5. CONDUCT WITNESS INTERVIEWS.

- Develop witness plans for identified witnesses using VA Handbook 0700, Appendix F, Witness Planning Worksheet.
  - If witnesses are covered by a collective bargaining agreement, review the applicable collective bargaining agreement, and consult with labor / management relations staff to ensure compliance.
  - Coordinate potential union / labor issues, including requests for representation, with the Convening Authority's staff.
  - Identify the form and process by which the testimony should be obtained (i.e. sworn verbatim testimony, declaration or oral interview with notes, who will attend the interview, how questioning should be conducted, etc.).
- Determine sequence of interviews and schedule them.
  - Note the considerations regarding the collection of evidence from the subject of the investigation in VA Handbook 0700, Ch. 5, § 2(b).

- Coordinate with Convening Authority, supervisors of VA employees and witnesses themselves for attendance at interviews.
  - Schedule the interviews to allow ample time for each session.
  - Leave time to re-interview key witnesses if evidence raises new questions.
  - If any witnesses are VA patients, review and comply with VA Handbook 0700, Ch. 5, § 2(c) and Ch. 6, § 2(c)-(d) as well as the requirements of 38 C.F.R. § 17.33 (Patients' Rights).
- Use VA Handbook 0700, Appendix G, Procedure/Checklist for Obtaining Witness Testimony, to prepare for and conduct interviews of witnesses.

## **6. WRITE THE REPORT.**

- Review VA Directive and Handbook 0700 and the Charge Letter to determine what is required in the report.
- Make sure you understand the important distinctions between Findings of Fact and Conclusions.
  - Make sure the report clearly states the evidentiary basis for your Findings and Conclusions.
- Determine the overall structure for the report.
- Meet with the other members to discuss the matters to be included and how the report should be structured to best communicate the results of the investigation. For example, you could provide all Findings of Fact in chronological order, followed by Conclusions. Alternatively, you could group together Findings of Fact and Conclusions regarding particular issues, if you clearly distinguish them within each section.
  - Plan to include additional explanatory background material as exhibits where appropriate and note them in the preliminary statement.
- If needed, assign the tasks of writing initial drafts of the various sections of the report. For example, members can draft Findings of Fact and Conclusions related to specific issues in which they have special expertise, with one member assigned to consolidate the drafts into a single report for review.
- Compile and circulate the draft report to members for comment.
- Each member should review all the evidence to ensure that it provides adequate

support for Findings and Conclusions.

- Communicate/ meet to resolve any disagreements over Findings, Conclusions or other matters.

Review the report to eliminate these common problems areas:

- Use of language indicating a lack of objectivity.
- Failing to obtain, review and address material evidence on significant issues, including evidence tending to contradict the investigation's Findings and Conclusions. This includes failure to ask direct and pertinent questions to subjects of the investigation and failure to follow up or gather evidence on explanations that may be pretexts for improper actions.
- Failing to resolve all issues in Findings of Fact or Conclusions.
- Findings or Conclusions that focus on the investigation process, rather than the matter investigated.
- Failing to distinguish Findings of Fact from Conclusions.
- Failing to document the evidentiary basis for Findings of Fact or Conclusions by citation to exhibits.
- Failing to explain basis for Conclusions or to address and resolve significant conflicts in evidence.
- Resolving disputed matters by relying on the AIBs' subjective opinions (including opinions of witness character), rather than obtaining and thoroughly analyzing material evidence.
- Failing to review evidence to verify that the report correctly reflects its content and effect.
- Failure to include exhibits or to index exhibits properly.
- Including exhibits that contain a large volume of irrelevant material.
- Providing Recommendations that are not authorized (only applicable to AIBs) or that are not based on Findings or Conclusions.

Sign the report and deliver to the Convening Authority with the investigative file.

## APPENDIX C. TIPS FOR EFFECTIVE ADMINISTRATIVE INVESTIGATIONS

**NOTE:** *This information applies to both AIBs and Factfindings.*

### 1. THE ROLE OF THE INVESTIGATOR

- a. Realize that you are an investigator, not a judge or a jury. Your main job is to collect and assemble relevant evidence, to use that evidence to determine what happened and why and to report what you find, all in an impartial, objective manner.
- b. Realize that the procedures used by an investigator can have important beneficial or adverse effects on the morale and efficiency of everyone involved, particularly on alleged victims, those accused of deficient performance or misconduct and other witnesses.
- c. Remember that your authority as an investigator is only to conduct the investigation. If it is necessary to compel cooperation with the investigation (e.g. to get a witness to appear at an interview), any order must come from someone with authority over the individual or matter involved (unless you are specifically authorized to take such action). Please see VA Handbook 0700, Ch. 5, § 2(c)(3).
- d. Avoid preconceptions and keep an open mind. Until you sign the report, consider any Findings, Conclusions or inferences to be tentative and subject to change.

### 2. DETERMINING ISSUES FOR INVESTIGATION

- a. Issues are the questions to be answered by the investigation, either by Findings of Fact or Conclusions. When issues are resolved by evidence establishing facts that are not reasonably disputable, they are Findings of Fact – otherwise they must be addressed by Conclusions. (See VA Handbook 0700, Ch. 7 and 8).
- b. Although some issues may be specified in the Charge/Authorization Letter or in governing policies, determining which issues are within the scope of the investigation is an ongoing process that requires considerable interpretation and judgment by the investigator. New evidence may resolve some issues and raise new ones.
- c. Review any Charge/Authorization Letter to determine the scope (i.e., the boundaries) of the investigation and any issues specified by the Convening/Initiating Authority. If there is no Authorization Letter for a Factfinding, the

Factfinder should determine the issues prior to beginning an investigation.

- d. Identify other issues based on the known evidence and allegations. Certain issues are common to most investigations (depending on the circumstances):
  - i. The nature and sequence of significant events and the individuals involved.
  - ii. The nature and amount of any harm or adverse consequences.
  - iii. The reasons challenged actions were taken (or not taken) and whether any exercise of judgment or discretion was reasonable.
  - iv. Whether applicable standards (including regulations, professional standards, established practices and procedures and other standards) were met or violated, the reasons standards were not met and the adequacy of those standards (if within the scope of the investigation). Consult with technical advisors, including subject matter experts and OGC, as necessary to help identify and explain relevant standards. Obtain copies of written standards. Break standards down into elements to identify reasonably specific issues for investigation.
  - v. The causes of events or harm. Establish whether there were causal connections, between related incidents and actions. Depending on the scope and purpose of the investigation, consider root cause analysis of the significant chains of causation.
  - vi. Aggravating or mitigating factors – that is, factors that help to explain why error, misconduct or misjudgment occurred, such as whether a person knew pertinent facts or was aware of applicable standards and potential adverse consequences.

### 3. EVIDENCE AND ANALYSIS OF ISSUES, FACTS AND CONCLUSIONS

#### a. *Sources of Evidence*

- i. Evidence is anything that makes a matter more or less likely to be true. Investigators look for *material* evidence of *facts relevant* to the *issues* for investigation – that is, evidence that is reliable and effectively shows what happened, resolving the issues for investigation. You do not need to collect everything you see, but you should make a copy or at least a note of anything you think is, or may become, material evidence. Such materials should be maintained in the investigative file.
- ii. Consider all types of evidence, particularly about matters subject to dispute. Look for physical evidence (i.e., anything that may have affected, or have been affected by, the matter investigated) and all kinds of documents (including photographs, videotapes, records, correspondence, etc.) as well as testimony. In some cases, technical or forensic analysis of physical evidence can help prove critical facts (e.g. to show the cause of damage).

Consult with experts if this is deemed necessary for the investigation.

- iii. Visit the scene of significant incidents early, if applicable, to collect evidence, to help you understand how the evidence fits together and to identify potential leads.
- iv. If another investigation has been conducted into a related matter (for example, by OIG, ORMDI, OAWP or law enforcement), seek to obtain any relevant evidence from that investigation that can be made available to the investigator. Do not ask for information that cannot be disclosed to the investigator, such as confidential quality assurance information.
- v. Be alert for new leads and follow them up. In addition to the names of potential witnesses provided by individual(s) making allegations, other potential leads are often identified in the course of formal or informal witness interviews or other case-related discussions.

#### **b. Assessing Credibility and Resolving Conflicts in Evidence**

- i. The formal rules of evidence do not apply to administrative investigations (or in administrative proceedings that may use evidence gathered in an administrative investigation). The principles underlying those rules, many of which are touched on below, nevertheless provide a useful guide to analyzing the probative weight (or “proving power”) of evidence and for resolving apparent conflicts in evidence.
- ii. Be alert for significant inconsistencies in the evidence and other matters affecting the credibility of evidence (i.e., the reliability of the evidence for establishing true, relevant facts). The following are some well-recognized factors used to assess credibility:
  - 1) *Witness’s Capacity and Opportunity to Observe and Recall the Event Accurately.* Every witness statement should clearly establish the basis for the witness’s knowledge of the matters testified to; what did the witness see, hear, smell, touch, taste or (if material) think. Any difficulty in perceiving, recalling or describing the matter testified to may affect credibility. Similarly, while “hearsay” testimony (testimony relaying the observations of someone other than the witness) may be considered by an investigator, it is often accorded substantially less weight than that of a direct observer.
  - 2) *Inherent Probability.* Some testimony requires or implies circumstances or coincidences that are simply unlikely to occur in the real world because of their inherent improbability or inconsistency with human nature. Less probable testimony is generally less credible, so look to see if other evidence can corroborate improbable testimony.
  - 3) *Consistency with Other Statements by the Same Witness.* Inconsistencies among a witness’s own statements, both official and unofficial, may raise

doubts about credibility. The witness should be asked to explain any apparent inconsistency in statements. In some circumstances, a prior consistent statement (e.g. made before the witness had a motive or an opportunity to make up a false statement) may increase the credibility of testimony.

- 4) *Consistency with Other Evidence.* Other evidence may contradict a witness's statement if it is inconsistent with the statement. On the other hand, consistency of testimony with other evidence tends to support its credibility, particularly when the other evidence is from an independent source.
  - 5) *Bias.* Certain interests or attitudes on the part of a witness may cause a witness, consciously or unconsciously, to shade their recollections or testimony. The nature and intensity of the witness's interest is a critical factor in assessing bias. The fact that a witness's testimony may be self-serving is not sufficient grounds for disbelieving that testimony, but it is a factor for consideration in assessing the probative weight of the evidence. Similarly, a statement that is clearly contrary to the witness's interests may be a factor enhancing its credibility.
  - 6) *Character Traits Related to Truthfulness.* A witness's character for truthfulness or untruthfulness may render that person's testimony less reliable. Such character traits are established, for example, by documentation of recent misconduct involving false statements or deceit. Untruthfulness is also established by a person's reputation or other specific acts, but it is seldom effective to pursue vague or isolated allegations of untruthfulness or bad character unless they are closely related to the issues for investigation.
  - 7) *Demeanor.* Demeanor is the behavior and appearance of a witness during testimony, which the investigator can assess and document. Demeanor may include emotional behavior, evasion of particular questions, body language, etc. Trained investigators use a witness's demeanor to guide their questioning and investigative efforts, but demeanor is seldom reliable as evidence. If demeanor is used as a credibility factor, the behavior must be detailed in the investigative report (e.g. by an interviewer's declaration describing the conduct in detail).
- iii. *Look closely at apparent conflicts before leaping into credibility analysis.*
- 1) In most cases, an official, sworn statement of the observations of a responsible federal employee is sufficient to prove the facts testified to, unless there is specific reason to doubt such statements (such as conflicting evidence, inherent improbability or a significant motive to lie or misremember). Often, close inspection of evidence will show that an apparent inconsistency arises from diverse interpretations or opinions regarding the same objective facts. Investigators should therefore look

closely at any evidence and ask appropriate follow-up questions to determine whether contrasting statements constitute conflicting evidence of material facts.

- iv. Don't confuse *credibility* with *honesty*.
  - 1) Credibility is a characteristic of the evidence; honesty is a character trait of the witness. Evidence of a character trait for honesty or dishonesty is only one of many factors used to assess credibility. Honest people can sometimes lack credibility (for example, if they did not observe or do not remember events accurately) and even the most dishonest people can be credible under some circumstances (for example, if they have no motive to lie, if their statements can be independently corroborated and if motivated to tell the truth by fear of the consequences of perjury or false statements).
  - 2) A witness may be very credible on some points and not credible on others. An investigator should rarely, if ever, dismiss a witness's entire statement as not credible unless a careful objective analysis shows that no reasonable person could believe the testimony.
- v. Don't rely on gut feelings for credibility analysis.
  - 1) In administrative investigations credibility must be assessed by objective evidence, not by "gut feelings" of the investigator or the witnesses. The investigator's feelings as to whether a particular witness is credible are seldom very useful to users of the report. Resolving evidentiary conflicts based on credibility requires consideration of the objective evidence, the witnesses who provided statements and the circumstances under which the statements were made.

### **c. Authenticity of Evidence**

- i. Be alert for authenticity issues. Evidence is not required to be formally authenticated; however, any questions raised regarding authenticity must be addressed.
- ii. Authenticity issues involve whether a piece of evidence is what it appears to be. For example, information that an evidentiary document was forged or altered in some way would raise an issue of its authenticity.
- iii. Generally, evidence from a records custodian or other reliable source (as shown in the index of exhibits), such as evidence taken from official records or other agency files, is presumed to be what it appears to be unless there is a specific reason to doubt it.
- iv. Although authentication of key pieces of evidence (i.e., important evidence on disputed issues) is not required, authentication should occur, if feasible (e.g.,

“Mr. Overmeister, please examine this copy of Exhibit 12, an email with the Subject line “Stop the Leaks!” that shows you as originator – did you send this email?”).

- v. If the authenticity of material evidence is in dispute (e.g. by a witness during an interview who testifies that a document appears altered in a significant way) you must resolve the authenticity issue.

#### 4. WITNESS INTERVIEWS

- a. Procedures for witness interviews are in VA Handbook 0700, Appendix G.
- b. Conduct testimonial interviews so that the transcript (if applicable) or other testimony format “tells the story” in a logical way.
- c. Establish the relationship of the witness to the case – including the witness’s position or role in the matter investigated.
- d. Establish the basis for the witness’s knowledge - i.e., the “opportunity to observe,” or how they know what they are testifying to. For example, establish presence at the scene of significant events.
- e. Have the witness explain, in their own words, what happened, starting from the beginning. Once the employee has completely related their narrative, ask specific questions.
- f. During questioning, focus testimony on *material evidence*:
  - i. Make sure that the witness testifies to the material facts. This may sound obvious, but investigators often simply fail to ask -- or insist on direct answers to -- critical questions, such as whether the subject did the act complained of, how and why.
  - ii. Treat all witnesses with respect -- whether they are subjects, complainants, eyewitnesses, experts, employees, VA beneficiaries or others -- but don’t be reluctant to ask any witness probing questions about material facts.
  - iii. Focus on what the witness did or observed -- saw, heard, felt, smelled or tasted - rather than what they thought about it (unless their thoughts are themselves material facts). Ask not only what a witness knows, but also how they know it.
  - iv. Do not presume that minor inconsistencies between a witness’s testimony and other evidence indicate a deliberate falsehood. Such inconsistencies can often be explained by, for example, a lack of time to review notes and records or to prepare for the testimony. Your approach should be analytical and critical – not cynical.

- v. Once you have firm testimony on the relevant facts, ask the witness about any inconsistent statement and give them an opportunity to explain any apparent prior inconsistency.
  - vi. Although witnesses' opinions, characterizations and conclusions are rarely helpful as evidence unless they are directly at issue, questions about these matters may be useful as leads to more helpful questions. Delve into the basis for opinions or conclusions: ask what the witness saw, heard, smelled, felt or tasted that led them to that opinion or conclusion.
  - vii. Remember, however, that a person's beliefs, knowledge or thought processes may sometimes be material facts. If the witness's intentions, purposes or reasons for doing something are themselves at issue (e.g. when a person is suspected of discrimination or reprisal), their account of such matters is extremely important. Question them thoroughly on such matters. Ask them what they knew or believed about the situation and details about why they decided as they did. Have them identify (and produce, if possible) any documents or other information they relied on, any person they consulted or discussed the issue with.
  - viii. Look for and follow up on leads. Ask questions that may lead to new or corroborating evidence (e.g., identification of date, time and other witnesses to a significant act or conversation) and then investigate the leads.
  - ix. Ask witnesses whether they have discussed the matters testified to with others and, if so, why. Ensure you provided witnesses with instructions not to discuss their testimony or the investigation with others.
- g. Use effective questioning techniques.
- i. Have a list of questions or points to address, starting with less controversial, embarrassing or confrontational matters.
  - ii. Phrase questions in an open-ended manner that will elicit full explanations, and then ask narrower follow-up questions as needed for clarity. Constructing questions too narrowly might impede your efforts to learn all the facts.
  - iii. Listen to the answer. Don't presume that the witness answered the same as they did previously.
  - iv. Cover all the bases regarding the event (i.e., who, what, when, where, how and why). Ask the witness to be specific in describing the incident, even if it entails repeating profanity, or describing/demonstrating inappropriate physical contact.
  - v. Think about how your question and the answer will appear in written form. Avoid ambiguous questions (e.g., bad question: "Q: Did you not see Ms.

Jones punch Mr. Smith in the nose? A: Yes”).

- vi. If the witness rambles into irrelevant matters or becomes evasive, bring the witness back on to track with more specific questions.
  - vii. Use *open* questions (questions that require a narrative response) to determine the extent of a witness’s knowledge or to obtain general recollections from the witness’s point of view (Open question: “Please describe what you did when Mr. Smith called you a buffoon.”) Use closed questions (questions that call for a “yes” “no” or “short answer” response) to “nail down” the specifics of the testimony. (Closed Question: “What part of Mr. Smith’s face did Ms. Jones strike?”)
  - viii. Generally, avoid using *leading* questions (questions that suggest or encourage a particular “preferred” answer) except where necessary to elicit specific admissions or answers from an evasive or uncooperative witness (e.g. “You punched Mr. Smith in the nose, didn’t you?”), or if you have no other reasonable alternative to get the information. These types of questions often make it look like the interviewer is testifying or pressuring the witness.
  - ix. If a witness does not appear to remember incidents or seems to have difficulty recollecting specifics, it is permissible to refresh their recollection with documents or other items, but use only items that they previously had access to (notes, correspondence, etc.)
  - x. Ask questions about apparent exaggerations, inconsistencies, gaps, etc.; whether internal to the interview or between the interview account and a previous statement or statements of others. Give the witness an opportunity to explain any inconsistency.
  - xi. Do not be reluctant to clarify statements if it is necessary to fully develop the testimony, even if it might make the person uncomfortable (e.g., repeating obscenities).
  - xii. You may ask the same question repeatedly (or rephrase the question), particularly if answers seem evasive.
- h. Review your witness plan again before concluding the interview to ensure that all necessary points are covered.

## 5. WRITING THE REPORT

- a. Remember that your audience may include people unfamiliar with the day-to-day functions of your organization. The report should not contain references, terminology or acronyms that are not readily understood outside of your organization without explanation.
- b. You must specifically identify the evidence you are relying on for each Finding

- of Fact and Conclusion. Review the evidence carefully to make sure it says what you think it says.
- c. Prepare exhibits from the investigative file for all evidence discussed in the report. Generally, if referring to only a small part of a large document in the report, an extract of the document is prepared as an exhibit. Make sure that any extract gives a full picture of its evidentiary value, both good and bad.
  - d. Where appropriate and consistent with clarity, consider using official titles, rather than personal names, to help depersonalize the tone of the report.
  - e. For *Conclusions*:
    - i. Clearly identify the Conclusion and then provide the analysis for the reasons you believe it to be true.
    - ii. Identify any facts, evidence and interpretive rules you use, such as definitions, legal or technical standards or terms, etc.
    - iii. Identify and show how you resolved significant inconsistencies or conflicts in the evidence by objective analysis.
    - iv. Base any assessment of credibility (e.g. when resolving conflicting evidence) firmly on objective analysis of the evidence – not on your feelings or speculations.
  - f. Consider organizing your analysis as follows:
    - i. State your Conclusion;
    - ii. Identify the issue, including any standards that apply;
    - iii. Identify any relevant undisputed facts;
    - iv. Analyze any disputed matters by identifying the conflicting evidence, discussing how you analyzed the conflict and stating what you concluded about the facts from the analysis; and
    - v. Analyze how the standard applies to the facts determined.
  - g. Recommendations are provided only if specifically required or permitted by an AIB's Charge Letter and are not permitted in Factfindings. Make sure any Recommendations are well-supported by your Findings of Fact and Conclusions and are phrased so that they can be acted on directly by the Convening Authority (e.g. recommend that the Convening Authority forward a proposal to change a directive promulgated by higher authority).
  - h. For AIBs, circulate the draft Findings of Fact at least once to other members for




**APPENDIX E: ISSUE ANALYSIS WORKSHEET**

<b><u>Issues and Elements</u></b>	<b><u>Information Sources (Documents, Technical Experts, Etc.)</u></b>	<b><u>Potential Witnesses</u></b>


**APPENDIX F. WITNESS PLANNING WORKSHEET**

Witness Name: \_\_\_\_\_

Title / Position: \_\_\_\_\_

Witness's role in matter investigated: \_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Address: \_\_\_\_\_

Office: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

Status: (Circle Yes or No)

VA Employee? Y N

Member of VA Collective Bargaining Unit? Y N

VA Patient/Beneficiary? Y N

Subject of investigation? Y N

**NEED FOR TESTIMONY:**

List investigative issues related to this witness:

List prior statements / documents prepared by this witness:

List other evidence related to this witness:

Nature of any suspected misconduct / neglect by this witness and relevant standards:

**QUESTIONS/ AREAS OF INQUIRY FOR INTERVIEW:**

Relation of Witness to Case:

Opportunity to Observe:

Material Facts:

Admissions/ Corroboration of other evidence:

Authentication of Evidence:

Credibility Matters (if relevant):

Other Matters:

**DOCUMENTATION:**

Identify how the interview will be documented for the investigative file and report. (See VA Handbook 0700, Ch. 6, § 1(c); Appendix K).

- Sworn or Affirmed Verbatim Testimony
- Affidavit
- Unsworn Declaration under Penalty of Perjury
- Written Statement or Declaration
- Summary of Witness Interview
- Informal Descriptions from Witnesses

**APPENDIX G. PROCEDURE / CHECKLIST FOR OBTAINING WITNESS TESTIMONY**

**NOTE:** *This information applies to both AIBs and Factfindings.*

**1) PLANNING THE INTERVIEW**

- Review and amend witness plan for this witness (See VA Handbook 0700, Appendix F). Formulate key questions for the witness and flag potential problem areas.
- Review in advance the ground rules and duties regarding the interview process to help ensure that the process is orderly and effective.
- Review VA Handbook 0700, particularly Chapter 6.
- Be familiar with, and prepared to explain, witness rights and responsibilities. (See VA Handbook 0700, Appendix H, Summary of Witness Obligations and Rights).
- Know your options if the employee or representative refuses to cooperate. (See VA Handbook 0700, Ch. 5, § 2(c)(3)).

**2) HOLDING A PRELIMINARY INTERVIEW**

- Decide whether to hold a preliminary interview. (See VA Handbook 0700, Ch. 6, § 1(d)).
  - In some circumstances, it may be beneficial to hold a preliminary interview with a potential witness. It can be useful to meet with a witness prior to a testimonial interview to determine the extent of a witness's knowledge of material facts, to provide notices, to determine whether the witness will exercise any applicable rights and/or to schedule subsequent interviews. For AIBs, a preliminary interview prior to the taking of transcribed testimony (sworn verbatim testimony) can ensure efficient use of the time scheduled with the court reporter. For Factfindings, such a preliminary interview could be used to determine if a full interview is needed; depending on the complexity of the information provided, the preliminary interview may provide a basis for a declaration (or other written testimony). Such informal interviews also help build rapport, save time and costs and reduce digressions in a subsequent testimonial interview.
  - Preliminary interviews may not be appropriate if you are concerned about a witness improperly influencing testimony of other witnesses, changing testimony or for other reasons.
- Hold the preliminary interview, if applicable.
  - Be sure to accord any applicable witness rights in a preliminary interview, which do trigger such rights. (See VA Handbook 0700, Appendix H).

- Based on the preliminary interview, decide how to proceed with obtaining and/or documenting the witness's testimony. (See VA Handbook 0700, Ch. 6, § 1).

### 3) **PREPARING WRITTEN TESTIMONY.**

- Review the options for obtaining and memorializing testimony in written form, such as sworn verbatim testimony, affidavits, unsworn declarations under penalty of perjury, written statements and declarations or other informal means as described in VA Handbook 0700, Ch. 6.
- Determine the appropriate form of witness testimony based on the type of administrative investigation and the nature of the testimony.
- Obtain the written testimony.
  - While it is permissible to have the witness prepare the declaration, affidavit or statements, investigators often find it most effective to draft the declaration for the witness based upon the investigator's notes of a verbal interview, because this ensures that all material points of testimony are covered in a clear and definite manner. When conducting interviews for this purpose, follow the guidance below. If you use this approach, make it clear that you are trying to accurately record the witness's recollections and not trying to influence their testimony or put words in their mouth. Provide the witness an opportunity to review and edit any written testimony drafted by an investigator as noted below.
  - VA Handbook 0700, Appendix K, provides a suggested format for Declarations, Unsworn Declarations Under Penalty of Perjury and Affidavits.
    - If completing an Unsworn Declarations Under Penalty of Perjury or Affidavit, if possible, the investigator should observe the witness sign the declaration and then the investigator should sign the declaration in the "Witnessed by" block as shown in Appendix K2.
  - Present the written testimony to the witness. Impress upon the witness that they alone are responsible and accountable for every word in the declaration. Maintain correspondence related to obtaining the declaration in the investigative file.
  - Encourage the witness to correct and supplement the draft so that it accurately reflects the witness's recollections or other testimony and becomes the witness's own statement.
  - Drafts with noted or tracked edits should be maintained in the investigative file. Such edits should be implemented and any notations or tracked changes removed before the witness signs. In most cases, the final clean copy with the witness signature will be used as an exhibit to the investigative report.
  - Review the declaration to ensure that it is completed correctly. If it differs

materially from any verbal testimony, ask the witness to clarify or explain the discrepancy or change and amend the declaration accordingly.

- If a witness significantly alters the substance of their verbal testimony on material facts when revising a draft of their written testimony, the investigator should include a note to that effect in the investigative report and the investigative file along with their notes of the interview. This can be considered when making credibility determinations.
- Ask the witness to initial each page, date and sign the written testimony.
- If the witness is reluctant or refuses to sign, determine the problem. Remember VA employees must cooperate in the investigation. Usually the only valid reasons for an employee's refusal to sign are: (1) that the declaration does not accurately or sufficiently reflect the personal knowledge of the witness, in which case, the witness should correct the declaration and sign it, or (2) the witness has invoked the right against self-incrimination. (See VA Handbook 0700, Ch. 5, § 2(c)(3) for additional information on compelling cooperation).
- If the witness still refuses to sign, prepare an investigator's declaration summarizing the interview and append as an exhibit to the investigative report. Include the reasons given by the witness for refusing to sign the investigative report (for AIBs, this should be contained in the preliminary statement).

#### 4) OPENING INTERVIEWS

**NOTE:** *Sworn verbatim testimony in front of a court reporter or other method of transcription is used in AIBs only. However, investigators should utilize the general format or tips below when conducting any verbal interview, absent the guidance on transcription.*

- Introductions (usually not transcribed or otherwise memorialized)
  - Thank the interviewee for coming
  - Introduce the members of the AIB or the Factfinder(s)
  - Try to put the person at ease
  - Explain the purpose of the interview
  - Inform the witness they can take a break, although the break should not be granted until the witness answers a pending question.
  - Ensure any potential scheduling issues are identified at the outset.
- Resolve procedural issues, if not already completed, including:
  - Obtain the person's signature on a Notice of Witness Obligations, Protections and

Subject Matters. (See VA Handbook 0700, Appendix I, Sample Notice of Witness Obligations, Protections and Privacy Act Matters).

- Resolve any questions or exercise of rights by the witness.
  - If applicable, obtain witness's Designation of Representative. (See VA Handbook 0700, Appendix J).
  - Ensure the requirements of any applicable collective bargaining agreement are met.
  - Begin the interview, ensuring you are "on the record," if being transcribed by a court reporter (i.e., tell the court reporter you are ready to go on the record).
- State the following:
- This is \_\_\_\_\_ (day of the week), \_\_\_\_\_ (date). The time is \_\_\_\_\_ (time). Speaking is \_\_\_\_\_ (name), Chair/member of the Administrative Investigative Board, convened for the purpose of hearing the testimony of \_\_\_\_\_ (witness name) concerning \_\_\_\_\_ (brief summary of the issue). We are meeting in \_\_\_\_\_ (location/room number). Present are: \_\_\_\_\_ (state the names of all the persons in the room and their role in the investigation, witness and any witness representative). This interview is being recorded by a court reporter.
  - If applicable, note for the record whether the witness is testifying pursuant to a guarantee that the information will not be used for criminal prosecution, commonly referred to as a *Kalkines* warning. OGC must be consulted prior to making any such guarantees.
  - For AIBs and sworn testimony, administer the Oath (or have the court reporter issue the Oath) after asking the witness whether they prefer to "swear" or "affirm" their testimony. The Oath or Affirmation is usually administered by the court reporter. If needed, utilize the following language:
    - Please state your full name and your current position and employer.
    - Do you solemnly swear or affirm that the testimony you will give in the case under investigation will be the truth, the whole truth, and nothing but the truth [if sworn, add: "So help you God"]?
    - State that you have obtained the person's signature on the "Statement of Employee Rights and Responsibilities" (or reasons for declining to sign) and "Designation of Representative" (if applicable).
- Begin your questions (See VA Handbook 0700, Appendix F).
- If the interview is not being transcribed or recorded, ensure that the Factfinder or

AIB member(s) take thorough notes of the substance of the witnesses' responses, which can be used to prepare written testimony as described above.

## 5) CONCLUDING INTERVIEWS

**NOTE:** *The following should be used for any interview, whether conducted by an AIB or Factfinder and whether or not the interview is transcribed.*

- Ask the witness whether they know anyone else with information about the matters discussed.
- Ask the other AIB members or Factfinders (if applicable) if there are further questions.
- Ask witness if they have anything further to offer to help with the investigation.
- Ask witness if there is anything they would like to clarify about the testimony they have just given.
- If completing Sworn Verbatim Testimony, advise the witness "Your testimony will be transcribed. You have the right to review the transcript, make clerical corrections and attach a supplementary statement, and you will then be asked to sign and date the document."
- If drafting an Affidavit, Unsworn Declaration under Penalty of Perjury or Written Statement or Declaration, advise the witness, "I/we will draft a written statement based on your testimony provided today. I will do my best to accurately record your testimony based upon my notes from this interview. It is not my intent to influence your testimony or to capture it incorrectly. You will be provided an opportunity to review and edit my draft of your written testimony to ensure it is accurate. The completed statement will be signed by you and will represent your testimony. I will provide further instructions for signature when I provide the draft statement to you for your review."
- Remind the witness: "You may be called back to answer some additional questions. You will remain under oath (if applicable). Do not discuss this interview with anyone, other than any other investigator, [or your representative]. If you have questions, if anyone else tries to discuss your testimony with you, or if someone tries to take action against you for cooperating with this investigation, please tell me immediately."
- Thank the witness for meeting with the AIB or Factfinder.

## 6) PREPARING TRANSCRIPTS OF SWORN VERBATIM TESTIMONY

**NOTE:** *The below will only apply to AIBs, as Factfindings generally do not include Sworn Verbatim Testimony.*

- Verbatim transcripts are prepared by court reporting services.
  - The court reporter will index the transcript.
  - The court reporter can provide a condensed copy of the transcript.
  - The court reporter can provide an electronic copy of the transcript.
  
- Upon receipt of the transcript, have the witness
  - Review the transcript.
  - List any necessary corrections of transcription errors on an errata sheet provided by the court reporter (not on the transcript); Attach errata sheet to the transcript.
  - Sign the transcript and return it to you for inclusion in the investigative file.
  - If the witness refuses to sign, ascertain the witness's reasons and summarize the reasons for refusal in the investigative report.

## APPENDIX H. SUMMARY OF WITNESS OBLIGATIONS AND RIGHTS

**NOTE:** *Although VA Directive 0700 and this handbook do not establish rights for individuals with respect to administrative investigations, such rights may be established by external sources such as statutes, regulations, collective bargaining agreements or governing directives. The following summary of witness obligations and rights is provided to assist investigators in observing the rights of witnesses and in dealing with legal issues that may arise during the investigation. Investigators must consult with OGC if significant questions arise regarding the rights or obligations of witnesses.*

### 1. DUE PROCESS RIGHTS ARE NOT APPLICABLE TO ADMINISTRATIVE INVESTIGATIONS

Federal law provides certain due process rights to persons in proceedings where important personal interests such as property or liberty are at stake. Because administrative investigations are investigative bodies and do not determine such interests, such rights are inapplicable to administrative investigations. The employee, therefore, has no due process right to advance notice or to a notice of charges. Nor does the employee have a right to review or to challenge adverse evidence. If adjudication proceedings, such as disciplinary proceedings and appeals, are initiated as a result of an administrative investigation, any applicable due process rights would attach to those proceedings.

### 2. VA EMPLOYEES' OBLIGATION TO COOPERATE

Federal Regulation, 38 C.F.R. § 0.735-12(b), entitled "Furnishing Testimony," states "Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts or willfully inaccurate testimony in connection with an investigation or hearing may be grounds for disciplinary action. An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that they may be or is involved in a violation of law wherein there is a possibility of self-incrimination." The obligation to furnish information extends to VA records and other records for which the witness is accountable as a VA employee, but might not extend to the employee's private documents or information. Refer questions regarding the reach of this obligation to OGC. (See VA Handbook 0700, Ch. 5, § 2(c)(3) for additional information on compelling testimony).

### 3. RIGHTS AND OBLIGATIONS REGARDING SELF-INCRIMINATION

If a witness is compelled to give self-incriminating testimony in an administrative interview, such testimony (or evidence derived in some way from the testimony) may not be used in any criminal proceeding, because such use would violate the constitutional privilege against compelled self-incrimination. "Self-incriminating" testimony is testimony that could be used to prove criminal charges against the individual testifying. It does *not* include testimony that could only be used to prove non-criminal charges, such as those used in employee disciplinary proceedings. However, an employee who is assured the government will not make use of the employee's testimony for criminal prosecution, which requires approval from a U.S. Attorney, of that employee may be disciplined for

subsequently refusing to answer questions. (Commonly referred to as a *Kalkines* warning.) Thus, if employees refuse to respond to questions on the basis of their right against self-incrimination, the investigator should consult with OGC.

#### **4. COLLECTION OF INFORMATION FROM SUBJECTS OF INVESTIGATIONS**

- a. If an investigator obtains evidence or allegations of conduct that may justify disciplinary or other adverse action against an individual (i.e., a “subject”), they:
  - i. Must interview the subject about that conduct and request any material evidence that the individual can provide; and
  - ii. Should do so before seeking other evidence on that matter from third parties, to the extent practicable consistent with the effectiveness and efficiency of the investigation. (See VA Handbook 0700, Ch. 5, § 2(b)).
- b. Here are some factors to consider in assessing “practicability” of seeking evidence from a subject:
  - i. Existing agency records and documents are obtained and reviewed prior to seeking information from the subject.
  - ii. A need to clarify allegations or the basis of allegations often justifies collecting evidence from a reporting source and eyewitnesses before seeking information from the subject.
  - iii. Interviewing the subject early may effectively narrow the issues for investigation and reduce the need for discussing the case with third parties, thus reducing the potential for rumor, disruption of agency processes, unjustified harm to individual and organizational reputations and overall costs of investigation. For example, the subject may admit to certain alleged facts, identify essential witnesses and evidence and provide explanations for actions that can then be effectively either corroborated or refuted.
  - iv. A real, fact-based concern that the subject may intentionally or unintentionally influence or intimidate witnesses, or may otherwise limit their complete and truthful testimony, may justify questioning those witnesses or taking other investigative action before interviewing the subject or before informing the subject that the investigation is in progress.

#### **5. PROTECTION AGAINST RETALIATION FOR TRUTHFUL TESTIMONY VA**

VA Directive 0700 requires Convening/Initiating Authorities to protect witnesses from reprisal for their lawful cooperation with an administrative investigation. Retaliation by any VA employee against any person for cooperating with an investigation or providing truthful testimony is prohibited by statutes and regulations, depending in part on the persons involved, the information provided and the nature of the retaliatory act. Witnesses who believe they are being reprisal against should be advised that the

investigator will report the matter to the Convening/Initiating Authority and that they may also report the matter to OAWP, OIG or OSC, as appropriate. An AIB member who receives such a report should obtain specific details from the reporting employee and immediately forward the matter to the Convening Authority, or other appropriate authority, for any necessary action. A Factfinder who receives such a report should similarly report the matter to the Initiating Authority, or other appropriate authority, if applicable.

## 6. RIGHTS OF BARGAINING UNIT EMPLOYEES

Interviews of bargaining unit employees are conducted in accordance with rights established under statute or any applicable collective bargaining agreement. Investigators must consult the applicable collective bargaining unit agreements to determine the requirements of those agreements.

### a. *"Weingarten" Rights*

Weingarten rights refers to the right of bargaining unit employees to have a union representative present during "investigative interviews" that could lead to disciplinary action. The specific right of federal employees to union assistance during investigative interviews is provided for in 5 U.S.C. § 7114(a)(2)(B). This statute provides that the union that represents a collective bargaining unit "shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation."

Under case law interpreting this provision, the union representative in attendance at an investigative interview may take an active role, which generally includes asking questions of the unit employee, assisting the employee in producing relevant information and consulting with the employee. A union representative is not entitled to disrupt an investigation, to provide answers for the employee being questioned or to attend meetings or interviews where the employee is not present.

If a member of a collective bargaining unit requests union representation, the investigator should suspend the interview pending resolution of the request; review any applicable collective bargaining agreements and contact the Convening/Initiating Authority for any necessary advice or liaison with the Union. OGC should also be consulted.

Under title 38 U.S.C. § 7422 (b), the collective bargaining rights of title 38 employees are not applicable to matters involving (1) professional conduct or competence (i.e., direct patient care or clinical competency), (2) peer review, or (3) certain pay matters. Therefore, title 38 employees have no statutory right to assistance of union representatives at investigative interviews involving these types of matters. In most cases, however, representation is permitted as a matter of discretion as described in VA Handbook 0700, Ch. 6, § 2. Questions should be referred to OGC.

### b. *Rights and Obligations under Collective Bargaining Agreements*

Collective bargaining agreements may establish rights, obligations or procedures in addition to, or more extensive than, those listed in this appendix. Such provisions might, for example, require advance notice to employees or to the union of certain matters, require notifying witnesses of their right to representation and may also govern the conduct of union representatives with respect to an investigation (e.g. prohibiting disclosure of information). Consult with your Employee Relations/Labor Relations Specialist for advice.

*c. Union Rights to Participate in Formal Discussions.*

Under 5 U.S.C. § 7114(2)(A), unions representing collective bargaining units must be given an opportunity to be represented at “formal discussions” between management and unit employees that concern a grievance or the conditions of employment of the unit. Witness interviews conducted as part of an administrative investigation do not normally constitute formal discussions primarily because they seek the personal recollections and testimony of the witness, rather than a discussion of the conditions of employment of the bargaining unit or the resolution of a grievance. VA labor relations officials and OGC should be consulted if the investigator believes that a given interview with a bargaining unit member may involve a formal discussion or if the Union raises the issue.

## **7. PRIVILEGES**

The law affords protection against compulsory disclosure of the content of certain communications, including certain discussions with clergy, health care professionals, one’s spouse or one’s attorney. Depending on the source of the privilege, the protection may apply only in specific federal or state legal proceedings or may apply directly to administrative investigations. If a witness declines to answer a question based on an assertion of privilege, the investigator may often resolve the issue by asking a question that does not call for disclosure of privileged information. If a witness continues to refuse to answer questions based on privilege, the investigator should contact OGC for guidance.

## **8. PROVIDING ADVICE OF RIGHTS AND OBLIGATIONS**

VA Handbook 0700, Appendix I, provides a sample form for advising witnesses of their rights and obligations. This form may be adapted to meet local requirements, including any requirements of collective bargaining agreements. Witnesses may also be provided copies of applicable policies and allowed to consult with private legal counsel. If the investigator obtains written advice regarding witness rights from OGC, consult with OGC prior to releasing the advice to a witness.

## **APPENDIX I. SAMPLE NOTICE OF WITNESS OBLIGATIONS, PROTECTIONS AND PRIVACY ACT MATTERS**

1. VA Regulation 38 C.F.R. § 0.735-12(b) states, “Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts or willfully inaccurate testimony in connection with an investigation or hearing may be grounds for disciplinary action. An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that he or she may be or is involved in a violation of law wherein there is a possibility of self-incrimination.” In addition, VA Directive 0700 requires all employees to cooperate with administrative investigations to the extent permitted by governing laws, regulations, policies and collective bargaining agreements.
2. For individuals who are not VA employees, participation and testimony in this investigation are voluntary.
3. You may refuse to answer a question if you believe the answer could be used to convict you of a crime. If you refuse to answer on this basis, you must inform the investigator that you are asserting this right. No adverse action may be taken against you for such a refusal unless you have been assured that your answer will not be used against you in a criminal prosecution. You do not have the right to refuse to answer a question based on a belief that your response may incriminate a person other than yourself or that it may result in adverse administrative action against you.
4. VA Directive 0700 requires you to refrain from disclosing any information developed during the investigation, including the substance of your testimony, with others. This is to protect the integrity and fairness of the investigative process. You may, however, discuss such matters with federal investigators, such as the Office of Accountability and Whistleblower Protection (OAWP), Office of the Inspector General (OIG) or the Office of Special Counsel (OSC), or with your designated representative (if any). In addition, you will not be reprimed against for and are not prohibited from making any disclosures protected by whistleblower protection laws or other statutes.
5. You will be protected from reprisal for providing truthful testimony or otherwise cooperating lawfully with an administrative investigation. If you feel that you are treated adversely for such actions, please advise the investigator immediately to ensure that effective corrective and remedial action is taken. You may also contact other appropriate officials, including OAWP, OIG or OSC, if you feel you are retaliated against for your cooperation with an administrative investigation.
6. Information obtained from you may be included in a Privacy Act system of records and disclosed as needed through certain statutory exceptions. These exceptions cover disclosures such as internal administrative matters of the Department of Veterans Affairs, correction of systemic problems, determination of liability for claims and benefits, administrative or disciplinary actions or actions affecting professional licenses and employment, law enforcement requests, court orders, investigative requests from by other federal and state agencies, requests by Congress or requests

under the Freedom of Information Act.

- 7. Failure to provide the requested information could lead to actions and decisions based on incomplete or erroneous information. For employees of the Department of Veterans Affairs, failure to provide requested information could result in disciplinary action against such employees for violations of the requirements discussed above. Employees covered by Collective Bargaining Agreements (CBA) who reasonably believe their responses may result in disciplinary action against them may have a union representative assist them during the interview if they so request. If you are covered by a CBA and choose to have a representative, notify the investigator(s) immediately to obtain an appropriate form for your designation.
- 8. Additional Notice (as required by governing policy, collective bargaining agreement, etc.):

If you have any questions regarding the matters discussed above, please notify an investigator immediately.

**I HAVE READ THE ABOVE NOTICES, OR HAVE HAD THEM READ TO ME, AND HAVE HAD ANY QUESTIONS ANSWERED TO MY SATISFACTION.**

\_\_\_\_\_  
(Print or type Name of Interviewee)

\_\_\_\_\_  
(Signature of Interviewee)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Print or type Name of Interviewer)

\_\_\_\_\_  
(Signature of Interviewer)

\_\_\_\_\_  
(Date)

**APPENDIX J. SAMPLE DESIGNATION OF ADVISOR / UNION REPRESENTATIVE**

This is to certify that I, \_\_\_\_\_ have designated \_\_\_\_\_ to assist me during the present investigation.

This designation will remain in effect until I make a new designation, or I cancel this designation in writing.

My advisor and I will not discuss my testimony or any information gained as a result of this investigation with others, except for disclosures specifically protected by law.

**SIGNED:**

**DATE:**

\_\_\_\_\_  
(Print name here)

**ADVISOR'S SIGNATURE:**

**SIGNED:**

**DATE:**

\_\_\_\_\_  
(Print name here)

**ADVISOR IS** (Check and complete all applicable)

\_\_\_\_ Union (CBU) Representative, Union/Local

\_\_\_\_ Attorney, Member of \_\_\_\_\_ (State) Bar.

\_\_\_\_ Other, specify relation to witness:

**APPENDIX K. SAMPLE UNSWORN DECLARATION UNDER PENALTY OF PERJURY / AFFIDAVIT/WRITTEN STATEMENTS OR DECLARATIONS.**

**NOTE:** Drafting guidance in *[italics]*. Required language in black. Suggested language format *in blue*.

**K1. Declaration**

**DECLARATION OF *[NAME, POSITION]***

I *[Full Name of Witness]* hereby state that the following is true and based on my personal knowledge and belief.

*[Paragraphs containing information numbered]*

*[Identifying Information]*

1. My name is *[Full Name]*. I am currently employed at \_\_\_\_\_ or I live at \_\_\_\_\_

*[Relation to case; e.g.]:*

2. During the period \_\_\_\_\_, I worked for \_\_\_\_\_ within the office of \_\_\_\_\_,

Among my duties at this time was \_\_\_\_\_. In addition, on \_\_\_\_\_, I was present for a meeting with \_\_\_\_\_ in my capacity as \_\_\_\_\_.

*[Substance of Testimony – include all material evidence, including the source of the information for the witness, opportunity to observe, etc.]*

3. I was at \_\_\_\_\_. I saw \_\_\_\_\_. I heard \_\_\_\_\_. She told me that \_\_\_\_\_. I did \_\_\_\_\_. I thought \_\_\_\_\_. I thought / did this because \_\_\_\_\_ *[etc.]*

4. *[continuation of facts as needed]*

*[Required Language at end of Declaration]*

**The foregoing is a complete statement of my personal knowledge regarding the matters discussed. I have thoroughly read and reviewed this statement and have made any appropriate corrections or additions to it.**

**Executed on *[insert date of signature]***

\_\_\_\_\_*[Signature]*

Name of Declarant

Signature Witnessed by:

\_\_\_\_\_*[Signature]*

*[Signature of Witness to Declarant Signing]*

**K2. Unsworn Declaration Under Penalty of Perjury**

**DECLARATION OF [NAME, POSITION]**

I [Full Name of Witness] pursuant to 28 U.S.C. § 1746, swear or affirm that the following is true and based on my personal knowledge and belief.

[Paragraphs containing information numbered]

[Identifying Information]

1. My name is [Full Name]. I am currently employed at \_\_\_\_\_ or I live at \_\_\_\_\_

[Relation to case; e.g.]:

2. During the period \_\_\_\_\_ I worked for \_\_\_\_\_ within the office of \_\_\_\_\_. Among my duties at this time was \_\_\_\_\_. In addition, on \_\_\_\_\_ I was present for a meeting with \_\_\_\_\_ in my capacity as \_\_\_\_\_.

[Substance of Testimony – include all material evidence, including the source of the information for the witness, opportunity to observe, etc.]

3. I was at \_\_\_\_\_. I saw \_\_\_\_\_. I heard \_\_\_\_\_. She told me that \_\_\_\_\_. I did \_\_\_\_\_. I thought \_\_\_\_\_. I thought / did this because \_\_\_\_\_ [etc.]

4. [continuation of facts as needed]

[Required Language at end of Declaration]

**The foregoing is a complete statement of my personal knowledge regarding the matters discussed. I have thoroughly read and reviewed this statement and have made any appropriate corrections or additions to it. I understand that I may be subject to administrative sanctions or criminal penalties if any part of this statement is false.**

**I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed on [insert date of signature]**

\_\_\_\_\_  
Name of Declarant [Signature]

\_\_\_\_\_  
Signature of Witness to Declarant's Signature [Signature]

**K3. Affidavit**

**AFFIDAVIT**

I [*Name of Witness*], personally appeared before the undersigned notary public, and under oath or affirmation hereby make the following statements:

*[Paragraphs containing information numbered]*

*[Identifying Information]*

1. My name is [*Full Name*]. I am currently employed at \_\_\_\_\_ or I live at \_\_\_\_\_

*[Relation to case; e.g.]:*

2. During the period \_\_\_\_\_, I worked for \_\_\_\_\_ within the office of \_\_\_\_\_,

Among my duties at this time was \_\_\_\_\_. In addition, on \_\_\_\_\_, I was present for a meeting with \_\_\_\_\_ in my capacity as \_\_\_\_\_.

*[Substance of Testimony – include all material evidence, including the source of the information for the witness, opportunity to observe, etc.]*

3. I was at \_\_\_\_\_. I saw \_\_\_\_\_. I heard \_\_\_\_\_. She told me that \_\_\_\_\_. I did \_\_\_\_\_. I thought \_\_\_\_\_. I thought / did this because \_\_\_\_\_ *[etc.]*

4. *[continuation of facts as needed]*

*[Required Language at end of Affidavit]*

Further Affiant Sayeth Naught.

\_\_\_\_\_  
Name of Witness *[Signature]*

-----  
*[Notary Certification]*

State of \_\_\_\_\_ :

:ss

County of \_\_\_\_\_ :

Sworn and subscribed to in my presence under penalty of perjury on this the \_\_\_\_\_ Day of \_\_\_\_\_, in the year \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires On: \_\_\_\_\_

**APPENDIX L. SAMPLE AIB INVESTIGATIVE REPORT –SUMMARY FORMAT**

*The following example is based on an imaginary, relatively simple scenario involving employee misconduct.*

(VA Standard Memorandum Format)

From: Administrative Investigation Board  
Subj: Investigative Report into Allegations of Patient Abuse, VAMC Anytown  
To: Director, VAMC Anytown

**PRELIMINARY STATEMENT**

I have completed the administrative investigation into allegations of verbal patient abuse by VA employee Mr. John Orderly on May 24, 2001, as required by your memorandum dated May 30, 2001. (Exhibit 1). The initial statement of Mr. Paul Patient, the alleged victim of the abuse, is provided in Exhibit 2. In conducting this investigation, I obtained sworn testimony from Mr. Orderly, whose conduct was the subject of this investigation; his supervisor Ms. Janet Nitingale, who was also an eyewitness; and Dr. Elizabeth Proctor, the treating physician. (Exhibits 3, 4, and 5). I obtained further information from Mr. Patient over the telephone, but he refused to sign another statement (Exhibit 6, Record of Contact). I also reviewed Mr. Orderly's OPF. (Exhibit 7).

I questioned the four other employees on duty in Ward 3 at the time of this incident but determined that none of them had information material to this investigation.

**FINDINGS OF FACT**

1. Mr. Orderly has been employed by VAMC Anytown as an orderly since October 1994. Ms. Nitingale, RN, has been Mr. Orderly's supervisor since February 1999. (Exhibit 3, p. 1; Exhibit 4, p. 1).
2. According to Ms. Nitingale, Mr. Orderly has been an average to above-average worker. (Exhibit 3, p. 1). He has not previously received disciplinary action for patient abuse or other misconduct. (Exhibit 4, p. 10).
3. During his off-hours in May of 2001, Mr. Orderly was pursuing a nursing degree at the University of Anytown. Ms. Nitingale permitted him to work on school homework during work hours as long as it was related to his medical duties and did not interfere with his VA work assignments (Exhibit 3, p. 5; Exhibit 4, p. 6).
4. On May 20, 2001, Mr. Orderly was on duty in Ward 3, VAMC Anytown. Mr. Orderly's tour of duty was scheduled to end at 7:00 AM. He had a class in Medical Ethics scheduled for 8:00 AM. Mr. Orderly had an essay due that day for that class, which he was working on when not assisting patients. As Mr. Orderly acknowledges, he was under pressure to do well on this essay because he was in danger of failing the class and his grade on the essay was worth 1/5 of his grade for the course. (Exhibit 3, p. 7).

5. Ms. Nitingale was also on duty at that time, as Duty Nurse for Ward 3. Mr. Patient was in room 327B recovering from surgery (Exhibit 4, p. 7).
6. Ms. Nitingale, Mr. Orderly and others on the ward considered Mr. Patient to be a “difficult” patient. Ms. Nitingale and Mr. Orderly were aware of several specific incidents in which Mr. Patient had, unnecessarily, made work more difficult for the staff. Mr. Orderly had at least once referred to Mr. Patient as a “lazy S.O.B” in a conversation with Ms. Nitingale. (Exhibit 3, p. 8; Exhibit 4, p. 7).
7. At about 2:30 AM, Mr. Patient rang for bedpan removal, and Mr. Orderly arrived shortly thereafter. Mr. Patient was reading a magazine and still sitting on the bedpan when he arrived. Mr. Orderly asked Mr. Patient to lift slightly so he could remove the bedpan. Mr. Patient replied that he would do so as soon as he finished the article that he had almost finished reading. (Exhibit 2; Exhibit 3, p. 9).
11. Approximately fifteen seconds later, Mr. Orderly asked Mr. Patient to lift again, after which Mr. Patient replied that he would be finished “in a minute.” Mr. Orderly then made the statement that is the subject of Mr. Patient’s complaint. The words Mr. Orderly used, which are disputed by the witnesses, are discussed in Conclusion 1. (Exhibit 2; Exhibit 3, p. 9).
12. Mr. Patient then said in a loud and accusing voice, “Who are you calling a lazy [or crazy] slob?” or similar language, which was overheard by Ms. Nitingale. Without challenging the implication of Mr. Patient’s question, Mr. Orderly then said, “just lift up so I can get the bedpan,” retrieved the bedpan, and left the room quickly. (Exhibit 2; Exhibit 4, p. 9).
13. Ms. Nitingale checked on Mr. Patient and took his statement, which is included as Exhibit 2 to this report. Mr. Patient stated at that time that Mr. Orderly had just “disrespected him” by saying, “Move your can, you lazy slob.” She describes Mr. Patient’s manner at that time as angry, embarrassed and annoyed, but rational. (Exhibit 2; Exhibit 4, p. 10).
14. Mr. Patient was released from VAMC Anytown on May 25, 2001. Dr. Proctor, his treating physician, stated that Mr. Patient told her at his pre-release review that one of the orderlies had called him a disrespectful name, that he had already reported it to the Medical Center Director, that he was sure the Director would “have his job,” and as far as he was concerned it was a “closed subject.” (Exhibit 5).

## **CONCLUSIONS:**

**CONCLUSION 1: When Mr. Patient continued to read after Mr. Orderly had asked him to “lift up,” Mr. Orderly reacted by saying, “Move your can, you lazy slob,” or similar words, to Mr. Patient.**

**Analysis:** Mr. Patient’s sworn account of Mr. Orderly’s conduct, written within minutes of the incident, is strongly supported by independent evidence and the facts above.

Particularly persuasive are the following facts: (1) Mr. Orderly had used similar language in discussing Mr. Patient with a coworker; (2) Mr. Patient accused Mr. Orderly of making the statement, “who you calling a lazy [or crazy] slob,” and Mr. Orderly did not deny or even address the accusation; (3) Mr. Orderly was under pressure to get back to an important school assignment, which explains why he may have been short-tempered; and (4) there is no evidence of a credible reason for Mr. Patient to make up such an accusation. Mr. Orderly states that he never would use this kind of language to a patient, but he does not remember the words he did use to Mr. Patient, nor can he otherwise account for the facts discussed above.

**CONCLUSION 2: Mr. Orderly’s disrespectful conduct was in part due to the pressure from his schoolwork and in part due to Mr. Patient’s rudeness to staff – neither of which excuses his behavior.**

***NOTE:** These conclusions were made under a preponderance of the evidence standard of proof. Certain adverse actions may be based upon a different, and lower, burden of proof, substantial evidence. Therefore, the conclusions made by AIBs under the preponderance of the evidence standard are not determinative in those adverse actions. Nonetheless, the evidence in the AIB’s investigative report may be utilized to support a disciplinary or adverse action. Proposing and deciding officials should refer to the applicable human resources policy and guidance, including VA Directive and Handbook 5021, and confer with their servicing human resources specialist regarding disciplinary matters. (See VA Handbook 0700, Ch. 2, § 3(a)).*

\_\_\_\_\_  
IMA Sleuth, Investigator

\_\_\_\_\_  
Date

### EXHIBIT INDEX

Number	Description	Source
1	Charge letter dated May 24, 2001	Charge Letter for AIB
2	Report of Contact signed by Paul B. Patient, dated May 20, 2001.	Charge Letter
3	Transcript of Testimony of John Orderly, May 27, 2001	AIB Interview
4	Transcript of Testimony of Janet Nitingale, RN, May 27, 2001	AIB Interview
5	Declaration of Elizabeth Proctor, MD Treating Physician, dated May 29, 2001 with Supplementary Statement.	AIB Interview
6	Report of Contact with Mr. Paul B. Patient (Patient) dated May 29, 2001.	AIB Report of Contact
7	Extracts from OPF of John Orderly prepared May 30, 2001	VAMC Anytown (HRM Office)

## **APPENDIX M. SAMPLE AIB INVESTIGATIVE REPORT –STANDARD FORMAT**

*The following example is based on an imaginary, relatively complex scenario involving a senior manager and matters that cannot be proved directly (in this case, the reasons for decisions and actions by the subject of the investigation).*

August 5, 2020

From: Administrative Investigation Board

To: Belinda Wiedlin, VAMC Director

Subj: Investigative Report into Allegations of Vehicle Misuse at Musicville VAMC

### **PRELIMINARY STATEMENT**

The Administrative Investigation Board (AIB) has completed its investigation directed by your memorandum dated June 22, 2020, as amended (Exhibit 1).

#### **1. Scope.**

This investigation was convened to inquire into the facts and circumstances surrounding an allegation that Dr. Christine Nicks, Staff Physician, Primary Care, Musicville VAMC, used a government vehicle for other than official purposes during the period May 1, 2020, through June 15, 2020. Allegations that Dr. Nicks committed whistleblower retaliation against the VA employee who reported the alleged misuse of the government vehicle have been made to the VA Office of Accountability and Whistleblower Protection (OAWP). OAWP asked the Convening Authority to provide a copy of this investigative report when completed. OAWP investigates allegations of whistleblower retaliation against VA supervisors; therefore, that allegation is not within the scope of the present investigation. (Exhibit 2).

In addition to the witnesses named in the list of exhibits, the AIB questioned the following persons but determined that they did not possess information material to this investigation: Mick Richards; Keith Jagger; Charlie Wood; and, Ron Watts.

Unless otherwise noted in this investigative report, all named individuals are Musicville VAMC employees.

#### **2. Significant procedural issues.**

a. On July 14, 2020, Mr. Roger Townshend, Administrative Officer for Primary Care, informed the AIB that he refused to answer questions regarding the subject of this investigation based on his constitutional right against compulsory self-incrimination. VA Office of General Counsel and the Convening Authority consulted with the local U.S. Attorney's Office and received authority to assure Mr. Townshend that his testimony would not be used against him for criminal prosecution. (Exhibit 8). Mr. Townshend testified

subject to this assurance. On July 22, 2020, the Convening Authority authorized a 14-day extension of this investigation due to the delay occasioned by this matter. (Exhibit 15).

b. On June 25, 2020, a representative of the AEIOU Local 1234 requested that the union be allowed to attend certain witness interviews on behalf of the employee who reported the vehicle misuse so that the union could assist him in his whistleblower reprisal claim. The AIB denied this request after consultation with Labor-Management relations staff. (Exhibit 4).

## **FINDINGS OF FACT**

1. According to 31 U.S.C. § 3144, government vehicles may be used only for official purposes. Generally, transportation of an employee from his or her residence to his or her place of employment is not official.
2. An agency head may authorize home-to-work use of a Government vehicle where it is required for the performance of field work. See 31 U.S.C. § 1344(a), (b)(9); 41 C.F.R. § 102-5.40. All home-to-work transportation must be approved by the agency head. 31 U.S.C. § 1344. This authority is non-delegable. 31 U.S.C. § 1344(d)(3); 41 C.F.R. § 102-5.40. "Field work" means official work requiring the employee's presence at various locations other than their regular place of work.
3. Dr. Christine Nicks is a Staff Physician in Primary Care. She has held the position since June 2015. As part of Dr. Nicks' job duties, she has utilized a government vehicle assigned to the Musicville VAMC to travel to different Community Based Outpatient Clinics. From May 1, 2020, through June 15, 2020, Dr. Nicks exclusively used Musicville government vehicle number 1 when she used a government vehicle; (Exhibit 7, pp. 2-3; and exhibit 5).
4. In the years 2015 through 2020, Dr. Nicks has received training about the appropriate use of a government vehicle. Included in the training was information that using the government vehicle for local transportation between home and work was prohibited unless specifically authorized by the Secretary of the VA. (Exhibit 7, p. 7).
5. Dr. Martin Hyde has been the Chief of Primary Care since July 1, 2020. Prior to him holding the position, there were several Acting Chiefs of Primary Care from January 2015 until he started in his position. He searched records maintained in Primary Care and did not find any authorization by the Secretary of VA for home-to-work use of a government car for any employee of the Primary Care department at any time. (Exhibit 10, p. 2).
6. Dr. Nicks never received permission to drive the government vehicle between her home and work. (Exhibit 7, p. 8).
7. In about mid-April 2020, Mr. Townshend, the Administrative Officer for Primary Care, had a discussion with Dr. Nicks in which Dr. Nicks expressed that following her divorce, her financial situation had changed significantly. She described her ex-husband as a drain on her resources. She added that since the divorce, she moved residences and

now had a much longer commute. It was adding to her financial burden. Mr. Townshend advised Dr. Nicks that home-to-work use of the Musicville VAMC government vehicle was authorized by VA policy. (Exhibit 9, pp. 5-6).

8. Between May 1, 2020, and May 20, 2020, Dr. Nicks used a Musicville VAMC government vehicle seven times for local transportation directly from home to duty station, which were 30 miles apart. (Exhibit 5 and Exhibit 6).
9. On about May 20, 2020, after attending a training session presented by a VA OGC attorney, Mr. Townshend advised Dr. Nicks that he had been mistaken in his previous advice and that the law prohibited Dr. Nicks from using the car for home-to-work transportation. (Exhibit 9, p. 8). During this conversation, Dr. Nicks asked whether she could park the government vehicle at another VA facility and drive it between that facility and her office at the Musicville VAMC, Mr. Townshend told her she could do so only if she had official business at the other VA facility. (Exhibit 9, pp. 8-9).
10. On about May 22, 2020, Dr. Nicks directed Mr. Townshend to arrange for a Musicville VAMC government vehicle to be parked at the Studio CBOC, which was 3 miles (driving distance) from her home and 20 miles from her Musicville VAMC office. (Exhibit 9 pp. 10-11; and exhibit 6).
11. On about May 25, 2020, Dr. Nicks started a routine morning telephone conference with office staff from the Studio CBOC. Each workday, Dr. Nicks would drive her own car from home to the CBOC and would begin the workday at the clinic at 7:30 AM by holding the telephone conference from a vacant office. (Exhibit 7, p. 10; Exhibit 11, p. 3; Exhibit 12, p. 3). After completing the telephone conference, Dr. Nicks would drive the government vehicle to her Musicville VAMC office. Depending on traffic, this trip averaged between 30 minutes and 45 minutes. At the close of her regularly scheduled workday, Dr. Nicks would depart her office and return the car to the Studio CBOC in the evening. (Exhibit 7, pp. 12-13).
12. Dr. Nicks testified she determined that starting the workday at the Studio CBOC would improve employee morale. She said there were employee issues present there that would benefit from her physical presence each day. Dr. Nicks did not provide specifics about the morale issues. (Exhibit 7, p. 14).
13. Levon Robertson, Employee/Labor Relations Specialist, produced the performance appraisals of the five Studio CBOC employees for fiscal years 2018 and 2019. The overall ratings for all employees were Excellent or Outstanding for each year. (Exhibit 14). Mr. Robertson testified that his department has not received any reports of contact or emails indicating morale problems at the CBOC. (Exhibit 13, p. 2).
14. Studio CBOC employees Wilson Redding and Otis Pickett have worked at the Studio CBOC since 2015 and 2017, respectively. They both testified that in their respective opinions, there have not been morale problems at the Studio CBOC. They consistently testified that the Studio CBOC is a great place to work. (Exhibit 11, pp. 405; and exhibit 12, pp. 3-4).

15. There was differing testimony about the duration of the telephone conferences Dr. Nicks held during the morning at the Studio VAMC. Dr. Nicks testified they ranged anywhere from 30 minutes to an hour. Mr. Redding and Mr. Pickett testified the conferences seldom lasted more than 10 minutes long. (Exhibit 7, p. 15; Exhibit 11, pp. 6-7; Exhibit 12, pp. 4-5).
16. Dr. Nicks repeated the routine described in paragraphs 11 and 12 of this Facts section approximately 15 times between approximately May 25, 2020, and June 15, 2020. (Exhibit 5).
17. On June 15, 2020, Freddie May, a Health Systems Specialist in Primary Care, notified Dr. Hyde, the Primary Care Chief, that Dr. Nicks was using the government vehicle for commuting. (Exhibit 3). Dr. Hyde then notified Dr. Nicks and discussed the matter with her. Dr. Hyde instructed Dr. Nicks to stop using the government vehicle until notified otherwise. Dr. Nicks has not used the government vehicle since receiving this instruction. (Exhibit 10, p. 3; Exhibit 7, p. 16; and Exhibit 5).

## CONCLUSIONS

**Conclusion 1: Dr. Nicks's use of the government vehicle prior to May 1, 2020 and May 20, 2020, for transportation between home and work was in accordance with staff advice but violated the law.**

**Analysis:** Dr. Nicks did not start using the government vehicle between her home and work until receiving advice in mid-April 2020 from Mr. Townshend that she could (Finding of Fact, No. 7). Dr. Nicks also did not have authorization from the Secretary of the VA to use the government vehicle between her residence and work (Finding of Fact, Nos. 5 & 6). Although there was no evidence to support the conclusion Dr. Nicks intentionally violated the law, she violated it, nevertheless. She also received training about the appropriate use of the government vehicle on multiple occasions. (Finding of Fact, No. 4). She should not have solely relied on the advice of Mr. Townshend. She should have discussed the matter with her leadership or sought an opinion from OGC.

**Conclusion 2: Dr. Nicks's use of the government vehicle after May 20, 2020, from the CBOC to the VAMC was not for official purposes. The morning telephone conferences from the CBOC were a pretext to justify transferring much of her personal commuting burden to the government. Dr. Nicks's use of the government vehicle after May 20, 2020 violated the law intentionally.**

**Analysis:** Like Dr. Nicks's use of the government vehicle prior to May 20, 2020, her use of it after that date for home-to-work transportation violated the law. She did not have permission from the Secretary of the VA. The question is whether her misuse of the government vehicle was intentional.

Dr. Nicks testified that she decided to begin the workday at the CBOC because she identified morale problems there. There was conflicting testimony about whether the Studio CBOC had morale problems. Dr. Nicks said such problems existed, but she did

not provide specifics. Mr. Robertson, the Employee/Labor Relations Specialist, produced performance appraisals and provided testimony, which indicated there were no morale problems. Mr. Pickett and Mr. Redding, who have worked at the CBOC for several years, testified no morale problems existed. The AIB concludes Dr. Nicks' testimony lacked credibility. For her to make such a significant change to her daily work schedule, she should have been able to provide specifics about the purported morale problems. The timing of her decision is also highly questionable. She did not begin working daily at the CBOC until after Mr. Townshend told her the law prohibited her from using the car for home-to-work transportation; and that she could park the government vehicle at a different VA facility if she had official business at the other VA facility. (Finding of Fact, No. 9). Weighing all the evidence, the AIB concludes Dr. Nicks parked the government vehicle at the CBOC and then drove it to the VAMC for personal benefit. The arrangement clearly benefited Dr. Nicks personally. By beginning the workday at the CBOC with the conference, Dr. Nicks reduced her commute, a commute that had been causing financial strain for her (finding of fact no. 7).

We conclude that Dr. Nicks's misuse of the government vehicle after May 20, 2020, was intentional. She had received updated advice from Mr. Townshend that her use of the government vehicle up to that point was not permissible. So, she found a reason unsupported by evidence, and to her personal benefit, to continue using the government vehicle in a manner that reduced her commute and personal expenses.

**NOTE:** *These conclusions were made under a preponderance of the evidence standard of proof. Certain adverse actions may be based upon a different, and lower, burden of proof, substantial evidence. Therefore, the conclusions made by AIBs under the preponderance of the evidence standard are not determinative in those adverse actions. Nonetheless, the evidence in the AIB's investigative report may be utilized to support a disciplinary or adverse action. Proposing and deciding officials should refer to the applicable human resources policy and guidance, including VA Directive and Handbook 5021, and confer with their servicing human resources specialist regarding disciplinary matters. (See VA Handbook 0700, Ch. 2, § 3(a)).*

## RECOMMENDATIONS

1. Appropriate disciplinary or other administrative action should be taken against Dr. Nicks for misuse of a government vehicle.
2. Appropriate disciplinary or other administrative action should be taken against Mr. Townshend concerning his exercise of poor judgment with respect to his initial advice to Dr. Nicks about use of the government vehicle.

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Aretha Sinatra, AIB Chair

Date

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Frank Franklin, AIB Member

Date

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Elvis McCartney, AIB Member

Date

**INVESTIGATION OF ALLEGED VEHICLE MISUSE****EXHIBIT INDEX**

<b>Number</b>	<b>Description</b>	<b>Source</b>
1	Charge letter from Musicville VAMC Director Belinda Wiedlin	Belinda Wiedlin
2	Correspondence from Office of Accountability and Whistleblower Protection to Ms. Wiedlin	OAWP
3	Statement of Freddie May to Dr. Chrissie Chambers regarding vehicle misuse	Charge Letter for AIB
4	Email to AEIOU Local 1234 denying request to attend witness interviews	AIB chair
5	Vehicle log use for Musicville VAMC government vehicle number 3	Engineering Service
6	Google maps showing distances between: (1) residence of Dr. Nicks and Musicville VAMC; (2) residence of Dr. Nicks and Studio CBOC; and (3) Musicville VAMC and Studio CBOC	Maps.google.com
7	Transcript of testimony by Dr. Christine Nicks	AIB Interview
8	Letter from U.S. Attorney's office regarding testimony of Mr. Robert Townshend	U.S. Attorney's Office
9	Transcript of testimony by Mr. Robert Townshend	AIB Interview
10	Transcript of testimony by Dr. Martin Hyde	AIB Interview
11	Transcript of testimony by Wilson Redding	AIB Interview
12	Transcript of testimony by Otis Pickett	AIB Interview
13	Transcript of Testimony by Levon Robertson	AIB Interview
14	Performance appraisals of Studio CBOC employees	Levon Robertson
15	Extension of time for AIB to complete investigation	Convening Authority

## APPENDIX N. SAMPLE COMPLETION CERTIFICATE FOR AIBS

**NOTE:** *Language similar to that in italics should be included as appropriate.*

### COMPLETION OF INVESTIGATION

I have conducted a review of the attached investigative report dated [Report date] into [insert subject from Charge Letter] in accordance with VA Handbook 0700. This investigation was convened by my Charge Letter of [insert date].

*Review of the report was extended to 20 days to perform a thorough legal and financial review with respect to Conclusions 4, 5, and 7, as documented by Appendices \_\_\_\_ and \_\_\_\_.*

### MODIFICATIONS:

*The Findings of Fact and Conclusions are modified as follows:*

- a. *Change Finding of Fact 1 to read "...” As discussed below, the matter deleted from this Finding is a Conclusion rather than an undisputed fact.*
- b. *Change Finding of Fact 4 by deleting the following language, "\_\_\_\_” The deleted portion is not supported by the evidence cited and is contradicted by evidence in Exhibit 5, page 7).*
- c. *Add as an additional Finding of Fact, number 27, the following: "... (Exhibits \_\_\_\_, \_\_\_\_, and \_\_\_\_).”*
- d. *Delete Conclusion 13, which expresses an unnecessary and inappropriate legal opinion.*
- e. *With respect to Conclusion 14, I note that\_\_\_\_\_*

*The following corrective action has been taken regarding the subject matter of this report:*

- a. *I have requested \_ to conduct a thorough financial audit of the operations of\_ to ensure that its current procedures comply with applicable requirements, and that adequate control mechanisms are in place to preclude recurrence of the matters documented in Conclusions 5 and 7.*
- b. *The Chief Operating Officer has initiated disciplinary action with respect to the matters in Findings 12 and 13 and Conclusion 5.*
- c. *I have directed that a copy of this report be forwarded to the Deputy Under Secretary \_\_\_\_ for consideration of VA-wide policy changes in view of Conclusions 9 and 10, and for distribution of lessons learned from this investigation to field activities.*

I certify that this report has been reviewed for compliance with VA Directive and Handbook 0700, and the subject of the report has been properly investigated.

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Convening Authority Signature

Date

**APPENDIX O. SAMPLE FACT FINDING REPORT**

(Utilize a VA Standard Memorandum Format)

**Section 1: To be completed by the Third-Party Initiating Authority**

*(if this is a self-initiated Factfinding, skip to Section 2).*

From: Initiating Authority, Smalltown VAMC

Subj: Investigative Report into Allegations equipment mismanagement, VAMC Anytown

To: Factfinder, Smalltown VAMC

**I Authorize you to conduct a Factfinding into the incident(s) described below:**

*(Describe what occurred or did not occur, using who, what, where, when, why and how format.)*

In January 2019, Smalltown VA Pharmacy Team purchased multiple ventilation hoods. These hoods did not comply with DEA standards, so loaner hoods were acquired in March 2019. A recent VISN audit (Exhibit 1), completed on December 31, 2019, revealed that the loaner hoods are not functioning properly. I am concerned for patient safety. Dr. F. Good, Chief of Pharmacy, could not explain why the pharmacy is not in compliance with DEA standards (Exhibit, 2, Dec. 31, 2019, Email from Dr. Good).

This Factfinding should answer the following questions:

- (a) What is the inventory count for all hoods, purchased and loaners?
- (b) What were the dates of purchase for all hoods?
- (c) Who was involved in the purchase/ procurement of all hoods?
- (d) Has any of the manufacturer provided inaccurate data about their product?
- (e) Did the pharmacy team seek guidance from VISN lead, the DEA or any other subject matter expert before purchasing these hoods?
- (f) Is the pharmacy aware of and following VISN policy 123-456A (Exhibit 3), Pharmacy Ventilation Systems? If not, what needs done to bring us into compliance?

The Factfinding must be completed by February 15, 2020. The investigative report must be submitted to the Initiating Authority no later than the completion date.

The A.O. for this service line is Olive Oil Jones. Please start your interview with her.

Is the following information provided above? *Check each box after verifying the information is included above.*

- What work unit/service line is involved
- Who is the Point of Contact within the work unit/service line
- Who lodged the complaint, if known
- What other Employee(s) are involved
- What witnesses are identified
- What law, rule, regulation, policy, etc. was allegedly violated and how
- Was the employee aware of the rule or procedure that was violated:  YES  NO  
 UNKNOWN

If yes, how? What evidence supports this conclusion (e.g. training records, VA Employee Handbook, etc.)

- Can any harmful or adverse consequence(s) be attributed to this incident?  YES  
 NO  UNKNOWN

If yes, describe the harmful or adverse consequence(s). What evidence supports this assessment?

## **Section 2: To be completed by the Factfinder**

### **PRELIMINARY STATEMENT**

I have completed the Factfinding into questions of equipment mismanagement in the pharmacy at the Smalltown VAMC. My investigation was conducted over five business days, totaling about 10 working hours. I found all witnesses to be cooperative. I was provided with all requested evidence.

### **ISSUES**

During the course of my investigation, I examined the following issues:

- (a) What is the inventory count for all hoods, purchased and loaners?
- (b) What were the dates of purchase for all hoods?

- (c) Who was involved in the purchase/ procurement of all hoods?
- (d) Has any of the manufacturer provided inaccurate data about their product?
- (e) Did the pharmacy team seek guidance from VISN lead, the DEA or any other subject matter expert before purchasing these hoods?
- (f) Is the pharmacy aware of and following VISN policy 123-456A (Attachment 3), Pharmacy Ventilation Systems? If not, what needs done to bring us into compliance?

<b>Interviews:</b> <i>List identified witnesses below and interview times/dates and representative present (if applicable)</i>			
Witness Name & Job Title	Date/Time	BUE Representation Offered (N/A if not a BUE).	Representative Name (if present) (Ensure Reprs. Complete Form in Appendix J of VA Handbook 0700, and include in investigative file)
Dr. F. Good	1/4/2020, 9 AM	N/A	N/A
Olive Oil Jones	1/5/2020g, 9 AM	Yes	Helpful Henry, AFGE
Steven Scribner, procurement SME	1/5/2020, 11 AM	Yes	N/A
Ms. Manners, VISN compliance	1/6/2020 9 AM	N/A	Mr. Manners, husband
Polly Personality, HRO	1/7/2020, 9 AM	N/A	N/A
<b>Evidence Index:</b> <i>List and number all material documents, records and testimony obtained during this fact finding. (i.e., time and leave records, Reports of Contact, policies, emails, etc.). All material evidence must be attached to this form upon completion. Be sure to maintain a full copy of all investigation records in the investigative file. See VA Handbook 0700, Ch. 5, § 4.</i>			
Exhibit 1- VISN Audit report (Dec. 31, 2019)			
Exhibit 2- Policy 123-456A			
Exhibit 3- Purchase Orders and Lease Documents for Pharmacy Vent Hoods			
Exhibit 4- Training records for Dr. F. Good			
Exhibit 5- "How to Order the Pharmacy Vent Hood" from Ms. Manners			
Exhibit 6- Uniform Sterilization Procedure (USP) 800/797			
Exhibit 7- Unsworn Declaration under Penalty of Perjury of Dr. F. Good			
Exhibit 8- Declaration of Olive Oil Jones			
Exhibit 9- Declaration of Steven Scribner			
Exhibit 10- Summary of interview with Ms. Manners			

Exhibit 11 – Summary of interview with HRO
Exhibit 12 – Representative designations

**Findings of Fact** are factual statements, relevant to the issues under investigation, that the investigator has determined to be true or false based upon the evidence and that are not subject to reasonable dispute. Examples are objective statements of things seen, heard, touched, smelled, tasted, thought, believed, measured or determined by established scientific or mathematical processes. A statement is not subject to reasonable dispute if it is supported by evidence objectively establishing its truth; is not substantially contradicted by other evidence; and does not require inferences or interpretations (including credibility determinations). Be sure to cite to the Exhibit containing the evidence that supports each fact.

Fact 1: The facility currently possesses 4 Pharmacy Vent Hoods:

Model 3443A (2), purchased January 12, 2019

Model 456LM (2), acquired by loan from manufacturer March 24, 2019.

(Exhibit 3, Exhibit 7, Exhibit 8).

Fact 2: The purchase order and lease documents for all 4 hoods were properly maintained by the pharmacy service. (Exhibit 3).

Fact 3: Facility's experiences with different Vent Hoods was often discussed extensively on VA Chiefs Teleconferences from January 2019 through the present. (Exhibit 1, Exhibit 7).

Fact 4: All major medical device purchases must be made in compliance with the FAR and done through the acquisition office. (Exhibit 1, Exhibit 5, Exhibit 10).

Fact 5: The acquisition office was not involved in any purchase or loan of Vent Hoods described in Facts 1, located in the pharmacy. (Exhibit 1, Exhibit 2, Exhibit 3, Exhibit 7, Exhibit 8).

Fact 6: Dr. F. Good was solely responsible for procuring two hoods Model 3443A. (Exhibit 3, Exhibit 7, Exhibit 8).

Fact 7: Only after purchasing hoods Model 3443A in January 2019, did Dr. F. Good realize that they were not in compliance with policy. However, he did not attempt to remedy the problem for several months, until approximately March 2019 when he acquired the two additional hoods via a loan from the manufacturer. (Exhibit 7, Exhibit 8).

Fact 8: Every hood purchased or otherwise acquired by the facility was accompanied by the appropriate operating manuals. (Exhibit 5, Exhibit 10).

Fact 9: USP 800/797 is current and complies with all VA sterilization SOPs. (Exhibit 2, Exhibit 6).

Fact 10: The Model 3443A pharmacy hoods does not comply with USP 800/797. (Exhibit 1, Exhibit 6, Exhibit 7).

Fact 11: VISN policy 123-456A is current and complies with all VA hood purchasing SOPs. (Exhibit 2, Exhibit 10).

Fact 12: Ms. Manners was never contacted by Dr. F. Good regarding hood purchases. (Exhibit 7, Exhibit 10).

Fact 13: In 2019, the pharmacy was understaffed, and existing staff were required to perform multiple duties. (Exhibit 7, Exhibit 8, Exhibit 13).

Fact 14: Dr. F. Good was current on all required training, including procurement procedures and sterilization procedures. (Exhibit 4).

Fact 15: Since September 23, 2019, the following steps were implemented by the pharmacy to ensure compliance without all appreciable policies:

- New Compliance Manager attending Critical Point training and certification on USP 800/797 compliance in near future.
- Continue to address and resolve non-compliance areas and requirement from the national stand-down assessment.
- Continue to use contracted vendor as a back-up product supply source after hazardous (chemo) room is operational.

(Exhibit 1, Exhibit 4, Exhibit 8, Exhibit 9, Exhibit 11).

**Conclusions:** *Disputed issues are resolved by the Factfinder in the Conclusions, which must be supported by a preponderance of the evidence. Conclusions require interpretation or assessment of conflicting evidence, including credibility assessments. The Factfinder should identify any evidence that materially conflicts with the stated Conclusion and discuss the process in resolving of the conflict (i.e., it should describe why the investigator found the Conclusion to be more reasonable than any feasible alternatives).*

**Conclusion 1:** Dr. F. Good and A.O. Olive Oil Jones are the only staff active in hood purchases and compliance over the past three years. Their main sources of information were from VA Chiefs teleconferences. This is not in compliance with FAR provisions or facility standard operating procedures. There exist other resources and facility employees that should be consulted with making durable equipment purchases. (Facts 2, 4, 5 and 9).

**Conclusion 2:** There was no evidence that the manufacturer provided inaccurate data. (Fact 6).

**Conclusion 3:** Despite evidence that Dr. F. Good had exposure to National Chiefs Leaders in Pharmacy, and other information around the time of purchase, there is no evidence of him using any such information in the decision-making process when purchasing hoods from this vendor.(Fact 3). I note that when interviewed by the VISN, Dr. F. Good stated that he relied on information from the National Pharmacy Office (Exhibit 1);

however, when questioned further, he admitted that he had not done so. (Exhibit 7). I give greater weight to his testimony during the Factfinding, because the variation was created when I confronted him with testimony from Olive Oil Jones (Exhibit 8) and he confirmed he was changed his prior testimony. (Exhibit 7).

Conclusion 4: There was some patient safety risk from Sept. 1 to Oct. 15, 2019, specifically:

- Compounded hazardous (chemo) compounds from Sept. 1-23, 2019 in a hood that lost its certification. Could not verify cleanliness for any of these products compounded during that time
- Hazardous (chemo) compounding occurred in a positive pressure room which has been a VA violation of USP compliance since May 2018
- Other products were compounded from Sept 1 through Oct. 15, 2019 under the similar non-certified hood conditions. (Fact 10).

Conclusion 5: Dr. F. Good was slow to respond between January 2019 and March 2019. This is evidenced by his slow response to obtain loaner hoods. He did not provide a reasonable explanation regarding this delay. (Fact 7).

Conclusion 6: Dr. F. Good's response was hindered from wearing multiple hats during this period:

- Acting Chief of Radiology (with some major concerns to address)
- Chief of Staff
- Leading Fact Finding for Surgery
- Personal hospitalization related to stress

(Fact 13; I also discussed this matter with the HRO, who confirmed that this workload was above the normal workload expected of a service chief)

Conclusion 7: Dr. F. Good did not meet performance expectations or follow through appropriately regarding issues with the hoods on multiple occasions from January to December 2019, despite being fully trained. This conclusion is based on Dr. Good's admission to this effect in his statement and an assessment. (Facts 7 and 14; Exhibit 7).

Conclusion 8: The pharmacy recognizes that there was a breakdown in the acquisition process that potentially placed patient safety at risk and has taken meaningful steps to avoid repeating the error as described in Fact 15. These steps comply with all policies and procedures reviewed during this factfinding. (Fact 15).

**NOTE:** *These conclusions were made under a preponderance of the evidence standard of proof. Certain adverse actions may be based upon a different, and lower, burden of proof, substantial evidence. Therefore, the conclusions made by the Factfinder under the preponderance of the evidence standard are not determinative in those adverse actions. Nonetheless, the evidence in the investigative report may be utilized as evidence in a disciplinary or adverse action. Proposing and deciding officials should refer to the applicable human resources policy and guidance, including VA Directive and Handbook 5021, and confer with their*

*servicing human resources specialist regarding disciplinary matters. (See VA Handbook 0700, Ch. 2, § 3(a)).*

Signed: \_\_\_\_\_  
Factfinder Signature

Date: \_\_\_\_\_