Department of Veterans Affairs
Washington, DC 20420

VA DIRECTIVE 5021
Transmittal Sheet
April 15, 2002

EMPLOYEE/MANAGEMENT RELATIONS

1. REASON FOR ISSUE: To issue Department of Veterans Affairs (VA) policy regarding employee/management relations.

2. SUMMARY OF CONTENTS/MAJOR CHANGES: This directive sets forth policies previously contained in numerous other issuances. No substantive changes have been made.

3. RESPONSIBLE OFFICE: The Human Resources Management Programs and Policies Service (051), Office of the Deputy Assistant Secretary for Human Resources.

4. RELATED HANDBOOK: VA Handbook 5021, "Employee/Management Relations."

5. RESCISSIONS: Refer to the Transmittal Sheet for VA Directive 5001, "General Introduction and Administration."

CERTIFIED BY:

John A. Gauss
Assistant Secretary for
Information and Technology

BY DIRECTION OF THE SECRETARY OF VETERANS AFFAIRS:

Jacob Lozada, Ph.D.
Assistant Secretary for Human
Resources and Administration

EMPLOYEE/MANAGEMENT RELATIONS

1. PURPOSE. This directive contains policy on employee relations programs. This directive should be used in conjunction with VA Handbook 5021, which contains mandatory guidance and procedures.

2. POLICY

a. The public interest requires the maintenance of high standards of employee integrity, conduct, effectiveness, and service to the public. When such standards are not met, prompt and appropriate disciplinary or other corrective action will be taken. The policy of VA is to maintain standards of conduct and efficiency that will promote the best interests of the service.

b. It is the policy of VA to identify, prevent, and make reasonable efforts to resolve employee dissatisfactions. Efforts will be made to resolve grievances informally. However, the filing of formal grievances is not to be discouraged or prevented. All individuals involved in grievance proceedings, whether employees, employee representatives, or members of management, are expected to be candid and to act in good faith, not only in following the letter of the grievance procedure, but in observing the underlying spirit and intent in attempting to resolve dissatisfactions. Supervisors are expected to give full and fair consideration to employee complaints and causes of dissatisfaction.

c. VA will administer the employee relations programs covered by this directive and VA Handbook 5021 in accordance with applicable laws and regulations. The appendix to this directive contains program requirements applicable to certain employees appointed under title 38. The contents of the appendix were published in the Federal Register, Vol. 57, No. 21, dated January 31, 1992.

3. RESPONSIBILITIES. Statements of responsibility for the various employee relations programs may be found in each of the separate parts or chapters of VA Handbook 5021, or the appendix to this directive, as appropriate.

APPENDIX A. DISCIPLINARY AND GRIEVANCE PROCEDURES

SECTION A. DISCIPLINARY AND MAJOR ADVERSE ACTIONS

1. SCOPE AND AUTHORITY

a. This section governs disciplinary and major adverse actions based on conduct or performance in the Department of Veterans Affairs (VA). The provisions of this section apply to VA employees holding a full-time, permanent appointment under 38 U.S.C. 7401(l) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included in this category are: physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants and expanded- function dental auxiliaries. Henceforth, "employee(s)" will be the term used to refer to the above categories in this section, unless otherwise specified.

b. This chapter does not apply to employees appointed under 38 U.S.C., chapters 3, 71 or 78, or to employees appointed under 38 U.S.C. 7306, 38 U.S.C. 7401(3), 38 U.S.C. 7405, or 38 U.S.C. 7406.

(Authority: 38 U.S.C. 501(a), 7401, 7403(b), 7405, 38 U.S.C. 7461-7464.)

2. REFERENCES

a. Section 203 of the Department of Veterans Affairs Health-Care Personnel Act of 1991 (Pub. L. 102-40).

b. Title 38, United States Code, chapter 74.

3. DEFINITIONS. Unless otherwise noted, the following definitions apply to this appendix only.

a. **Disciplinary Actions.** These are adverse actions, other than major adverse actions, which include admonishment and reprimand based on conduct or performance.

b. **Admonishment.** An official letter of censure to an employee for minor act(s) of misconduct or deficiency in competence. This letter normally remains in the employee's personnel folder for two years.

c. **Reprimand.** An official letter of censure to an employee for an act of misconduct or deficiency in competence. A reprimand is a more severe disciplinary action than an admonishment. This letter normally remains in the employee's personnel folder for three years.

d. **Major Adverse Actions.** These are suspension, transfer, reduction in grade, reduction in basic pay, and discharge based on conduct or performance.

e. **Suspension.** The involuntary placement of an employee, for disciplinary reasons, in a non-duty, non-pay status for a temporary period of time.

f. **Transfer.** The involuntary movement of an employee from one VA facility to another (under separate managerial authority) based on conduct or performance and without a break in service.

g. **Reduction in Grade.** The involuntary assignment to a lower grade on the same pay schedule based on conduct or performance.

h. **Reduction in Basic Pay.** The involuntary reduction, based on conduct or performance, of the annual rate of basic pay to which an employee is entitled under 38 U.S.C. 7404, including above minimum entrance rates and special salary rates authorized under 38 U.S.C. 7455. This does not apply to reductions in pay other than basic pay, such as the loss of physician or dentist special pay or head nurse differential, other differentials, allowances or premium pay such as standby, on-call, shift, overtime, Sunday, holiday, night work, hazardous duty, and interim geographic adjustment.

i. **Discharge.** The involuntary separation of an employee from employment based on conduct or performance.

j. **Disciplinary Appeals Board.** The three member board designated to hear an employee's appeal of a major adverse action which is based in whole or in part on a question of professional conduct or competence.

k. **Professional Conduct or Competence.** A question of professional conduct or competence involves direct patient care and/or clinical competence. The term clinical competence includes issues of professional judgment.

l. **Mixed Case.** This is a case that includes both (1) a major adverse action arising out of (or including) a question of professional conduct or competence, and (2) a major adverse action which does not arise out of a question of professional conduct or competence, or a disciplinary action.

m. **Grade.** The established grades for the positions covered by this chapter will be as defined by 38 U.S.C. 7404, and the qualification standards issued pursuant to 38 U.S.C. 7402. (See part II of VA Handbook 5005, Staffing.) (Authority: 38 U.S.C. 501(a), 7421.)

4. RESPONSIBILITIES AND AUTHORITIES. The Under Secretary for Health or designee will appoint Disciplinary Appeals Boards to hear appeals of major adverse actions and will review and take appropriate action on all decisions rendered by Disciplinary Appeals Boards.

(Authority: 38 U.S.C. 501(a).)

5. DISCIPLINARY ACTIONS

a. **Types of Disciplinary Actions.** This paragraph applies to adverse actions, other than major adverse actions, which include admonishment and reprimand based on conduct or performance (refer to paragraph 3 of this section for definitions).

b. **Procedural Entitlements**

(1) Prior to taking disciplinary action, employees must be given:

(a) Advance written notice of the action proposed. The advance notice of proposed action must contain the following information:

1. The nature of the action proposed (e.g., admonishment);

2. A statement of the specific charges upon which the proposed action is based, including names, dates, places, and other data sufficient to enable the employee to fully understand the charges and to respond to them;

3. A statement of any specific law, regulation, policy, procedure, practice or other specific instruction (national, local or otherwise) that has been violated as it pertains to the charge(s), if applicable;

(b) The right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(c) The right to a reasonable amount of time to submit the reply or replies (time limits may vary according to the circumstances but in no event should be less than five calendar days);

(d) The right to review the material relied upon to support the reasons for the proposed action;

(e) Identification of the official who will receive any oral and/or written replies;

(2) The right to a written decision as soon as possible after the employee's reply has been fully considered or after the expiration of the time allowed for reply, if the employee does not reply;

(3) The right to be represented by an attorney or other representative of the employee's choice at all stages of the case; and

(4) The right to grieve the disciplinary action, if any.

c. **Employee's Reply**

(1) If the employee requests an opportunity to reply orally, the decision official or designee will receive the employee's reply. Any official designated to receive the reply must have the authority to recommend what final decision should be made.

(2) A written summary signed by the official hearing the oral reply must be made part of the record.

d. **Arriving at a Final Decision**

(1) The decision official will give full and impartial consideration to the employee's reply, if any; the recommendation of the designee hearing an oral reply, if any oral reply was made; and all evidence of record. If the decision official finds one or more of the charges in the advance notice sustained, he or she will determine an appropriate action.

(2) A decision adverse to the employee must be based only on the charges stated in the notice of proposed action. If none of the charges are sustained, either in whole or in part, no action may be imposed, regardless of any record of past discipline cited in the notice.

(3) The penalty may not be more severe than that proposed in the notice of proposed action.

(4) If the notice of proposed action is determined to be procedurally defective to the detriment of the employee's substantive rights, or if it is found that additional reasons other than those set forth should be considered, or that the appropriate action should be more severe than that proposed, the notice of proposed action will be rescinded and a new notice of proposed action issued.

(5) If it is determined that the appropriate action is a major adverse action, the procedures outlined in paragraph 6 of this section will apply.

e. **Decision.** The decision will be in writing and will contain the following information:

(1) A statement of whether any of the charges sustained arose out of a question of professional conduct or competence.

(2) A statement that consideration has been given to all evidence developed, including the employee's reply(ies).

(3) A statement of the decision official's determination regarding which charges, if any, in the advance notice were sustained, and which charges, if any, were not sustained.

(4) If a record of prior disciplinary actions was cited in the advance notice, the decision will indicate how the past record, as cited in the advance notice, was taken into consideration in determining the proper action. (Prior disciplinary actions which have expired or have been withdrawn may not be cited as a basis for a future action.)

(5) A statement concerning the employee's rights to file a grievance, and the time limit within which it must be filed.

f. **Appeals of Disciplinary Actions**

(1) If the disciplinary action involves or includes a question of professional conduct or competence, the employee may appeal it under the grievance procedures contained in section B of this appendix.

(2) If the disciplinary action does not involve or include a question of professional conduct or competence, the employee may appeal the action under the grievance procedure in section B of this appendix. However, if the employee is covered by a collective bargaining agreement under 5 U.S.C., chapter 71, and the negotiated grievance procedure includes disputes over these actions within its scope, the employee may elect to appeal the action through the negotiated grievance procedure or the grievance procedure in section B of this appendix, but not both. The employee shall elect which grievance procedure will be used. The timely filing of a grievance under either procedure shall constitute an irrevocable election. Grievances filed under the negotiated grievance procedure must be filed in

accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to the negotiated agreement for the appropriate steps and time limits.

g. **Withdrawal of Action**

(1) After 2 years, admonishments will be removed from the personnel folder and destroyed. However, in cases of patient abuse, an admonishment may be retained in the personnel folder indefinitely. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management (HRM) Officer that the admonishment, including patient abuse cases, be withdrawn, if the employee's conduct so warrants.

(2) After 3 years, a reprimand will be removed from the personnel folder and destroyed. However, in cases of patient abuse, the reprimand may be retained in the personnel folder indefinitely. The employee's supervisor may, after 2 years, make a written request to the HRM Officer that the reprimand, including patient abuse cases, be withdrawn, if the employee's conduct so warrants.

(3) If the request for early withdrawal is initiated by a supervisor below the level of the official who issued the action, it must be approved at or above the level of the initial decision official.

(4) The employee may, after 6 months, make a written request to the supervisor that the admonishment be withdrawn. The employee may, after 2 years, make a written request to the supervisor that the reprimand be withdrawn.

(5) Since the admonishment or reprimand may be appealed under the grievance procedure initially and, except in patient abuse cases, will automatically be removed from the personnel folder after 2 or 3 years, respectively, a grievance may not be filed based on a supervisor's decision not to remove it earlier than the expiration date.

(Authority: 38 U.S.C. 501(a), 7421, 7461, 7463.)

6. MAJOR ADVERSE ACTIONS

a. **Types of Actions.** This paragraph applies to suspensions, transfers, reductions in grade, reductions in basic pay, and discharges.

b. **Burden of Proof.** When taking a major adverse action against an employee, the Department bears the burden of proving by a preponderance of evidence the charges that form the basis for the action.

c. **Procedural Entitlements**

(1) Prior to taking a major adverse action, the employee must be given:

(a) 30 calendar days advance written notice of the action proposed. The advance notice of proposed action must contain the following information:

1. The nature of the action proposed;

2. The specific charges upon which the proposed action is based, including the details and circumstances (i.e., names, dates, places, and other data) constituting the basis for action, sufficient to enable the employee to fully understand the charges and to afford the employee a fair opportunity to respond to them;

3. Any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated as it pertains to each charge;

4. A statement of the employee's past disciplinary record when such record is to be relied upon as evidence or considered as part of the basis for the proposed action. Specific previous infractions and penalties will be cited and identified and the employee will be advised that he or she may reply orally or in writing, or both orally and in writing, with respect to those previous infractions. The statement will also advise the employee that he or she may submit supporting evidence, including affidavits, and may make a statement concerning the use to be made of the past record in determining proper action. Prior disciplinary actions which have expired or have been withdrawn may not be cited as the basis for future action;

(b) The right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(c) The right to a reasonable amount of time to submit the reply(ies). Time limits may vary according to the particular circumstances in each case. However, the employee must be allowed a minimum of seven days from date of receipt of the notice of proposed action, but no more than 30 days from date of the written notice of charges. The proposing/deciding official may grant extensions beyond 30 days only when good cause is shown;

(d) The right to review the material relied upon to support the reasons for the proposed action;

(e) Identification of the official who will receive any oral or written replies;

(f) Identification of the decision official;

(2) The right to representation by an attorney or other representative of the employee's choice at all stages of the case;

(3) The right to a written decision within 21 days of receipt of the employee's reply, if any, or of the expiration of the reply period if no reply is made (see subparagraph g (1) and (2) below); and

(4) The right to grieve or appeal, as appropriate, any major adverse action effected.

d. **Exceptions to 30-day Advance Notice.** The requirement for a 30-day advance notice period may be shortened if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (38 U.S.C. 7462(b)(1)(A)). This exception is concerned solely with shortening the advance notice period. In order for the "crime provision" or "crime exception" to be invoked, there must be reasonable cause to believe that the employee has committed a crime for which the employee may be imprisoned. The employee must still be afforded a reasonable

amount of time, but not less than 7 days, to reply orally and/or in writing to a notice of proposed adverse action.

e. **Employee's Reply**

(1) If the employee requests an opportunity to reply orally, the decision official, or designee, will receive the employee's reply. Any official designated to receive the reply must have the authority to recommend what final decision should be made.

(2) A written summary of the oral reply must be made and placed in the adverse action file.

f. **Arriving at a Final Decision on the Proposed Action**

(1) The decision on a proposed major adverse action will be made by an official who is in a higher position than the official who proposed the action, unless the action is proposed by the Secretary.

(2) The decision official will give full and impartial consideration to the employee's reply, if any, and all evidence of record. If the decision official finds that one or more charges in the advance notice are sustained, he or she will determine the appropriate action. If none of the charges are sustained, either in whole or in part, no action may be imposed, regardless of any past record cited in the notice.

(3) Any penalty imposed by the decision official may not be more severe than the action specified in the notice of proposed action.

(4) If the notice of proposed action is determined to be procedurally defective to the detriment of the employee's substantive rights, or if it is found that additional reasons other than those set forth should be considered, or that the appropriate action should be more severe than that proposed, the notice of proposed action will be rescinded and a new notice of proposed action issued.

(5) If additional evidence becomes available to further support the charges in the advance notice, but does not necessarily provide a basis to alter the charges or the proposed action, the employee will be afforded the opportunity to respond to the new evidence before a final decision is made.

g. **Decision**

(1) The deciding official shall render a decision in writing within 21 days of his/her receipt of the employee’s reply(ies). The decision will be delivered to the employee at least five days prior to the effective date of the action, whenever possible. The five day period does not apply in cases where there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (see paragraph 6d of this section).

(2) A decision on a proposed major adverse action may be held in abeyance at the request of the employee and agreement by the deciding official, in order for the employee to seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973 (see 29 U.S.C. Section 701, et seq.). The employee must provide acceptable documentation for his or her request which, at a minimum, establishes both a qualifying handicapping condition and a causal connection between the

handicapping condition and the cited misconduct and/or deficiency in performance. However, an abeyance of this nature may not exceed one year.

(3) The decision letter must contain the following:

(a) A statement of the specific charges that are sustained and those that are not sustained;

(b) When a major adverse action is imposed, a statement as to whether any of the charges sustained arose out of a question of professional conduct or competence;

(c) A statement that consideration has been given to all evidence developed, including the employee's reply. If the employee replies both orally and in writing, both must be mentioned;

(d) If a record of prior disciplinary actions was cited in the advance notice, the decision will indicate how the past record, as cited in the advance notice, was taken into consideration in determining proper action;

(e) A statement of the effective date (not less than 30 days from receipt of notice of proposed action), if the action imposed is a major adverse action. If the action is a suspension, the inclusive dates of the suspension will be stated; and

(f) A statement specifying the employee's appeal rights, and the time limits within which any appeal must be filed.

h. **Appeals of Major Adverse Actions**

(1) If the major adverse action does not involve or include a question of professional conduct or competence, an employee may elect to seek review of the decision under the grievance procedure described in section B of this appendix. However, if the employee is covered by a collective bargaining agreement under 5 U.S.C., chapter 71, and the negotiated grievance procedure includes disputes over these actions within its scope, the employee may elect to appeal the action through the negotiated grievance procedure or the grievance procedure in section B of this appendix, but not both. The employee shall elect which grievance procedure will be used. The timely filing of a grievance under either procedure shall constitute an irrevocable election. Time limits for filing a grievance under the VA procedure are governed by the provisions of section B of this appendix. Grievances filed under the negotiated grievance procedure must be filed in accordance with the provisions of the applicable negotiated agreement.

(2) If the major adverse action is based in whole or in part on a question of professional conduct or competence, the employee may appeal to the Disciplinary Appeals Board under the provisions in section C of this appendix.

(3) If the employee does not request a hearing in the request for an appeal, the Board may elect to conduct a hearing or make a decision based on a review of the record.

(4) Appeals to the Disciplinary Appeals Board must be submitted to the Under Secretary for Health or designee so as to be received within 30 days after the date of service of the written decision on the employee. The 30-day time limit may not be extended.

(5) An issue of whether a matter or question concerns, or arises out of, professional conduct or competence is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining and may not be reviewed by any other agency.

(Authority: 38 U.S.C. 501 (a), 7421, 38 U.S.C. 7461-7464.)

SECTION B. GRIEVANCES

1. SCOPE AND AUTHORITY

a. **General.** This section governs employee grievances under the VA grievance procedure.

b. **Employee Coverage**

(1) This section applies to all physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants, and expanded-function dental auxiliaries who are not on time-limited appointments.

(2) A bargaining unit employee may elect to use the VA grievance procedure described in this section or the negotiated grievance procedure, but not both, in the case of a disciplinary or major adverse action covered under section A of this appendix which does not involve a question of professional conduct or competence.

c. **Disciplinary and Adverse Actions Covered.** Disciplinary and major adverse actions, other than major adverse actions which involve questions of professional conduct or competence, are covered by the grievance procedures described in this section.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

2. REFERENCES

a. Section 203 of the Department of Veterans Affairs Health-Care Personnel Act of 1991 (Pub. L. 102-40).

b. 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.

3. RESPONSIBILITIES. The Under Secretary for Health and other key management officials are responsible for delegating authority to appropriate officials to decide grievances. The Under Secretary for Health and facility directors, as appropriate, will designate such officials in writing.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

4. DEFINITIONS

a. **Grievance.** A request by an employee, or group of employees, for personal relief in a matter of concern or dissatisfaction relating to employment which is subject to the control of agency management. Matters not covered by the grievance procedure may be found in paragraph 14 of this section.

b. **Employee.** Any physician, dentist, podiatrist, optometrist, nurse, nurse anesthetist, physician assistant, or expanded-function dental auxiliary covered in the scope of this section. Former employees of VA are also included, but only in connection with a grievance over discharges or actions resulting in loss of pay or benefits (for example, a former employee charged with 8 hours absence without leave

(AWOL) who has requested that the 8 hours of pay be restored). Former employees must have filed a timely grievance in accordance with the provisions of this appendix in order to receive consideration.

c. **Bargaining Unit Employee.** An employee included in an appropriate unit, pursuant to 5 U.S.C. 7112 and 7135, for which a labor organization has been accorded exclusive recognition.

d. **Personal Relief.** A specific remedy directly benefiting the grievant, but may not include a request for disciplinary or other action affecting another employee.

e. **Grievance File.** A separate file subject to the Privacy Act which contains all documents related to the grievance, including, but not limited to, statements of witnesses, records or copies thereof, the report of the hearing if one is held, statements made by the parties to the grievance, and the decision.

f. **Decision Official.** An official designated to (1) receive and attempt to adjust formal grievances; (2) refer formal grievances for further review and inquiry; and (3) decide formal grievances based on the results of impartial reviews and recommendations.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

5. REPRESENTATION

a. **Election of Representation.** An employee may present a grievance with or without representation.

b. **Designation of Representative.** An employee has the right to be accompanied, represented, and advised by a representative of his or her choice at any stage of the procedure. If a grievance is presented under the formal grievance procedure, designation of a representative, will be in writing and will be submitted to the decision official. Any change of representative will be in writing.

c. **Disallowance of Designated Representative.** An employee's representative who is employed by VA may be disallowed by the facility Director because of conflict of position, or conflict of interest. The disallowance of a designated representative may be challenged in accordance with part IV, chapter 3, paragraph 4 of VA Handbook 5021.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

6. TIME LIMITS FOR PROCESSING GRIEVANCE

a. **Time Limits.** A decision on a grievance will be issued within the shortest time frame possible. To ensure timely and orderly processing, the following time limits are established for each stage of the grievance procedure:

(1) **Informal Procedure**

(a) 15 days from the date of the incident or action on which the grievance is based for employee to initiate grievance. When an employee is informed of a final decision that has not yet been effected, the period to present a grievance is counted from the date of notification of the action.

(b) 10 days for the supervisor to complete the action under the informal procedure.

(2) **Formal Procedure**

(a) 10 days for employee to file a written grievance under the formal procedure after completion of the informal procedure, or 15 days from the date of service of a decision where a grievance originates at the formal process (see par. 9, this sec.).

(b) 10 days for deciding official to adjust, reject, or refer grievance for inquiry by examiner or for technical review after employee files formal grievance.

(c) 30 days for completion of the inquiry and submission of report when the examiner is appointed locally.

(d) 45 days for completion of the inquiry and submission of report when an examiner from outside the facility is appointed.

(e) 30 days for Central Office to issue technical reviews when requested to do so by the decision official.

(f) 15 days for issuance of the decision after the decision official receives the examiner's report of findings and recommendations or the Central Office technical review.

b. **Grievance on Continuing Condition or Practices.** An employee may present a grievance concerning a continuing practice or condition at any time. Situations caused by actions which were taken or occurred on a specific date (e.g., admonishments, reprimands, or shift assignments) are not considered continuing conditions for these purposes despite any continuing effects they may have.

c. **Delays in Processing Grievances.** Management officials will ensure that grievances are processed promptly. Management delays in any stage of the grievance procedure beyond the prescribed time limits will be explained to the employee and the employee's representative. Such delays should be rare. If the employee delays in any stage of the grievance procedure, management will determine whether there was good cause and whether the grievance should continue to be processed. Such delays, explanations, and determinations will be documented for the record. This includes any delay created by the denial of an employee's representative or by challenge to the denial.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

7. INFORMAL GRIEVANCE PROCEDURE

a. **Presenting Grievance Under Informal Procedure.** An employee desiring consideration of a grievance must first seek informal adjustment of the matter through supervisory channels. This informal procedure will not be utilized when grieving disciplinary and major adverse actions, where grievances will be initiated at the formal step of the grievance procedure (see par. 9 of this sec.). The employee's request for informal adjustment of a grievance should be made as soon as possible, but not later than 15 days after the date of the incident or action upon which the grievance is based, or the date upon

which the employee became aware of, or should have become aware of, the incident or action upon which the grievance is based (see par. 6a of this sec.).

b. **Resolving Grievance.** The supervisor to whom a grievance has been presented for informal adjustment will attempt to resolve it as expeditiously as possible, seeking the advice and assistance of others where necessary, and will give the employee a written decision on the matter within 10 days from the date of the request for informal consideration. If the relief sought is not granted, the employee shall be advised of the right to present the grievance under the formal procedure.

c. **Mandatory Use of Informal Procedure.** Normally, the employee must complete processing under the informal procedure before a grievance will be accepted for processing under the formal procedure. However, when the authority to resolve the matter is reserved to the Secretary, the informal procedure will not be used. This informal procedure will not be utilized when grieving disciplinary and major adverse actions, where grievances will be initiated at the formal step of the grievance procedure (see par. 9 of this sec.).

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

8. FORMAL GRIEVANCE PROCEDURE

a. **Presenting Grievance Under Formal Procedure.** If the employee is not satisfied with the decision at the informal stage, or is grieving a disciplinary or major adverse action (see par. 9 of this sec.), he/she may present the grievance under the formal procedure. The formal grievance must be submitted in writing through the employee's immediate supervisor, within 10 days after completion of the informal procedure, or 15 days from the date of service of a decision where a grievance originates at the formal process (see par. 9, this sec.). The immediate supervisor or other official receiving the employee's formal grievance will refer it promptly through channels to the appropriate decision official. The time limit may be extended by management when good cause is shown by the employee.

b. **Contents of Formal Grievance**

(1) A formal grievance will be submitted in writing, will contain sufficient detail to identify and clarify the basis for the grievance, and will specify the personal relief requested by the employee. It will contain the following information:

(a) The specific action or incident on which the grievance is based, the date the action or incident occurred (if known), and the date the employee first learned of the action or incident (if appropriate).

(b) The reason(s) for which the employee believes that the action was unjustified or that (the employee) was treated unfairly; and/or the specific policy (department, facility, etc.), written agreement, or regulation violated and how it affected the employee.

(c) The corrective action desired by the employee.

(2) If the formal grievance does not contain a statement of the grievance giving essentially the information specified above, the decision official will return the grievance to the employee so that the necessary information may be furnished. If the employee fails to provide the necessary information

after being provided with an opportunity to do so, the decision official should cancel the grievance following procedures contained in paragraph 10 of this section.

c. **Group Grievances.** When a group of employees has an identical formal grievance, it will be considered in the same manner as an individual complaint and the decision will be binding on all employees in the group. The group will select one individual case for processing under the provisions of the formal grievance procedure.

d. **Decision Official.** When the facility Director decided the action being grieved, the grievance examiner and grievance decision official will be from outside the facility. See further guidance in part IV, chapter 3, paragraph 3 of VA Handbook 5021.

e. **Adjustment or Referral of Grievance by Decision Official.** Unless the decision official rejects or returns the grievance for additional information, that official will review the employee's grievance and the grievance file and explore the possibility of adjusting the grievance to the employee's satisfaction. If the decision official is unable to resolve the grievance in a manner acceptable to the employee, the grievance will be referred for inquiry by an examiner (see par. 12 of this sec.) or for technical review by an appropriate official (see par. 11 of this sec.) within 10 days of the decision official's receipt of the formal grievance. (Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

9. GRIEVANCES OVER DISCIPLINARY AND MAJOR ADVERSE ACTIONS

a. Grievances over disciplinary and major adverse actions will be filed at the formal stage described in paragraph 8 of this section without first filing under the informal procedure. In cases of a major adverse action, the employee is entitled to a hearing before a grievance examiner, if requested.

b. Grievances initiated under the formal stage must be filed within 15 days from the date of service of the decision letter as indicated by paragraph 6a of this section.

c. Except as provided in subparagraphs a and b, all other provisions of this section apply.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

10. REJECTION, RETURN, OR CANCELLATION OF A GRIEVANCE

a. **Reasons for Rejection of a Grievance.** The decision official may reject a grievance only for one or more of the following reasons:

(1) The relief sought is not personal to the grievant. Relief in the form of a request to discipline another employee will not be considered appropriate;

(2) The matter(s) is(are) not covered by the VA grievance procedure (see par. 14 of this sec.);

(3) The grievance was not filed in a timely manner (see par. 6, this sec., for specific time limits). A grievance may be rejected under the formal procedure based on a failure to timely file at either the formal or informal stage.

b. **Written Notification of Rejection of Formal Grievance.** The grievant and the grievant's representative will be notified in writing when a formal grievance is rejected, and provided with the specific reason(s) for the rejection.

c. **Reasons for Return**

(1) Insufficient detail was furnished to clearly identify the matter being grieved;

(2) The personal relief sought is not specified.

d. **Written Notification of Return of Grievance.** The grievant and the grievant's representative will be notified in writing when a grievance is returned, and provided with the specific reason(s) for the return. A reasonable time will be identified for resubmission of the grievance.

e. **Reasons for Cancellation of Grievance.** A grievance may be canceled, either wholly or partially as appropriate, by the decision official under any of the following conditions:

(1) At the employee's request;

(2) Termination of the employee's employment, unless the personal relief sought by the employee involves monetary issue(s) and can be granted after termination of employment;

(3) Death of the employee, unless the grievance involves a matter which would have entitled the employee to pay or benefits;

(4) Failure of the employee to furnish required information after being notified in accordance with the procedures contained in paragraph 10d of this section; or

(5) Failure of the employee to duly proceed with advancement of the grievance.

f. **Written Notification Of Cancellation of Formal Grievance.** The grievant and the grievant's representative will be notified in writing when a grievance is canceled, and provided with the specific reason(s) for the cancellation.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

11. TECHNICAL REVIEW

a. In cases where the facts are not in dispute and the primary issue involves only the interpretation of regulation or policy, instead of appointing an examiner, the decision official may forward the grievance for technical review and recommendations through appropriate channels to the Office of Human Resources Management (051) in VA Central Office. Situations where "the facts are not in dispute" are those instances where management essentially agrees with the grievant's statement of facts in the formal

grievance, and the primary issue in dispute is regulatory or policy interpretation. The grievant and the grievant's representative will be provided with a copy of the decision official's referral letter to VA Central Office. Upon receipt of the request, the grievance will be forwarded to the appropriate organizational element in VA Central Office which has technical program responsibility in the matter(s) disputed. A technical review will be conducted and the resulting recommendations transmitted by an appropriate VA Central Office line official to the decision official, who will resolve the grievance as indicated in paragraph 13 of this section. Since the technical review is part of the grievance file, the employee is entitled to a copy, if requested.

b. Matters covered under section A of this appendix which are subject to review under the grievance procedure, may only be resolved through a technical review if the employee waives the right to a formal review by a grievance examiner. Such waivers shall be in writing.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

12. REVIEW BY GRIEVANCE EXAMINER

a. **Appointment of Grievance Examiner**

(1) In cases where an examiner is required, the decision official may appoint a subordinate employee to act as the grievance examiner or request an examiner be appointed from outside the local area. The grievance examiner will be fair, impartial, and objective, with demonstrated analytical and fact-finding skills. The grievance examiner will not be assigned cases in his or her work unit or service, and must be an employee who has not been involved in the matter being grieved and who does not occupy a position subordinate to any official who recommended, advised, made a decision, or who otherwise is or was involved in the matter being grieved. The grievant and any designated representative will be informed of the assignment. The examiner assigned will promptly review the case and determine the nature and scope of the inquiry appropriate to the issue(s) involved in the grievance.

(2) In cases arising from disciplinary actions involving professional conduct or competence as covered under section A of this appendix, the grievance examiner will be selected from the panel of employees designated to serve on Disciplinary Appeals Boards. Notice of the grievance examiner's name on the panel list must have been provided at least 30 days prior to his or her selection as an examiner.

(3) When the facility Director decided the action being grieved, the grievance examiner and grievance decision official will be from outside the facility. See guidance in part IV, chapter 3, paragraph 3 of VA Handbook 5021.

b. **Formal Review.** At the examiner's discretion, the grievance inquiry may consist of:

(1) The securing of documentary evidence, including the solicitation of such technical advice as may be needed, or compelling expert VA testimony;

(2) Personal or telephone interviews (statements of witnesses obtained by the examiner should be under oath or affirmation, without a pledge of confidentiality);

(3) A group meeting;

(4) A hearing; or

(5) Any combination of the preceding.

c. **Hearings**

(1) Formal hearings should be limited to grievances involving complex matters or where important factual matters are in dispute. The decision to schedule a hearing is the prerogative of the examiner, except in grievances over major adverse actions where the employee has the right to a hearing, if requested.

(2) If a hearing is held, the examiner will determine how the hearing will be recorded, and will have a verbatim transcript or written summary of the hearing prepared. The record will include all pertinent documents submitted and accepted by the examiner. The examiner will make the transcript a part of the record of the proceedings. When a verbatim transcript was not made, a summary of pertinent portions of the testimony will be made by the examiner. The summary will constitute the report of the hearing and is made a part of the record of the proceedings.

(3) The examiner's authority includes but is not limited to taking proper steps to expedite the hearing of evidence and ruling on all questions arising during the proceeding, such as admissibility of evidence and calling of witnesses.

d. **Administering Oaths or Affirmations.** For purposes of this section, examiners are authorized to administer oaths or affirmations to those individuals providing testimony relative to the grievance.

e. **Preparation of Examiner's Report.** The examiner will prepare a report of findings and recommendations, and submit that report, with the grievance file, to the decision official. The examiner will also furnish a copy of the report to the employee and the employee's representative. The examiner's report should include the rationale for the findings and recommendations.

f. **Time Limits for Examiner's Report.** Except in unusual cases, the time limit for submission of the report and the grievance file to the decision official is 30 days for local grievance examiners or 45 days for grievance examiners from outside the facility, after receipt of written notification of appointment as the grievance examiner.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

13. DECISION ON GRIEVANCE

a. **Action by Decision Official - Technical Review.** VA Central Office technical reviews (par. 11a, this sec.) and the resulting recommendations will be forwarded to the formal grievance decision official, and will serve as the basis for the final decision. The decision official will issue the decision to the employee within 15 days after the technical review is received from VA Central Office.

b. **Action by Decision Official - Examiner's Report.** Upon receipt of the grievance examiner's report of findings and recommendations, the decision official will accept, modify, or reject the examiner's recommendation(s) and issue a written decision to the employee within 15 days after the recommendation is received. The employee's representative will also receive a copy of the decision.

(1) If the decision official modifies or rejects the examiner's recommendation(s), the written decision will include a specific statement of the reason(s) for the modification or rejection. Modification or rejection of recommendations of the grievance examiner will be limited to the following grounds:

(a) The recommendation(s) are contrary to law, regulation, or published Department policy; and/or

(b) The recommendation(s) are not supported by the preponderance of the evidence.

(2) The decision official may elect to grant the relief sought by the employee without regard to the examiner's recommendation(s).

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

14. MATTERS EXCLUDED FROM COVERAGE UNDER THE GRIEVANCE PROCEDURE. The following actions and complaints are excluded from coverage under the grievance procedure:

a. Major adverse actions taken under section A of this appendix which involve a question of professional conduct or competence.

b. Disputes over whether a matter or question concerns, or arises out of, professional conduct or competence.

c. Separation during probationary period.

d. Complaints arising from failure to receive special advancement.

e. Complaints arising from failure to receive a promotion or reassignment.

f. Complaints arising from dissatisfaction with grade or pay on initial appointment.

g. Complaints arising from actions taken due to the individual's physical or mental condition.

h. Complaints arising from dissatisfaction with proficiency rating.

i. An action which terminates a temporary promotion within a maximum period of 2 years and returns the employee to the position from which the employee was temporarily promoted, or reassigns the employee to a different position that is not at a lower grade or pay than the position from which the employee was temporarily promoted.

j. The content of published VA or VHA regulations and policies. An employee's allegation that locally established policy is in conflict with existing Department policy or regulation may be handled as indicated in paragraph 11a of this section.

k. A decision which is subject to final administrative review by the Federal Labor Relations Authority (FLRA), or the Office of Workers' Compensation Programs (OWCP), under law or regulations of the FLRA or the OWCP; or any other matter for which final administrative authority lies outside VA.

l. Allegations of discrimination on the basis of race, color, religion, sex, national origin, age (over 40) and/or disability, in connection with any decision or action. Such allegations may only be pursued as complaints of discrimination, pursuant to regulations of the Equal Employment Opportunity Commission. Complaints of discrimination are excluded from the grievance procedure. However, other disputes related to the case are not precluded from review under the grievance procedures. Accordingly, a grievance concerning a matter or matters about which the employee has filed a complaint of discrimination must be rejected, either wholly or partially, as appropriate.

m. A preliminary warning notice of an action which, if effected, would be covered under a grievance or appeal system or excluded from coverage by other paragraphs of this section.

n. Disapproval of a suggestion, disapproval of a discretionary award or disagreement with the amount of an award.

o. A matter which includes specified relief that is not personal to the grievant or is not subject to the control of management.

p. A matter covered by a negotiated grievance procedure. However, an employee may elect to use the VA grievance procedure described in this section or the negotiated, grievance procedure in the case of a disciplinary or major adverse action covered under section A of this appendix which does not involve a question of professional conduct or competence.

q. A grievance of an individual from outside VA, except as provided in paragraph 4b of this section.

r. Grievances concerning the number of positions to be filled, or the grade level at which positions are filled.

s. An action taken in accordance with the terms of a formal agreement voluntarily entered into by an employee.

t. Matters that are not directly related to the employee's conditions of employment.

u. Matters involving the methods, means or technology of performing work.

v. Determinations and authorizations, including those delegated by the Secretary, to approve, disapprove, change, discontinue special pay or to decide upon waivers of special pay refund obligations. Examples of these include, but are not limited to: determinations on special pay amounts relating to geographical locations, exceptional qualifications, executive positions, and scarce medical or dental specialties.

w. Designations of employees to serve on the panel from which members of Disciplinary Appeals Boards are selected, designations of employees to serve on Disciplinary Appeal Boards or the appointment of a grievance examiner.

x. All matters for which review procedures are already established in VA policy.

y. A decision not to remove an admonishment or reprimand from an employee's personnel folder prior to the expiration date.

(Authority: 38 U.S.C.501(a), 7421.)

SECTION C. APPEALS TO THE DISCIPLINARY APPEALS BOARD

1. SCOPE, AUTHORITY AND DEFINITIONS. This section governs appeals of major adverse actions which arise out of, or which include, a question of professional conduct or competence in the Department of Veterans Affairs (VA). Major adverse actions are suspensions (including indefinite suspensions), transfers, reductions in grade, reductions in basic pay, and discharges. A question of professional conduct or competence involves direct patient care and/or clinical competence. The term clinical competence include issues of professional judgment. This section applies to VA employees holding a full-time, permanent appointment under 38 U.S.C. 7401(l) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included in this category are: physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants and expanded-function dental auxiliaries. The (preceding) categories of individuals are included in the term "employee(s)" as used in this section unless otherwise specified.

(Authority: 38 U.S.C. 501(a), 7401, 7403(b), 7421, 38 U.S.C. 7461-7464.)

2. REFERENCES

a. Section 203 of the Department of Veterans Affairs Health-Care Personnel Act of 1991 (Pub. L. 102-40).

b. 38 U.S.C. 501(a), 7421, 7461, 7462, 7464.

3. FILING AN APPEAL TO THE DISCIPLINARY APPEALS BOARD

a. **Initiating an Appeal.** An employee subjected to a major adverse action which is based in whole or in part on a question of professional conduct or competence, may file a written notice of appeal to the Disciplinary Appeals Board under the provisions of this section. The employee may request a hearing before the Board. Any such request must be submitted in writing and accompany the employee's notice of appeal. The appeal must contain (1) the appellant's name, address, telephone number, designation of representative (if any), (2) a copy of the notice of action proposed and decision letter, (3) a statement as to whether the employee is requesting a hearing before the Board, (4) why the appellant believes the major adverse action taken was in error or should not have been taken, and (5) a statement describing the expected relief. The original appeal and the request for hearing, if any, must be submitted to the Under Secretary for Health or designee so as to be received within 30 days after the date of service of the written decision on the employee. Submission of the appeal must be by personal service, facsimile, or certified mail -return receipt requested. A copy of the appeal must be served on the decision official who took the action being appealed and any management representative of record.

b. **Establishing Timeliness of an Appeal.** For purposes of computing the 30-day period for filing an appeal, the date of service of the written decision on the employee will be determined by the date of receipt by the employee of the personal delivery, the signed receipt of certified mail, or presumed to be 5 days after depositing the decision in the U.S. mail if no acknowledged receipt is available.

c. **Representation.** The employee may be represented by an attorney or other person of the employee's choice.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

4. APPOINTMENT OF DISCIPLINARY APPEALS BOARDS

a. **General.** The Under Secretary for Health or designee shall appoint Disciplinary Appeals Boards in accordance with this section to hear appeals of major adverse actions involving questions of professional conduct or competence as defined in section A of this appendix. Such Boards shall be referred to as Disciplinary Appeals Boards. Each Board will be comprised of three VA employees, each of whom shall be of the same grade as, or be senior in grade to, the employee who is appealing the action. For purposes of this section, the term grade is defined by the provisions of 38 U.S.C. 7404, and the qualification standards issued pursuant to 38 U.S.C. 7402. (See part II of VA Handbook 5005, Staffing.) At least two of the members of the Board shall be employed in the same category of position as the employee who is appealing the action. For purposes of this section, a member employed in the same category of position is one who is employed in the same occupation e.g., physician, nurse, dentist as the appellant and has sufficient professional knowledge to evaluate the specific issues of clinical competence and/or direct patient care involved in the appeal.

b. **Panel Notice.** Notice of a name being on the list will be provided at least 30 days prior to the selection of the individual to serve on a Board**.**

5. JURISDICTION. The Disciplinary Appeals Boards appointed under this section shall have exclusive jurisdiction to review any case which arises out of, or which includes, a question of professional conduct or competence, and in which a major adverse action was taken under section A of this appendix.

(Authority: 38 U.S.C. 501(a), 7462, 7463.)

6. POWERS OF THE CHAIRMAN OF THE DISCIPLINARY APPEALS BOARD. The Chairman's authority includes, but is not limited to:

a. Taking proper steps to expedite the hearing of evidence, and speaking and acting for the Board;

b. Ruling on all questions arising during the proceedings, such as admissibility of evidence offered during the hearing, calling of witnesses, order of introduction of witnesses, etc.;

c. Obtaining further evidence concerning any issue under consideration by the Board at any stage of the proceedings;

d. Acting as the presiding officer, directing the regular and proper conduct of the proceedings, and authenticating, by his or her signature, instructions and proceedings of the Board;

e. Ruling on questions of disqualification of any member of the Board. In cases where the Chairman is the challenged member, the question shall be resolved in accordance with paragraph 7e of this section;

f. Scheduling the specific hour and dates of hearings;

g. Closing the record;

h. Administering oaths or affirmations made by individuals giving testimony;

i. Ruling on motions from the parties; and

j. Calling witnesses on behalf of the Board. (Authority: 38 U.S.C. 501(a).)

(Authority: 38 U.S.C. 501(a).)

7. PROCEDURE

a. **Determining Jurisdiction.** When a Board is convened to consider an appeal, the Board shall first determine whether the case is properly before it prior to considering the merits of the appeal. The Board shall determine whether the matter appealed is a major adverse action as defined in section A of this appendix, and whether it arises out of or includes a question of professional conduct or competence, and was filed timely. The determination of jurisdiction will be made as soon as practicable. The Board will make a record of its determination**.**

(1) The record of decision in any mixed case shall include a statement by the Board of its exclusive jurisdiction, citing 38 U.S.C. 7462(a) as the authority and the basis for such exclusive jurisdiction. A mixed case is one that includes both (a) a major adverse action arising out of, or including, a question of professional conduct or competence, and (b) a major adverse action which does not arise out of a question of professional conduct or competence or a disciplinary action.

(2) If necessary, the Board may develop the record to establish jurisdiction.

(3) If the Board determines that the appeal is not properly before it, e.g., that it lacks jurisdiction, the Board shall fully set forth its reasons, including a statement of the appropriate appeal procedure. The Under Secretary for Health will take appropriate action on the decision of the Board as described in paragraph 9c of this section.

b. **Type of Hearing.** The employee has the right to a hearing before the Board in connection with his/her appeal of an adverse action. If the employee does not ask for a hearing before the Board, the Board may elect to conduct a hearing without the appellant or may consider the evidence of record, including any evidence developed by the Board. Formal hearings will be conducted in accordance with paragraph 8 of this section.

c. **Technical Advisors.** Employees may be designated to serve as technical advisors to the Board and assist in the development and review of the case.

d. **Presence of Board Members.** No Board hearing will proceed unless all members are present.

e. **Disqualification.** A Board member will be disqualified for service if the Chairman rules that the Board member initiated or participated in the initiation of charges, had direct personal knowledge of the case or facts giving rise to the action, or if the Board member's relationship with the appellant or officials involved in recommending or deciding on the disputed action creates a question of bias. Any party to the case or member of the Board may make a motion to disqualify a Board member. The Chairman will rule on the disqualification for service of any member of the Board. In cases where the Chairman is the challenged member, or if a member of the Board questions the ruling of the Chairman, the Board will make the ruling as to disqualification by majority vote in closed session.

f. **Mental/Physical Condition of Employee.** In the course of the hearing, if the appellant raises an issue of his/her mental or physical condition in relation to the charges, the appellant will be given the opportunity to present evidence relating to the condition. If appropriate, the Board may refer the matter to a Physical Standards Board for review so that the Board may determine whether the matter was appropriately before the Board as a major adverse action taken under section A of this appendix, or whether it should have been processed under VA Handbook 5019, Occupational Health Services, for consideration of physical and/or mental incapacity. If, however, the appellant is alleging discrimination on the basis of a handicapping condition, he/she should be referred to the EEO discrimination complaint process, which is the exclusive procedure for reviewing allegations of discrimination, and the hearing shall then proceed on the merits of the charges.

g. **Closing of Record.** At the conclusion of the hearing, the Chairman will close the record unless he/she authorizes parties to submit written closing arguments, briefs, or documents identified for introduction into evidence. Should this be the case, the record will close on the date set by the Chairman. If the appellant does not request an oral hearing, the record will close on the date the Board Chairman sets as the final date for the receipt of submissions.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

8. FORMAL HEARINGS

a. **Notifications.** The Board Chairman shall notify the appellant, the head of the facility, and any designated representatives when a hearing is scheduled. The initial notice from the Chairman shall include the following:

(1) The names of the Board members and technical advisor(s) used;

(2) The specific hour and dates of the scheduled hearing;

(3) The date by which submissions must be made to the chairman in connection with motions from the parties, e.g., to request rescheduling of hearing if good cause can be shown, as well as motions in other areas; and,

(4) The date by which witness lists must be exchanged, which must include statements as to what testimony each witness is expected to provide as well as any objections either party may have to the other's witnesses. Service will be by personal delivery or certified mail - return receipt requested.

b. **Exclusion of Individuals During Proceeding.** Prior to testifying or, if subject to recall, no witness will be permitted to hear the testimony being given by another witness unless the witness is the appellant, or is assisting in the representation of either party. In any event, the Chairman of the Board will make the final determination on exclusion of individuals during any phase of the proceeding.

c. **Oaths.** The Chairman and Secretary of the Board shall have the authority to administer oaths or affirmations which will be made by all individuals giving testimony.

d**. Verbatim Record.** A verbatim record shall be maintained of Board hearings (see subparagraph g below for further details).

e. **Witnesses.** Both the appellant and management will have the right to call witnesses. The Chairman will, on his/her own initiative, call such witnesses on behalf of the Board as the Chairman deems necessary. The Chairman has the final authority to determine the acceptability of any witness.

f. **Scheduling of Hearing.** The hearing will be conducted on official Government time, and normally, without charge to leave of the employee(s) concerned.

g. **Record of Hearing**

(1) A verbatim record of the hearing proceedings will be prepared.

(2) The employee and/or his/her representative shall be provided a copy of the transcript of the formal hearing after authentication.

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

9. DISCIPLINARY APPEALS BOARD DECISIONS

a. **Findings.** The Board shall, with respect to each charge appealed, sustain the charge, dismiss the charge, or sustain the charge in part and dismiss the charge in part.

b. **Decision.** The Board has full authority to render a decision on an appeal. The Board shall reach a decision within 45 calendar days of completion of the hearing, if a hearing is convened. In any event, a decision will be made by the Board no later than 120 calendar days after the appeal is received by the Under Secretary for Health or designee.

(1) If any charge is sustained in whole or in part, the Board shall approve the action as imposed; approve the action with modification, reduction, or exception; or reverse the action.

(2) If none of the charges are sustained in whole or in part, the Board will reverse the decision.

c. **Action by the Under Secretary for Health.** The Under Secretary for Health shall execute the Board's decision in a timely manner, but in no case later than 90 calendar days after the Board's decision is received by the Under Secretary for Health. Pursuant to the Board's decision, the Under Secretary for Health may order reinstatement, award back pay in accordance with the Back Pay Act , and provide

such other remedies as the Board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

(1) However, if the Under Secretary for Health finds a decision of the Board to be clearly contrary to the evidence or unlawful the Under Secretary for Health may:

(a) Reverse the decision of the Board; or

(b) Vacate the decision of the Board and remand the matter to the Board for further consideration.

(2) If the decision, while not clearly contrary to the evidence or unlawful, is found to be not justified by the gravity of the charges, the Under Secretary for Health may mitigate the adverse action imposed.

(3) The Under Secretary for Health's execution of a Board's decision, or the mitigated action if appropriate, shall be the final administrative action in the case.

d. **Case Record.** The case record will consist of the notice of proposed adverse action, appellant's reply , if any, all evidence (documents or testimony) relied upon by the Board in reaching its decision, notice of decision to appellant, appellant's request for a hearing, Under Secretary for Health's or designee's appointment of Board, Board communications and notices related to the hearing, any Board rulings or submissions of the parties, verbatim record of any formal hearing, Board Action (VA Form 10-2543), Under Secretary for Health's execution of the Board's recommendation, and any Notification of Personnel Action (SF-50B).

(Authority: 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.)

10. REVIEW OF RECORDS. The Chairman of a Board may review records or information covered by 38 U.S.C. 5701 and 1332 in accordance with 7464(c)(1) of title 38.

(Authority: 38 U.S.C. 501(a), 7421,.38 U.S.C. 7461-7464.)

SECTION D. DESIGNATION OF PANEL MEMBERS

1. SCOPE AND AUTHORITY. This section governs the designation of employees to serve on the panel from which Disciplinary Appeals Board members and grievance examiners will be appointed to hear appeals of major adverse actions and disciplinary actions involving a question of professional conduct or competence.

(Authority: 38 U.S.C. 501 (a), 512(a), 7421, 38 U.S.C. 7461-7464.)

2. REFERENCES

a. Section 203 of the Department of Veterans Affairs Health-Care Personnel Act of 1991 (Pub. L. 102-40).

b. 38 U.S.C. 501(a), 7421, 7464.

3. RESPONSIBILITIES. The Under Secretary for Health or designee will periodically designate employees to serve on the panel.

(Authority: 38 U.S.C. 501 (a), 512(a), 7421, 38 U.S.C. 7461-7464.)

4. PANEL DESIGNATIONS. Decisions related to the designation or termination of the designation of any individual to serve on the panel are not subject to review under any grievance or appeal procedure.

(Authority: 38 U.S.C.501(a), 38 U.S.C. 7461-7464.)

5. TRAINING. All employees designated for the panel shall receive training in the functions and duties of Disciplinary Appeals Boards and grievance procedures.

(Authority: 38 U.S.C. 501(a), 512(a), 7421, 38 U.S.C. 7461-7464.)

EMPLOYEE/MANAGEMENT RELATIONS

1. REASON FOR ISSUE: To issue Department of Veterans Affairs (VA) procedures regarding employee/management relations.

2. SUMMARY OF CONTENTS/MAJOR CHANGES: This handbook sets forth mandatory procedures previously contained in numerous other issuances. No substantive changes have been made.

3. RESPONSIBLE OFFICE: The Human Resources Management Programs and Policies Service (051), Office of the Deputy Assistant Secretary for Human Resources.

4. RELATED DIRECTIVE: VA Directive 5021, "Employee/Management Relations."

5. RESCISSIONS: Refer to the Transmittal Sheet for VA Handbook 5001, "General Introduction and Administration."

CERTIFIED BY:

John A. Gauss
Assistant Secretary for
Information and Technology

BY DIRECTION OF THE SECRETARY OF VETERANS AFFAIRS:

Jacob Lozada, Ph.D.
Assistant Secretary for Human
Resources and Administration

EMPLOYEE/MANAGEMENT RELATIONS

CONTENTS

PART I. DISCIPLINARY AND ADVERSE ACTIONS UNDER TITLE 5

PART II. DISCIPLINARY PROCEDURES UNDER TITLE 38

PART III. PROBATIONARY PERIOD ACTIONS

PART IV. EMPLOYEE GRIEVANCES AND ADMINISTRATIVE APPEALS

PART V. TITLE 38 APPEALS TO THE DISCIPLINARY APPEALS BOARD

PART VI. TITLE 38 SEPARATIONS NOT COVERED UNDER PARTS II AND III

EMPLOYEE/MANAGEMENT RELATIONS

PART I. DISCIPLINARY AND ADVERSE ACTIONS UNDER TITLE 5

CONTENTS

PARAGRAPH PAGE

CHAPTER 1. GENERAL

1. SCOPE I-1
2. REFERENCES I-1
3. POLICY I-1
4. DEFINITIONS I-2
5. RESPONSIBILITIES I-3
6. OFFICIAL AUTHORIZED TO PROPOSE AND DECIDE ACTIONS I-5
7. DETERMINING THE FACTS I-6
8. DETERMINING APPROPRIATE ACTION I-8

CHAPTER 2. DISCIPLINARY ACTIONS

1. ADMONISHMENT I-15
2. REPRIMAND I-16
3. DISCIPLINARY SUSPENSION FOR 14 CALENDAR DAYS OR LESS I-17

CHAPTER 3. ADVERSE ACTIONS

1. ACTIONS COVERED I-23
2. EMPLOYEES COVERED I-23
3. EMPLOYEES EXCLUDED I-23
4. ACTIONS EXCLUDED I-24
5. TYPES OF ADVERSE ACTIONS I-25
6. BURDEN OF PROOF DURING APPEAL PROCESS I-25
7. EMPLOYEE ENTITLEMENTS I-26
8. EXCEPTIONS TO 30 DAYS ADVANCE NOTICE I-27
9. NOTICE OF PROPOSED ACTION I-27
10. STATUS OF EMPLOYEE DURING ADVANCE NOTICE PERIOD OF ADVERSE ACTION I-29
11. EMPLOYEE'S REPLY I-30
12. ARRIVING AT FINAL DECISION ON THE PROPOSED ADVERSE ACTION I-31
13. DECISION NOTICE I-32
14. ADVERSE ACTIONS RELATING TO THE CRIME PROVISION I-33
15. ADVERSE ACTIONS IN THE SENIOR EXECUTIVE SERVICE I-35
16. RECORDS I-35

CONTENTS - CONTINUED

PARAGRAPH **PAGE**

APPENDICES

I-A. TITLE 5 - TABLE OF EXAMPLES OF OFFENSES AND PENALTIES I-A-1
I-B. TITLE 5 - SAMPLE ADMONISHMENT I-B-1
I-C. TITLE 5 - SAMPLE REPRIMAND I-C-1
I-D. TITLE 5 - SAMPLE NOTICE OF PROPOSED REMOVAL FOR DISCIPLINARY REASONS I-D-1
I-E. TITLE 5 - SAMPLE DECISION LETTER FOR DISCIPLINARY ACTIONS I-E-1
I-F. TITLE 5 - SAMPLE DECISION LETTER FOR ADVERSE ACTIONS I-F-1
I-G. TITLE 5 - SAMPLE PROPOSED INDEFINITE SUSPENSION I-G-1
I-H. TITLE 5 - SAMPLE DECISION NOTICE – INDEFINITE SUSPENSION I-H-1
I-I. TITLE 5 – SAMPLE FIRM CHOICE, LAST CHANCE AND ABEYANCE AGREEMENTS I-I-1
I-J. TITLE 5 – SAMPLE TERMINATION OF NON-COMPETITIVE EXCEPTED APPOINTMENT (SCHEDULE B) I-J-1
I-K. GRIEVANCE AND APPEAL RIGHTS I-K-1
I-L. SAMPLE PROPOSED REMOVAL FOR PERFORMANCE BASED ACTION I-L-1
I-M. SAMPLE DECISION LETTER FOR PERFORMANCE BASED ACTION (NON BARGAINING UNIT) I-M-1
I-N. SAMPLE DECISION LETTER FOR PERFORMANCE BASED ACTION (BARGAINING UNIT) I-N-1

PART I. DISCIPLINARY AND ADVERSE ACTIONS UNDER TITLE 5

CHAPTER 1. GENERAL

1. SCOPE. This chapter contains the policy for taking disciplinary and adverse actions in the Department of Veterans Affairs (VA). Unless otherwise indicated, the chapter applies to all VA employees appointed under title 5 U.S.C., and under title 38 U.S.C., sections 7401(3).

2. REFERENCES. Title 5 U.S.C., chapters 73 and 75; VA Handbook 5005, Staffing, part IV; 5 CFR, part 752; VA Handbook 5019; and 38 U.S.C. 7401(3).

3. POLICY

a. The public interest requires the maintenance of high standards of employee integrity, conduct, effectiveness, and service to the public. When such standards are not met, it is essential that prompt and just corrective action be taken. The policy of VA is to maintain standards of conduct and efficiency that will promote the best interests of the service. Disciplinary and adverse actions shall be governed by these basic principles:

(1) An employee shall be informed in writing honestly and specifically why the action is being brought against him or her.

(2) An employee shall be given a reasonable opportunity to present his or her side of the case.

(3) The employee and representative shall have assurance of freedom from restraint, interference, coercion, discrimination, or reprisal in discussing, preparing, and presenting a defense.

b. In taking actions covered by this part, like penalties will generally be imposed for like offenses (see appendix A of this part, for further discussion). However, supervisors should give consideration to several factors when determining what action is appropriate, including the nature and-gravity of the offense, the existence of either mitigating or aggravating circumstances, the frequency of the offense, and the employee's position. Adverse actions against employees (excluding employees in the Senior Executive Service (SES)) will be taken only for such cause as will promote the efficiency of the service. Adverse actions against SES employees will be based only on misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

c. The adverse action procedures described in this part will be used for all actions defined as an adverse action in paragraph 4 below and covered under 5 CFR, part 752.

d. An action covered under this part must be in conformance with the merit system principles in 5 U.S.C. 2301 and must not be based on any of the prohibited personnel practices listed in 5 U.S.C. 2302. Accordingly, actions covered under this chapter may not be based on prohibited discrimination because of race, color, religion, sex, national origin, age, or disability. Except when required by statute, an action covered under this chapter must not be taken against an employee because of marital status or partisan political reasons. Actions covered under this chapter must not be taken as

reprisal for the proper exercise of an employee's legal or administrative appeal rights. The Whistleblower Protection Act of 1989 (Public Law No. 101-12) specifically affords protections and entitlements to employees who allege reprisal for having engaged in whistleblowing activities.

e. Any applicable provisions of a negotiated labor-management agreement should be consulted to determine the possible effect on the processing of disciplinary/adverse actions, notices of such actions, and employee rights.

f. Any VA employee may review this part and related material by contacting the Human Resources Management office.

4. DEFINITIONS

a. **Grade.** A numerical level assigned to a position under a position classification or job grading system.

b. **Pay.** The rate of basic pay fixed by law or administrative action for the position held by an employee.

c. **Day.** Day means calendar day.

d. **Active Duty Status.** Pay status including authorized overtime, holiday pay, or premium pay.

e. **Disciplinary Action.** An action taken to correct misconduct or other offenses and to enforce prescribed rules of behavior. It includes admonishments, reprimands, and suspensions of 14 days or less.

f. **Adverse Action.** A removal, separation for disability, suspension for more than 14 days, furlough for 30 days (22 non-continuous days) or less, or reduction in grade or pay effected by management for either disciplinary or non-disciplinary reasons, except for those actions which are excluded by law or regulation (see 5 CFR, part 752).

g. **Proposing Official.** The management official who issues a notice of proposed disciplinary or adverse action (i.e., any proposed suspension, removal, reduction in grade or pay, or furlough for 30 days or less),

h. **Deciding Official.** The management official designated to make the final decision on a disciplinary or adverse action.

i. **Furlough.** The placing of an employee in a temporary status without duties and pay due to lack of work or funds, or other non-disciplinary reasons.

j. **Official Time.** Time granted to an employee to review the material relied on to support a proposed action, to prepare an answer, and to secure affidavits, If the employee is otherwise in a duty status.

k. **Notice Period.** The period of time that begins the day after the date an employee receives a written proposal of a disciplinary or adverse action and which ends on the effective date of the action, if effected.

l. **Reduction in Grade.** An employee is moved to a position of lower grade under the General Schedule or Federal Wage System.

m. **Reduction in Pay.** An employee's rate of basic pay is reduced involuntarily, that is, not requested by the employee for personal reasons or benefit. Reduction in pay does not include the involuntary loss of any differentials such as standby pay, night work, overtime, hazardous duty, or holiday pay,

n. **Suspension.** The placement of an employee, for disciplinary reasons, in a temporary status without duties and pay,

o. **Indefinite Suspension.** The placement of an employee in a non-duty, non-pay status for a temporary period of time pending investigation, inquiry, or further agency action.

p. **Removal.** The involuntary separation of a non-probationary employee for disciplinary or non-disciplinary reasons,

q. **Individual with a Disability.** One who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment (29 CFR 1614.203).

r. **Qualified Individual with a Disability.** With respect to employment, an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used, (1) meets the experience and/or education requirements of the position or (2) meets the criteria for appointment under one of the special appointing authorities for people with disabilities.

s. **Paid Non-Duty Status.** Compensating an employee while not on duty.

5. RESPONSIBILITIES

a. Administration Heads, Assistant Secretaries, Other Key Officials, and Deputy Assistant Secretaries, and field facility directors are responsible for:

(1) Administering policy concerning disciplinary and adverse actions in conformance with requirements of this chapter and any applicable labor-management agreements; and reviewing existing policies and recommending appropriate changes.

(2) Delegating to supervisors appropriate authority for the direction and discipline of employees under their jurisdiction and assuring proper supervisory training.

(3) Ensuring that supervisors properly exercise their disciplinary authority.

(4) Ensuring that appropriate mechanisms are in place to inform employees of VA policy concerning disciplinary and adverse actions and where this chapter may be reviewed.

b. The Deputy Assistant Secretary for Human Resources Management is responsible for:

(1) Developing departmental disciplinary and adverse action policy.

(2) Providing technical advice and guidance to management officials and field facility human resources officials.

c. Supervisors are responsible for:

(1) Gathering and analyzing the facts concerning each possible disciplinary or adverse action and documenting these facts.

(2) Initiating appropriate and timely disciplinary or adverse actions.

d. The Human Resources Management Officer is responsible for:

(1) Assisting supervisors and management officials at all levels with disciplinary and adverse action matters; interpreting regulations and statutes; recommending sound human resources management practices; reviewing existing policies and procedures and recommending appropriate changes.

(2) Reviewing disciplinary and adverse actions prior to issuance to ensure compliance with existing laws and regulations and advising the decision official as necessary.

(3) Advising employees and answering their questions regarding their rights in disciplinary and adverse action matters, and providing guidance on interpretations of disciplinary and adverse action procedures, regulations and statutes.

(4) Ensuring that all employees are made aware of VA standards of ethical conduct and related responsibilities as well as other laws, rules, and regulations governing VA expectations of acceptable conduct.

e. Employees are responsible for:

(1) Meeting standards of conduct as required by laws, rules, regulations, and policies.

(2) Obtaining advice from authoritative agency officials (supervisors, human resources management officers, regional counsels, etc.) on any unclear or questionable rules of conduct before engaging in the conduct.

6. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS

a. Administration Heads, Assistant Secretaries, Other Key Officials, and Deputy Assistant Secretaries, and field facility directors, as appropriate, are responsible for designating in writing management officials who may propose and decide actions covered in this part, and for ensuring that supervisory employees under their jurisdiction are made aware of such designations.

b. Officials who may issue admonishments and reprimands, and propose and decide suspensions of 14 calendar days or less, and adverse actions will be as follows:

(1) **Admonishment.** The official who may issue a letter of admonishment will normally be the employee's immediate supervisor or in the supervisory line.

(2) **Reprimand.** The official who may issue a letter of reprimand to an employee must be at the division or service chief level in a field facility, or at the division chief level or above in Central Office.

(3) **Suspension of 14 Calendar Days or Less.** The official who may issue a letter of proposed suspension of 14 calendar days or less to an employee must be at the division or service chief level or above in a field facility, or at the division chief level or above in Central Office. A final decision on a proposed suspension of 14 calendar days or less will be made by the proposing official, or an official at any level in the supervisory line above the official who proposed the action. The Secretary or designee retains the authority to make the final decision on the suspension of employees occupying positions centralized to the Secretary.

(4) **Furloughs.** VA Handbook 5005, part IV, identifies officials who may propose and decide furloughs.

(5) **Adverse Action**

(a) **Proposed Adverse Actions.** The official who may issue a letter of proposed adverse action to an employee must be at the division or service chief level or above in a field facility, or at the division chief level or above in Central Office.

(b) **Decisions on Adverse Actions.** The official who may issue a letter of decision must be at the director level in a field facility or at the service director level or above in Central Office. The Secretary or designee retains the authority to make the final decision on adverse actions involving employees occupying positions centralized to the Secretary,

c. Actions resulting from a Central Office investigation, with the exception of those conducted by the Office of Inspector General (OIG), will be proposed and decided by officials in Central Office. Such authority may be delegated on a case by case basis to the field facility Director. Actions based on OIG investigations may be taken at the field facility level in coordination with the appropriate organizational elements in Central Office.

d. Consistent with the restrictions provided in subparagraphs b and c above, field facility directors are responsible for designating officials who may propose and/or decide disciplinary and adverse actions

involving employees in the field occupying non-centralized positions. Administration Heads, Assistant Secretaries, Other Key Officials, Deputy Assistant Secretaries, and field facility directors are responsible for designating officials who may propose and/or decide disciplinary and adverse actions involving:

(1) employees under their jurisdiction occupying positions centralized to the Secretary (except final decisions on suspensions of 14 calendar days or less and adverse actions);

(2) employees under their jurisdiction occupying positions centralized to an Administration Head or Assistant Secretary;

(3) employees in Central Office under their respective jurisdictions; and,

(4) employees in the field who are not under the supervision of a field facility director.

7. DETERMINING THE FACTS

a. Inquiry and Investigation

(1) In cases involving a potential disciplinary or adverse action, inquiry will be made into the incident or situation as soon as possible to obtain the facts and determine what action, if any, is warranted. Except in very rare or unusual circumstances, if the employee desires a representative, the investigator will wait a reasonable period of time before proceeding. Ordinarily, a preliminary inquiry will be made by the appropriate line supervisor. A further investigation may be warranted depending on the nature and seriousness of the incident. Information concerning the matter will be sought from the employee who is alleged to have committed the offense and from any other persons who may have pertinent information about the case. The resulting information will be documented. Signed statements, preferably under oath, are the best form of documentation and should be obtained, when possible, from employees interviewed. The authority to take sworn statements must be exercised in accordance with 38 U.S.C. 5711 and its implementing regulations. However, failure to obtain a statement from the employee involved will not, in and of itself, serve to void the action, particularly where sufficient information is otherwise obtained from the employee, or the nature of the situation makes it impractical or unnecessary to obtain a written statement. Information will be developed impartially and an effort will be made to resolve conflicting statements by developing additional evidence. Material which cannot be disclosed to the employee or to his or her representative, may not be used to support a disciplinary or adverse action.

(2) All employees are required to provide full and truthful answers during any inquiry or investigation. Failure to do so may be grounds for disciplinary or adverse action. The only time employees are entitled to remain silent is if they may potentially incriminate themselves in a criminal offense. Employees claiming such a right must state this as their reason in order for the right to apply. The assistance of the Regional Counsel or General Counsel, as appropriate, will be obtained in determining whether immunity from prosecution may be granted. Immunity and the extent of immunity will be reduced to writing and provided to the employee. (Also see subparagraph e below.)

b. **Status of Employee Pending Inquiry or Investigation**

(1) **Duty Status.** Ordinarily, the employee will be retained in a pay and active duty status in his or her position at current grade and salary during any inquiry or investigation.

(2) **Detail, Leave or Paid Non-Duty Status.** In those instances where it is determined that the employee's continued presence at his or her worksite during an inquiry or investigation might pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the following alternatives may be considered:

(a) Detailing the employee to other duties where he or she is no longer a threat to safety, to VA's mission, or to Government property;

(b) Allowing the employee to take leave, (annual, sick, leave without pay), or carrying him or her in an absent without leave status if the employee has absented himself or herself from the work-site without requesting leave);

(c) As a last resort, placing the employee in a paid non-duty status pending completion of the inquiry or investigation. Although Civil Service regulations grant agencies the authority to place employees in a non-duty status with pay during the advance notice period of a proposed removal under the limited circumstances described in this paragraph, these regulations do not address the status of an employee during a period of inquiry or investigation or during the notice period of a proposed indefinite suspension. In those instances where management determines that an employee's continued presence at the worksite might pose a threat to the employee or others, result in loss of, or damage to, Government property, or be injurious to some other legitimate Government interest, or when a proposed indefinite suspension is issued in conjunction with the crime provision, managers may place the employee in a brief period of non-duty status with pay for the period of time necessary to conduct an inquiry or investigation and prepare charges, including the advance notice of a proposed indefinite suspension. Care should be taken to ensure that this is for the shortest practicable period.

(3) **Indefinite Suspension.** (See par. 8f of this chapter.)

c. **Evidence File**. If a proposed adverse action is contemplated, an evidence file must be established before the notice is issued to the employee. The file must contain all available evidence upon which the notice of proposed action is based, and which supports the reasons in that notice (including records of past disciplinary action and related material, if such a record forms part of the basis for the action proposed). It must also include any written summary of employee's oral reply and/or employee's written reply. Normally the evidence file will contain an index for easier reference to documents. Additional evidence acquired after the issuance of a proposed adverse action notice may be added without necessitating re-issuance of the notice unless the additional evidence forms the basis for initiating new reasons for proposing the action. However, the employee must be provided with copies of any material when it is added to the evidence file. Any use or disclosure of a record or information must comply with legal requirements for disclosure.

d. **VA Beneficiary Records.** The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained when questions arise concerning the use of VA beneficiary records in

taking an action covered under this chapter. Specifically, the use of VA beneficiary records must be in accordance with the guidelines of confidentiality provided in 38 U.S.C. 5701, 5705, and 7332; and the Privacy Act at 5 U.S.C. 552a.

e. **Official Investigation Reports or Official Inquiries**

(1) It is not necessary for a supervisor or other appropriate official to inquire into an incident in accordance with the above instructions where sufficient information is available from other official sources. These sources include, but are not limited to: reports of a Central Office or Office of the Inspector General investigation, reports of a field examination conducted by a representative of the Office of Regional Counsel, or other official investigations conducted under the authority of MP-I, part l, chapter 2. Where the information appears to be inadequate, the Human Resources Management Officer should be consulted concerning the necessity for the development of additional information. The same principle also applies to official investigations of other government agencies, whether Federal, state or local, if the agency allows the use of the investigation, or part of it, or extracts from it. In cases involving criminal matters, it is the policy of VA to cooperate with appropriate law enforcement agencies. In obtaining evidence and/or coordinating such matters, the assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained.

(2) When management relies on facts developed from an official investigation or other official inquiry to support a proposed adverse action, only the information relied upon will be included in the evidence file. When using official information, care must be exercised to extract only that information which is being relied on to support the reasons in a proposed adverse action.

(3) Title 38 CFR, part 17 defines the VA Medical Quality Assurance Program, and the Health Services Review Organization (HSRO), and provides confidentiality for certain quality assurance records and documents. Documents and records generated through these programs cannot be used as evidence to support taking a disciplinary or adverse action. However, information which led to a quality assurance investigation can also lead to the initiation of a separate, independent investigation. Evidence developed as a result of such independent investigation can be used in a disciplinary or adverse action. The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained when questions arise concerning the confidentiality of Quality Assurance and HSRO documents and whether such documents are covered by the provisions of 38 CFR, part 17, or can be used as evidence in a disciplinary or adverse action.

8. DETERMINING APPROPRIATE ACTION

a. **General.** After determining the facts in a case, the responsible official authorized to initiate action should consult the table of offenses and penalties contained in appendix A of this part. Any extenuating or mitigating circumstances or other contributing factors which may have some bearing on the situation, including past record, should be considered in determining the action to be taken. The initiating official will consult with the Human Resources Management Officer regarding the propriety of the disciplinary or adverse action being considered.

b. **Substance Abuse/Medical Considerations**

(1) In relating alcoholism and drug abuse problems to disciplinary policies and practices, it is important to consider non-disciplinary procedures aimed at rehabilitation. However, if the employee refuses to accept assistance offered through the program or to otherwise correct performance, disciplinary measures will be invoked on the basis of the specific misconduct of the employee.

(2) In offering rehabilitative assistance, the employee's supervisor need not confront the employee with the supervisor's belief that the employee has a drinking or drug abuse problem. The supervisor must make the employee aware in general terms that a problem exists affecting his/her conduct, and recommend that the employee participate in a rehabilitation program that is available. Casual suggestions to the employee that the Department would be willing to assist the employee with any problems he/she may have are not a sufficient attempt at counseling to constitute reasonable accommodation. The counseling must be specific with the supervisor recommending that the employee participate in a rehabilitation or counseling program. Should the employee ignore the offer of assistance and the performance or conduct problem continues, it may be necessary to give the employee a "firm choice", between accepting treatment or facing the consequences. A sample firm choice letter is contained in appendix I of this part. This letter should be modified to suit your particular circumstances.

(3) Referrals under the Employee Assistance Program (EAP) should be made in writing and as early as possible when the supervisor has a conduct or performance related reason to believe the employee has an alcohol or drug abuse problem which is causing the deficiencies. Written documentation should be maintained of any meetings between the supervisor and the employee to show that an offer of assistance was made. Copies of such documentation should be given to the employee. This documentation can be included at a later date in the evidence file used to support an adverse action. If the employee rejects the offer of assistance, and refuses to acknowledge the problem, action based on misconduct may be taken, including possible removal, even though the employee may later attribute the misconduct to an alcohol or drug problem.

(4) There may be situations where a meaningful offer of assistance is not possible, and appropriate action such as a proposed removal is required. Examples include situations where an employee is incarcerated for an extended period of time, or where the act of misconduct is so egregious (e.g., patient abuse) as to require that the employee be removed immediately from duty status during the period of an investigation and any subsequent proposed adverse action. Normally, an employee will be maintained in a paid duty status during the period between proposal and decision letters. There are circumstances as outlined in law or governing government-wide regulations that allow management to make exception to this provision. In such instances, management must be prepared to demonstrate before a third party that accommodating the employee would have imposed an undue hardship upon the facility where the employee works.

(5) Continuing misconduct while an employee is participating in the program may be dealt with by taking appropriate disciplinary or adverse action. However, the length of time in the program, the type of rehabilitation program provided to the employee, and the employee's demonstrable progress in treatment will be considered as possible mitigating or aggravating factors when deciding on the appropriate action.

(6) When an employee raises the issue of an alcohol or drug related problem as an affirmative defense at the point when a formal adverse action has been proposed, management must consider its reasonable accommodation requirements before acting on the proposal. However, if the action is effected, management should be prepared to demonstrate (as appropriate) during any third party review that:

(a) The employee has never raised the issue until receipt of the notice of proposed action, and has failed to prove the existence of a substance abuse problem;

(b) There is no nexus (connection) between the employee's alcohol or drug problem and the specific incident(s) or reasons on which the proposed action is based;

(c) The employee has refused previous offers of rehabilitative assistance;

(d) The employee's conduct and/or performance has failed to improve despite previous participation in the EAP;

(e) Efforts to reasonably accommodate the employee would impose an undue hardship on the operation of the Department; or,

(f) The employee does not meet the regulatory criteria of an employee with a disability.

(7) If management has any reason to believe that the employee's claim may be a pretext to delay a proposed adverse action, it may request documentation to show the presence of an alcohol or drug dependence problem. The documentation must consist of expert evidence on the existence of a substance abuse problem at the time of the misconduct, and may include:

(a) Objective clinical findings such as test results and observation of physical signs;

(b) Medical diagnoses based on evaluation; or

(c) Evaluation and assessment of a non-medical expert in the field of alcohol or drug rehabilitation, such as a qualified Employee Assistance Program Counselor.

(8) For further information and discussion on alcohol and drug problems and the Employee Assistance Program, see VA Handbook 5019, Occupational Health Services. Because of periodic changes in case law regarding reasonable accommodation for employees with alcohol and drug abuse problems, supervisors should consult with the Human Resources Management office prior to confronting an employee with a suspected problem.

(9) Executive Order 12564 on the Drug-Free Federal Workplace generally requires agencies to initiate disciplinary or adverse action against any employee who is found to use illegal drugs.

(10) Management may enter into last chance or abeyance agreements with employees who have an alcohol or drug abuse problem. These agreements are generally entered into after a disciplinary suspension or adverse action has been proposed, and offer the employee an opportunity to participate in

a rehabilitation program while the proposed action or implementation of the decision is held in abeyance. The final decision on the proposed action is based on whether the employee's participation is successful, and/or whether further misconduct occurs. A primary benefit of last chance or abeyance agreements is that the agency's reasonable accommodation efforts are clearly documented for the record, Since case law in this area is constantly evolving, and there are no set formulas for last chance or abeyance agreements, officials involved in preparing such agreements should contact the Regional Counsel or General Counsel, as appropriate, or the Office of Human Resources Management (051) in VA Central Office, when questions arise. Sample abeyance agreements are contained in appendix I of this part.

(a) There is no set formula for abeyance or last chance agreements:

1. they are tailored to the individual situation;

2. they are fair, and provide some potential consideration or benefit to the employee (generally the agency's agreement to withhold an action which it could take);

3. they can be imposed unilaterally by the agency, or

4. negotiated with the employee or his representative, (if they involve a waiver of rights, the employee must agree);

5. they can be imposed at several stages of the adverse action process: after a proposal, after a decision, or even after the action has been effected; and

6. if the conditions are not met, the agency can take immediate action (no need to wait until the end of the period, or to give a new notice).

(b) Abeyance and last chance agreements should contain at least the following:

1. a time limit and conditions tailored to the situation;

2. a clear statement of all the agency's requirements of the employee including satisfactory participation in a rehabilitation program, and satisfactory conduct;

3. a description of behaviors that will be considered evidence of compliance or failure to comply with the requirements; and,

4. an explanation of what the agency will do if the employee fails to comply, and what the agency will do if the employee complies.

(c) When an action is taken based on violation of an abeyance agreement, the following is recommended:

1. the violation should not become part of the charges, but should be used only to show that the employee violated the agreement and thus triggered the agency's action;

2. the letter to the employee should clearly describe how the employee violated the provisions of the agreement (MSPB will require proof of violations); and,

3. the agency should proceed on the basis of the original charges only.

c. **Non-Disciplinary Reasons Resulting in Removal, or Reduction in Grade or Pay.** (See chapter 3, paragraph 5d of this part.)

d. **Reductions in Grade or Pay, or Removal Based on a Combination of Performance and Conduct Related Factors.** (See chapter 3, par. 5e, of this part.)

e. **Involuntary Leave.** The authority of agencies to impose involuntary leave status on employees has been significantly curtailed by several Merit Systems Protection Board (MSPB) decisions. These decisions have held that the use of enforced leave as an alternative when dealing with employees who wish to work but appear to be mentally or physically unable to do so and who pose a safety threat to themselves or others in the workplace, constitutes a disciplinary suspension and is thus an appealable action, if the suspension exceeds 14 calendar days. Otherwise, the action is grievable. However, when an employee, because of vicious or intemperate conduct or illness (mental or physical), is regarded as presenting an immediate threat to Government property or to the well-being of the employee, fellow workers, or the general public, several other alternatives may be considered as circumstances require; detail to other duties, sick or annual leave with the employee's consent, or non-duty paid status for a limited period, any of which may present some immediate relief to the situation. (See par. 7b(2)above.)

f. **Indefinite Suspension.** In cases where management foresees a need for considerable time to complete its inquiries, medical examinations, or investigation, and make a determination in the case, consideration may be given to imposing an indefinite suspension. The basis for the indefinite suspension would be the need to have the employee away from the worksite pending inquiry, investigation, or the medical examination process. During the advance notice period of a proposed indefinite suspension, the employee may be placed in a non-duty paid status, and in cases involving the commission of a crime, the crime provisions procedure may be followed. (See chapter 3, par. 14, of this part.) An indefinite suspension must specify a completion point (e.g., acquisition of medical documentation sufficient for management to make an informed decision). The employee may not be suspended without such a completion point set out in the proposal, and the suspension cannot continue once the completion point is reached. At the completion of the suspension, management must either return the employee to his or her position, detail or reassign the employee to another position, remove the employee for either disciplinary or non-disciplinary reasons related to inability to perform, or take other appropriate administrative action. Due to the changing nature of case law in the area of indefinite suspensions, officials involved in such actions should consult with the Regional or General Counsel, as appropriate, or the Office of Human Resources Management (051) in Central Office prior to initiating action.

g. **Progressive Discipline.** Using the least severe action which, in the supervisor's judgment, will most likely correct the employee's misconduct is a commonly recognized principle. It is most applicable in repeated infractions of a minor nature (e.g., brief tardiness). However, it does not prohibit issuance of a more severe penalty (e.g., suspension or removal) prior to issuance of each and every lesser penalty.

For example, it is not always appropriate to issue an admonishment and/or a reprimand prior to issuance of a suspension or removal. Sound supervisory discretion and judgment must be applied in all cases fully considering any aggravating and/or mitigating circumstances. The concept of progressive discipline and the recommended guidance provided by the Table of Offenses and Penalties (see appendix A of this part) is not intended to preclude the exercise of discretion in determining appropriate action, but rather to serve as an aid to maintaining consistency. The facts of the case, degree of willfulness of the employee's violation of VA conduct rules, and the seriousness of the misconduct and its resultant impact on VA operations, may be examples of reasons for necessitating consideration of more severe discipline (e.g., suspension without prior admonishment or reprimand).

CHAPTER 2. DISCIPLINARY ACTION

1. ADMONISHMENT

a. **Definition.** An admonishment is a written statement of censure given to an employee for a minor act of misconduct.

b. **Procedure.** An admonishment will be in the form of an official letter to the employee describing the reasons for the action. It will advise the employee that a copy of the admonishment and any written explanation or comments regarding the admonishment will be placed on the left-hand side of the employee's personnel folder. The admonishment will contain a statement advising the employee of the right to appeal the action under the grievance procedure in part IV, chapter 2, of this handbook, or the negotiated grievance procedure, as appropriate, and will also contain a statement informing the employee of the withdrawal provisions. Before release to the employee, the admonishment will be forwarded to the Human Resources Management office for review and concurrence. A sample letter of an admonishment appears in appendix B of this part.

c. **Withdrawal of Admonishment.** After 2 years (or whatever time frame is specified in any applicable labor-management agreement), admonishments will be removed from the personnel folder and destroyed. However, in cases of patient abuse, an admonishment may be retained in the personnel folder for as long as the individual is employed by VA. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management Officer that the admonishment be withdrawn, if the employee's conduct so warrants. Upon receipt of such a request, the Human Resources Management Officer will return the admonishment to the supervisor for destruction. If the request is initiated by a supervisor below the level of the official who issued the admonishment, it must be approved at or above the level of the official who issued it.

(1) In determining whether an admonishment should be withdrawn early, consideration should be given to the fact that it may not be used after its withdrawal as a past disciplinary record in connection with any future proposed disciplinary or adverse action. This is especially important with respect to admonishments for patient abuse.

(2) When an admonishment has been withdrawn early and destroyed, the supervisory official will inform the employee. In order to assure the employee that no record remains in the personnel folder, the supervisor may wish to destroy it in the employee's presence or give it to the employee for disposition.

(3) Since the admonishment may be appealed under the grievance procedure initially and, except in patient abuse cases, will automatically be removed from the personnel folder after 2 years, a grievance may not be filed based on a supervisor's decision not to remove it earlier than the expiration date.

d. **Right to File a Grievance.** The employee may appeal an admonishment under the VA grievance procedure in part IV, chapter 2 of this handbook, or under the negotiated grievance procedure, as appropriate. Under the VA grievance procedure, the grievance must be submitted through supervisory channels not later than 15 days after receipt of the admonishment. Grievances from bargaining unit

employees must be filed in accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to that procedure for the appropriate steps and time limits.

2. REPRIMAND

a. **Definition.** A reprimand is a written statement of censure given to an employee for misconduct.

b. **Procedure.** A reprimand will be in the form of an official letter to the employee describing the reasons for the action. It will advise the employee that a copy of the reprimand and any written explanation or comments regarding the reprimand will be placed on the left-hand side of the employee's personnel folder. The reprimand will contain a statement of the right to appeal the action under the VA's grievance procedure in part IV, chapter 2 of this handbook, or the negotiated grievance procedure, as appropriate, and will also contain a statement informing the employee of the withdrawal provisions. Before release to the employee, the reprimand will be forwarded to the Human Resources Management Office for review and concurrence. A sample letter of reprimand appears as appendix C of this part.

c. **Withdrawal of Reprimand.** After 3 years (or whatever time frame is specified in any applicable labor-management agreement), a reprimand will be removed from the personnel folder and destroyed. However, in cases of patient abuse, the reprimand may be retained in the personnel folder for as long as the individual is employed by VA. The employee's supervisor may, after 2 years, make a written request to the Human Resources Management Officer that the reprimand be withdrawn, if the employee's conduct so warrants. Upon receipt of such a request, the Human Resources Management Officer will return the reprimand to the supervisor for destruction. If the request is initiated by a supervisor below the level of the official who issued the reprimand, it must be approved at or above the level of the official who issued it.

(1) In determining whether a reprimand should be withdrawn early, consideration should be given the fact that after its withdrawal, it may not be used as a past disciplinary record in connection with any future proposed disciplinary or adverse action. This is especially important with respect to reprimands for patient abuse.

(2) When a reprimand has been withdrawn early and destroyed, the supervisory official will so inform the employee. In order to assure the employee that no record remains in the personnel folder, the supervisor may wish to destroy it in the employee's presence or give it to the employee for disposition.

(3) Since the reprimand may be appealed under the grievance procedure initially and, except in patient abuse cases, will automatically be removed from the personnel folder after 3 years, a grievance may not be flied based on a supervisor's decision not to remove it earlier than the expiration date.

d. **Right to File a Grievance.** The employee may appeal the reprimand under the VA grievance procedure in part IV, chapter 2 of this handbook, or under the negotiated grievance procedure, as appropriate. Under the VA grievance procedure, the grievance must be submitted through supervisory channels not later than 15 calendar days after receipt of the reprimand. Grievances from bargaining unit employees must be filed in accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to that procedure for the appropriate steps and time limits.

3. DISCIPLINARY SUSPENSION OF 14 CALENDAR DAYS OR LESS

a. **Actions Covered.** The provisions of this paragraph apply to suspensions of 14 calendar days or less.

b. **Employees Covered.** This paragraph applies to all VA employees except:

(1) Employees in the Veterans Health Administration (VHA) appointed under 38 U.S.C., chapter 74 covered by a proficiency rating system. **NOTE:** *Employees appointed under 38 U.S.C. 7401(2) and (3) are covered by the provisions of this chapter.*

(2) Canteen Service employees appointed under 38 U.S.C. 78 (see Veterans Canteen Service Procedures, VCS-1);

(3) Schedule C employees;

(4) An individual appointed by the President;

(5) Re-employed annuitants;

(6) Members of the Senior Executive Service.

(7) Members of the Board of Veterans and Contract Appeals; and,

(8) Employees appointed under 38 U.S.C., chapter 3 (e.g. Under Secretary for Health, Under Secretary for Benefits).

c. **Employee Entitlements**

(1) An advance notice stating the specific reasons for the proposed suspension;

(2) A reasonable time to answer, orally or in writing, or both orally and in writing, and to furnish affidavits or other documentary evidence in support of the answer;

(3) The right to be represented by an attorney or other representative;

(4) The right to review the evidence relied upon to support the proposed action (evidence which may not be disclosed to the employee or the employee's designated representative may not be used to support the reasons in a notice of proposed suspension). The evidence will be maintained in the Human Resources Management office;

(5) A reasonable amount of official time, if otherwise in a duty status, for reviewing the material relied upon to support the proposed action, and for preparing and presenting a written and/or oral reply. This also applies to the employee's representative, if a VA employee;

(6) The right to reply to either the decision official or to someone with authority to recommend what the final decision should be;

(7) A written decision and the specific reasons supporting the decision at the earliest practicable date; and,

(8) The right to appeal the action under the VA grievance procedure or under the negotiated grievance procedure, as appropriate. There is no right of appeal to the Merit Systems Protection Board of a disciplinary suspension of 14 days or less.

d. **Procedures**

(1) **Preparation.** The appropriate supervisory official, with the assistance of the Human Resources Management office, will prepare and issue the advance notice of proposed suspension.

(2) **Review.** Before being given to the employee, the notice will be reviewed by the Human Resources Management Office for compliance with applicable statutes, regulations, labor management agreements, and VA policy. The Human Resources Management office should also review the evidence and, if indicated, make a recommendation to the proposing official concerning the propriety of the action.

(3) **Content of Proposed Notice.** The advance notice of proposed suspension must contain the following information (see appendix D of this part):

(a) the number of days that it is proposed that the employee be suspended;

(b) a statement of the specific reasons for the proposed action, including names, dates, places, and other data, sufficient to enable the employee to fully understand the reasons and to afford the employee a reasonable opportunity to respond to them;

(c) a statement that the employee has the right to be represented by an attorney or other representative;

(d) a statement that the employee has the right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(e) a statement of the amount of time the employee has to submit the reply or replies (time limits may vary according to applicable labor-management agreements, but in no event may be less than 24 hours).

(f) a statement informing the employee that the material relied upon to support the reasons for the proposed suspension will be made available to the employee and his/her representative upon request;

(g) a statement that if the employee has any questions about the reasons for the proposed suspension, he or she may contact the official who signed the proposed notice or the Human Resources Management office for further explanation;

(h) a statement identifying the decision official;

(i) a statement that the employee's written reply should be submitted through supervisory channels to the decision official and that the decision official or his or her designee will receive the employee's oral reply;

(j) when an employee's past disciplinary record is to be considered as part of the basis for the proposed suspension, a statement will be included that specifically cites and identifies the previous infractions and penalties, and advises the employee that he or she may make a statement concerning the consideration to be given to the past record in determining a penalty in the present case;

1. If cited, the previous disciplinary record will not be set forth as a current reason, but will be stated in a paragraph separate and apart from the current reasons. In order to be cited in the post record paragraph, the disciplinary action must meet the following requirements:

a. The action must have been in writing;

b. The action must be a matter of record; and

c. The employee must have been given an opportunity to contest the action to a higher authority than the official who imposed it.

2. Counselings and charges of "Absent Without Leave" (AWOL) without concurrent disciplinary action are not disciplinary actions and may not be included in the past record paragraph, However, counselings may be cited in a separate paragraph and may be considered in determining appropriate action against an employee. If such counselings are cited, the counseling must have been in writing and must be included in the evidence file used to support the proposed action. Any references to letters or memoranda of counseling in the proposal letter must be sufficiently clear so as to enable the employee to comment on the weight to be given to the counseling in determining the final action.

3. Suspensions may not be cited in the past record paragraph unless the suspension has actually been served by the employee.

(k) a statement that full and impartial consideration will be given to the employee's reply, if a reply is made;

(l) a statement that the employee will be given a written decision as soon as possible after his or her reply has been fully considered or after the expiration of the time allowed for reply, if the employee does not reply.

(4) **Employee's Reply**

(a) If the employee requests an opportunity to reply orally, the decision official will receive the employee's reply or will designate a representative to receive it. The representative designated to receive the reply will be an official who has authority to recommend what final decision should be

made. The right to reply orally includes the right to be given a reasonable opportunity to make any plea which the employee believes might sway the final decision in his or her case. The employee's oral reply must not be restricted to matters dealing solely with the charges against him or her. The employee must be permitted to plead extenuating circumstances or make any other argument he or she deems proper.

(b) A written summary of the employee's oral reply must be made and placed in the evidence file. If a designee is named to hear the oral reply, the summary may contain a specific recommendation on the proposed action.

(c) The employee may reply in writing to the notice in addition to making an oral reply or instead of an oral reply.

(d) An employee's failure to reply is not to be considered an admission of the charges. The burden of proof rests with management to support its reasons for the action.

(5) **Arriving at a Final Decision on a Proposed Suspension**

(a) The decision official will give full and impartial consideration to the employee's reply, if any, and all evidence of record. If the decision official finds one or more of the reasons in the advance notice sustained, he or she will give consideration to the table of examples of offenses and penalties in appendix A of this part in determining the appropriate penalty. This appendix also lists several factors to consider in arriving at a decision.

(b) A decision adverse to the employee must be based only on the reasons stated in the notice of proposed action. If none of the reasons are sustained, either in whole or in part, no penalty may be imposed, regardless of any past record cited in the notice.

(c) The penalty may not be more severe than that proposed in the notice of proposed action.

(d) If the notice of proposed suspension is determined to be procedurally defective, or if it is found that additional reasons other than those set forth should be considered or that the appropriate penalty should be more severe than that proposed, the notice of proposed suspension will be rescinded and a new notice of proposed action issued. The new notice will include a new advance notice period and another opportunity to reply orally or in writing, or both orally and in writing.

(6) **Decision Notice**

(a) The decision letter will be dated and signed by the appropriate decision official, and will be delivered to the employee prior to the effective date of the action.

(b) Before the decision is released to the employee, it will be reviewed by the Human Resources Management office for compliance with applicable statutes, OPM regulations, and VA policies. The Human Resources Management office will also review the merits of the case and any mitigating factors and, if indicated, advise the decision official concerning the propriety of the action.

(c) The decision letter will contain the following information (see appendix E of this part):

1. A statement that consideration has been given to all evidence developed, including the employee's reply. A written reply made by a representative on behalf of the employee is considered to be an employee's reply. If the employee replies both orally and in writing, both replies must be mentioned.

2. A statement of the decision official's determinations regarding what reasons, if any, in the advance notice were sustained and what reasons, if any, were not sustained.

3. If a record of prior disciplinary actions was cited in the advance notice, the decision will state whether the action takes the past record, as cited in the advance notice, into consideration in determining proper action.

4. A statement of the inclusive dates of the suspension.

5. A statement concerning the employee's rights to file a grievance, and the time limit within which it must be filed.

6. A statement advising the employee that a further explanation of his or her appeal rights may be obtained by consulting the Human Resources Management office.

(d) The guidelines in chapter 3, paragraph 13e of this part concerning delivery should be followed.

CHAPTER 3. ADVERSE ACTIONS

1. ACTIONS COVERED. The provisions of this chapter apply to suspensions for more than 14 days, removals, reductions in grade or pay, furloughs of 30 days or less, or other actions which result in an involuntary separation or reduction in grade or pay when such actions are not based solely on unacceptable performance.

2. EMPLOYEES COVERED

a. Among those employees covered by the provisions of this chapter are:

(1) Employees in the competitive service who have completed a probationary or trial period for their current appointment;

(2) Employees in the excepted service who are preference eligibles and who have completed 1 year of current continuous employment in the same or similar positions;

(3) Employees in the excepted service (other than a preference eligible) who are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; and,

(4) Employees in the excepted service (other than a preference eligible) who have completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less.

(5) Employees appointed under 38 U.S.C. 7401(3) (i.e., full-time title 38 hybrids) who have completed their probationary period.

b. Most adverse actions will be initiated against employees who meet the criteria described in the previous subparagraph. However, 5 CFR 752.401 (c) provides a comprehensive list of all employees covered by the adverse action provisions of this chapter and should be consulted when questions arise concerning employee coverage.

3. EMPLOYEES EXCLUDED

a. Physicians, dentists, nurses, nurse anesthetists, expanded function dental auxiliaries, physician assistants, podiatrists, optometrists, and other health care professionals appointed under 38 U.S.C. 74 (see part II of this handbook). **NOTE:** *Employees appointed under 38 U.S.C. 7401(2) and (3) are covered by the provisions of this chapter.*

b. Schedule C employees;

c. An individual appointed by the President; and,

d. Members of the Senior Executive Service (except as specifically covered by this chapter).

4. ACTIONS EXCLUDED. The provisions of this chapter do not apply to the following actions:

a. Reduction in force;

b. Reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321 (a)(2) if such reduction is to the grade held immediately before becoming such supervisor or manager;

c. Reduction in grade or removal based solely on unacceptable performance under 5 CFR, part 432;

d. Any action taken by the MSPB under the provisions of 5 U.S.C. 1204;

e. Action which entitles an employee to grade retention under 5 CFR, part 536 and an action to terminate this entitlement;

f. Voluntary action initiated by the employee;

g. Action taken or directed by VA or OPM under 5 CFR, part 731 or part 754;

h. Involuntary retirement because of disability under 5 CFR, part 831;

i. Termination of an appointment on the expiration date specified as a basic condition of employment at the time the appointment was made.

j. Action which terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay, in accordance with 5 CFR, part 335.

k. Cancellation of a promotion to a position not classified prior to the promotion;

l. Placement of an employee serving on an intermittent, part-time, or seasonal basis in a non-duty, non-pay status in accordance with conditions established at the time of appointment;

m. Reduction of an employee's rate of pay from a rate which is contrary to law or regulation to a rate which is required or permitted by law or regulation;

n. Reduction in rank not accompanied by a reduction in grade;

o. Termination of employees during a probationary or trial period;

p. Termination of employees serving under Veterans Readjustment Appointments during the first year of a 2 year trial period; and,

q. Any other action excluded under 5 CFR, part 752.

5. TYPES OF ADVERSE ACTIONS

a. **Suspension of More than 14 Calendar Days.** A suspension for more than 14 calendar days is an enforced temporary non-pay status and absence from duty. Such action is given for serious misconduct. It may also be given for continued or repeated acts of misconduct of a less serious nature.

b. **Reduction in Grade for Disciplinary Reasons.** A reduction in grade imposed for disciplinary reasons is proper when such an action would be effective in correcting a situation and thus serve to retain a valuable and trained employee. For example, a reduction in grade may be appropriate when the offense indicates unsuitability for supervisory duties but not for duties of a non-supervisory nature.

c. **Removal for Disciplinary Reasons.** Removal for disciplinary reasons is an involuntary separation taken for serious misconduct or for continued or repeated acts of misconduct of a less serious nature.

d. **Non-Disciplinary Reasons Resulting in Removal or Reduction in Grade or Pay.** An action may be non-disciplinary, but at the same time adverse to the employee. For example, the removal of an employee because of refusal to accompany the activity to a new location is an adverse action even though no disciplinary element is involved. Demotion or separation due to the employee's failure to meet the physical requirements of the position is another example of an adverse action which did not grow out of a disciplinary situation.

e. **Demotion or Removal Based on Combination of Performance and Non-Performance Related Factors.** Adverse actions based on a combination of performance and either misconduct or inability to do the work of the position because of disability, are processed under this chapter. (For pure performance based removals under 5 CFR, part 432, see appendices I-L, I-M and I-N.)

f. **Furlough for 30 days or Less.** This is a non-disciplinary adverse action taken on the basis of an emergency situation, lack of work or funds, or other non-disciplinary reasons. Furloughs are appropriate Only when motivated by temporary conditions. VA Handbook 5005, Staffing, contains procedures for identifying employees for furlough and requesting furlough authority.

6. BURDEN OF PROOF DURING APPEAL PROCESS

a. Prior to initiating an adverse action, officials involved in the decision making process should consider the burden of proof which must be met in order to sustain the adverse action on appeal.

b. When taking an adverse action against an employee, the agency bears the burden of proof under 5 U.S.C. 7701 (c)(1) on all reasons and issues that form the basis for the adverse action.

c. The agency has the burden of proof on the following 3 elements of its decision on all adverse actions taken under 5 U.S.C. 75:

(1) **Proof of Charges.** The agency must prove the factual basis of the misconduct relied on in taking the action by a "preponderance of the evidence." Preponderance of the evidence means that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient

evidence to support a conclusion that the reasons for taking action are more likely to be true than not true. This standard of proof is used by the MSPB and arbitrators in deciding appeals and grievances. In proving the charges themselves, it may also be necessary to establish a number of sub-elements. An example would be a case involving charges of absence without leave (AWOL). In such a case, the agency must prove not only that the employee was absent on the date(s) in question, but also that its decision to place the employee in an AWOL status, rather than in an approved leave status, was reasonable.

(2) **Nexus.** Nexus is the element in an adverse action which requires proof of an adequate relationship between the act of misconduct and the efficiency of the service.

(3) **Appropriateness of Penalty.** The agency must establish that the penalty selected is within the tolerable limits of reasonableness (see Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), for a discussion of the Board's authority to review penalties, and appendix A of this part, which lists the "Douglas" factors and contains the Table of Offenses and Penalties). The sample decision letter in appendix F of this part, contains suggested language regarding the "Douglas" factors which can be used in the adverse action decision notice.

7. EMPLOYEE ENTITLEMENTS

a. 30 days advance written notice, stating the specific reasons for the proposed action, except when invoking the crime provision (see paragraph 14 of this chapter), or for furloughs without pay due to unforeseeable circumstances (see VA Handbook 5005, part IV, for further guidance);

b. A reasonable time, but not less than 7 days (or whatever time frame is specified in any applicable labor-management agreement) to answer orally and/or in writing and to furnish affidavits or other documentary evidence in support of the answer;

c. Right to be represented by an attorney or other representative;

d. Right to review the evidence relied upon to support the proposed action (material which cannot be disclosed to the employee or to his or her representative cannot be used to support the reasons in a notice of proposed adverse action and must not be included in the evidence file).

e. A reasonable amount of official time, if otherwise in a duty status, for reviewing the evidence relied upon to support the proposed action, and for preparing and making a written and oral reply. This also applies to the employee's representative if a VA employee.

f. A written decision and the specific reasons therefore at the earliest practicable date;

g. Right to appeal the action to MSPB or under a negotiated grievance procedure (NGP), if the NGP covers appeals of adverse actions and the employee is a member of the bargaining unit, or to file a discrimination complaint under 29 CFR 1614 of the Equal Employment Opportunity Commission's regulations in those instances where the employee has raised an allegation of discrimination during the advance notice period of the adverse action.

8. EXCEPTIONS TO 30 DAYS ADVANCE NOTICE

a. The 30-day advance notice period is not required where there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Paragraph 14 of this chapter contains guidance concerning the crime provision, and the use of indefinite suspensions in conjunction with the crime provision.

b. The 30-day advance notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdown in equipment, acts of God (e.g., flood, tornado, etc,) or sudden emergencies requiring immediate curtailment of activities (see VA Handbook 5005, part IV, for further guidance).

9. NOTICE OF PROPOSED ACTION

a. Before being released to the employee, the notice of proposed action will be reviewed, by the Human Resources Management office for compliance with applicable statutes, regulations, labor-management agreements, and VA policy. The Human Resources Management office will also review the evidence and, if indicated, provide guidance concerning the propriety of the action.

b. The advance notice of proposed action must contain the following information (see appendix D of this part):

(1) The nature of the action proposed (i.e., removal, length of suspension, demotion, etc.);

(2) A statement of the specific reasons for the proposed action, including names, dates, places, and other data, sufficient to enable the employee to fully understand the reasons and to afford the employee a fair opportunity to respond to them;

(3) A statement that the employee may be represented by an attorney or other representative;

(4) A statement that the employee has the right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(5) A statement of the amount of time the employee has to submit the reply, or replies. Time limits may vary according to applicable labor-management agreements, but in no event may it be less than 7 days;

(6) A statement that if the employee has any questions about the reasons for the proposed adverse action, he or she may contact the official who signed the advance notice or the Human Resources Management office for further explanation;

(7) A statement identifying the decision official;

(8) A statement that the employee's written reply should be submitted through supervisory channels to the decision official and that the decision official, or designee, will receive the employee's oral reply;

(9) When an employee's past disciplinary record is to be considered as part of the basis for the proposed adverse action, a statement should be included that specifically cites and identifies the previous infractions and penalties, and advises the employee that he or she may reply orally or in writing, or both orally and in writing, with respect to those previous infractions. The statement will also advise the employee that he or she may submit supporting evidence, including affidavits, and may make a statement concerning the consideration to be given to the past record in determining proper action:

(a) If cited, the previous disciplinary record will not be set forth as a current reason, but will be stated in a paragraph separate and apart from the current reasons. In order to be cited in the past record paragraph, the disciplinary action must meet the following requirement:

1. The action must have been in writing;

2. The action must be a matter of record; and,

3. The employee must have been given an opportunity to contest the action to a higher authority than the official who imposed it.

(b) Counselings and charges of AWOL without concurrent disciplinary action are not disciplinary actions and may not be included in the post record paragraph. However, counselings may be cited in a separate paragraph and may be considered in determining appropriate action against an employee. If such counselings are cited, the counseling must have been in writing and must be included in the evidence file used to support the proposed action. Any references to letters or memoranda of counseling in the proposal letter must be sufficiently clear so as to enable the employee to comment on the weight to be given to the counseling in determining the final action.

(c) Suspensions may not be cited in the past record paragraph unless the suspension has actually been served by the employee.

(10) A statement that full and impartial consideration will be given to the employee's reply, if a reply is made;

(11) A statement that the employee will be given a written decision as soon as possible after his or her reply has been fully considered or after the expiration of the time allowed for reply, if the employee does not reply;

(12) A statement advising the employee of the duty and pay status in which he or she will be carried during the notice period;

(13) A statement that if it is decided to take the proposed adverse action, such action will be effective not less than 30 days from the day following the date of receipt of the notice;

(14) A statement informing the employee where the evidence relied on to support the reason(s) for the proposed action will be available for the employee's (and/or his or her designated representative's)

review. (Generally, the evidence file should be maintained in the Human Resources Management office.);

(15) A statement that:

(a) Informs the employee that he or she will be allowed a specific number of hours of official time (if otherwise in an active duty status) for reviewing the notice, for preparing a written and/or oral reply, for securing affidavits; and

(b) Identifies the person with whom the employee should make arrangements for the use of official time. (The time allowed will depend on the facts and circumstances of each individual case. In most cases, 8 hours of time may be deemed sufficient. However, for more complex cases, more than 8 hours may be allowed. Since the time spent by the employee in reviewing the evidence and preparing the reply may be spread over several days (i.e., the 7-day reply period), documentation should be made as to how much official duty time is used each day. If the employee requests additional official time beyond what was originally approved, the request may be honored if it is reasonable.)

10. STATUS OF EMPLOYEE DURING ADVANCE NOTICE PERIOD OF ADVERSE ACTION

a. **Duty Status.** Ordinarily the employee will be retained in a pay and active duty status in his or her position at current grade and salary, during the period pending a decision on a proposed action.

b. **Detail, Leave or Paid Non-Duty Status.** During the advance notice period of a proposed removal, it may be necessary to remove the employee from the worksite. In those instances where it is determined that the employee's continued presence at work during the advance notice period might pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the following alternatives can be considered:

(1) Detailing the employee to other duties where he or she is no longer a threat to safety, to the VA's mission, or to Government property;

(2) Allowing the employee to take leave (annual, sick, leave without pay), or carrying him or her in an absent without leave status if the employee has absented himself or herself from the worksite without requesting leave;

(3) Curtailing the notice period in cases where the agency can invoke 5 CFR, part 752.404(d)(1) (i.e., the "crime provision");

(4) If none of the above alternatives is available, placing the employee in a paid, non-duty status (i.e., authorized absence for timekeeping purposes) during all or part of the advance notice period,.

c. **Emergency Suspensions.** Agencies are not authorized to effect emergency suspensions under the Civil Service Reform Act of 1978.

11. EMPLOYEE'S REPLY

a. If the employee requests an opportunity to reply orally, the decision official will receive the employee's reply, or will designate a representative to receive it. The representative designated to receive the reply will be an official who has the authority to recommend what final decision should be made. The right to reply orally includes the right to be given reasonable opportunity to make any plea which the employee believes might influence the final decision in his or her case. The employee's oral reply must not be restricted to matters dealing solely with the charges against him or her. The employee must be permitted to plead extenuating circumstances or make any other arguments he or she deems proper. A written summary of the oral reply must be made and placed in the adverse action file. If a designee hears the oral reply, the summary may include a recommendation on the proposed action.

b. The employee may reply in writing to the notice, in addition to making an oral reply or instead of an oral reply.

c. An employee's failure to reply is not to be considered an admission of the charges. The burden of proof rests with management to support its reasons for the action.

d. In making a reply, the employee may allege alcohol or drug abuse or some other disabling medical condition.

(1) If the employee alleges that a physical or mental condition or disability is causing the conduct or performance problems, the decision official will allow the employee a reasonable opportunity to supply medical documentation in order to assess the effect of the condition on the employee's performance or conduct. If the documentation is not sufficient or needs clarification, in limited instances a medical examination may be offered or ordered under the provisions of VA Handbook 5019. This documentation will assist in determining whether the employee has a disability for the purpose of considering reasonable accommodation. If the employee's unacceptable performance or conduct is unrelated to the nature of the disability, the employee is not a qualified employee with a disability and reasonable accommodation need not be considered.

(2) Reasonable accommodation will be afforded to the known physical or mental limitations of a qualified employee with a disability unless it can be demonstrated that the accommodation would impose an undue hardship on the operation of the Department. The type of accommodation will be specific to the individual circumstances. In determining whether an accommodation would impose an undue hardship on the operation of the agency, a number of factors should be considered, including but not limited to, the nature and cost of the accommodation, and the impact such accommodation would have on the workload of other employees.

(3) When an employee with a disabling medical condition cannot be reasonably accommodated, management may, depending on the circumstances, wish to change its cause for action against the employee prior to making a final decision on the proposed adverse action. For example, if an employee whose removal has been proposed for misconduct, clearly demonstrates through medical evidence that there is a causal relationship between the actions on which the proposed removal is based and his or her medical condition, the notice of proposed removal for reasons of misconduct should be canceled and a new notice of proposed separation for disability issued, based on the medical evidence.

NOTE: *For further information relating to medical documentation and medical determinations, see 5 CFR, part 339 and VA Handbook 5019. For additional information on disability and reasonable accommodation considerations, see 29 CFR 1614.203.*

(4) When the employee raises a drug or alcohol problem, management will, if appropriate, refer the individual to the Employee Assistance Program. VA Handbook 5019, Occupational Health Services, and chapter one, paragraph 8, of part I of this handbook contain guidance on this program.

(5) When an employee raises a medical condition during the advance notice period but fails to provide supporting evidence, or to submit medical evidence after being given an opportunity to do so, the decision official will base the final decision on the reasons in the notice of proposed adverse action. This is also true when it is determined by VA medical authorities that, despite medical evidence submitted by the employee, there is no causal relationship between the employee's medical condition and the reasons for the proposed adverse action.

(6) In any case where an employee raises a medical condition and is eligible for disability retirement, the employee will be counseled regarding disability retirement application procedures. However, an employee's application need not preclude or delay the final decision on the proposed action.

12. ARRIVING AT FINAL DECISION ON THE PROPOSED ADVERSE ACTION

a. The decision on a proposed action should be made by an official who is in a higher position than the official who proposed the action. In all cases, it is essential that consideration be given to the requirement that the employee be given an opportunity to reply and to have that reply considered before the final decision is made.

b. The decision official will give full and impartial consideration to the employee's reply(ies), if any, and all evidence of record. If the decision official sustains one or more reasons in the advance notice, he or she will give consideration to the table of examples of offenses and penalties in appendix A of this part in determining the appropriate penalty. The decision official will also carefully consider those issues discussed in paragraph 6 of this chapter regarding the burden of proof which must be met in order to sustain the adverse action on appeal.

c. In arriving at the decision, the decision official must not consider any reasons for action other than the reasons stated in the notice of proposed action. If none of the reasons are sustained, either in whole or in part, no penalty may be imposed, regardless of any past record cited in the notice.

d. The penalty may not be more severe than that proposed in the notice of proposed action. It can, however, be less severe.

e. If the notice of proposed adverse action is determined to be procedurally defective so as to result in harmful error (i.e. error in the application of these procedures which, in the absence or correction of the error, might have caused management to reach a conclusion different than the one reached) or if it is found that additional reasons other than those set forth should be considered or that the appropriate penalty should be more severe than that proposed, the notice of proposed adverse action will be

rescinded and a new notice of proposed action issued. The notice will include a new advance notice period and another opportunity to reply orally or in writing, or both orally and in writing. If additional evidence becomes available to further support the charges in the advance notice, but does not necessarily provide a basis to alter the charges or the proposed penalty, the employee will be afforded the opportunity to respond to the new evidence before a final decision is made.

f. Officials involved in taking an adverse action against an employee should be aware of the prohibitions against improper "ex parte communications." The MSPB has held that agency officials may communicate with each other during the decision making process. However, it is improper for an interested party (e.g. supervisor, proposing official), to pressure the decision official into making an adverse decision. Such communications are improper, and might support reversal of the action on appeal.

13. DECISION NOTICE

a. The decision letter will be dated and signed by the appropriate decision official and will be delivered to the employee prior to the effective date of the action.

b. Before being issued to the employee, the notice will be reviewed by the Human Resources Management Officer, or designee, for compliance with the procedural requirements of existing statutes, OPM regulations, MSPB decisions, applicable labor-management agreements and VA policies. Any comments the Human Resources Management office may have concerning the merits of the case and any mitigating factors will be presented to the decision official.

c. The letter of decision will contain the following information (appendix F of this part):

(1) A statement that consideration has been given to all evidence developed, including the employee's reply. A written reply made by a representative in behalf of the employee is considered to be an employee's reply. If the employee replies both orally and in writing, both must be mentioned. The decision official should also make a statement regarding consideration that was given to the "Douglas" factors (see sample letter in appendix F of this part, for suggested language).

(2) A statement of the decision official's determinations regarding what reasons, If any, in the advance notice were sustained and what reasons, if any, were not sustained.

(3) If a record of prior disciplinary actions was cited in the advance notice, a statement that the action takes the past record, as cited in advance notice, into consideration in determining proper action.

(4) A statement of the effective date, if the penalty imposed is a demotion or removal; or the inclusive dates, If the penalty is a suspension.

(5) A statement concerning the employee's appeal rights, including the right to file a complaint of discrimination (if appropriate), a grievance under the negotiated grievance procedure (if applicable) or an appeal to the appropriate MSPB Regional Office. Only one of the above options may be elected. An employee shall be deemed to have made an election to raise a matter under one of the procedures when the employee timely files an appeal with the MSPB, files a formal complaint of discrimination

(29 CFR 1614), or timely files a grievance in writing in accordance with the provisions of the labor-management agreement.

(6) The statement in the decision letter concerning appeal rights must include the time limit within which an appeal must be filed with MSPB, and the address of the appropriate MSPB Regional Office. Appeals to MSPB must be filed within 30 days of the effective date of the adverse action. Time limits for filing a grievance will be governed by the applicable negotiated grievance procedure.

(7) Indication that a copy of the MSPB regulations and appeal form is attached.

(8) A statement advising the employee that a further explanation of his or her appeal rights may be obtained by consulting the Human Resources Management office.

d. Non-preference eligible employees appointed under the authority of Schedule A or Schedule B who have completed 1 year, but less than 2 years, of current continuous service must be advised in the decision letter of the right to appeal an adverse action under the agency administrative appeal procedure (see chapter 2, part IV of this handbook and appendix J of this part).

e. It is best to deliver a decision letter to the employee personally and to obtain his or her dated, written acknowledgment of receipt so as to show the date and fact of receipt. If the employee refuses to sign, this should be so noted on the acknowledgment copy. In those instances where the decision letter cannot be personally delivered to the employee, it should be sent by certified mail, return receipt requested, in order to establish that the letter was received. A copy should also be sent to the employee's last known home address of record by regular mail in the event the certified mail is not delivered and/or the employee fails to obtain it from the Postal Service after being notified to do so.

14. ADVERSE ACTIONS RELATED TO THE CRIME PROVISION

a. The "crime provision" of 5 U.S.C. 7513(b)(1) allows the 30 day advance written notice period of an adverse action to be shortened so that expeditious action may be taken when appropriate. This provision is concerned solely with the duration of the advance notice period and the opportunity to answer. It does not deal with the employee's duty status during the advance notice period or the merits of the action. All other procedures except the full 30 day advance notice period of an adverse action apply.

b. In order for this provision to be invoked in connection with an adverse action, there must be reasonable cause to believe that the employee has committed a crime for which a penalty of imprisonment may be imposed (see appendix G of this part, for further guidance in this area).

c. The crime provision may be used only in conjunction with a proposal to remove or suspend indefinitely. In those situations in which the retention of the employee in an active duty status would be inappropriate, but where management wishes to defer final judgment until completion of judicial proceedings, or where evidence to substantiate a removal is not yet available or usable, an indefinite suspension should be proposed. The prime benefits of the indefinite suspension are the expeditious removal of the employee from the premises with the retained option of either reinstating or removing the employee upon completion of the judicial proceedings or further investigation. Action should be taken

to propose the employee's removal as soon as sufficient information is available to support charges against the employee concerning the act(s) of misconduct regardless of any subsequent judicial proceedings. The Regional Counsel should be consulted to assure that there is appropriate coordination with the prosecuting office.

d. Conviction may be cause for removal. However, a subsequent acquittal of the employee on appeal could invalidate the cause for action. Thus, the preferred basis for the adverse action is the misconduct which led to the arrest and conviction. If the cause relied upon is the employee's act(s) of misconduct rather than the arrest and conviction, the administrative action by VA will not be affected by subsequent court action on the criminal case.

e. By invoking the crime provision, the 30-day advance notice period may be shortened to whatever is reasonable under the circumstances, but not less than 7 days, to allow the employee to reply orally and/or in writing to a notice of proposed adverse action. If there is a need for immediate action and it is in the public interest to keep the employee off duty, he or she may be placed in a non-duty status with pay during the advanced notice period of a proposed indefinite suspension or removal, including any period of investigation. To invoke the crime provision and process a removal or indefinite suspension with a curtailed notice period, the following actions should be taken:

(1) Notify the employee in writing that he or she is being put immediately in a non-duty status with pay.

(2) Give the employee a notice either of proposed indefinite suspension pending further investigation or disposition of the criminal action, or of proposed removal when there is sufficient evidence to warrant removal. The notice will advise the employee of the reasonable period to respond orally and/or in writing (not less than 7 days).

(3) Issue a decision on the proposed action after the employee has had the stated opportunity to respond orally and/or in writing, and the response has been considered.

(4) With the exception of the shortened notice period and any enforced non-duty status, the proposed adverse action and decision notices must conform in all other aspects to the requirements for initiating and taking adverse actions.

(5) Any case involving the crime provision should be discussed with the Regional or General Counsel, as appropriate. This will prove helpful in obtaining official information regarding an arrest, the charges, indictment, arraignment, etc., needed to establish justification for use of the crime provision,

(6) Sample notices for use in connection with the crime provision may be found in appendices G and H of this part.

15. ADVERSE ACTIONS IN THE SENIOR EXECUTIVE SERVICE

a. **Actions Covered**

(1) The provisions of this paragraph apply only to a removal from the Civil Service or a suspension for more than 14 days,

(2) Adverse actions under this paragraph will be based only on misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function,

b. **Employees Covered.** The provisions of this paragraph apply to:

(1) A career employee who:

(a) Has completed the probationary period in the Senior Executive Service (SES);

(b) Is not required to serve a probationary period; or

(c) Was covered under adverse action procedures immediately before appointment to the SES.

(2) A limited term or limited emergency appointee who:

(a) Received the limited appointment without a break in service in the some agency as the one in which the employee held a career or career-conditional appointment (or an appointment of equivalent tenure as determined by the Office of Personnel Management) in a permanent civil service position outside the SES; and

(b) Was covered under adverse action procedures immediately before appointment to the SES.

c. **Procedures**

(1) Since members of the SES are centralized to the Secretary, adverse actions in the SES will be proposed by an appropriate higher level official. The Secretary reserves the right to decide adverse actions against employees in the SES.

(2) All procedural requirements for adverse actions discussed in this chapter must be met.

16. RECORDS

a. The Department shall retain all relevant documentation concerning disciplinary suspensions and adverse actions in a separate file and make it available for review by the affected employee or his/her representative. At a minimum, the agency's records shall consist of:

(1) A copy of the notice of proposed action.

(2) Evidence supporting the action taken including the affidavits of any witnesses.

(3) The reply of the employee when it is in writing, and/or a summary of any oral reply.

(4) The notice of decision and the reasons therefore.

(5) Evidence of the dates the employee received the notice of proposed action and decision.

(6) Copies of prior disciplinary and adverse actions (SF 50-B, Notification of Personnel Action, should be used to document any previous suspensions).

(7) Copies of relevant timecards if the adverse action was based on absence without leave (AWOL).

b. Disciplinary suspension and adverse action files should be maintained and disposed of in accordance with the provisions of VA Handbook 6300.1.

APPENDIX A. TITLE 5 - TABLE OF EXAMPLES OF OFFENSES AND PENALTIES

1. INSTRUCTIONS FOR USE OF TABLE

a. The range of penalties indicated in this table is to be used as a guide in administering discipline to help assure that like disciplinary action is taken for like offense.

b. The suspension penalties listed in the table are applicable to workdays only.

(Caution: In title 5, U.S. Code, chapter 75, "Suspended for More than 14 days" is interpreted to express calendar days)

c. In using this table, consideration will be given to the following:

(1) The table is designed to be sufficiently broad to include most types of offenses, but is not intended to be an exhaustive listing of all offenses. For other offenses, appropriate penalties may be prescribed by disciplinary officials for application within their jurisdiction, consistent with the range of penalties for comparable offenses listed in the table.

(2) This guide does not cover all offenses for which disciplinary penalties are expressly provided by law or Civil Service regulation.

(3) Offenses need not be identical in order to support progressively more severe disciplinary/ adverse action against an employee. For example, an employee who has received an admonishment for AWOL can receive a reprimand for sleeping on duty, and possibly be suspended or removed for a third offense unrelated to the two previous infractions.

(4) When an employee has committed a combination or series of offenses, a greater penalty than is listed for a single offense is appropriate.

(5) Where appropriate, demotion may be used in place of removal as provided in this chapter, except for the offense described in item 27 of the table.

(6) Disciplinary penalties will generally fall between the ranges indicated in the guide, but in unusual circumstances greater or lesser penalties may be imposed. In determining disciplinary action to be taken in a specific case, the following factors that will be considered as cited in Douglas v.VA, 5M.S.P.R.280 (1981). Remember that any of the Douglas factors may be either mitigating or aggravating. Each relevant factor must be addressed.

(7) The following are the twelve (12) Douglas factors:

(a) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(b) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(c) The employee's past disciplinary record;

(d) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(e) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;

(f) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(g) Consistency of the penalty with any applicable agency table of penalties;

(h) The notoriety of the offense or its impact upon the reputation of the agency;

(i) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(j) Potential for the employee's rehabilitation;

(k) Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(l) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

(7) Removal action will be taken whenever required by law or regulation or whenever warranted by the facts in the individual case. Normally, progressively more severe penalties will be administered before removal action is initiated, unless the offense is so serious that it warrants removal action. The severity of the penalty will be that which is required in order to correct the attitude or conduct of the employee or to correct the situation.

(8) Although oral or written counselings of employees are not considered disciplinary actions, such counselings may be considered when assessing the appropriate penalty for a particular offense.

(9) The "Douglas" factors are not applicable in those instances where a specific penalty (e.g., 30 day suspension for misuse of a Government vehicle) is required by statute.

2. RANGE OF PENALTIES FOR STATED OFFENSES

NOTE: *'Days' specified in this table refer to suspension.*

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
1. Unexcused tardiness.	Admonishment Reprimand	5 days Reprimand	5 days Removal
2. Unexcused or unauthorized absence.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
3. Leaving job to which assigned or VA premises, during working hours, without proper permission	Admonishment Reprimand	5 days Reprimand	10 days Removal
4. Loafing, willful idleness, or waste of time.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
5. Careless or negligent workmanship resulting in waste or delay.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
6. Violating traffic regulations or reckless driving on VA premises; or improper operation of a motor vehicle.	Admonishment 10 days	Reprimand Removal	10 days Removal
7. Failure to observe precaution for personal safety, posted rules, signs, written or oral safety instructions, or to use protective clothing or equipment.	Admonishment 10 days	Reprimand Removal	10 days Removal
8. Smoking in unauthorized places or carrying of matches in explosive areas	Admonishment Reprimand	Reprimand 10 days	10 days Removal
9. Endangering the safety of or causing injury to anyone on VA premises through carelessness or negligence.	Admonishment Removal	10 days Removal	Removal
10. Failure to report personal injury or accident.	Admonishment Reprimand	Reprimand 10 days	5 days 15 days
11. Failure to safeguard confidential matter.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
12. Deliberate failure or unreasonable delay in carrying out instructions.	Admonishment Reprimand	3 days 10 days	10 days Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
13. Sleeping on duty. a. Where safety of patients, beneficiaries, members, employees or property is not endangered. b. Where safety of patients, beneficiaries, members, employees, or property may be endangered.	Admonishment Reprimand 5 days Removal	Reprimand 10 days Removal	10 days Removal
14. Abuse of patients or beneficiaries	Reprimand Removal	10 days Removal	Removal
15. Fighting, threatening, attempting or inflicting bodily injury to another; engaging in dangerous horseplay. (Penalty depends on such factors as provocation, extent of any injuries, and whether actions were defensive or offensive in nature)	Reprimand Removal	10 days Removal	Removal
16. Disrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel, patients, or visitors.	Reprimand Removal	10 days Removal	Removal
17. Deliberate refusal to carry out any proper order from, or insolent, abusive, or obscene language toward immediate or other supervisor having responsibility for the work of the employee; willful resistance to same	Reprimand Removal	10 days Removal	Removal
18. Offenses related to intoxicants. Actions involving these offenses should be reviewed to ensure the requirements of drug and alcohol abuse program are met. a. Alcohol-related: (1) Unauthorized possession of alcoholic beverages while on VA premises or in duty status.	Reprimand 5 days	10 days Removal	15 days Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
18.a. (Continued) (2) Unauthorized use of alcoholic beverages while on VA premises or in duty status.	Reprimand 10 days	15 days Removal	Removal
(3) Reporting to or being on duty while under the influence of alcohol.	Reprimand 10 days	15 days Removal	Removal
(4) Sale or transfer of an alcoholic beverage while on VA premises or in a duty status or while any person involved is in a duty status.	10 days Removal	Removal	
b. Drug-related:			
(1) Unauthorized possession of an illegal drug or controlled substance while on VA premises or in a duty status.	5 days 10 days	15 days Removal	Removal
(2) Unauthorized use of a drug or controlled substance while on VA premises or in a duty status.	10 days Removal	15 days Removal	Removal
(3) Reporting to or being on duty while under the influence of a drug or controlled substance.	15 days Removal	Removal	
(4) Sale or transfer or a drug or controlled substance while on VA premises or in a duty status or while any person involved is in a duty status.	15 days Removal	Removal	
(5) Refusal to take drug test, as required	Admonishment Removal	15 days Removal	Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
19. Gambling, unlawful betting; on VA premises.	Reprimand 10 days	10 days Removal	Removal
20.Promotion of' gambling on VA premises.	Reprimand 10 days	10 days Removal	Removal
21. Indebtedness-lack of good faith in paying just financial obligations; such as failure without good cause to make or live up to arrangements to pay a debt that the employee admits he owes or that is supported by court judgment, or that represents a tax or other financial obligation to the U.S. Government or to State and local government.	Admonishment	Admonishment Reprimand	Reprimand Removal
22. Actual or attempted theft of Govern-ment property, or of personal property. on VA. premises.	Reprimand Removal	10 days Removal	Removal
23. Making false or unfounded statements, which are slanderous or defamatory, about other VA personnel or officials.	Reprimand Removal	10 days Removal	Removal
24. Falsifying attendance record for self or another employee.	Reprimand Removal	10 days Removal	Removal
25.Intentional falsification, misstatement, or concealment of material fact in connection with employment or any investigation, inquiry or proper proceeding; refusal to cooperate in same; or willfully forgoing or falsifying official Government records or documents	Reprimand Removal	10 days Removal	Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
26. Loss of, damage to, or unauthorized use of Government property: a. Through carelessness or negligence b. Through maliciousness or intent **NOTE:** *For willful use or authorization of the use of any Government vehicle for other than official purposes, the prescribed penalty is suspension for not less than 30 days or removal (31 U.S.C. 1349(b); see number 49.*	 Admonishment 15 days Reprimand Removal	 10 days Removal 10 days Removal	 Removal Removal
27. Owning any interest in, or receiving any wages, salary dividends, profits, gratuities, or services from any educational institution operated for profit in which an eligible veteran, or person, is pursuing a course of education or training under 38 U.S.C. 34 and 35 where it is determined that detriment will result to the United States or to eligible veterans, or persons, by reason or such interest or connection	Removal		
28. Participation in any type of outside activities, of relationships with contractors lenders, builders, or others engaged in business with VA or relationships with those seeking contracts, which would be contrary to the best interests of VA and the veterans it serves. Penalty action will be determined on the basis of whether the activities, or relationships, might result in a conflict between the private interest of the employee and his/her duty and obligation to or tend to create in the minds of others a suspicion of prejudice or favoritism that would be of embarrassment to VA.	Admonishment Removal	10 days Removal	Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
29. Except as specifically authorized, disclosing or using directly or indirectly information obtained as a result of employment in VA, which is of a confidential nature or which represents a matter of trust; or any other information so obtained of such character that its disclosure or use would be contrary to the best interests of the Government, VA, or the veterans being served by it.	Reprimand Removal	Removal	
30. Borrowing from, or lending money to, any beneficiary or claimant of VA; or borrowing from, or lending money to, another VA employee (or non-VA employee) for the purpose of monetary gain while on duty or on VA property.	Reprimand Removal	Removal	
31. Soliciting contributions for, or otherwise promoting, on premises occupied by VA, any national or local welfare or other type of campaign which has not had appropriate VA endorsement	Reprimand Removal	10 days Removal	Removal
32. Selling tickets, stocks, articles, or commodities or services on VA premises. This prohibition is not to be construed as prohibiting employees from engaging in bonafide activities on premises occupied by VA or organized employee union, group, organization, or association, as provided in other chapter of this manual.	Reprimand Removal	10 days Removal	Removal
33. Accepting gifts or gratuities (whether in the form of goods, money, services, purchases at discount, entertainment, or similar favors) from claimants or beneficiaries of VA, or individuals or firms doing business with or having contractual relations with VA.	Reprimand Removal	Removal	

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
34. Violation of the Privacy Act.	Reprimand 10 days	10 days Removal	Removal
35. Prohibited personnel practice (Reference 5 U.S.C. 2302.)	Reprimand Removal	10 days Removal	Removal
36. Participating in a strike, work stoppage, sick-out, slowdown, or other job action.	Reprimand Removal	Removal	Removal
37. Sexual harassment.	Reprimand Removal	5 days Removal	10 days Removal
38. Discrimination based on race, color, sex, religion, national origin, age, marital status, political affiliation, or disability.	Reprimand Removal	5 days Removal	10 days Removal
39. Interference with an employee's exercise of, or reprisal against an employee for exercising, a right to grieve, appeal or file a complaint through established procedures.	Reprimand Removal	5 days Removal	Removal
40. Reprisal against an employee for providing information to an Office of Inspector General (or equivalent) or Office of Special Counsel, or to an EEO investigator, or for testifying in an official proceeding.	10 days Removal	Removal	
41. Reprisal against an employee for exercising a right provided under 5 U.S.C. 71(Federal Labor Management Relations Statute).	Reprimand Removal	5 days Removal	10 days Removal
42. Violation of an employee's constitutional rights (i.e., freedom of speech, association, religion).	Reprimand Removal	5 days Removal	10 days Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
Offenses Prescribed in Statute: 43. Finding by MSPB of refusal to comply with MSPB order or of violation of statute causing issuance of Special Counsel complaint ((5 U.S.C. 1204(a)(2) and 1212(a)). **NOTE:** *Penalty may need to be coordinated with Office of Special Counsel.*	Reprimand Removal	Reprimand Removal	Reprimand Removal
44. Directing, expecting, or rendering services not covered by appropriations (5 U.S.C. 3103).	Removal		
45. Prohibited Political Activity:* a. Violation of prohibition against the solicitation of political contributions (5 U.S.C. 7323). b. Violation of prohibition against influencing elections (5 U.S.C. 7324).	Removal 30 days Removal	Removal	
46. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations for salaries (5U.S.C. 5501).	Removal		
47. Soliciting contributions for a gift for a superior; making a donation as a gift to a superior; accepting a gift from an employee receiving less pay (5 U.S.C. 735 1).	Reprimand Removal	10 days Removal	Removal
48. Action against national security (5 U.S.C. 7532).	30 days Removal	Removal	
49. Willfully using or authorizing the use of government passenger motor vehicle or aircraft for other than official purposes (31 U.S.C. 1349(b)). **NOTE:** *30 days for this offense means calendar days.*	30 days Removal	Removal	
50. Mutilating or destroying a public record (18 U.S.C. 207 1).	Removal		

*Actions based on Hatch Act violations will be initiated by the Office of Special Counsel.

APPENDIX B. TITLE 5 – SAMPLE ADMONISHMENT

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)
SUBJ: Admonishment

1. You are admonished because you were absent without leave for 8 hours on (date). You failed to obtain permission from your supervisor for the absence as required. Your actions are in violation of (cite specific law, regulation, or policy which has been violated, i.e., Medical Center Policy Memorandum Number xx-xx-xx) which requires employees to ....", if applicable.

2. A copy of this admonishment will be placed in your personnel folder. You may, if you wish, make a written reply in explanation of your conduct. If you do, it will also be placed in your personnel folder.

3. This admonishment may remain in your folder for 2 years or it may be withdrawn and destroyed after 6 months, depending entirely on your future behavior and attitude.

Admonishment for patient abuse should read "may remain in your personnel folder for as long as you are employed in VA or it may be withdrawn and destroyed after 6 months, etc."

4. This letter may be used in determining an appropriate penalty if further infractions occur.

5. If you believe that this admonishment is unjustified, you may appeal the action under the (VA or negotiated, as appropriate) grievance procedure. Your grievance must be submitted through your supervisor (number of days) after you receive this admonishment. For further information about the grievance procedure, you may consult the Human Resources Management Office.

Language may vary based on provisions of negotiated grievance procedure. Any applicable provisions of a negotiated labor-management agreement should be consulted to determine the possible effect on the processing of disciplinary/adverse actions, notices of such actions, and employee rights.

(Signature of appropriate supervisor)

FOR OFFICIAL USE ONLY

APPENDIX C. TITLE 5 – SAMPLE REPRIMAND

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Reprimand

1. You are reprimanded because you were absent without leave for 8 hours on (date). You failed to obtain permission from your supervisor for the absence as required. Your actions are in violation of (cite specific law, regulation, or policy which has been violated, i.e. Medical Center Policy Memorandum Number xx-xx-xx) which requires employees to ...."

2. This is the second offense of this nature within the past 3 months. On (date) you were admonished for AWOL.

Past record may be cited if considered appropriate.

3. A copy of this reprimand will be placed in your personnel folder. You may, if you wish, make a written reply in explanation of your conduct. If you do, it will also be placed in your personnel folder.

4. This letter may be used in determining an appropriate penalty if further infractions occur.

5. This reprimand may remain in your folder for 3 years or it may be withdrawn and destroyed after 2 years, depending entirely on your future behavior and attitude.

A reprimand for patient abuse should read "may remain in your folder as long as you are employed by VA or it may be withdrawn and destroyed after 2 years, etc."

6. If you believe that this reprimand is unjustified, you may appeal the action under the (VA or negotiated, as appropriate) grievance procedure. Your grievance must be submitted through your supervisor (number of days) after you receive this reprimand. For further information about the grievance procedure, you may consult the Human Resources Management Office.

Language may vary based on specific provisions of the negotiated grievance procedure. Any applicable provisions of a negotiated labor-management agreement should be consulted to determine the possible effect on the processing of disciplinary/adverse actions, notices of such actions, and employee rights.

(Signature of division or service chief or higher level official)

FOR OFFICIAL USE ONLY

APPENDIX D.
TITLE 5 – SAMPLE NOTICE OF PROPOSED REMOVAL

NOTE: *Applicable for other adverse actions and suspensions of 14 days or less*

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Proposed Removal

1. It is proposed to remove you from employment with VA based on the following reasons:

I. On (date), at approximately (time),you allowed patient J.D. to bring a bottle of whiskey on the hospital premises despite the fact that it was your duty (under the standing order for guards) to prevent patients from introducing alcoholic beverages on the hospital premises.

The practice of grouping reasons under general headings, such as "Neglect of Duty," or "Insubordination," etc., is discouraged.

II. At 10:00 a.m., approximately 1 hour after the incident, you were ordered by your immediate supervisor, Mr. John Smith, to report at once to the Chief, Security Service, and explain your neglect of duty. However, you told Mr. Smith that you refused to do so and, although he repeated the order, you still did not report to the Chief, Security Service.

After each charge, cite specific law, regulation, or policy which has been violated.

III. At 10:00 a.m., immediately following your refusal to carry out the above-mentioned order, you struck Mr. Smith several times with your fists and knocked him down on the floor.

2. You have the right to reply to this notice orally, or in writing, or both orally and in writing and to submit affidavits in support of your reply, showing why this notice is inaccurate and any other reasons why your removal should not be effected. The evidence on which this notice of proposed action is based will be available for your review in the Human Resources office, (Room). You will be allowed (give at least (8) or more hours) of official

Only applies when employee is in an active duty status. Must be used in adverse actions. Use "a reasonable amount of official time" for suspension of 14 days or less.

duty time for reviewing the evidence relied on to support the reason(s) in this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me. You have the right to be represented by an attorney or other representative.

3. You will be given until the close of business (date) to reply to these reasons orally or in writing, or both orally and in writing. Your written reply should be submitted to the (deciding official). The (deciding official) will receive your oral reply or will designate an official or officials to receive it. If you do not understand the above reason(s) why your removal is proposed, contact me, or the Human Resources Management Office (give location) for further explanation.

At least 7 calendar days is permitted, more if justified by circumstances, or required by the negotiated agreement for members of the bargaining unit.

4. On 2 previous occasions you refused to follow orders given to you by your supervisor. After the first occasion, you were admonished by letter of (date) and after the second, you were reprimanded by letter of (date). This past record will be taken into account in determining proper disciplinary action, if one or more of the above reasons is sustained. You may reply orally or in writing, or both orally and in writing, with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. In this regard, you may make a statement expressing your views as to the consideration to be given such past record in determining proper action.

Citation of past record is not considered a current reason. Copies of the past record must be included in the evidence file.

5. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and impartial consideration to your reply(ies), if submitted.

6. If it is the decision of the (deciding official) that you be removed, your removal will be effective not less than 30 calendar days from the day after the date of receipt of this notice.

Not needed for suspensions of 14 days or less.

7. You will be given a written decision as soon as possible after your reply has had full consideration, or after the close of business on (same date as in par. 3 above), if you do not reply.

8. You will be retained in an active duty status during the advance notice period.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

APPENDIX E. TITLE 5 – SAMPLE DECISION LETTER FOR DISCIPLINARY ACTIONS (Suspension for 14 Calendar Days or Less For Disciplinary Reasons)

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Suspension

1. In connection with the letter of (date) in which you were given advance notice of your proposed suspension for 10 calendar days, a decision has been made to suspend you for the period (date) through (date), based on the following reason(s):

Whenever possible the decision should be delivered at least 5 days prior to the effective date of an action. In every case, the date set must provide for receipt of decision letter at or prior to the time the action will be effective.

[CITE THE SUSTAINED REASON(S)]

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed.

If applicable, also advise the employee that the decision takes into consideration his/her past disciplinary record as cited in the notice of proposed suspension.

3. You may appeal this action under the (VA or negotiated, as appropriate) grievance procedure. Your grievance must be submitted through your supervisor not later than (number of days) after the effective date of the suspension. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Office.

Language may vary based on specific provisions of the negotiated agreement.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

APPENDIX F. TITLE 5 – SAMPLE DECISION LETTER FOR ADVERSE ACTIONS
(Removal, demotion, suspension for more than 14 calendar days and other adverse actions)

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Removal

1. In connection with the letter of (date) in which you were given advance notice of your proposed removal, a decision has been made to remove you from employment effective(date), based on the following reasons:

Whenever possible the decision should be delivered at least 5 days prior to the effective date of an adverse action. In every case the date set must provide for receipt of the decision letter at or prior to the time the action will be effective.

[CITE THE SUSTAINED REASON(S)]

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed. This decision also takes into consideration your past disciplinary record as cited in your notice of proposed removal.

Applicable only if action considers past record.

3. I have also considered other factors including your years of service, your past work record, the seriousness of the offenses with which you have been charged, and whether there are any mitigating or extenuating circumstances which would justify mitigation of the proposed penalty. I have concluded that the sustained charges against you are of such gravity that mitigation of the proposed penalty is not warranted, and that the penalty of removal is appropriate and within the range of reasonableness.

This sample wording pertaining to the decision official's consideration of the "Douglas" factors should be modified according to the specific factors considered and the final decision on the action proposed.

4. (See app. K for sample for wording on employee appeal rights.)

5. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Office.

6. (Notice of any other matter required by applicable Labor-Management Relations Agreement should be included.)

(Signature of facility director or comparable or higher level official)

Enclosure

APPENDIX G.
TITLE 5 – SAMPLE PROPOSED INDEFINITE SUSPENSION
* (Invoking the "Crime Provision")

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organizational Element)
(VA Office of Field Facility)
(City, State and ZIP Code)

SUBJECT: Proposed Indefinite Suspension

1. It is proposed to suspend you from duty and pay status for an indefinite period of time pending (cite investigation of probable criminal conduct on employees). Should this proposal result in an indefinite suspension and should subsequent administrative determination so warrant, a proposal may be made to discharge/remove you while you remain in a suspension status.

2. This proposed indefinite suspension is based on the following reason:

(Describe criminal activity and give date, times and place). On _(date)_ you were arrested by (name of law enforcement agency) and charged with (cite criminal charge). On date you were bound over for trial or held for further legal action by (Name of Court or Grand Jury). Because of this, there is reasonable cause to believe that you may be guilty of a crime for which a sentence of imprisonment may be imposed.

3. In light of the seriousness of this situation and on the basis that it is incompatible with your official duties and responsibilities, it is not in the best interest of VA to retain you in a duty status pending investigation of this criminal activity.

4. You have the right to reply to this notice orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of your reply, showing why this notice is inaccurate and any other reasons why your proposed indefinite suspension should not be effected.

5. You will be given until the close of business (date - not less than 7 calendar days) to reply and to submit affidavits and other documentary evidence in support of your reply. Your written reply should be submitted to the (deciding official). The deciding official will receive your oral reply, or will designate an official or officials to receive it.

6. The evidence on which this notice of proposed action is based will be available for review in the Human Resources Management Service, Room ___. You will be allowed ___ hours of official duty time for reviewing the evidence relied on to support the reasons in this notice, preparing a written reply, securing affidavits, and for making a

The number of hours of official time to review the evidence would not normally exceed 8 hours. A reasonable amount of time should be granted based on the individual circumstances. Only applies when employee is in an active duty status.

personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

7. You have the right to be represented by an attorney or other representative of your choice at all stages of this matter. Any representative must be designated in writing.

8. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and impartial consideration to your reply, if a reply is submitted.

9. If it is the decision of the (deciding official) that you be suspended indefinitely, your suspension will be effective not less than 7 calendar days from the date of your receipt of this notice.

10. You will be given a written decision within 21 calendar days of the receipt of your reply(ies) or, the close of business on (same date as in par. 5) if you do not reply.

11. You will be retained in a non-duty status with pay during the period of advance notice.

12. If you have any questions about the reasons why your indefinite suspension is proposed, contact me or the Human Resources office (give location and phone number) for further explanation.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

*Indefinite suspensions may be used without invoking the crime provision, however, in these cases, the notice must advise the employee that "if it is the decision of the deciding official that you be suspended indefinitely, your suspension will be effective not less than 30 calendar days from the day after the date of receipt of this notice." In addition, the reason identified in paragraph 2 will, most likely be other than criminal activity.

NOTE: *According to current case law, the crime provision cannot be invoked based solely on evidence of the employee's arrest. The arrest must be accompanied by circumstances sufficient to show reasonable cause such as an arrest warrant issued by a magistrate or judge, or evidence that the employee was arrested and held for further legal action by a magistrate, or was indicted by a grand jury. This would generally constitute reasonable cause for believing the employee had committed a crime. Case law in this area has been continuously evolving. Officials should contact their regional counsel or general counsel as appropriate, or the Office of Human Resources Management (051) in VA Central Office when questions arise.*

APPENDIX H.
TITLE 5 – SAMPLE DECISION NOTICE - INDEFINITE SUSPENSION

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(Street Address (when needed)
(City, State, and ZIP Code)

SUBJECT: Indefinite Suspension

1. In connection with the letter of (date), in which you were given advance notice of your proposed indefinite suspension, a decision has been made to suspend you indefinitely pending (investigation of probable criminal conduct on your part) effective (date). Should subsequent administrative determination so warrant, a proposal may be made to remove you while you are in an indefinite suspension status.

2. This indefinite suspension is based on the following reason(s):

The reason(s) as stated in the notice of proposed indefinite suspension is (are) sustained.

3. In reaching this decision, your written reply has been carefully considered along with all of the evidence developed.

4. (See app. K for sample wording on employee appeal rights.)

5. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Office.

6. (Notice of any other matter required by applicable Labor-Management Relations Agreement should be included.)

(Signature of facility director or comparable or higher level official)

Enclosure

FOR OFFICIAL USE ONLY

APPENDIX I.
TITLE 5 - FIRM CHOICE, LAST CHANCE, AND ABEYANCE AGREEMENTS

1. This appendix is intended to provide guidance and sample language for the use and construction of these instruments in certain problem situations. Although they may be useful in various circumstances, these instruments are particularly helpful in dealing with situations requiring reasonable accommodation.

2. Case law pertaining to "firm choice," "last chance," and "abeyance" agreements is constantly evolving. As of issuance of this handbook, firm choice letters are not required before proceeding with disciplinary/adverse actions against an employee with substance abuse problems. However, management is not prohibited from providing a firm choice when it is determined to be appropriate. When questions arise in this area, officials should contact their Regional Counsel or General Counsel, as appropriate, or the Human Resources Management Programs and Policies Service (051) in VA Central Office.

SAMPLE FIRM CHOICE LETTER

NOTE: *The following sample paragraphs are intended as a guide to assist in the development of a letter tailored to the specific circumstances of each case. It may be used when an employee has claimed a substance abuse problem, or in cases when the employee has not claimed substance dependence, but the supervisor has a conduct-related or performance related reason to believe that an employee has a substance dependence which may be causing an ongoing work related problem, and prior counselings and offers of assistance have failed to get the employee's attention. Letters of firm choice should be consistent with the provisions of any applicable collective bargaining agreements.*

(Date)

(Name and Address of Employee)

SUBJECT: Firm Choice Letter

1. Based on your past conduct (and/or performance), which has already been discussed with you (see attached letters of counseling), we have reason to believe that you have a substance abuse problem which warrants professional help.

2. For this reason, we are formally referring you to the VA Employee Assistance Program (EAP), so that an assessment and appropriate referral can be made for you. This offer of assistance is an opportunity period for you to address your serious work-related problems and resolve them. The VA EAP is a confidential and free resource, and no record of details of your participation in EAP will be placed in your personnel folder. Although the referral to EAP and your participation in rehabilitation is voluntary, you should understand that this is to offer you a "firm choice" - either seek and complete the prescribed treatment for your problem or accept the consequences of your misconduct. In this regard you are being given the opportunity to seek, and successfully complete, (an inpatient and/or outpatient) substance abuse program.

3. You have ____ calendar days from receipt of this letter to enroll yourself in (an inpatient or outpatient) program for this purpose. Whether or not you elect to use the VA EAP, within this (number) day period you must provide documentation regarding the program prior to entry, including the time which will be required for participation and any leave which you will request, so that (appropriate official) can determine whether the program can be approved. If (appropriate official) approves the program, you will be granted leave (annual, sick, or leave without pay) provided you have properly requested such leave in advance and the type of leave requested is available and appropriate.

4. You must also sign the attached release of information and return it to (appropriate official) . A release of information is needed so that (appropriate official) can contact your counselor to discuss your enrollment and continued participation in the program.

NOTE TO MANAGER: *If the employee is uncomfortable with signing a release, you may stipulate in the release that the only information to be given the supervisor is that the employee is complying with the program requirements. Generally, accommodation should not be denied solely because employee refuses to sign a release form.*

If you require additional information on what programs are available, you should contact the Employee Assistance Program office at this facility (provide name of contact and telephone number) . Failure to provide the requested documentation or failure to enroll in a program will be regarded as evidence that you did not successfully complete a rehabilitation program.

NOTE TO MANAGER: *If an action is being held in abeyance, use the following:*

This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

5. During the time you are enrolled in a program, you must furnish acceptable documentation concerning your progress at regular intervals (for example every 2 weeks.) If it is suspected that you are not maintaining sobriety, or are not participating in the program, you will be referred to employee health, or your program counselor, as appropriate, for examination, and the results of this examination will be furnished to (appropriate official). Failure to provide the requested documentation will be regarded as evidence that you did not successfully complete a rehabilitation program.

NOTE TO MANAGER: *If an action is being held in abeyance, use the following:*

This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

6. You must furnish acceptable documentation that you have successfully completed this program within 10 days of the completion of such program. Failure to provide the requested documentation will be regarded as evidence that you did not successfully complete a rehabilitation program.

NOTE TO MANAGER: *If an action is being held in abeyance, use the following:*
This will lead us to effect the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

NOTE: *If employee's conduct/performance/leave use has become completely acceptable, but the employee has failed to complete some portion of the rehabilitation program requirements, the firm choice obligation is met. Action should not be taken if based solely on failure to complete the rehabilitation program.*

NOTE TO MANAGER: *If there is a decision to remove the employee being held in abeyance, use the following paragraphs:*

7. For a period of 6 months (time period may vary) after successful completion of a rehabilitation program, you will be required to maintain yourself in a manner reflecting credit upon VA. This includes maintaining satisfactory attendance, performance, and conduct.

NOTE TO MANAGER: *If time and attendance problems have been an issue, use the following:*

In addition, you must support every unscheduled absence by acceptable documentation establishing an emergency situation as a condition for considering whether or not to approve leave for the period in question. Medical documentation must include a complete diagnosis which establishes that you could not work for the period in question.

Failure to maintain yourself in a manner reflecting credit upon VA will be regarded as evidence that you did not successfully complete your rehabilitation program, and will lead us to impose the removal action being held in abeyance.

8. Upon successful completion of all the preceding requirements of your rehabilitation program, the removal action against you being held in abeyance will be (reduced/canceled.) You will be expected to continue to maintain yourself in a manner reflecting credit upon VA.

9. I appreciate your difficulties and I am not unsympathetic to your needs. I sincerely hope you will prevail in your rehabilitative efforts.

Signature of Appropriate Official

NOTE TO MANAGER: *Wherever possible, firm choice letters should be mutually agreed upon by management, the employee, and the employee's representative, and signed as memos of understanding or agreements.*

NOTE TO MANAGER: If *there is a decision less than removal being held in abeyance, or an action has been issued in conjunction with the firm choice, use the following paragraphs:*

7. For a period of 6 months (time period may vary) after successful completion of a rehabilitation program, you will be required to maintain yourself in a manner reflecting credit upon VA. This means there will be no more instances of problems of any type related to substance abuse, and includes maintaining satisfactory attendance, performance, and conduct. Failure to maintain yourself in a manner reflecting credit upon VA will be regarded as evidence that you did not successfully complete your attempt at rehabilitation.

NOTE TO MANAGER: If *an action is being held in abeyance, use the following:*

This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

8. Upon successful completion of all the preceding requirements of your rehabilitation program, you will be expected to continue to maintain yourself in a manner reflecting credit upon VA.

NOTE TO MANAGER: If *an action is being held in abeyance, use the following:*

The (action) against you being held in abeyance will be reduced/canceled.

9. I appreciate your difficulties and I am not unsympathetic to your needs. I sincerely hope you will prevail in your rehabilitative efforts.

Signature of Appropriate Official

NOTE TO MANAGER: *Whenever possible, firm choice letters should be mutually agreed upon by management, the employee, and the employee's representative, and signed as memos of understanding or agreements.*

LAST CHANCE AND ABEYANCE AGREEMENTS

a. The following guidance was published by the Office of Personnel Management regarding "Last Chance" and "Abeyance Agreements" in situations requiring reasonable accommodation. Some minor changes have been made to reflect current case precedent. As a result, numerous references to the Merit Systems Protection Board (MSPB) will be apparent in this text since it is based upon decisions made by MSPB. References to MSPB appeals will generally correlate to appeals to the DAB or an appeal through the grievance procedure, as appropriate.

b. Some agencies are finding the use of abeyance or last chance agreements particularly helpful in dealing with employees with alcohol or drug abuse problems. We begin a discussion of abeyance instruments by showing excerpts from some instruments to serve as examples. Then we will discuss the important characteristics of abeyance and last chance agreements, and how they affect reasonable accommodation.

c. **Sample Instruments**

(1) **Approach 1.** Agency proposes removal, but makes no decision on that proposal. Instead, the agency letter informs the employee that it is holding its decision in abeyance.

(a) **Situation.** In response to the proposal to remove, the employee informed the agency that he was an alcoholic, and that he had just begun participating in the in-patient rehabilitation program to which the agency employee assistance counselors had referred him.

(b) **Agreement Provisions.** The abeyance letter read in relevant part:

1. "Management agrees to afford the employee an opportunity to become a productive and dependable employee."

2. "Employee must participate fully in the (specific) alcohol rehabilitation program, including missing no more than one of the follow-up meetings. Employee must attend two agency Alcohol Anonymous meetings per week."

3. "For a period of 6 months after hospitalization, the employee will be required to show fully satisfactory attendance and performance. Every unscheduled absence must be supported by acceptable documentation establishing an emergency situation. Medical documentation must include a complete diagnosis, which establishes that the employee could not work."

4. "Failure to comply with the preceding will constitute just cause for proceeding with the proposed action."

NOTE: *The abeyance letter was signed by the decision official, and did not require the employee's agreement.*

(c) **Outcome**: The employee stopped going to the follow-up rehabilitation meetings, and the counselors so informed the agency. When the employee also had two subsequent unscheduled, unsupported absences, the agency invoked the agreement. Since the action had been held in abeyance before a decision was made, the agency had to issue a final decision on the charges in the original proposed action. In its decision letter, the agency first cited failure to participate in rehabilitation and the two instances of unsupported, unscheduled absence as violations of the abeyance agreement. Based on these violations, the agency explained that it was proceeding with the proposed action. The agency then assessed the evidence on the original charges, sustained them, decided to remove, and notified the employee that he would be removed in 1 week.

(2) **Approach 2.** Agency issues decision to remove, but holds implementation of decision in abeyance.

(a) **Situation.** Although the agency had referred the employee to alcohol treatment twice before, it wasn't until the employee received a notice of proposed removal for over 80 hours of AWOL that he admitted that he was an alcoholic, and requested reasonable accommodation. The agency's decision letter sustained the charges, found removal warranted, and decided to remove. However, it also said that the agency had decided to hold the removal action in abeyance under specific conditions.

(b) **Agreement Provisions.** The abeyance letter read in relevant part:

"It is my decision that you should be removed from your position, but that this removal be held in abeyance for 1 year from the date you receive this letter, subject to the following: you have no further absences charged to AWOL; you submit documentation of successful completion of the (agency) Employee Assistance Program and the Kaiser Alcohol Abuse Program; your sick leave usage remains under the installation goal; and your performance is at least fully successful. If all the foregoing criteria are met, the action will be cancelled at the end of the 1-year period. Failure to meet any one of these criteria during the 1-year period will result in your immediate removal."

NOTE: *The letter was signed by the decision official and did not require the agreement of the employee.*

(c) **Outcome.** Later, the agency decided that the employee had violated the terms of the agreement and reinstated the action. The decision letter described the specific violations: "On (date) your reported for work at 9:25. You claimed to have forgotten to set your alarm clock. You were charged with 1.5 hours of AWOL. On (date) you did not call in until 12:44. You claimed you could not call earlier because you had no change. You were charged with 4.25 hours of AWOL." (The agency also knew, but did not state in the letter, that the employee had stopped regular participation in the alcohol rehabilitation program.) "it is my decision that you have violated the terms of our agreement and, as such, you will be removed, effective (date)."

(3) **Approach 3.** Employee's removal has been effected, and the action is being appealed. The agency and the appellant reached an agreement to give him one last chance.

(a) **Situation.** The employee was removed for being AWOL and being intoxicated on duty. While preparing for the hearing before MSPB, the appellant informed the agency that he was successfully

participating in a rehabilitation program and requested one last chance. While clearly not required to do so, the agency agreed under certain conditions which the agency believed gave it a quid pro quo.

(b) **Agreement Provisions.** The last chance agreement read in relevant part: "in consideration for reinstatement to the position of (specify position) for a 1 year period, (employee) agrees to the following:

-to participate in (specific) alcohol rehabilitation program, and to maintain satisfactory punctuality, attendance, and good work habits."

"Should (employee) fail to participate in the rehabilitation program, or should the employee's attendance and work habits become unsatisfactory during the 1-year period, the removal will be reinstated. One incident of *AWOL* or of' being intoxicated on duty will be cause for reinstating the removal."

"Appeal rights to the MSPB, and grievance-arbitration procedures are waived during this 1-year period on any disciplinary action against (employee)."

"I clearly understand the last chance opportunity agreement, and fully agree with the terms of the settlement. I know and understand that I have appeal rights to the MSPB. With this agreement, I waive all appeal rights regarding my removal, which was effective (date), including MSPB, grievance, and the EEOC."

NOTE: *The agreement was signed by the employee, employee representative, supervisor, and two witnesses.*

(c) **Outcome.** Two months later appellant was *AWOL* for 2 days. The employee's supervisors went to the employee's home and found the employee intoxicated. The agency removed the employee the next day. MSPB ruled that the agreement had been properly invoked, that the appellant had waived the appeal rights to the MSPB and thus dismissed the case.

d. **Discussion**

(1) As the three examples show, there is no set formula for abeyance or last chance agreements:

(a) They are tailored to the individual situation;

(b) They are fair, and provide some potential consideration or benefit to the employee (generally the agency's agreement to withhold an action which it could take);

(c) They can be imposed unilaterally by the agency, or negotiated with the employee or representative, (if they involve a waiver of rights, the employee must agree);

(d) They can be imposed at several stages of the adverse action process:

1. After a proposal,

2. After a decision, or

3. Even after the action has been effected.

(e) If the conditions are not met, the agency can take immediate action (no need to wait until the end of the period, or to give a new notice).

(2) Abeyance and last chance agreements should contain at least the following:

(a) A time limit and conditions tailored to the situation;

(b) A clear statement of all the agency's requirements of the employee including satisfactory participation in a rehabilitation program and satisfactory conduct;

(c) A description of behaviors that will be considered evidence of compliance or failure to comply with the requirements; and,

(d) An explanation of what the agency will do if the employee fails to comply, and what the agency will do if the employee complies.

(3) When an action is taken based on violation of an abeyance agreement, the following is recommended:

(a) The violation should not become part of the charges, but should be used only to show that the employee violated the agreement and thus triggered the agency's action;

(b) The letter to the employee should clearly describe how the employee violated the provisions of the agreement; and,

(c) The agency should proceed on the basis of the original charges only.

APPENDIX J.
TITLE 5 – SAMPLE TERMINATION OF NON-COMPETITIVE EXCEPTED APPOINTMENT (SCHEDULE B)

NOTE: *This is an appointment made under Schedule B, 5 CFR 213.3202(N)*

DATE

FOR OFFICIAL USE ONLY

Employee's Name
Service

SUBJECT: Termination of Non-Competitive Excepted Appointment

1. On August 29, 1999, you received an Excepted Appointment under Schedule B, 5CFR 213.3202(N) as a {POSITION TITLE}. During your employment with us, supervisors are required to study your potential closely to determine whether you are suited for successful government work. When it becomes apparent that your conduct, general character traits or capacity do not meet the requirements for satisfactory service, your supervisor is required to initiate action to separate you.

2. The {RECOMMENDING SERVICE} has recommended that you be terminated from your position for failure to qualify due to:

CITE REASON(S)

3. The effective date of your termination will be {DATE}. You must properly clear the facility, turn in any government property and clear any indebtedness, prior to the release of your final paycheck.

4. If you feel this termination is based on discrimination because of race, color, religion, sex, national origin, age, or handicapping condition, you may appeal this action by contacting the Office of Resolution Management at 1-888-737-3361 within 45 calendar days of the date you receive this letter.

5. If you believe this termination is based on discrimination because of marital status or partisan political reasons, you may appeal this action to the Merit Systems Protection Board. Your appeal must be submitted in writing by certified mail or in person at any time after you receive this letter, but not later than 30 calendar days after the discharge has been effected. Copies of the Rules and Regulations of the Merit Systems Protection Board and Optional Form 283 are enclosed.

6. If you allege your termination is based on discrimination which includes reasons in both paragraphs 4 and 5 above, you may appeal to the Merit Systems Protection Board within 30 days using the same procedure as set forth in paragraph 5.

7. If you have any questions concerning the above, please contact [insert name and title] or me at [insert telephone number and extension].

SIGNATURE

APPENDIX K. GRIEVANCE AND APPEAL RIGHTS

1. This appendix explains the grievance and appeal rights of employees in VA, under the provisions of this handbook, and parts 752 and 1201 of the Civil Service regulations in 5 CFR. The language used in this appendix as well as the sample letters in appendix A should be followed very closely to assure that employees are informed of their proper grievance and appeal rights.

2. This appendix does not explain any grievance rights under a negotiated grievance procedure. Such information should be obtained from the pertinent negotiated Labor Management agreement.

APPEAL RIGHTS, REMOVALS, SUSPENSIONS FOR MORE THAN 14 CALENDAR DAYS, REDUCTIONS IN GRADE OR BASIC PAY

3. Include:

If the employee:	**In Notice of Final Decision:**
Is covered by Section 752.401 of the OPM regulations and a negotiated grievance procedure.	Paragraph 3. You are entitled to appeal this action to the Merit Systems Protection Board (MSPB), or under the negotiated grievance procedure, but not both. You shall be deemed to have exercised your option to appeal this action to the MSPB (give address of appropriate office), or under the negotiated grievance procedure at such time as you timely initiate action to appeal to the Board or timely file a grievance in writing under the negotiated grievance procedure. If you elect to file a grievance under the negotiated grievance procedure, you will be entitled to union representation as provided for in the negotiated agreement. Paragraph 4. If you appeal to the MSPB, your appeal must be in writing and must be filed with the Board no later than 30 calendar days after the effective date of this action. Any appeal to the Board must be filed either by mail or in person. Copies of the Board's appeal form and regulations are enclosed. You may be represented by an attorney or other representative of your choice.

REMOVALS, SUSPENSIONS FOR MORE THAN 14 CALENDAR DAYS, REDUCTIONS IN GRADE OR BASIC PAY (Continued)

If the employee:	**In Notice of Final Decision:**
Is covered by Section 752.401 of the OPM Regulations and a negotiated grievance procedure.	Paragraph *5. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or disability, you may file a complaint of discrimination with VA in accordance with EEO discrimination complaint procedures, or you may raise the issue of discrimination in connection with your appeal to the Merit Systems Protection Board, (or in connection with a grievance under the negotiated grievance procedure) **, as previously described. Whichever is filed first (i.e., the discrimination complaint, appeal to the Board, or grievance) shall be considered an election by you to proceed in that manner. Paragraph *6. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or disability, you may file a complaint of discrimination with VA in accordance with Office of Resolution Management (ORM) discrimination compliant procedures. Should you elect to do so, you may appeal this action by contacting ORM at 1-888-737-3361 within 45 calendar days of the date you receive this letter.

REMOVALS, SUSPENSIONS FOR MORE THAN 14 CALENDAR DAYS, REDUCTIONS IN GRADE OR BASIC PAY (Continued)

*Paragraphs 5 and 6 should only be used If allegations of discrimination have been raised by the employee.

**This statement should only be included when the negotiated grievance procedure allows complaint of discrimination to be raised in connection with a grievance,

If the employee:	**In Notice of Final Decision:**
Is a non-preference eligible who completed 1 year, but less than 2 years, of current continuous employment in a position outside the competitive service.	Paragraph 3. You have the right to appeal this action to (cite the appropriate decision official. See part IV of this handbook for discussion of decision officials.) at any time after you receive this decision but not later than 15 calendar days after the effective date of this action. The appeal must be in writing and set forth the specific reasons, facts, and circumstances which make you believe that the action taken was unwarranted. Paragraph 4. In an appeal, you have the right to a hearing before an examiner under the provisions of part IV of this handbook. To obtain a hearing, you must request it in writing in your appeal. If you do not indicate in writing that you want a hearing, your case will be decided on the basis of the record. At the hearing, if one is held, you may be represented by a person of your choice and you may present evidence and witnesses who are willing to testify. The VA Human Resources Management Office (give location) will, upon your request, advise you further regarding the appointment of an examiner and the conduct of the hearing.

GRIEVANCE AND APPEAL RIGHTS
SUSPENSIONS FOR 14 CALENDAR DAYS OR LESS

If the employee:	**In Notice of Final Decision:**
Is covered by 5 CFR 771.104 (non-bargaining unit employees), or a negotiated grievance procedure.	Paragraph 3. You may appeal this action under the (agency or negotiated) grievance. Your grievance must be submitted through your supervisor not later than (*number of days) after the effective date of the suspension. Paragraph 4. A further explanation of your appeal rights may be obtained by consulting the VA Human Resources Management Office (give location).

*For employees covered under the VA administrative grievance procedure (part IV of this handbook), the grievance must be submitted no later than 15 days after the effective date of the action. For grievances under the negotiated grievance procedure, consult the appropriate negotiated labor-management agreement.

APPENDIX L. SAMPLE PROPOSED REMOVAL LETTER FOR PERFORMANCE BASED ACTION

TO: (Name of Employee)
(Organizational Element)
(Department of Veterans Affairs Office or Field Facility)
(Street Address)
(City, State and Zip Code)

SUBJ: Proposed Removal – Unacceptable Performance

1. On July 10, 1991, you were issued a written Warning of Unacceptable Performance – Notice of Opportunity to Demonstrate Acceptable Performance and advised that you must meet the standards of acceptable performance for the critical element of your position. Since that date, you have failed to improve and demonstrate an overall acceptable performance level. Therefore, this is to notify you that it is proposed to remove you from the Department of Veterans Affairs for the following reasons:

For the period July 10, 1991 through October 7, 1991, * you failed to meet the performance standards of the critical element of your position entitled "Coding Actions."

2. Specifically, during the above period your performance, as measured against the performance standards for the critical element of your position, has been as follows:

Standard: Codes personnel actions with no more than 5 valid rejects or error messages as a result of erroneous coding for every 100 actions processed.

Actual Performance: A review of over 200 personnel actions indicates a reject or error message rate of 22 per 100 actions. The specific cases which resulted in rejects or error messages are as listed below:

<u>Nature of Action – Date Coded – Name of Employee</u>

a) Life Insurance 7/15/91 John Doe
b)
c)

* The record need only prove unacceptable performance during (and not prior to) the opportunity to demonstrate acceptable performance in order to show that the employee's performance is unacceptable.

3. You have the right to reply to this notice orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of your reply, showing why this notice is inaccurate and any other reasons why your proposed removal should not be effected. The evidence on which this notice of proposed action is based will be available for your review in the Human Resources Office. You will be allowed up to 8 hours of official duty time for reviewing the evidence relied on to support the reasons in this notice, preparing a written reply, securing affidavits and/or other

documentary evidence, and for making an oral reply. Arrangements for the use of official time or requests for additional time should be made with me. You may have a representative of your choice. Please advise me in writing of any representative designated.

4. You will be given until (date – usually 14 calendar days from receipt of proposal) to reply to these reasons orally or in writing, or both orally and in writing. Your written reply should be submitted through me to the (deciding official). The (deciding official) will receive your oral reply, or will designate an official or officials to receive it. If you do not understand the above reasons why your removal is proposed, contact ***(name & telephone number of Human Resources Specialist)***, for further explanation.

5. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and impartial consideration to your reply, if a reply is submitted.

6. You will be given a written decision as soon as possible, but not less than 30 calendar days from the day following your receipt of this notice.

7. You will be retained in an active duty status during the period of advance notice.

SIGNATURE OF SERVICE or DIVISION CHIEF
or higher level official

APPENDIX M. SAMPLE DECISION LETTER FOR PERFORMANCE BASED ACTION (NON-BARGAINING UNIT)

TO: (Name of Employee)
(Organizational Element)
(Department of Veterans Affairs Office or Field Facility)
(Street Address)
(City, State and Zip Code)

SUBJ: Removal – Unacceptable Performance

1. In connection with the letter of (date) in which you were given advance notice of your proposed removal for unacceptable performance, a decision has been made to remove you from employment in VA, effective (date), based on the following reason:

The reason given in the letter of (date) is sustained.

2. In reaching this decision, your reply (replies) has (have) been carefully considered along with all the evidence developed.

3. You may appeal this action to the Merit Systems Protection Board. Your appeal to the Board must be in writing and must be filed with the Board any time during the period beginning the day after the effective date, but no later than 30 calendar days after the effective date to this action. Any appeal to the Board must be filed either by certified mail to (address) or in person. You may be represented in your appeal by an attorney or other representatives (copies of the Board's appeal form and regulations are enclosed).

*4. If you believe that this action is based on discrimination because of your race, color, sex, religion, age and national origin or disabling condition, you may file a complaint of discrimination with the Department of Veterans Affairs in accordance with equal employment opportunity discrimination complaint procedures or raise the issue of discrimination in any appeal to the Merit Systems Protection Board. Whichever is filed first, an appeal to the Merit Systems Protection Board or a discrimination complaint, shall be considered an election by you to proceed in that manner.

*5. Should you elect to file a complaint of discrimination with VA, your complaint will be processed in accordance with regulations of the Equal Employment Opportunity Commission (29 CFR, part 1614). If you elect to file a complaint of discrimination, you may do so only after contacting an EEO Counselor. You must contact the Counselor within 45 calendar days of the effective date of this action. A complaint is deemed filed on the date it is received if delivered to the appropriate agency official, or on the date postmarked if addressed to an appropriate agency official designated to receive such complaints.

6. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Officer.

SIGNATURE and Title of
Deciding Official

Enclosures

*Paragraphs 4 and 5 in this sample decision notice are only required when the employee has raised the issue of discrimination during the processing of the adverse action.

APPENDIX N. SAMPLE DECISION LETTER FOR PERFORMANCE BASED ACTION (BARGAINING UNIT)

TO: (Name of Employee)
(Organizational Element)
(Department of Veterans Affairs Office or Field Facility)
(Street Address)
(City, State and Zip Code)

SUBJ: Removal – Unacceptable Performance

1. In connection with the letter of (date) in which you were given advance notice of your proposed removal for unacceptable performance, a decision has been made to remove you from employment in VA, effective (date), based on the following reason:

The reason given in the letter of (date) is sustained.

2. In reaching this decision, your reply (replies) has (have) been carefully considered along with all the evidence developed.

3. You may elect to appeal the action to the Merit Systems Protection Board or under the negotiated grievance procedure; however, you may not do both. You shall be deemed to have exercised your option to appeal this action to the Merit Systems Protection Board, or under the negotiated grievance procedure, at such time as you timely initiate action to appeal to the Board or timely file a grievance in writing under the negotiated grievance procedure, whichever occurs first. If you appeal under the grievance procedure, your grievance must be in writing and filed no later than (specify time frame). You may be represented by a union representative.

4. If you file a grievance under the negotiated grievance procedure, you may ask the MSPB to review the final decision of an arbitrator if you allege that this action was based, in whole or in part, on prohibited discrimination. Your request for MSPB review must be filed within 35 days after the date that the arbitrator's decision is issued or, if you received the decision more than 5 days after the date it was issued, you must file within 30 days after the date you received the decision.

5. If you appeal to the Merit Systems Protection Board, your appeal must be in writing and must be filed with the Board any time during the period beginning the day after the effective date, but no later than 30 calendar days after the effective date of this action. Any appeal to the Board must be filed either certified mail to (address) or in person. You may be represented in your appeal by an attorney or other representative. Copies of the Board's appeal form and regulations are enclosed.

*6. If you believe that this action is based on discrimination because of your race, color, sex, religion, age and national origin or disabling condition, you may file a complaint of discrimination with the Department of Veterans Affairs in accordance with equal employment opportunity discrimination complaint procedures or raise the issue of discrimination in any appeal to the Merit Systems Protection

Board, (or in a grievance under the negotiated grievance procedure as described above, when the negotiated grievance procedure allows a complaint of discrimination to be raised in connection with a grievance). Whichever is filed first, an appeal to the Merit Systems Protection Board, a grievance under the negotiated procedure, or a discrimination complaint, shall be considered an election by you to proceed in that manner.

*7. Should you elect to file a complaint of discrimination with VA, your complaint will be processed in accordance with regulations of the Equal Employment Opportunity Commission (29 CFR, part 1614). If you elect to file a complaint of discrimination, you may do so only after contacting an EEO Counselor. You must contact the Counselor within 45 calendar days of the effective date of this action. A complaint is deemed filed on the date it is received if delivered to the appropriate agency official, or on the date postmarked if addressed to an appropriate agency official designated to receive such complaints.

8. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Officer.

SIGNATURE and Title of
Deciding Official

Enclosures

*Paragraphs 6 and 7 in this sample decision notice are only required when the employee has raised the issue of discrimination during the processing of the adverse action.

EMPLOYEE/MANAGEMENT RELATIONS

PART II. DISCIPLINARY PROCEDURES UNDER TITLE 38

CONTENTS

PARAGRAPH PAGE

CHAPTER 1. DISCIPLINARY AND MAJOR ADVERSE ACTIONS

1. SCOPE II-1
2. AUTHORITY II-1
3. POLICY II-2
4. DEFINITIONS II-2
5. RESPONSIBILITIES II-4
6. DETERMINING THE FACTS II-6
7. DETERMINING APPROPRIATE ACTION II-10
8. DISCIPLINARY ACTIONS II-10
9. MAJOR ADVERSE ACTIONS II-15
10. SERVICE OF DOCUMENTS II-23

CHAPTER 2. DELEGATIONS

1. SCOPE II-25
2. AUTHORITY II-25
3. RESPONSIBILITIES II-25

CHAPTER 3. REPORTS

1. SCOPE II-29
2. REPORTS II-29

APPENDICES

II-A. TITLE 38 – TABLE OF PENALTIES II-A-1
II-B. TITLE 38 – SAMPLE NOTICE OF PROPOSED DISCIPLINARY ACTION (NON-PROBATIONARY) II-B-1
II-C. TITLE 38 – SAMPLE DECISION LETTER FOR DISCIPLINARY ACTION (NON-PROBATIONARY) II-C-1
II-D. TITLE 38 – SAMPLE NOTICE OF PROPOSED MAJOR ADVERSE ACTION II-D-1
II-E. TITLE 38 – SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE II-E-1
II-F. TITLE 38 – SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS NOT INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE II-F-1
II-G. TITLE 38 – SAMPLE PROPOSED INDEFINITE SUSPENSION II-G-1
II-H. TITLE 38 – SAMPLE DECISION NOTICE – INDEFINITE SUSPENSION II-H-1
II-I. TITLE 38 – SAMPLE FIRM CHOICE, LAST CHANCE AND ABEYANCE AGREEMENTS II-I-1

PART II. DISCIPLINARY PROCEDURES UNDER TITLE 38

CHAPTER 1. DISCIPLINARY AND MAJOR ADVERSE ACTIONS

1. SCOPE

a. This part governs disciplinary and major adverse actions based on conduct or performance in the Department of Veterans Affairs (VA).

(1) The provisions of this chapter apply to VA employees holding a full-time, permanent appointment under 38 United States Code (U.S.C.) 7401(l) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included are:

(a) Physicians,

(b) Dentists,

(c) Podiatrists,

(d) Optometrists,

(e) Nurses,

(f) Nurse anesthetists,

(g) Physician assistants, and

(h) Expanded-function dental auxiliaries.

(2) Henceforth, "employee(s)" will be the term used to refer to the covered occupations in this chapter, unless otherwise specified.

(3) This part should be used in conjunction with VA Directive 5021.

b. This chapter does not apply to employees appointed under 38 U.S.C., chapters 3, 71 or 78, or to employees appointed under 38 U.S.C. 7306, 38 U.S.C. 7401(3), 38 U.S.C. 7405, or 38 U.S.C. 7406.

2. AUTHORITY

a. Section 203 of the Department of Veterans Affairs Health Care Personnel Act of 1991 Public Law (Pub. L.) 102-40.

b. 38 U.S.C. 501(a), 38 U.S.C. 7304.

c. Title 38, U.S.C., chapter 74.

d. VA Standards of Conduct.

e. Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR 2635.

3. POLICY

a. Employees are expected to maintain the highest standards of honesty, integrity, impartiality, conduct, and effectiveness. Whenever an employee's performance of duty or professional competence is determined to be unsatisfactory; or when an employee's professional or personal conduct is not satisfactory, prompt and appropriate, disciplinary or major adverse action, or other corrective action will be taken. The policy of VA is to maintain standards of conduct and efficiency which will promote the best interests of VA.

b. Disciplinary or major adverse actions will be taken when it is evident that other supervisory techniques have failed to correct a given problem, or would be inappropriate. Actions taken should be consistent with the precept of like penalties for like offenses, with due consideration of any extenuating circumstances.

c. Employees are entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case. Employees must identify their chosen representative in writing. A representative who is employed by VA may be disallowed by the facility Director because of:

(1) Conflict of position, or

(2) Conflict of interest.

d. Actions covered under this part are subject to the prohibited personnel practices listed in 5 U.S.C. 2302, prohibiting:

(1) Discrimination because of race, color, religion, sex, national origin, age, disabling condition, marital status, or partisan political reasons; and

(2) Reprisal for the proper exercise of an employee's legal or administrative appeal rights.

4. DEFINITIONS. Unless otherwise noted, the following definitions apply to this part only:

a. **Disciplinary Actions.** These are adverse actions, other than major adverse actions, which include admonishment and reprimand based on conduct or performance.

b. **Admonishment.** An official letter of censure to an employee for minor act(s) of misconduct or deficiency in competence. This letter normally remains in the employee's personnel folder for 2 years.

c. **Reprimand.** An official letter of censure to an employee for an act of misconduct or deficiency in competence. A reprimand is a more severe disciplinary action than an admonishment This letter normally remains in the employee's personnel folder for 3 years.

d. **Major Adverse Actions.** These are suspension (including indefinite suspension), transfer, reduction in grade, reduction in basic pay, and discharge based on conduct or performance.

e. **Suspension.** The involuntary placement of an employee, for disciplinary reasons, in a non-duty, non-pay status for a temporary period of time.

f. **Indefinite Suspension.** The involuntary placement of an employee in a non-duty, non-pay status for a temporary indefinite period of time pending investigation, inquiry, or further management action.

g. **Transfer.** The involuntary movement of an employee from one VA facility to another (under separate managerial authority) based on conduct or performance and without a break in service.

h. **Reduction in Grade.** The involuntary assignment to a lower grade on the same pay schedule based on conduct or performance.

i. **Reduction in Basic Pay.** The involuntary reduction, based on conduct or performance, of the annual rate of basic pay to which an employee is entitled under 38 U.S.C. 7404, including above minimum entrance rates and special salary rates authorized under 38 U.S.C. 7455. This does not apply to other reductions in pay, such as the loss of:

(1) Physician or dentist special pay or head nurse differential,

(2) Other differentials,

(3) Allowances, or

(4) Premium pay such as:

(a) Standby,

(b) On-call,

(c) Shift,

(d) Overtime,

(e) Sunday,

(f) Holiday,

(g) Night work,

(h) Hazardous duty, and

(i) Interim geographic adjustment.

j. **Discharge.** The involuntary separation of an employee from employment based on conduct or performance.

k **Disciplinary Appeals Board.** The three member Board designated to hear an employee's appeal of major adverse action which is based in whole or in part on a question of professional conduct or competence.

l. **Professional Conduct or Competence.** A question of professional conduct or competence involves direct patient care and/or clinical competence. The term clinical competence includes issues of professional judgment.

m**. Mixed Case.** This is a case that includes both:

(1) A major adverse action arising out of, or including, a question of professional conduct or competence, and

(2) A major adverse action which does not arise out of a question of professional conduct or competence, or a disciplinary action.

n. **Grade.** The established grades for the positions covered by this chapter will be as defined by 38 U.S.C. 7404, and the qualification standards issued pursuant to 38 U.S.C. 7402. (See VA Handbook 5005, Staffing.)

o. **Official Time.** Time granted to an employee and/or representative to review the material relied upon to support a proposed action, to prepare a reply, and to secure affidavits, if the employee is otherwise in a duty status.

5. RESPONSIBILITIES

a. The Under Secretary for Health, Deputy Under Secretary for Health, Assistant Deputy Under Secretary for Health, other officials in the Office of the Under Secretary (38 U.S.C. 7306(a)), network directors, other key Veterans Health Administration (VHA) officials and field facility directors are responsible for:

(1) Administering policy concerning disciplinary and major adverse actions in conformance with requirements of statute and this chapter, and reviewing existing policies and recommending appropriate changes.

(2) Delegating to supervisors authority for the direction and discipline of employees under their jurisdiction, as appropriate, and assuring proper supervisory training.

(3) Ensuring that supervisors properly exercise their disciplinary and major adverse action authorities.

(4) Ensuring that appropriate mechanisms are in place to inform employees of VA policy governing disciplinary and major adverse actions, and that this policy and related materials are available for review in the Human Resources Management office.

(5) Ensuring that appropriate mechanisms are in place to inform employees of VA standards of ethical conduct and related responsibilities as well as other laws, rules and regulations governing VA expectations of acceptable conduct.

b. The Deputy Assistant Secretary for Human Resources Management is responsible for:

(1) Developing Department policy on disciplinary and major adverse actions.

(2) Providing technical advice and guidance to management officials and field facility Human Resources Management officials.

(3) Ensuring that all necessary and required training is accomplished.

c. Supervisors are responsible for:

(1) Informing all employees of the requirements for acceptable conduct (e.g., standards of ethical conduct).

(2) Gathering, analyzing, and developing the facts concerning each situation where a disciplinary or major adverse action may be appropriate.

(3) Initiating appropriate and timely actions.

d. Human Resources Managers are responsible for:

(1) Ensuring that all employees are made aware of VA policy concerning disciplinary and major adverse actions, and that this policy and related materials are available for review in Human Resources Management office.

(2) Ensuring that all employees are made aware of VA standards of ethical conduct and related responsibilities as well as other laws, rules, and regulations governing VA expectations of acceptable conduct.

(3) Assisting supervisors and management officials at all levels with:

(a) Disciplinary and major adverse action matters;

(b) Applying and providing guidance on interpretations of regulations and statutes;

(c) Recommending sound human resources management practices;

(d) Reviewing existing policies and procedures, and recommending appropriate changes.

(4) Reviewing disciplinary and major adverse actions prior to issuance to ensure compliance with VA policy and advising the decision official as necessary.

(5) Assisting management in informing employees of the rules for acceptable conduct and for clarifying such rules.

(6) Advising employees and answering their questions regarding their rights in disciplinary and major adverse action matters.

(7) Providing guidance on interpretations of disciplinary and major adverse action procedures, policies, regulations, and statutes.

e. Employees are responsible for:

(1) Meeting standards of conduct as required by VA policy, and other laws, rules, and regulations.

(2) Obtaining advice from authoritative VA officials (supervisors, human resources management officials, Regional Counsels, ethics counselors, etc.) on any unclear or questionable rules of conduct prior to engaging in the conduct.

(3) Maintaining an acceptable level of professional competence.

(4) Providing full and truthful answers during any inquiry or investigation.

6. DETERMINING THE FACTS

a. Inquiry and Investigation

(1) When an incident occurs which may result in a potential disciplinary or major adverse action, inquiry will be made into the incident or situation as soon as possible to obtain the facts and determine what action, if any, is warranted.

(a) Ordinarily, a preliminary inquiry will be made by the appropriate line supervisor. (See also paragraph 6a(3)(a), below.) As appropriate, it may be necessary for other management officials to make the preliminary inquiry.

(b) A further investigation may be warranted depending on the nature and seriousness of the incident (e.g., administrative investigation). Investigating officials will seek information concerning the matter from the employee(s) who is alleged to have committed the offense and from any other persons who may have pertinent information about the incident(s).

(c) The resulting information will be documented. Signed statements, preferably under oath, are the best form of documentation, and should be obtained, whenever possible, from employees interviewed. (The authority to take sworn statements must be exercised in accordance with 38 U.S.C. 5711 and its implementing regulations.) Failure to obtain a signed statement from the employee involved will not, in

and of itself, serve to preclude taking the action, particularly where sufficient information is otherwise obtained from the employee, or the nature of the situation makes it impractical or unnecessary to obtain a written statement.

(d) Evidence will be developed impartially and an effort will be made to resolve any conflicting statements by developing additional evidence. Material which cannot be disclosed to the employee or to the employee's representative may not be used to support a disciplinary or major adverse action.

(2) All employees are required to provide full and truthful answers during any inquiry or investigation. Failure to do so may be grounds for disciplinary or adverse action. The only time employees are entitled to remain silent, without threat of disciplinary or adverse action, is if they may potentially incriminate themselves in a criminal offense. Employees claiming such a right must state this as their reason in order for the right to apply. The assistance of the Regional Counsel or General Counsel, as appropriate, will be obtained in determining whether immunity from prosecution may be granted.

(3) **Official Investigation Reports or Official Inquiries**

(a) It is not necessary for a supervisor to inquire into an incident in accordance with the instructions identified in paragraph 6a(1), above, where sufficient information is available from other official sources.

1. These sources include, but are not limited to reports of:

a. A VA Central Office or Office of Inspector General investigation,

b. A field examination conducted by a representative of the Office of Regional Counsel, or

c. Other official investigations.

2. Where the information appears to be inadequate, the Human Resources Manager should be consulted concerning the necessity for the development of additional information.

(b) The same principle applies to official investigations of other government agencies, whether Federal, State, or local, if the agency which conducted the investigation allows the use of the investigatory material, or part of it:

1. In cases involving criminal matters, it is the policy of VA to cooperate with appropriate law enforcement agencies.

2. In obtaining evidence and/or coordinating such matters, the assistance of the Regional Counsel or General Counsel, and Office of Inspector General, as appropriate, should be obtained.

(c) When management relies on facts developed from an official investigation or other official inquiry to support a proposed disciplinary or major adverse action, only the information relied upon will

be included in the evidence file. When using official information, care must be exercised to extract only that information which is being relied on to support the proposed action.

(d) Confidentiality for certain quality assurance records and documents is provided for in 38 CFR, part 17.

1. Certain restrictions may apply regarding the use of these records and documents as evidence to support taking a disciplinary or major adverse action.

2. It may be necessary to initiate an independent investigation to develop evidence which can be used in a disciplinary or major adverse action.

3. The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained. when questions arise concerning confidentiality and coverage by the provisions of 38 CFR. part 17.

b. **Status of Employee Pending Inquiry or Investigation**

(1) **Continue in Current Duty Status.** Ordinarily, the employee will be retained in a pay and active duty status in the employee's current position, grade, and salary level during any inquiry or investigation.

(2) **Detail, Leave or Paid Non-Duty Status.** In those instances where it is determined that the employee's continued presence at the employee's worksite during an inquiry or investigation might pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the following alternatives may be considered:

(a) Detailing the employee to other duties to eliminate any threat to safety, to VA's mission, or to Government property (VA Handbook 5005, Staffing, part III);

(b) Granting the employee leave (annual, sick, or leave without pay). In certain circumstances when the employee has failed to request leave or report for duty, or it is determined that granting the requested leave is inappropriate, a charge of absence without leave may be used (VA Handbook 5011, Hours of Duty and Leave);

(c) As a last resort, placing the employee in a paid non-duty status pending completion of the inquiry or investigation, preparation of the charges, and/or during the notice period of a discharge or a proposed indefinite suspension, may be appropriate. Care should be taken to ensure that this is for the shortest practicable period. This is an option in those unusual instances where management determines that a detail or granting leave may not be possible or is impractical.

(3) **Indefinite Suspension**

(a) In cases where management foresees a need for considerable time to complete its inquiry or investigation, and subsequently make a determination in a case; and when the potential of a threatening situation exits, consideration may be given to imposing an indefinite suspension.

1. The primary benefits of the indefinite suspension are the expeditious removal of the employee from the premises with the retained option of either reinstating or discharging the employee upon completion of the judicial proceedings or further investigation.

2. Action should be taken to propose the employee's discharge as soon as sufficient information is available to support charges against the employee concerning the act(s) of misconduct regardless of any subsequent judicial proceedings.

3. The Office of Inspector General, Regional Counsel, or Office of General Counsel should be consulted to ensure that there is appropriate coordination with the prosecuting office.

(b) Any indefinite suspension must be based on the need to have the employee away from the worksite pending inquiry, investigation, or the medical examination process. During the advance notice period of a proposed indefinite suspension, the employee may be placed in a non-duty paid status, if necessary. Further, in cases involving the commission of a crime, the "crime provision" procedure may be appropriate (see paragraph 9e of this chapter).

(c) An indefinite suspension must specify the condition(s) or event(s) that will end the suspension (e.g., completion of the investigation of probable criminal conduct and the taking of any administrative action that may be warranted).

1. The employee may not be suspended without such a completion point set out in the proposal, and the suspension cannot continue once the conditions for completion have been met.

2. At the completion of the suspension, management must either return the employee to the employee's position, detail, or reassign the employee to another position, discharge the employee or take other appropriate administrative action.

c. **Evidence File**

(1) If a proposed disciplinary or major adverse action is contemplated, the evidence file must be assembled before the proposed notice is issued to the employee. The file must contain the evidence upon which the notice of proposed action is based, and which supports the charges in that notice (including notices of past disciplinary and/or major adverse action, if such action forms part of the basis for the penalty proposed).

(2) Additional evidence acquired after the issuance of a notice of proposed action may be added without necessitating reissuance of the notice except when the additional evidence forms the basis for initiating new reasons for proposing the action, or it is determined that a different action should be proposed. If an employee requests and is provided with a copy of the evidence file, copies of any material added to the evidence file must also be provided. Any use or disclosure of a record or information must comply with legal requirements for disclosure.

d. **VA Beneficiary Records.** The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained where questions arise concerning the use of VA beneficiary records in taking an action covered under this chapter. Specifically, the use of VA beneficiary records must be in

accordance with the requirements of confidentiality provided in 38 U.S.C. 5701, 5705, and 7332; and the Privacy Act at 5 U.S.C. 552a.

7. DETERMINING APPROPRIATE ACTION

a. **General.** After determining the facts in a case, the responsible official authorized to initiate action should consider the Table of Penalties contained in appendix A of this part. Any extenuating or mitigating circumstances or the contributing factors which may have some bearing on the situation, including past record, should be considered in determining the action to be taken. The initiating official will consult with the Human Resources Management office regarding the propriety of the disciplinary or major adverse action being considered.

b. **Progressive Discipline**

(1) The level or type of discipline which, in the supervisor's judgment**,** is commensurate with the employee's misconduct and will most likely correct the misconduct, is a commonly applied principle.

(a) It is most applicable in repeated infractions of a minor nature (e.g., brief tardiness). It does not prohibit issuance of a more severe penalty (e.g., suspension or discharge) prior to issuance of each and every lesser penalty.

(b) For example, it is not always appropriate to issue an admonishment and/or a reprimand prior to issuance of a suspension or discharge.

(c) Sound supervisory discretion and judgment must be applied in all cases when fully considering the nature of the offense and any aggravating and/or mitigating circumstances.

(d) The concept of progressive discipline and the recommended guidance provided by the Table of Penalties (see appendix A of this part) are not intended to preclude the exercise of discretion in determining appropriate action, but rather to serve as aids to maintaining consistency.

(2) Examples of reasons that may warrant considering a more severe disciplinary action (e.g., suspension without prior reprimand) are:

(a) The facts of the case,

(b) Degree of willfulness of the employee's violation of VA conduct rules,

(c) The seriousness of the misconduct or deficiency in competence, and

(d) The resultant impact on VA operations.

8. DISCIPLINARY ACTIONS

a. **Types of Disciplinary Actions.** This paragraph applies to admonishments and reprimands, based on conduct or performance (refer to paragraph 4 of this chapter for definitions).

b. **Notice of Proposed Action**

(1) Before being released to the employee, a notice of proposed action will be reviewed by the Human Resources Management office for compliance with statutes, regulations, VA policies and other applicable requirements. Human Resources Management officials will review the evidence and, as appropriate, provide guidance concerning the propriety of the action.

(2) The advance notice of proposed action must contain the following information:

(a) The nature of the action proposed (e.g., admonishment);

(b) A statement of the specific charges upon which the proposed action is based, including names, dates, places, and other data sufficient to enable the employee to fully understand the charges and to respond to them;

(c) A statement of any specific law, regulation, policy, procedure, practice, or other specific instruction (national, local or otherwise) that has been violated as it pertains to the charge(s) (if applicable);

(d) A statement that the employee has the right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(e) A statement of the amount of time the employee has to submit the reply or replies (time limits may vary according to the circumstances, but in no event should be less than 5 calendar days);

(f) A statement that the material relied upon to support the reasons for the proposed action will be made available to the employee and the employee's representative upon request;

(g) A statement advising the employee of the official who will receive any oral and/or written replies;

(h) A statement that the employee will be given a written decision as soon as possible after the employee's reply has been fully considered, or after the expiration of the time allowed for reply, if the employee does not reply; and,

(i) A statement that the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case (see paragraph 3c of this chapter). The employee's designation of a representative must be made in writing.

c. **Employee's Oral Reply**

(1) If the employee requests an opportunity to reply orally, the decision official, or designee, will receive the employee's reply.

(a) Any official designated to receive the reply must have the authority to recommend what final decision should be made.

(b) The right to reply orally includes the right to be given a reasonable opportunity to make any plea which the employee believes might influence the final decision in the employee's case.

(c) The employee must be permitted to plead extenuating circumstances or make any other argument the employee deems proper.

(2) A written summary signed by the official hearing the oral reply must be made part of the record.

d. **Arriving at a Final Decision**

(1) The decision official will give full and impartial consideration to:

(a) The employee's written reply, if any;

(b) The recommendation of the designee to hear an oral reply, if any oral reply was made; and

(c) All evidence of record.

(2) If the decision official finds one or more of the charges in the advance notice sustained, the decision official will determine an appropriate action.

NOTE: *The Table of Penalties for examples of offenses and penalties (see appendix A of this part) will be considered in determining an appropriate penalty.*

(3) A decision adverse to the employee must be based only on the charges stated in the notice of proposed action. If none of the charges are sustained, either in whole or in part, no action may be imposed, regardless of any record of past discipline cited in the notice.

(4) The penalty may not be more severe than that proposed in the notice of proposed action.

(5) An employee's failure to reply may be considered, but by itself may not be considered an admission of the charges. The burden of proof rests with management to support its reasons for the action.

(6) If the notice of proposed action is determined to be procedurally defective to the detriment of the employee's substantive rights, or if it is found that additional reasons other than those set forth should be considered, or that the appropriate action should be more severe than that proposed, the notice of proposed action will be rescinded and a new notice of proposed action issued.

(a) The new notice will include a new advance notice period and another opportunity to reply orally and/or in writing.

(b) A procedural defect is detrimental to the employee's substantive rights when it is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

(7) If it is determined that the appropriate penalty is a major adverse action, the procedures outlined in paragraph 9 of this chapter will apply.

e. **Decision**

(1) Before the decision is released to the employee, it will be reviewed by Human Resources Management Service for compliance with the statutes, regulations, VA policies, and other applicable requirements. Any comments the Human Resources Management Service may have concerning technical aspects of the case will be presented to the decision official.

(2) The decision letter will be dated and signed by the appropriate decision official.

(3) The decision letter will be in writing and contain the following information:

(a) A statement of whether any of the charges sustained arose out of a question of professional conduct or competence.

(b) A statement that consideration has been given to all evidence developed, including the employee's reply(ies).

1. A written reply made by a representative on behalf of the employee is considered to be an employee's reply.

2. If the employee replies both orally and in writing, both replies must be mentioned.

(c) A statement of the decision official's determination regarding which charges, if any, in the advance notice were sustained, and which charges, if any, were not sustained.

(d) If a record of prior disciplinary actions was cited in the advance notice, the decision will indicate how the past record, as cited in the advance notice, was taken into consideration in determining the proper action. Prior disciplinary actions which have expired or have been withdrawn may not be cited as a basis for the action.

(e) A statement concerning the employee's rights to file a grievance and the time limit within which it must be filed.

(f) A statement informing the employee of the length of time the action will be retained in the employee's personnel folder.

(g) A statement advising the employee that a further explanation of the employee's appeal rights may be obtained by consulting the Human Resources Management office.

f. **Appeals of Disciplinary Actions**

(1) If the disciplinary action involves or includes a question of professional conduct or competence, the employee may appeal it under the grievance procedures contained in part IV, chapter 3 of this handbook.

(2) If the disciplinary action does not involve or include a question of professional conduct or competence, the employee may appeal the action under the grievance procedure in part IV, chapter 3 of this handbook. If the employee is covered by a collective bargaining agreement under 5 U.S.C., chapter 71, and the negotiated grievance procedure includes disputes over these actions within its scope, the employee may elect to appeal the action through the negotiated grievance procedure or the grievance procedure in part IV, chapter 3 of this handbook, but not both.

(a) The employee shall elect which grievance procedure will be used.

(b) The timely filing of a grievance under either procedure shall constitute an irrevocable election. Grievances filed under the negotiated grievance procedure must be filed in accordance with the provisions of the applicable negotiated grievance procedure.

(c) Reference should be made to the negotiated agreement for the appropriate steps and time limits.

g. **Withdrawal of Action**

NOTE: *Duration and withdrawal time frames may vary based on provisions in applicable negotiated agreements.*

(1) After 2 years, admonishments will be removed from the personnel folder and destroyed. However, in cases of patient abuse, an admonishment may be retained in the personnel folder indefinitely. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management office that the admonishment, including patient abuse cases, be withdrawn, if the employee's conduct so warrants.

(2) After 3 years, a reprimand will be removed from the personnel folder and destroyed. However, in cases of patient abuse, the reprimand may be retained in the personnel folder indefinitely. The employee's supervisor may, after 2 years, make a written request to the Human Resources Management office that the reprimand, including patient abuse cases, be withdrawn, if the employee's conduct so warrants.

(3) Upon expiration of the specified time frame or receipt of a valid request for early withdrawal (i.e., after 6 months for an admonishment) of a disciplinary action, the Human Resources Management office will return the action to the supervisor for destruction. If the request for early withdrawal is initiated by a supervisor below the level of the official who issued the action, it must be approved at or above the level of the initial decision official.

(4) The employee may, after 6 months, make a written request to the supervisor that the admonishment be withdrawn. The employee may, after 2 years, make a written request to the supervisor that the reprimand be withdrawn.

(5) Once an admonishment or reprimand is withdrawn, it may not be used as a past disciplinary record in connection with any future proposed disciplinary or major adverse action. This should be considered in determining whether a disciplinary action should be withdrawn early, particularly with respect to actions which were based on patient abuse.

(6) When a disciplinary action has expired or has been withdrawn early and destroyed, the supervisory official will so inform the employee. In order to assure the employee that no record remains in the personnel folder, the supervisor may wish to destroy it in the employee's presence or give it to the employee for disposition.

(7) Since the admonishment or reprimand may be appealed under the grievance procedure initially and, except in patient abuse cases, will automatically be removed from the personnel folder after 2 or 3 years, respectively, a grievance may not be filed based on a supervisor's decision not to remove it earlier than the expiration date.

9. MAJOR ADVERSE ACTIONS

a. **Types of Actions.** This paragraph applies to suspensions, transfers, reductions in grade, reductions in basic pay, and discharges.

b. **Burden of Proof and Appropriateness of Penalty**

(1) Prior to initiating a major adverse action, officials involved in the decision making process must consider the burden of proof which must be met in order to sustain the action on appeal. When taking a major adverse action against an employee, the Department bears the burden of proving by a preponderance of evidence the charges that form the basis for the action.

(2) The Department must establish that the penalty chosen is within the tolerable limits of reasonableness.

c. **Notice of Proposed Action**

(1) Prior to taking a major adverse action, the employee must be given 30 calendar days advance written notice of the action proposed.

(2) Before being released to the employee, a notice of proposed action will be reviewed by the Human Resources Management office for compliance with statutes, regulations, VA policies and other applicable requirements. Human resources management officials will review the evidence and, as appropriate, provide guidance concerning the propriety of the action.

(3) The advance notice of proposed action must contain the following information:

(a) The nature of the action proposed.

(b) The specific charges upon which the proposed action is based, including the details and circumstances (i.e., names, dates, places, and other data) constituting the basis for action, sufficient to enable the employee to fully understand the charges and to afford the employee a fair opportunity to respond to them.

(c) Any specific law, regulation, policy, procedure, practice, or other specific instruction (national, local or otherwise) that has been violated as it pertains to each charge.

(d) The right to reply orally or in writing, or both orally and in writing to the deciding official, or designee, and to submit affidavits and other documentary evidence in support of the reply by a specified date. Time limits may vary according to the particular circumstances in each case. The employee must be allowed a minimum of 7 days from date of receipt of the notice of proposed action, but no more than 30 days from date of the written notice of charges. The proposing or deciding official may grant extensions beyond 30 days only when good cause is shown.

(e) A statement of the employee's past disciplinary record when such record is to be relied upon as evidence or considered as part of the basis for the proposed action.

1. Specific previous infractions and penalties will be cited and identified and the employee will be advised that the employee may reply orally or in writing, or both orally and in writing, with respect to those previous infractions.

2. The statement will advise the employee that the employee may submit supporting evidence, including affidavits, and may make a statement concerning the use to be made of the past record in determining proper action (see paragraph 9d of this chapter).

(f) A statement that the employee has the right to representation by an attorney or other representative of the employee's choice at all stages of the case, and that the designation of a representative must be in writing. The representative may be disallowed if the individual's activities as a representative would cause a conflict of position or conflict of interest.

(g) A statement that if the employee has any questions about the reasons for the proposed action, the employee may contact the official who signed the advance notice or the Human Resources Management office for further explanation.

(h) Identification of the decision official.

(i) A statement that any written reply must be submitted through supervisory channels to the decision official and that the decision official, or designee, will receive the employee's oral reply.

(j) A statement that full and impartial consideration will be given to the employee's reply(ies), if a reply(ies) is made.

(k) A statement that the employee will be given a written decision within 21 days of receipt of the employee's reply, if any, or of the expiration of the reply period if no reply is made.

(l) A statement advising the employee of the duty and pay status in which the employee will be carried during the notice period.

(m) A statement that if it is decided to take the proposed action, such action will be effective not less than 30 days from the day following the date the employee receives the notice, except when invoking the crime provision (see paragraph 9e of this chapter).

(n) A statement informing the employee where the material relied upon to support the reason(s) for the proposed action will be available for review by the employee and or the employee's designated representative. Generally, the evidence file should be maintained in the Human Resources Management office.

(o) A statement that informs the employee that:

1. The employee will be allowed a specific number of hours of official duty time (if otherwise in an active duty status) for:

a. Reviewing the notice;

b. Preparing a written and/or oral reply; and

c. Securing affidavits.

2. Identifies the person with whom the employee should make arrangements for the use of official time.

(4) Policies relating to notice requirements regarding reductions and revocations of privileges, reporting to the State Licensing Boards and National Practitioners Data Bank (NPDB), should be reviewed to determine their applicability to specific cases. Statements regarding such should be included, as appropriate.

d. **Past Discipline.** Management should consider the recency of any past disciplinary actions that form part of the basis for the proposed action. Consideration should be given to the use of any actions which are more than 3 years old, even if they have remained in the personnel folder. They should be examined closely to ensure their relevance to the proposed action before they are used to support such action:

(1) If cited, the previous disciplinary record will not be set forth as a current charge(s), but will be stated in a paragraph separate from the current charge(s).

(2) Counselings and charges of Absence Without Leave (AWOL) without concurrent disciplinary action are not disciplinary actions and may not be included in the past record paragraph.

(a) Counselings may be cited in a separate paragraph and may be considered in determining appropriate action against an employee. If such counselings are cited, the counseling must have been in writing and must be included in the evidence file used to support the proposed action.

(b) Any reference to letters or memoranda of counseling in the proposal letter must be sufficiently clear so as to enable the employee to comment on the consideration that should be given to the counseling in determining the final action.

e. **Exceptions to 30-day Advance Notice.** The requirement for a 30-day advance notice period may be shortened if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (38 U.S.C. 7462(b)(1)(A)). This exception is concerned solely with shortening the advance notice period. In order for the "crime provision" or "crime exception" to be invoked, there must be reasonable cause to believe that the employee has committed a crime for which the employee may be imprisoned. The employee must still be afforded a reasonable amount of time, but not less than 7 days, to reply orally and/or in writing to a notice of proposed action.

(1) Normally, this provision would be used in conjunction with a proposal to remove or suspend indefinitely while awaiting a final disposition of a case. In those situations in which the retention of the employee in an active duty status would be inappropriate, but where management wishes to defer final judgment until completion of judicial proceedings, or where usable evidence to substantiate a discharge is not yet available, an indefinite suspension should be proposed (see paragraph 6(b)3 of this chapter).

(2) To invoke the crime provision and process a discharge or indefinite suspension with a curtailed notice period, the following actions should be taken:

(a) If not otherwise in a previously approved leave status, notify the employee in writing that the employee is being put immediately in a non-duty status with pay.

(b) Give the employee a notice either of proposed indefinite suspension pending further investigation or pending disposition of the criminal action, or of proposed discharge when there is sufficient evidence to warrant discharge. The notice will advise the employee of a reasonable period to respond orally and/or in writing (not less than 7 days).

(c) Issue a decision on the proposed action after the employee has had the stated opportunity to respond orally and/or in writing, and the response, if any, has been considered.

(d) With the exception of the shortened notice period and any enforced non-duty status, the proposed adverse action and decision notices must conform in all other aspects to the requirements for initiating and taking major adverse actions.

(e) Any case involving the crime provision should be discussed with the Regional Counsel or General Counsel's office, as appropriate. This will prove helpful in obtaining official information regarding an arrest, the charges, indictment, arraignment, etc., needed to establish justification for use of the "crime provision."

f. **Status of Employee During Advance Notice Period**

(1) Ordinarily, the employee will be retained in a pay and active duty status in the employee's current position, grade, and salary level, during the period pending a decision on a proposed action.

(2) During the advance notice period of a proposed action, it may be necessary to remove the employee from the worksite. In those instances where it is determined that the employee's continued presence at work during the advance notice period might pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the following alternatives can be considered:

(a) Detailing the employee to other duties to eliminate any threat to safety, to VA's mission, or to Government property;

(b) Granting the employee leave (annual, sick, leave without pay). In certain circumstances, when the employee has failed to request leave, failed to report for duty, or it is determined that granting the requested leave is inappropriate, a charge of AWOL may be used;

(c) Curtailing the notice period when the Department can invoke the "crime provision"; or

(d) Placing the employee in a paid non-duty status (i.e., authorized absence for timekeeping purposes) during all or part of the advance notice period, if none of these other alternatives are available.

g. **Employee's Reply and Official Time**

(1) If the employee requests an opportunity to reply orally, the decision official, or designee, will receive the employee's reply. Any official designated to receive the reply must have the authority to recommend what final decision should be made.

(a) The right to reply orally includes the right to a reasonable opportunity to make any plea which the employee believes might influence the final decision in the employee's case.

(b) The employee must be permitted to plead extenuating circumstances or make any other arguments the employee deems proper.

(2) A written summary of the oral reply must be made and placed in the adverse action file.

(3) The official time allowed for the employee to reply will depend on the facts and circumstances of each individual case.

(a) In most cases, up to 8 hours of official time may be deemed sufficient.

(b) For more complex cases, more than 8 hours may be allowed.

(c) Since the time spent by the employee in reviewing the evidence and preparing the reply may be spread over several days (e.g., 7-day reply period), documentation should be kept as to how much official duty time is used each day.

(d) If the employee requests additional official time beyond what was originally approved, the request may be honored if it is reasonable.

h. **Arriving at Final Decision on the Proposed Action**

(1) The decision on a proposed major adverse action will be made by an official who is in a higher position than the official who proposed the action, unless the action is proposed by the Secretary.

(2) The decision official will give full and impartial consideration to the employee's reply, if any, and all evidence of record. If the decision official finds that one or more of the charges in the advance notice are sustained, the decision official will determine the appropriate action. The Table of Penalties for examples of offenses and penalties in appendix A of this part, will be considered in determining the appropriate penalty.

(3) In arriving at the decision, the decision official must not consider any reasons for action other than the reasons stated in the notice of proposed action. If none of the charges are sustained, either in whole or in part, no action may be imposed, regardless of any past record cited in the notice.

(4) Any penalty imposed by the decision official may not be more severe than the penalty specified in the notice of proposed action.

(5) An employee's failure to reply may be considered, but by itself may not be considered an admission of the charges. The burden of proof rests with management to support the charges upon which the action is based.

(6) If the notice of proposed adverse action is determined to be procedurally defective to the detriment of the employee's substantive rights, or if it is found that additional reasons other than those originally set forth should be considered, or that the appropriate action should be more severe than that proposed, the notice of proposed action will be rescinded and a new notice of proposed action issued.

(a) The reissued notice will provide a new advance notice period and another opportunity to reply both orally and/or in writing.

(b) A procedural defect is detrimental to the employee's substantive rights when it is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

(7) If additional evidence becomes available to further support the charges in the advance notice, but does not necessarily provide a basis to alter the charges or the proposed action, the employee will be afforded the opportunity to respond to the new evidence before a final decision is made.

(8) Officials involved in taking a major adverse action against an employee must observe the prohibitions against improper "ex parte" communications. Department officials may communicate with each other during the decision-making process; however, it is improper for an interested party (e.g., supervisor, proposing official), to pressure the decision official into making a particular decision. Such communications may support reversal of the action upon appeal.

i. **Decision.** The deciding official shall render a decision in writing within 21 days of the deciding official's receipt of the employee's reply(ies) or close of business following the date identified to reply if the employee does not reply. The decision will be delivered to the employee at least 5 days prior to the effective date of the action, whenever possible. The 5 day period does not apply in cases where there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (see paragraph 9e of this chapter).

(1) Before the decision is released to the employee, it will be reviewed by Human Resources Management Service for compliance with statutes, regulations, VA policies, and other applicable requirements. Any comments the Human Resources Management office may have concerning technical aspects of the case will be presented to the deciding official.

(2) A decision on a proposed major adverse action may be held in abeyance at the -request of the employee and agreement by the deciding official, in order for the employee to seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973 (see 29 U.S.C. Section 701, et seq.).

(a) The employee must provide acceptable documentation for this request which, at a minimum, establishes both a qualifying disabling condition and a causal connection between the disabling condition and the cited misconduct and/or deficiency in performance.

(b) An abeyance of this nature may not exceed 1 year.

(3) The decision letter must contain the following:

(a) A statement of the specific charges that are sustained and those that are not sustained.

(b) A statement, when a major adverse action is imposed, as to whether any of the charges sustained arose out of a question of professional conduct or competence.

(c) A statement that consideration has been given to all evidence developed, including the employee's reply:

1. If the employee replies both orally and in writing, both must be mentioned.

2. A written reply made by an authorized representative on behalf of the employee is considered to be an employee's reply.

3. It is good practice for a statement to be made regarding consideration that was given to any aggravating or mitigating factors.

(d) If a record of prior disciplinary actions was cited in the advance notice, the decision will indicate how the past record, as cited in the advance notice, was taken into consideration in determining the proper action.

(e) A statement of the effective date (not less than 30 days from receipt of notice of proposed action), if the action imposed is a major adverse action. In the case of a suspension, the inclusive dates of the suspension will be stated. In the case of an indefinite suspension, the ending date is determined by the completion of specified conditions and/or events.

(f) A statement specifying the employee's appeal rights, and the time limits within which any appeal must be filed.

(g) A statement advising the employee that a further explanation of the employee's appeal rights may be obtained by consulting the Human Resources Management office.

j. **Appeals of Major Adverse Actions**

(1) The filing of an appeal under a grievance procedure or to the Disciplinary Appeals Board will not affect the implementation of the major adverse action. The action should be effected on the date specified in the decision letter regardless of whether an appeal is filed.

(2) If the major adverse action does not involve or include a question of professional conduct or competence, an employee may elect to seek review of the decision under the grievance procedure described in part IV, chapter 3 of this handbook. However, if the employee is covered by a collective bargaining agreement under 5 U.S.C., chapter 71 and the negotiated grievance procedure includes disputes over these actions within its scope, the employee may elect to appeal the action through the negotiated grievance procedure or the grievance procedure in part IV, chapter 3 of this handbook, but not both.

(a) The employee shall elect which grievance procedure will be used.

(b) The timely filing of a grievance under either procedure shall constitute an irrevocable election. Time limits for filing a grievance under the VA procedure are governed by the provisions of part IV, chapter 3 of this handbook. Grievances filed under the negotiated grievance procedure must be filed in accordance with the provisions of the applicable negotiated agreement.

(c) The employee must be advised of the right to request a hearing in connection with a grievance, and, advised that the request for a hearing must be submitted with the grievance.

(3) If the major adverse action is based in whole, or in part on a question of professional conduct or competence, the employee may appeal to the Disciplinary Appeals Board under the provisions in appendix A of VA Directive 5021 and part V, chapter 1 of this handbook.

(a) An employee must be advised of the right to request a hearing before the Board, and advised that the request for a hearing must be submitted with the notice of appeal. If the employee does not request a hearing in the request for an appeal, the Board may elect to conduct a hearing or make a decision based on a review of the record.

(b) The employee must be provided with a copy of part V, chapter 1 of this handbook which specifies the content requirements of an appeal.

(c) Appeals to the Disciplinary Appeals Board must be submitted to the Under Secretary for Health, or designee, so as to be received within 30 days after the date of service of the written decision on the employee. The 30-day time limit may not be extended.

(d) An issue of whether a matter or question concerns, or arises out of, professional conduct or competence is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining and may not be reviewed by any other agency.

10. SERVICE OF DOCUMENTS. It is best for a supervisor to deliver a notice to the employee personally and to obtain the employee's dated, written acknowledgment of receipt so as to show the date and fact of receipt. Supervisors may wish to have a witness present in order to corroborate delivery of the notice.

a. If the employee refuses to sign, the supervisor should so note this on the acknowledgment copy.

b. In those instances where the letter cannot be personally delivered to the employee, it should be sent by certified mail-return receipt requested, in order to establish that the letter was received. A copy should also be sent by regular mail in the event the certified mail is not delivered and/or the employee fails to obtain it from the Postal Service after being notified to do so. In these instances, date of service will be presumed to be 5 days after posting the letter.

CHAPTER 2. DELEGATIONS

1. SCOPE. This chapter contains the authorities as delegated by the Under Secretary for Health for proposing and deciding on disciplinary and major adverse actions. The Under Secretary for Health retains the authority to appoint individuals as members of the Disciplinary Appeals Board Panel.

2. AUTHORITY

a. Title 38, U.S.C., chapter 74.

b. 38 U.S.C. 7304

c. VA Directive 5021.

3. RESPONSIBILITIES

a. **Delegations of Proposing and Decision Authorities for Disciplinary Actions (Admonishments and Reprimands).**

(1) **Field Employees**

(a) Non-centralized positions:

1. Proposing Official: Immediate supervisor.

2. Decision Official: Service Chief or equivalent or senior medical officer.

(b) Service Chiefs and equivalent positions below the level of Chief of Staff or senior medical officer:

1. Proposing Official: Chief of Staff or senior medical officer.

2. Decision Official: Facility Director.

(c) Chiefs of Staff or senior medical officer:

1. Proposing Official: Facility Director.

2. Deciding Official: Network Director.

(2) **Title 38 Medical Center Directors**

(a) Proposing Official: Network Director.

(b) Decision Official: Assistant Deputy Under Secretary for Health.

(3) **Title 38 Employees in the Office of the Network Director**

(a) All employees except VISN chiefs of staff or senior medical officer:

1. Proposing Official: VISN Chief of Staff or senior medical officer or VISN Associate Director, as appropriate.

2. Decision Official: Network Director.

(b) VISN Chiefs of Staff:

1. Proposing Official: Network Director.

2. Decision Official: Assistant Deputy Under Secretary for Health.

(4) **Title 38 Employees in VA Central Office**

(a) Proposing Official: Immediate supervisor.

(b) Decision Official: Next higher level official.

b. **Delegations of Proposing and Decision Authorities for Major Adverse Actions Involving Reduction in Grade, Reduction in Pay, Suspension, or Discharge.**

(1) **Field Employees**

(a) Non-centralized positions:

1. Proposing Official: Service chief or equivalent.

2. Decision Official: Facility Director (except that transfers will require the concurrence of the Assistant Deputy Under Secretary for Health).

(b) Service Chiefs and equivalent positions below the level of Chief of Staff or senior medical officer:

1. Proposing Official: Chief of Staff or senior medical officer.

2. Decision Official: Facility Director.

(c) Chiefs of Staff or senior medical officer:

1. Proposing Official : Field Facility Director .

2. Decision Official: Network Director.

(2) **Title 38 Medical Center Directors**

(a) Proposing Official: Assistant Deputy Under Secretary for Health.

(b) Decision Official: Under Secretary for Health.

(3) **Title 38 Employees in the Office of the Network Director**

(a) Non-centralized positions:

1. Proposing Official: VISN Chief of Staff or senior medical officer or VISN Associate Director, as appropriate.

2. Decision Official: Network Director.

(b) Centralized positions (to include VISN chiefs of staff or senior medical officer):

1. Proposing Official: Assistant Deputy Under Secretary for Health.

2. Decision Official: Deputy Under Secretary for Health.

(4) **Title 38 Employees in VA Central Office**

(a) Proposing Official: Service director level or above.

(b) Decision Official: Under Secretary for Health, or designee.

c. **Supplemental Delegations.** Facility directors may issue supplemental delegations of authority to propose and/or decide actions involving employees in non-centralized positions under their jurisdiction. However, such authority may not be delegated to officials at lower levels than those authorized to propose and/or decide the action in paragraphs 3a and 3b, above.

(1) Delegations must be in writing and may be issued as the Director deems appropriate.

(2) In exercising this authority, directors must ensure that delegations are consistent with the statutory requirement that the decision official in a major adverse action must be at a higher level than the proposing official.

CHAPTER 3. REPORTS

1. SCOPE. This chapter describes information which may periodically be required by the Office Of Human Resources Management.

2. REPORTS. The Deputy Assistant Secretary for Human Resources Management, may periodically require field facilities to provide information regarding disciplinary and adverse actions.

a. Field facilities will be notified, as needed.

b. This information will include, but not be limited to:

(1) Occupation (to include specialty),

(2) Basis of action,

(3) Action proposed, and

(4) Final decision.

c. If the action was appealed or grieved, the information should include:

(1) Identification of the procedure used, and

(2) The disposition of any such appeal or grievance.

APPENDIX A. TITLE 38 - TABLE OF PENALTIES

1. INSTRUCTIONS FOR USE OF TABLE

a. **General.** This appendix will be used as a guide in the administration of disciplinary and major adverse actions to help ensure that like actions are taken for like offenses. The table is designed to be sufficiently broad to include most types of offenses, but is not intended to be an exhaustive listing of all offenses. For other offenses, appropriate penalties may be prescribed by decision officials for application within their jurisdiction, consistent with the range of penalties for comparable offenses listed in the table. Disciplinary penalties will generally fall between the ranges indicated in the guide, but in unusual circumstances greater or lesser penalties may be imposed. In determining action to be taken in a specific case, mitigating and aggravating factors should be considered such as length of service, past employment record, the potential for improved behavior, etc.

b. **Application of Table**

(1) **Progressive Discipline.** Offenses need not be identical in order to support progressively more severe adverse action against an employee. For example, an employee who has received an admonishment for being absent without leave (AWOL) can receive a reprimand for sleeping on duty, and possibly be suspended or discharged for a third offense unrelated to the two previous infractions.

(2) **Combination of Offenses.** When an employee has committed a combination or series of offenses, a greater penalty than is listed for a single offense may be appropriate.

(3) This guide does not cover all offenses for which adverse penalties are expressly provided by law or Civil Service regulation. A further listing of penalties prescribed by statute, regulation, or Executive Order is contained in 5 CFR, part 735.

(4) Where appropriate, alternate penalties may be used in place of discharge as provided in this chapter, except as noted for the offense described in item 28 of the table. Alternate penalties include reduction in grade, reduction in basic pay, and transfer.

(5) Discharge action will be taken whenever required by law or regulation or whenever warranted by the facts in the individual case. Usually progressively more severe penalties will be administered before discharge action is initiated, unless the offense is so serious that it warrants discharge action.

NOTE: *Although oral or written counselings of employees are not considered disciplinary actions, such counselings may be considered when assessing the appropriate penalty for a particular offense.*

2. RANGE OF PENALTIES FOR STATED OFFENSES

NOTE: *"Days" specified in this table refer to suspension and represent work days. The following abbreviations* will *be used throughout this appendix: Admonishment - Adm.; Reprimand - Repr.; Discharge - Disch.; Minimum - Min.; Maximum - Max.; Department of Veterans Affairs - VA; Equal Employment Opportunity - EEO; and United States Code - U.S.C.*

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
1. Unexcused tardiness.	Adm.-Repr.	Repr.-5 days	5 days-Disch.
2. Unexcused or unauthorized absence.	Adm.-Repr.	Repr.-10 days	10 days-Disch.
3. Leaving job, VA premises, or job to which assigned during working hours, without proper permission.	Adm.-Repr.	Repr.-5 days	10 days-Disch.
4. Loafing, willful idleness, or waste of time.	Adm.-Repr.	Repr-10 days	10 days-Disch.
5. Carelessness or negligence resulting in waste or delay.	Adm.-Repr.	Repr.-10 days	10 days-Disch.
6. Violating traffic regulations, reckless driving on VA premises, or improper operation of motor vehicle.	Adm.-10 days	Repr.-Disch.	10 days-Disch.
7. Failure to observe precaution for personal safety, posted rules, signs, written or oral safety instructions, or to use protective clothing or equipment.	Adm.-10 days	Repr.-Disch.	10 days-Disch.

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
8. Smoking in unauthorized places or carrying of flammables, e.g., matches, in explosive areas.	Adm.-Repr.	Repr.-10 days	10 days-Disch.
9. Endangering the safety of or causing injury to personnel through carelessness or negligence.	Adm.-Disch.	10 days-Disch.	Discharge
10. Failure to report personal injury or accident.	Adm.-Repr.	Repr.-10 days	5 days-15 days
11. Failure to safeguard confidential matter.	Adm.-Repr.	Repr.-10 days	10 days-Disch.
12. Deliberate failure or unreasonable delay in carrying out instructions.	Adm.-Repr.	3 days-10 days	10 days-Disch.
13. Sleeping on duty:			
a. Where safety of patients, beneficiaries, members of the public, employees, or property is not endangered.	Adm.-Repr.	Repr.-Disch.	10 days- Disch.
b. Where safety of patients, beneficiaries, members of the public, employees, or property is endangered.	5 days-Disch.	Discharge	
14. Abuse of patients or beneficiaries.	Repr.-Disch.	10 days-Disch.	Discharge

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
15. Fighting, threatening, attempting, or inflicting bodily injury to another; engaging in dangerous horseplay. (Penalty depends on such factors as provocation, extent of any injuries, and whether actions were defensive or offensive in nature.)	Repr.-Disch	10 days-Disch.	Discharge
16. Disrespectful conduct, use of insulting abusive or obscene language to or about other personnel.	Repr.-Disch.	10 days-Disch.	Discharge
17. Insubordination. i.e., deliberate refusal to carry out any proper order from, or insolent, abusive or obscene language toward, immediate or other supervisor having responsibility for the work of the employee; willful resistance to same.	Repr.-Disch.	10 days-Disch.	Discharge
18. Offenses related to intoxicants. Actions involving these offenses should be reviewed to ensure the requirements of Drug and Alcohol Abuse Program are met.			

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
a. Alcohol-related:			
(1) Unauthorized possession of alcoholic beverages while on VA premises or in duty status.	Repr.- 5 days	10 days - Disch.	15 days-Disch.
(2) Unauthorized use of alcoholic beverages while on VA premises or in duty status.	Repr. - 10 days	15 days- Disch.	Discharge
(3) Reporting to or being on duty while under the influence of alcohol.	Repr. 10 days	15 days - Disch.	Discharge
(4) Sale or transfer of an alcoholic beverage while on VA premises or in a duty status, or while any person involved is in a duty status.	10 days- Disch.	Discharge	
b. Drug-related:			
(1) Unauthorized possession of a drug or controlled substance while on VA premises or in a duty status.	5 - 10 days	15 days-Disch.	Discharge

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
(2) Unauthorized use of a drug or controlled substance while on VA premises or in a duty status.	10 days-Disch.	15 days-Disch.	Discharge
(3) Reporting to or being on duty while under the influence of a drug or controlled substance.	15 days- Disch.	Discharge	
(4) Sale or transfer of a drug or controlled substance while on VA premises or in a duty status, or while any person involved is in a duty status.	15 days - Disch.	Discharge	
(5) Refusal to take drug test, as required.	Adm. Disch.	15 days- Disch.	Discharge
19. Sexual harassment	Repr.-Disch.	5 days-Disch.	10 days-Disch.
20. Gambling, unlawful betting on VA premises.	Repr.-10 days	10 days-Disch.	Discharge
21. Promotion of gambling on VA premises.	Repr.-Disch.	15 days-Disch.	Discharge
22. Indebtedness-lack of good faith in paying just financial obligations; such as failure without good cause to make or live up to arrangements to pay a debt that the employee admits is owed or that is supported	Admonishment	Adm. - Repr.	5 days - Disch.

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
by court judgment, or that represents a tax or other financial obligation to the United States (U.S.) Government or to State and local government.			
23. Theft of Government property.	Repr.-Disch.	10 days-Disch.	Discharge
24. Making false or unfounded statements, which are slanderous or defamatory, about other VA personnel or officials.	Repr. -Disch.	10 days - Disch.	Discharge
25. Falsifying attendance record for self or another employee.	Repr. - Disch.	10 days - Disch.	Discharge
26. Intentional falsification, misstatement, or concealment of material fact in connection with employment or any investigation, inquiry or other proper proceeding; or willfully forging or falsifying official Government records or documents.	Repr. - Disc	10 days - Disch.	Discharge

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
27. Loss of, damage to, or unauthorized use of Government properly			
a. Through carelessness	Adm.-15 days	10 days - Disch.	Discharge
b. Through maliciousness or intent.	Repr. - Disch.	10 days- Disch.	Discharge

NOTE: *For willful use or authorization of the use of any Government vehicle for other than official purposes, the prescribed penalty is suspension for not less than 30 days or removal (31 U.S.C. 1349(b); see item number 39g).*

28. Owing any interest in, or receiving any, wages, salary, dividends, profits, gratuities, or services from any educational institution operated for profit in which an eligible veteran, or person is pursuing a course of education or training under 38 U.S.C. 34, 35 and 36, where it is determined that detriment will result to the U.S. or to eligible veterans, or persons by reason of such interest or	Discharge		
29. Participation in any type of outside activities, or relationships with contractors, lenders, or others engaged in business with VA or relationships with those seeking contracts, which would be contrary to the best interests of VA and the veterans it serves. Penalty action will be determined on the basis of whether the activities, or relationships,	Adm.-Discharge	10 days-Discharge	

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
might result in a conflict between the private interest of the employee and the employee's duty and obligation to VA, or tend to create in the minds of others a suspicion of prejudice or favoritism that would be of embarrassment to VA.			
30. Except as specifically authorized to do so, disclosing or using directly or indirectly information obtained as a result of employment in VA, which is of a confidential nature or which represents a matter of trust, or any other information so obtained of such character that its disclosure or use would be contrary to the best interests of the Government, VA, or the veterans it serves.	Repr.-Disch.	Discharge	
31. Borrowing from, or lending money to, any beneficiary or claimant of VA; or borrowing	Repr.- Disch.	Discharge	
32. Soliciting contributions for, or otherwise promoting, on premises occupied by VA, any national or local welfare or other type of campaign which has not had appropriate VA endorsement.	Repr.-Disch.		

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
33. Selling tickets, stocks, articles, commodities, or services on VA premises. This prohibition is not to be construed as prohibiting employees from engaging in bona fide activities on premises occupied by VA, of a recognized employee union, group, organization, or association, as provided or in other applicable Department policies.	Repr.-Disch.	10 days-Disch.	Discharge
34. Accepting gifts or gratuities (whether in the form of goods, money, services, purchases at discount, entertainment, or similar favors) from claimants or beneficiaries of VA, or individuals or firms doing business with or having contractual relations with VA, except as authorized by conduct regulations.	Repr.-Disch.	Discharge	
35. Violation of Privacy Act.	Repr.-Disch.	10-days-Disch.	Discharge
36. Prohibited personnel practice (Reference: 5 U.S.C. 2302).	Repr.-Disch.	10-days-Disch.	Discharge
37. Participating in a strike, work stoppage, sick-out, slowdown, or other job action.	Discharge		

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
38. Offenses Related to Supervisory/Managerial Observance of Employee Rights:			
a. Discrimination based on race, color, sex, religion, national origin, age, marital status, political affiliation, or disability.	Repr.-Disch.	5 days-Disch.	10 days-Disch.
b. Interference with an employee's exercise of, or reprisal against an employee for exercising a right to grieve, appeal or file a complaint through established procedures.	Repr.-Disch.	5 days-Disch	Discharge
c. Reprisal against an employee for providing information to the Office of Inspector General, Office of Special Counsel, an EEO investigator, or for testifying in an official proceeding. **NOTE:** *Penalty may require coordination with the Office of Special Counsel.*	10 days-Disch.	Discharge	

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
d. Reprisal against an employee for exercising a right provided under 5 U.S.C. 71 (Federal Labor-Management Relations Statute).	Repr.-Disch.	5 days-Disch.	10 days-Disch.
e. Violation of an employee's constitutional rights (i.e. freedom of speech and/or association and/or religion).	Repr.-Disch.	5 days-Disch.	10 days-Disch.
39. Offenses Prescribed in Statute:			
a. Finding by the Merit Systems Protection Board (MSPB) of refusal to comply with MSPB order or of violation of statute causing issuance of Special Counsel complaint (5 U.S.C. 1215). **NOTE:** *Penalty may need to be coordinated with Office of Special Counsel.*	Repr.-Disch.	Discharge	
b. Directing or rendering services not covered by appropriations (5 U.S.C. 3103).	Discharge		
c. Prohibited Political Activity:			
(1) Violation of prohibition against Political contributions (5 U.S.C. 7323).	Discharge		

Nature of Offense Min. Max.	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense
(2) Violation of prohibition against campaigning or influencing elections (5 U.S.C. 7324 and 7325). **NOTE:** *Actions based on Hatch Act violations will be initiated by the Office of Special Counsel.*	30 days-Disch.	Discharge	
d. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations for salaries (5 U.S.C. 5501).	Discharge		
e. Soliciting contributions for a gift for a superior; making a donation as gift to a superior; accepting a gift from an employee receiving less pay (5 U.S.C. 7351).	Repr.-Disch.	10 days-Disch.	Discharge
f. Action against national security (5 U.S.C. 7532).	30 days- Disch.	Discharge	
g. Willfully using or authorizing the use of a government passenger motor vehicle or aircraft for other than official purposes (31 U.S.C. 1349(b)). **NOTE:** *30-days for this offense means calendar days.*	30 days - Disch.	Discharge	

Nature of Offense	1st Offense	2nd Offense	3rd Offense
Min. Max.	Min. Max.	Min. Max.	
h. Willfully mutilating or destroying a public record (18 U.S.C. 2071).	Discharge		

APPENDIX B.
TITLE 38 – SAMPLE NOTICE OF PROPOSED DISCIPLINARY ACTION (NON-PROBATIONARY)

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Proposed Reprimand (or Admonishment)

1. It is proposed to reprimand you based on the following reason:

On (date), you were absent without leave for 8 hours. You failed to obtain permission from your supervisor for the absence as required. Your action violated (cite specific section of the Code of Federal Regulations (CFR) which has been violated.)

The practice of grouping reasons under general headings, such as "Neglect of Duty" and "Insubordination" is discouraged.

After each charge, cite specific section of CFR which has been violated (e.g., your actions, as described above, violated 38 CFR 0.735-10(a), etc.).

2. You have the right to reply to this notice orally, or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of your reply, showing why the charge(s) is(are) unfounded and any other reasons why you should not be reprimanded.

You will be given until the close of. business (date) to reply to these reasons orally or in writing, or both orally and in writing, and to submit any affidavits or other documentary evidence. Your written reply should be submitted to the (deciding official). The (deciding official) will receive your oral reply or will designate an official or officials to receive it.

At least 5 calendar days are required

3. The evidence upon which this notice of proposed action is based will be available for your review in the Human Resources office, Room ____.

4. You may be represented by an attorney or other representative of your choice at all stages of this matter. Any representative must be designated in writing.

5. On a previous occasion you were admonished for 8 hours absence without leave (AWOL). This past record will be taken into account in

For use only if past record will be considered. Citation of past record is not considered a current reason. Copies of the past record must be

determining proper disciplinary action, if one or more of the above reasons is sustained. You may reply orally or in writing, or both orally and in writing, with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. In this regard, you may make a statement expressing your views as to the consideration to be given such past record in determining proper action.

included in the evidence file, if used.

6. The final decision to effect the action proposed has not been made. The (title of deciding official), who will make the final decision, will give full and impartial consideration to any replies, if submitted. You will be informed in writing of the final decision as soon as possible after your reply has been considered or (date - 5 calendar days) if you do not reply.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

APPENDIX C.
TITLE 38 – SAMPLE DECISION LETTER FOR DISCIPLINARY ACTION (NON-PROBATIONARY)

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Reprimand (or Admonishment)

1. In connection with the notice of proposed reprimand dated _____, a decision has been made to reprimand you based on the following reason(s):

Reason number one as stated in the notice of proposed reprimand is sustained.

[CITE THE SUSTAINED REASON(S)]

2. In reaching this decision, your (written/oral) reply(ies) has(have) been carefully considered along with all of the evidence developed.

3. This decision also takes into account that this is the second offense of this nature within the past 3 months. On (date) you were admonished for AWOL.

Past record may be cited if considered appropriate.

4. A copy of this reprimand will be placed in your personnel folder. This reprimand may remain in your folder for 3 years or it may be withdrawn and destroyed after 2 years depending entirely on your future behavior and attitude.

A reprimand for patient abuse should read "may remain in your folder as long as you are employed by VA or it may be withdrawn and destroyed after 2 years…", etc. An admonishment for patient abuse should read "may remain in folder as long as you are employed by VA or it may be withdrawn and destroyed after 6 months."

5. This letter may be used in determining an appropriate penalty if further infractions occur.

6. The sustained reason does not involve a question of professional conduct or competence. Therefore, if you believe that this reprimand is unjustified, you may appeal the action under the VA grievance procedure or the negotiated grievance procedure, but not both. You shall be deemed to have exercised your option to appeal this action at such time as you timely file a grievance under either procedure. Your grievance must be submitted to (decision official)

Negotiated grievance procedure is an option only when the action does not involve a question of professional conduct or competence. Language may vary based on specific provisions of the negotiated grievance procedure.

within (number of days) after you receive this reprimand. For further information about the grievance procedure, you may consult the Human Resources office;

or

7. The sustained reason involves a question of professional conduct or competence. Therefore, if you believe that this action is unjustified, you may appeal the action under the VA grievance procedure. Your grievance must be submitted through me to (decision official) within 15 days after you receive this reprimand.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

APPENDIX D. TITLE 38 – SAMPLE NOTICE OF PROPOSED MAJOR ADVERSE ACTION

NOTE: *This letter is applicable for suspensions, transfers, reductions in grade, reductions in basic pay, and discharges based on conduct or performance.*

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Proposed Discharge

1. It is proposed to discharge you from employment with VA based on the following reasons:

I. On (date), at approximately 9:00 a.m. you allowed patient John Doe to bring a bottle of whiskey on the hospital premises despite the fact that it was your duty to prevent patients from introducing alcoholic beverages on the hospital premises. Your action violated (cite specific section of CFR which has been violated).

The practice of grouping reasons under general headings, such as "Neglect of Duty," "Insubordination," etc. is discouraged.

II. At 10:00 a.m., approximately one hour after the incident, you were ordered by your immediate supervisor Mr. John Smith, to report at once to the Chief, Security Service, and explain your neglect of duty. However, you told Mr. Smith that you refused to do so. Although he repeated the order, you still did not report to the Chief.

If applicable, cite a specific law, regulation or policy that was violated (e.g., your actions, as described above, violated 38 CFR 0.735-10(a)).

III. At 10:00 a.m., immediately following your refusal to carry out the above-mentioned order, you struck Mr. Smith several times with your fists and knocked him down onto the floor. Your action violated (if applicable)

2. You have the right to reply to this notice orally, or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of your reply, showing why the charge(s) is (are) unfounded and any other reasons why your discharge should not be effected. You will be given until the close of business (date) to reply to these reasons orally or in writing, or both orally and in writing, and to submit any affidavits

At least 7 calendar days is required, but no more than 30, unless good cause is shown.

or other documentary evidence. Your written reply should be submitted to the (deciding official). The (deciding official) will receive your oral reply or will designate an official or officials to receive it.

3. The evidence on which this notice of proposed action is based will be available for your review in the Human Resources office, Room____ . You will be allowed ___ hours of official duty time for reviewing the evidence relied on to support the reason(s) in this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

Only applies when employee is in an active duty status. The number of hours of official time to review the evidence would not normally exceed 8 hours. A reasonable amount of time should be granted based on the individual circumstance.

4. On two previous occasions you refused to follow orders given to you by your supervisor. After the first occasion you were admonished by letter of (date) and after the second you were reprimanded by letter of (date) . This past record will be taken into account in determining proper disciplinary action, if one or more of the above reasons is sustained. You may reply orally or in writing, or both orally and in writing, with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. In this regard, you may make a statement expressing your views as to the consideration to be given such past record in determining proper action.

Citation of past record is not considered a current reason. Copies of the past record must be included in the evidence file, if used.

5. You may be represented by an attorney or other representative of your choice at all stages of this matter. Any representative must be designated in writing.

6. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and impartial consideration to your reply(ies), if submitted.

7. If it is the decision of the (deciding official) that you be discharged, your discharge will be effective not less than 30 calendar days from the day after the date of receipt of this notice.

8. You will be given a written decision within 21 days of the receipt of your reply(ies) or, the close of business on (same date as in paragraph 2), if you do not reply.

9. Consistent with the mandate in the Department of Veterans Affairs Health-Care Amendments Act

This paragraph is to be used only in a proposed discharge.

of 1985 (Pub. L. 99-166), it is the-policy of VA to report to the State licensing boards those terminated (voluntarily or otherwise) health-care professionals whose professional clinical practice appears to have so significantly failed to conform to generally accepted standards of clinical professional practice as to raise reasonable concerns for the safety of patients. Please be advised that, in the event you are found not to meet standards of care, consideration will be given whether, under these criteria, you should be reported to the State licensing board(s).

10. You will be retained in an active duty status during the advance notice period (indicate duty status, i.e., leave, non-pay, or other status as appropriate).

*11. If you have any questions about the reasons why your discharge is proposed, contact me or the Human Resources office (give location) for further explanation.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

*In cases of proposed discharges or suspensions involving issues of professional conduct or competence, the following paragraph should be included, (renumber paragraph 11, as appropriate):

11. Should a decision be made to discharge you (or suspend you for more than 30 days) on the basis of professional conduct or competence, the discharge may be concurrent with the revocation (or suspension) of your clinical privileges. This information may be reported through the State Licensing board(s) to the National Practitioner Data Bank (NPDB).

APPENDIX E.
TITLE 38 – SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Discharge

1. In connection with the notice of proposed discharge dated _____, a decision has been made to discharge you from employment with VA, effective (date), based on the following reasons:

Whenever possible the decision should be delivered at least 5 days prior to the effective date of a major adverse action. In every case, the date set must provide for receipt of the decision letter at or prior to the time the action will be effective.

Reason number one as stated in the notice of proposed discharge is sustained.

[CITE THE SUSTAINED REASON(S)]

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed. This decision also takes into consideration your past disciplinary record as cited in your notice of proposed discharge. Your previous record was an aggravating factor in determining an appropriate penalty.

Applicable only if action considers past record.

3. I have also considered other factors including your years of service, your past work record, the seriousness of the offense(s) with which you have been charged, and whether there are any mitigating or extenuating circumstances which would justify mitigation of the proposed penalty. I have concluded that the sustained charge(s) against you is(are) of such gravity that mitigation of the proposed penalty is not warranted, and that the penalty of discharge is appropriate and within the range of reasonableness.

This sample wording pertaining to the decision official's consideration of mitigating and aggravating factors should be modified according to the specific factors considered, and the final decision on the action proposed.

4. Since reason number one as stated in the notice of proposed discharge involves a question of professional conduct or competence, you have the right to appeal this decision to the Disciplinary Appeals Board and to request a formal hearing

Even though only one of the reasons sustained provides the right to appeal this decision to a Disciplinary Appeals Board, all sustained reasons will be considered by the Board.

before the Board. Your request for a formal hearing must be submitted in writing in conjunction with your appeal. The appeal must be submitted through the Office of Human Resources Management, Human Resources Management Programs and Policies Service (051) to the Under Secretary for Health, (address), so as to be received no later than 30 calendar days after your receipt of this decision. The Office of Human Resources Management (051) may be contacted via phone (202-273-9816) or fax (202-273-9776 or 202-273-7607).

*5. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or handicap, you may file a complaint of discrimination with VA in accordance with Office of Resolution Management (ORM) discrimination complaint procedures. Should you elect to do so, you may appeal this action by contacting ORM at 1-888-737-3361 within 45 calendar days of the date you receive this letter.

6. A copy of VA Directive 5021, part V, chapter 1 is enclosed to provide you with necessary information regarding an appeal to the Disciplinary Appeals Board. A further explanation of your appeal rights may be obtained by consulting the Human Resources office.

(Signature of appropriate official)

Enclosure

FOR OFFICIAL USE ONLY

*Paragraph 5 should only be used if allegations of discrimination have been raised by the employee.

APPENDIX F.
TITLE 38 – SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS NOT INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJECT: Discharge

1. In connection with the notice of proposed discharge dated _____, a decision has been made to discharge you from employment with VA, effective(date), based on the following reason(s):

Whenever possible the decision should be delivered at least 5 days prior to the effective date of a major adverse action. In every case, the date set must provide for receipt of the decision letter at or prior to the time the action will be effective.

Reasons number one and two as stated in the notice of proposed discharge are sustained.

[CITE THE SUSTAINED REASON(S)]

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed. This decision also takes into consideration your past disciplinary record as, cited in your notice of proposed discharge. Your previous record was an aggravating factor in determining an appropriate penalty.

Applicable only if action considers past record.

3. I have also considered other factors including your years of service, your past work record, the seriousness of the offenses with which you have been charged, and whether there are any mitigating or extenuating circumstances which would justify mitigation of the proposed penalty. I have concluded that the sustained charges against you are of such gravity that mitigation of the proposed penalty is not warranted, and that the penalty of discharge is appropriate and within the range of reasonableness.

This sample wording pertaining to the decision official's consideration of mitigating and aggravating factors should be modified according to the specific factors considered, and the final decision on the action proposed.

4. Since reasons number one and number two as stated in the notice of proposed discharge do not involve a question of professional conduct or competence, you may appeal this action under the VA grievance procedure or the negotiated

The grievance procedure is an option only when the action does not involve a question of professional conduct or competence. Language may vary based on specific provisions of the negotiated grievance procedure. If the employee

grievance procedure, but not both. You shall be deemed to have exercised your option to appeal this action at such time as you timely file a grievance under either procedure. Your grievance must be submitted to (decision official) no later than (number of days) after you receive this letter. If you elect to file a grievance through the VA grievance procedure in connection with this action, you have the right to request a hearing. Any request for a hearing must be submitted in your grievance. For further information about the grievance procedure, you may consult the Human Resources Management Service.

has option to appeal under either a negotiated grievance procedure or the VA grievance procedure, include time frames for submission for both procedures.

*5. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or handicap, you may file a complaint of discrimination with VA in accordance with Office of Resolution Management (ORM) discrimination complaint procedures. Should you elect to do so, you may appeal this action by contacting ORM at 1-888-737-3361 within 45 calendar days of the date you receive this letter.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

*Paragraph 5 should only be used if allegations of discrimination have been raised by the employee.

APPENDIX G.
TITLE 38 – SAMPLE PROPOSED INDEFINITE SUSPENSION
* (Invoking the "Crime Provision")

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organizational Element)
(VA Office of Field Facility)
(City, State and ZIP Code)

SUBJECT: Proposed Indefinite Suspension

1. It is proposed to suspend you from duty and pay status for an indefinite period of time pending (cite investigation of probable criminal conduct on employees). Should this proposal result in an indefinite suspension and should subsequent administrative determination so warrant, a proposal may be made to discharge/remove you while you remain in a suspension status.

2. This proposed indefinite suspension is based on the following reason:

(Describe criminal activity and give date, times and place). On _(date)_ you were arrested by (name of law enforcement agency) and charged with (cite criminal charge). On date you were bound over for trial or held for further legal action by (Name of Court or Grand Jury). Because of this, there is reasonable cause to believe that you may be guilty of a crime for which a sentence of imprisonment may be imposed.

3. In light of the seriousness of this situation and on the basis that it is incompatible with your official duties and responsibilities, it is not in the best interest of VA to retain you in a duty status pending investigation of this criminal activity.

4. You have the right to reply to this notice orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of your reply, showing why this notice is inaccurate and any other reasons why your proposed indefinite suspension should not be effected.

5. You will be given until the close of business (date - not less than 7 calendar days) to reply and to submit affidavits and other documentary evidence in support of your reply. Your written reply should be submitted to the (deciding official). The deciding official will receive your oral reply, or will designate an official or officials to receive it.

6. The evidence on which this notice of proposed action is based will be available for review in the Human Resources Management Service, Room ___. You will be allowed ___ hours of official duty time for reviewing the evidence relied on to support the reasons in this notice, preparing a written reply, securing affidavits, and for making a

The number of hours of official time to review the evidence would not normally exceed 8 hours. A reasonable amount of time should be granted based on the individual circumstances. Only applies when employee is in an active duty status.

personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

7. You have the right to be represented by an attorney or other representative of your choice at all stages of this matter. Any representative must be designated in writing.

8. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and impartial consideration to your reply, if a reply is submitted.

9. If it is the decision of the (deciding official) that you be suspended indefinitely, your suspension will be effective not less than 7 calendar days from the date of your receipt of this notice.

10. You will be given a written decision within 21 calendar days of the receipt of your reply(ies) or, the close of business on (same date as in par. 5) if you do not reply.

11. You will be retained in a non-duty status with pay during the period of advance notice.

12. If you have any questions about the reasons why your indefinite suspension is proposed, contact me or the Human Resources office (give location and phone number) for further explanation.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

*Indefinite suspensions may be used without invoking the crime provision, however, in these cases, the notice must advise the employee that "if it is the decision of the deciding official that you be suspended indefinitely, your suspension will be effective not less than 30 calendar days from the day after the date of receipt of this notice." In addition, the reason identified in paragraph 2 will, most likely be other than criminal activity.

NOTE: *According to current case law, the crime provision cannot be invoked based solely on evidence of the employee's arrest. The arrest must be accompanied by circumstances sufficient to show reasonable cause such as an arrest warrant issued by a magistrate or judge, or evidence that the employee was arrested and held for further legal action by a magistrate, or was indicted by a grand jury. This would generally constitute reasonable cause for believing the employee had committed a crime. Case law in this area has been continuously evolving. Officials should contact their regional counsel or general counsel as appropriate, or the Office of Human Resources Management (051) in VA Central Office when questions arise.*

APPENDIX H.
TITLE 38 –SAMPLE DECISION NOTICE – INDEFINITE SUSPENSION

NOTE: *This letter is for use only in conjunction with the "Crime Provision."*

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(Street Address (when needed)
(City, State, and ZIP Code)

SUBJECT: Indefinite Suspension

1. In connection with the notice of proposed indefinite suspension dated (date) , a decision has been made to suspend you indefinitely pending (investigation of probable criminal conduct on your part effective (date) . Should subsequent administrative determination so warrant, a proposal may be made to discharge you while you are in an indefinite suspension status.

2. This indefinite suspension is based on the following reasons:

The reason(s) as stated in the notice of proposed indefinite suspension is (are) sustained.

3. In reaching this decision, your (written and oral) reply(ies) has (have) been carefully considered along with all of the evidence developed.

4. (See sample decision letters for major adverse actions, appendices I-E and I-F, for sample wording on employee appeal rights).

5. A further explanation of your appeal rights may be obtained by consulting the Human Resources office.

(Signature of appropriate official)

Enclosure

FOR OFFICIAL USE ONLY

APPENDIX I.
TITLE 38 - FIRM CHOICE, LAST CHANCE, AND ABEYANCE AGREEMENTS

1. This appendix is intended to provide guidance and sample language for the use and construction of these instruments in certain problem situations. Although they may be useful in various circumstances, these instruments are particularly helpful in dealing with situations requiring reasonable accommodation.

2. Case law pertaining to "firm choice," "last chance," and "abeyance" agreements is constantly evolving. As of issuance of this handbook, firm choice letters are not required before proceeding with disciplinary/adverse actions against an employee with substance abuse problems. However, management is not prohibited from providing a firm choice when it is determined to be appropriate. When questions arise in this area, officials should contact their Regional Counsel or General Counsel, as appropriate, or the Human Resources Management Programs and Policies Service (051) in VA Central Office.

SAMPLE FIRM CHOICE LETTER

NOTE: *The following sample paragraphs are intended as a guide to assist in the development of a letter tailored to the specific circumstances of each case. It may be used when an employee has claimed a substance abuse problem, or in cases when the employee has not claimed substance dependence, but the supervisor has a conduct-related or performance related reason to believe that an employee has a substance dependence which may be causing an ongoing work related problem, and prior counselings and offers of assistance have been ineffective. Letters of firm choice should be consistent with the provisions of any applicable collective bargaining agreements.*

(Date)

(Name and Address of Employee)

SUBJECT: Firm Choice Letter

1. Based on your past conduct (and/or performance), which has already been discussed with you (see attached letters of counseling), we have reason to believe that you have a substance abuse problem which warrants professional help.

2. For this reason, we are formally referring you to the VA Employee Assistance Program (EAP), so that an assessment and appropriate referral can be made for you. This offer of assistance is an opportunity period for you to address your serious work-related problems and resolve them. The VA EAP is a confidential and free resource, and no record of details of your participation in EAP will be placed in your personnel folder. Although the referral to EAP and your participation in rehabilitation is voluntary, you should understand that this is to offer you a "firm choice" - either seek and complete the prescribed treatment for your problem or accept the consequences of your misconduct. In this regard you are being given the opportunity to seek, and successfully complete, (an inpatient and/or outpatient) substance abuse program.

3. You have ____ calendar days from receipt of this letter to enroll yourself in (an inpatient or outpatient) program for this purpose. Whether or not you elect to use the VA EAP, within this (number) day period you must provide documentation regarding the program prior to entry, including the time which will be required for participation and any leave which you will request, so that (appropriate official) can determine whether the program can be approved. If (appropriate official) approves the program, you will be granted leave (annual, sick, or leave without pay) provided you have properly requested such leave in advance and the type of leave requested is available and appropriate.

4. You must also sign the attached release of information and return it to (appropriate official) . A release of information is needed so that (appropriate official) can contact your counselor to discuss your enrollment and continued participation in the program.

NOTE TO MANAGER: *If the employee is uncomfortable with signing a release, you may stipulate in the release that the only information to be given the supervisor is that the employee is complying with the program requirements. Generally, accommodation should not be denied solely because employee refuses to sign a release form.*

If you require additional information on what programs are available, you should contact the Employee Assistance Program office at this facility (provide name of contact and telephone number) . Failure to provide the requested documentation or failure to enroll in a program will be regarded as evidence that you did not successfully complete a rehabilitation program.

NOTE TO MANAGER: *If an action is being held in abeyance, use the following:*

This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

5. During the time you are enrolled in a program, you must furnish acceptable documentation concerning your progress at regular intervals (for example every 2 weeks.) If it is suspected that you are not maintaining sobriety, or are not participating in the program, you will be referred to employee health, or your program counselor, as appropriate, for examination, and the results of this examination will be furnished to (appropriate official). Failure to provide the requested documentation will be regarded as evidence that you did not successfully complete a rehabilitation program.

NOTE TO MANAGER: *If an action is being held in abeyance, use the following:*

This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

6. You must furnish acceptable documentation that you have successfully completed this program within 10 days of the completion of such program. Failure to provide the requested documentation will be regarded as evidence that you did not successfully complete a rehabilitation program.

NOTE TO MANAGER: *If an action is being held in abeyance, use the following:*
This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

NOTE: *If employee's conduct/performance/leave use has become completely acceptable, but the employee has failed to complete some portion of the rehabilitation program requirements, the firm choice obligation is met. Action should not be taken if based solely on failure to complete the rehabilitation program.*

NOTE TO MANAGER: *If there is a decision to remove the employee being held in abeyance, use the following paragraphs:*

7. For a period of 6 months (time period may vary) after successful completion of a rehabilitation program, you will be required to maintain yourself in a manner reflecting credit upon VA. This includes maintaining satisfactory attendance, performance, and conduct.

NOTE TO MANAGER: *If time and attendance problems have been an issue, use the following:*

In addition, you must support every unscheduled absence by acceptable documentation establishing an emergency situation as a condition for considering whether or not to approve leave for the period in question. Medical documentation must include a complete diagnosis which establishes that you could not work for the period in question.

Failure to maintain yourself in a manner reflecting credit upon VA will be regarded as evidence that you did not successfully complete your rehabilitation program, and will lead us to impose the removal action being held in abeyance.

8. Upon successful completion of all the preceding requirements of your rehabilitation program, the removal action against you being held in abeyance will be (reduced/canceled.) You will be expected to continue to maintain yourself in a manner reflecting credit upon VA.

9. I appreciate your difficulties and I am not unsympathetic to your needs. I sincerely hope you will prevail in your rehabilitative efforts.

Signature of Appropriate Official

NOTE TO MANAGER: *Wherever possible, firm choice letters should be mutually agreed upon by management, the employee, and the employee's representative, and signed as memos of understanding or agreements.*

NOTE TO MANAGER: *If there is a decision less than removal being held in abeyance, or an action has been issued in conjunction with the firm choice, use the following paragraphs:*

7. For a period of 6 months (time period may vary) after successful completion of a rehabilitation program, you will be required to maintain yourself in a manner reflecting credit upon VA. This means there will be no more instances of problems of any type related to substance abuse, and includes maintaining satisfactory attendance, performance, and conduct. Failure to maintain yourself in a manner reflecting credit upon VA will be regarded as evidence that you did not successfully complete your attempt at rehabilitation.

NOTE TO MANAGER: *If a removal action is being held in abeyance, use the following:*

This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will result in your being removed from VA.

If an action has been issued in conjunction with the firm choice, use the following:

Should your misconduct and/or performance problems continue it will result in your being removed from VA.

8. Upon successful completion of all the preceding requirements of your rehabilitation program, you will be expected to continue to maintain yourself in a manner reflecting credit upon VA.

NOTE TO MANAGER: *If an action is being held in abeyance, use the following:*

The (action) against you being held in abeyance will be reduced/canceled.

9. I appreciate your difficulties and I am not unsympathetic to your needs. I sincerely hope you will prevail in your rehabilitative efforts.

Signature of Appropriate Official

NOTE TO MANAGER: *Whenever possible, firm choice letters should be mutually agreed upon by management, the employee, and the employee's representative, and signed as memos of understanding or agreements.*

LAST CHANCE AND ABEYANCE AGREEMENTS

a. The following guidance was published by the Office of Personnel Management regarding "Last Chance" and "Abeyance Agreements" in situations requiring reasonable accommodation. Some minor changes have been made to reflect current case precedent. As a result, numerous references to the Merit Systems Protection Board (MSPB) will be apparent in this text since it is based upon decisions made by MSPB. References to MSPB appeals will generally correlate to appeals to the DAB or an appeal through the grievance procedure, as appropriate.

b. Some agencies are finding the use of abeyance or last chance agreements particularly helpful in dealing with employees with alcohol or drug abuse problems. We begin a discussion of abeyance instruments by showing excerpts from some instruments to serve as examples. Then we will discuss the important characteristics of abeyance and last chance agreements, and how they affect reasonable accommodation.

c. **Sample Instruments**

(1) **Approach 1.** Agency proposes removal, but makes no decision on that proposal. Instead, the agency letter informs the employee that it is holding its decision in abeyance.

(a) **Situation.** In response to the proposal to remove, the employee informed the agency that he was an alcoholic, and that he had just begun participating in the in-patient rehabilitation program to which the agency employee assistance counselors had referred him.

(b) **Agreement Provisions.** The abeyance letter read in relevant part:

1. "Management agrees to afford the employee an opportunity to become a productive and dependable employee."

2. "Employee must participate fully in the (specific) alcohol rehabilitation program, including missing no more than one of the follow-up meetings. Employee must attend two agency Alcohol Anonymous meetings per week."

3. "For a period of 6 months after hospitalization, the employee will be required to show fully satisfactory attendance and performance. Every unscheduled absence must be supported by acceptable documentation establishing an emergency situation. Medical documentation must include a complete diagnosis, which establishes that the employee could not work."

4. "Failure to comply with the preceding will constitute just cause for proceeding with the proposed action."

NOTE: *The abeyance letter was signed by the decision official, and did not require the employee's agreement.*

(c) **Outcome**: The employee stopped going to the follow-up rehabilitation meetings, and the counselors so informed the agency. When the employee also had two subsequent unscheduled, unsupported absences, the agency invoked the agreement. Since the action had been held in abeyance before a decision was made, the agency had to issue a final decision on the charges in the original proposed action. In its decision letter, the agency first cited failure to participate in rehabilitation and the two instances of unsupported, unscheduled absence as violations of the abeyance agreement. Based on these violations, the agency explained that it was proceeding with the proposed action. The agency then assessed the evidence on the original charges, sustained them, decided to remove, and notified the employee that he would be removed in 1 week.

(2) **Approach 2.** Agency issues decision to remove, but holds implementation of decision in abeyance.

(a) **Situation.** Although the agency had referred the employee to alcohol treatment twice before, it wasn't until the employee received a notice of proposed removal for over 80 hours of AWOL that he admitted that he was an alcoholic, and requested reasonable accommodation. The agency's decision letter sustained the charges, found removal warranted, and decided to remove. However, it also said that the agency had decided to hold the removal action in abeyance under specific conditions.

(b) **Agreement Provisions.** The abeyance letter read in relevant part:

"It is my decision that you should be removed from your position, but that this removal be held in abeyance for 1 year from the date you receive this letter, subject to the following: you have no further absences charged to AWOL; you submit documentation of successful completion of the (agency) Employee Assistance Program and the Kaiser Alcohol Abuse Program; your sick leave usage remains under the installation goal; and your performance is at least fully successful. If all the foregoing criteria are met, the action will be cancelled at the end of the 1-year period. Failure to meet any one of these criteria during the 1-year period will result in your immediate removal."

NOTE: *The letter was signed by the decision official and did not require the agreement of the employee.*

(c) **Outcome.** Later, the agency decided that the employee had violated the terms of the agreement and reinstated the action. The decision letter described the specific violations: "On (date) your reported for work at 9:25. You claimed to have forgotten to set your alarm clock. You were charged with 1.5 hours of AWOL. On (date) you did not call in until 12:44. You claimed you could not call earlier because you had no change. You were charged with 4.25 hours of AWOL." (The agency also knew, but did not state in the letter, that the employee had stopped regular participation in the alcohol rehabilitation program.) "it is my decision that you have violated the terms of our agreement and, as such, you will be removed, effective (date)."

(3) **Approach 3.** Employee's removal has been effected, and the action is being appealed. The agency and the appellant reached an agreement to give him one last chance.

(a) **Situation.** The employee was removed for being AWOL and being intoxicated on duty. While preparing for the hearing before MSPB, the appellant informed the agency that he was successfully

participating in a rehabilitation program and requested one last chance. While clearly not required to do so, the agency agreed under certain conditions which the agency believed gave it a quid pro quo.

(b) **Agreement Provisions.** The last chance agreement read in relevant part: "in consideration for reinstatement to the position of (specify position) for a 1 year period, (employee) agrees to the following:

-to participate in (specific) alcohol rehabilitation program, and to maintain satisfactory punctuality, attendance, and good work habits."

"Should (employee) fail to participate in the rehabilitation program, or should the employee's attendance and work habits become unsatisfactory during the 1-year period, the removal will be reinstated. One incident of *AWOL* or of' being intoxicated on duty will be cause for reinstating the removal."

"Appeal rights to the MSPB, and grievance-arbitration procedures are waived during this 1-year period on any disciplinary action against (employee)."

"I clearly understand the last chance opportunity agreement, and fully agree with the terms of the settlement. I know and understand that I have appeal rights to the MSPB. With this agreement, I waive all appeal rights regarding my removal, which was effective (date), including MSPB, grievance, and the EEOC."

NOTE: *The agreement was signed by the employee, employee representative, supervisor, and two witnesses.*

(c) **Outcome.** Two months later appellant was *AWOL* for 2 days. The employee's supervisors went to the employee's home and found the employee intoxicated. The agency removed the employee the next day. MSPB ruled that the agreement had been properly invoked, that the appellant had waived the appeal rights to the MSPB and thus dismissed the case.

d. **Discussion**

(1) As the three examples show, there is no set formula for abeyance or last chance agreements:

(a) They are tailored to the individual situation;

(b) They are fair, and provide some potential consideration or benefit to the employee (generally the agency's agreement to withhold an action which it could take);

(c) They can be imposed unilaterally by the agency, or negotiated with the employee or representative, (if they involve a waiver of rights, the employee must agree);

(d) They can be imposed at several stages of the adverse action process:

1. After a proposal,

2. After a decision, or

3. Even after the action has been effected.

(e) If the conditions are not met, the agency can take immediate action (no need to wait until the end of the period, or to give a new notice).

(2) Abeyance and last chance agreements should contain at least the following:

(a) A time limit and conditions tailored to the situation;

(b) A clear statement of all the agency's requirements of the employee including satisfactory participation in a rehabilitation program and satisfactory conduct;

(c) A description of behaviors that will be considered evidence of compliance or failure to comply with the requirements; and,

(d) An explanation of what the agency will do if the employee fails to comply, and what the agency will do if the employee complies.

(3) When an action is taken based on violation of an abeyance agreement, the following is recommended:

(a) The violation should not become part of the charges, but should be used only to show that the employee violated the agreement and thus triggered the agency's action;

(b) The letter to the employee should clearly describe how the employee violated the provisions of the agreement; and,

(c) The agency should proceed on the basis of the original charges only.

EMPLOYEE/MANAGEMENT RELATIONS

PART III. PROBATIONARY PERIOD ACTIONS

CONTENTS

PARAGRAPH **PAGE**

CHAPTER 1. TITLE 38 PROBATIONARY EMPLOYEES

1. SCOPE III-1
2. RESPONSIBILITIES III-1
3. SUMMARY BOARD REVIEWS III-2
4. OTHER APPROPRIATE PENALTY ACTIONS III-7
5. EMPLOYEE STATUS III-7
6. ABEYANCE AND FIRM CHOICE AGREEMENTS III-8

CHAPTER 2. TITLE 5 PROBATIONARY/TRIAL PERIOD EMPLOYEES

1. SCOPE III-9
2. RESPONSIBILITIES III-9
3. TERMINATION OF PROBATIONERS FOR UNSATISFACTORY PERFORMANCE OR CONDUCT III-9
4. APPEAL RIGHTS TO THE MERIT SYSTEMS PROTECTION BOARD III-9
5. SEPARATION OF PERSONS WHO FAIL TO REGISTER UNDER SELECTIVE SERVICE LAW III-10

APPENDICES

III-A. TITLE 5 – TERMINATION DURING PROBATIONARY PERIOD III-A-1
III-B. SAMPLE NOTICE OF SUMMARY REVIEW III-B-1
III-C. SAMPLE LETTER OF REPRIMAND III-C-1
III-D. SAMPLE LETTER OF ADMONISHMENT III-D-1

PART III. PROBATIONARY PERIOD ACTIONS

CHAPTER 1. TITLE 38 PROBATIONARY EMPLOYEES

1. SCOPE. This chapter contains the policy and procedures needed for taking actions against title 38 employees serving on a probationary period under 38 United States Code (U.S.C.) 7403(b) in the Department of Veterans Affairs (VA). This includes employees appointed under 38 U.S.C. 7401(1), i.e., physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants, and expanded-function dental auxiliaries. The Under Secretary for Health's designee refers to a designee in VA Central Office. This chapter does not apply to employees appointed under 38 U.S.C., chapter 3, 38 U.S.C. 7306, 38 U.S.C. 7401(3), 38 U.S.C. 7405 or 38 U.S.C. 7406.

2. RESPONSIBILITIES

a. **VA Central Office Assignments**

(1) **Authorizing Official.** Appropriate service director and equivalent positions or above

(2) **Review Board.** Appropriate Central Office Professional Standards Board (PSB)

b. **Facility Director**

(1) **Authorizing Official.** Network Director

(2) **Review Board.** Appropriate Central Office PSB

c. **Chief of Staff**

(1) **Authorizing Official.** Facility Director

(2) **Review Board.** Appropriate Central Office Board

d. **Facility Employees, except Assistant/Associate Chiefs, Nursing Service**

(1) **Authorizing Official.** Appropriate Service Chief (or equivalent)

(2) **Review Board.** Local PSB

e. **Assistant/Associate Chiefs, Nursing Service**

(1) **Authorizing Official.** Chief, Nursing Service

(2) **Review Board.** VISN Nurse PSB

NOTE: *For dentists and expanded-function dental auxiliaries, reviews will be conducted by the PSBs listed in VA Handbook 5005.*

NOTE: *If a facility director believes a local PSB meeting the requirements of this chapter cannot be properly constituted, the appropriate VISN board will be asked to complete the probationary review. If there are no VISN boards for the occupation, another facility director may be asked to establish a PSB for this purpose.*

NOTE: *For podiatrists and optometrists, the appropriate service chief is the authorizing official; however, the review will be conducted by the VA Central Office Professional Standards Board.*

f. **Professional Standards Boards.** Professional Standards Boards will review the work records of each employee serving a probationary period in accordance with the provisions of this chapter. The establishment, membership and composition of Professional Standards Boards, as prescribed in VA Handbook 5005, part II, chapter 3, will be applicable to probationary reviews. Members from facilities other than the employee's may be designated to serve on the Board when it is determined to be appropriate or necessary.

g. **Supervisors.** Supervisors will continually review the services of employees serving in a probationary status. Supervisors must assure by active measures that the work records of unsatisfactory employees or of those whose services are merely borderline are promptly referred to appropriate officials for action.

h. **Chief, Human Resources Management, or Designee.** The Chief, Human Resources Management, or designee, is responsible for:

(1) Assisting management officials with probationary procedures.

(2) Reviewing proposed probationary actions for conformance with Department and VHA policies and procedures.

(3) Advising employees about probationary procedures and rights.

(4) Serving as technical advisor to Boards. This includes advising Board members on policies and procedures related to conducting probationary reviews.

(5) Ensuring that copies of permanent records relating to periodic and summary reviews are included in the Health Care Provider Credentialing and Privileging Records of personnel with clinical privileges.

3. SUMMARY BOARD REVIEWS

a. **Purpose.** Summary reviews are limited to situations where summary separation from Federal service may be justified. Officials identified in paragraph 2a-2e above are responsible for deciding whether to conduct a summary review of an employee's services. Supervisors may initiate requests for summary reviews at any time during the probationary period.

b. **Review Boards.** Summary reviews will be conducted by the Professional Standards Boards listed in paragraph 2 above. Persons in a position to prejudice the action of a Board, such as an employee ' s immediate or second level supervisor, may not serve on the Board.

c. **Special Proficiency Report.** A special Proficiency Report may be initiated at any time. If an employee to be reviewed under this paragraph has not received a Proficiency Report within the three months prior to the summary review, a special Proficiency Report should be completed in accordance with VA Handbook 5013, Performance Management Systems.

d. **Employee Rights.** Employees subject to summary Board review have the right to:

(1) Advance written notice of the Board review.

(2) Review documents relied upon by officials in initiating or recommending a summary Board review, subject to applicable disclosure restrictions.

(3) Impartial review by the Board.

(4) Reply orally and/or in writing to the Board concerning the reasons for the review.

(5) Be represented by an individual of the employee's choice, provided the choice would not create a conflict of interest. A summary review is not an adversarial procedure. The representative's role is limited to assisting the employee in exercising the right to reply orally and/or in writing to the reasons for the review. Any responses to requests for information by the Board during the review process are considered part of the employee's reply. Accordingly, the employee's representative may assist in such matters. **NOTE:** *Because summary reviews deal with issues related to professional competence or conduct and peer review, a union representative is not entitled to be present at a summary review except when serving as the employee's personal representative.*

e. **Notice to Employee of Board Review.** Normally, the employee will be given 10 to 14 calendar days notice that a summary review is being conducted. The notice, which will be in writing and signed by the Chairperson of the Board, will inform the employee of the following:

(1) The time, date, and place of the proposed review;

(2) The reasons why the summary board is being done with sufficient detail for the employee to clearly understand why he or she may not be fully qualified and satisfactory; and

(3) The fact that while conducting the review, the Board will use available records and information furnished by the employee and others who may be called by the Board. The Board will issue findings and recommend the employee's retention or separation.

(4) The employee's rights in the review process.

(5) A date, normally no less than 3 workdays before the Board review date, by which the employee must submit any written reply and/or notify the Chairperson of the Board whether the employee will

appear personally before the Board and whether the employee will be accompanied by a representative. The employee will be asked to furnish the name, address, and occupation of any representative.

(6) That the Chief, Human Resources, or designee, is available to advise the employee about probationary review policies and procedures.

(7) That the employee will be notified of the outcome of the review.

NOTE: *Additional evidence that forms the basis for new reasons upon which to base the summary review acquired after the notice of summary review has been issued will not be considered in the summary review unless the notice of summary review has been reissued. The employee or employee's representative shall be provided with copies of any reissued notice of summary review.*

f. **Conduct of Board Review**

(1) The primary purpose of the Board in conducting a summary review is to obtain the available facts and determine whether the employee is fully qualified and satisfactory. Interviews with the employee, supervisors, or others should be conducted in an informal manner.

(2) Oaths or affirmations are not required in connection with the Board review.

(3) When the employee attends the review, the Chairperson will remind the employee of the reasons and the legal authority for the review, which were included in the notice to the employee.

(4) All members of the Board will be present throughout the entire review.

(5) A verbatim recording of the review will not be made unless the Chairperson deems it necessary. If however, a verbatim recording is made, it will be appended to the final board action upon completion.

(6) The Chief, Human Resources, or designee, will serve as a technical adviser to the Board. The Chairperson may also obtain technical or legal assistance from other VA employees. Persons who will advise or assist the Board cannot serve on the Board.

(7) To obtain essential facts, the Chairperson may call persons before the Board to answer questions that may assist the Board in its review. This includes persons who are believed to possess pertinent information about the employee or the circumstances which led to the review.

(8) Ordinarily, VA patients are not to be called upon for information or otherwise be involved in Board reviews. Patients, with their consent, may be witnesses when information from them is considered essential and there has been a medical determination that the patient has the capacity to testify and that appearance as a witness will not be detrimental to the patient's health or welfare.

(9) Only Board members are entitled to be present when an individual is being interviewed, except that an employee ' s representative may be present while the employee is being interviewed. Employees or others who may be called upon to furnish information will not be subject to cross-examination, and the Chairperson of the Board will ensure that this does not occur.

(10) If an allegation of discrimination based on race, color, religion, sex, age, disability, or national origin is raised at any stage of a review by a Board, the employees will be informed that the matter may be brought to the attention of an Office of Resolution Management counselor. After such notification, the probationary review will be completed. If the decision is to separate the probationer, the separation will not be delayed because of a discrimination complaint.

g. **Findings and Recommendations of Board.** Upon completion of the review, the Board will meet in closed session to discuss its findings and make its recommendations. The Board may recommend separation or retention of the employee. Findings and recommendations of the Board will be recorded on VA Form 10-2543, Board Action. The Board Action form will be prepared in triplicate to include a brief, but concise summary of information obtained through interviews and records that the Board determines to be directly relevant to the service or conduct of the employee, a copy of any recorded transcript of the proceeding, and other pertinent documents or exhibits. The employee, on request, will be furnished a copy of the summary report of the Board proceedings, along with a transcript of any verbatim recording.

h. **Action on Board Recommendations**

NOTE: *The administrative review and action on Board recommendations specified in this paragraph does not apply to VHA facilities in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota. The recommendations of Summary Review Boards conducted at facilities in these states are governed by the Board. While notification to the employee of any decision of the Summary Review Board should be signed by an appropriate official, such notification should reflect that the decision was made by the Board.*

(1) **Employees Other Than Chiefs of Staff, Facility Directors, and Other Key VHA employees**

(a) The completed Board action and all related documents will be sent to the Chief of Staff (or Nurse Executive, as appropriate) for review. (This includes summary reviews completed by VISN or Regional Professional Standards Boards, and summary reviews conducted at other VA facilities, including VA Central Office.) The Chief of Staff (or Nurse Executive) will comment on the Board recommendations and send these comments, the Board Action, and related documents to the facility Director.

(b) The facility Director, or designee, may approve, disapprove, or modify the Board's recommendation on the Board Action. In making this decision, the facility Director may seek additional advice and information, if needed.

(2) **Chiefs of Staff**

(a) The Central Office Board will forward the board action containing their recommendations, along with all related documents, to the Network Director for a final decision.

(b) The Network Director may approve, disapprove, or modify the Board’s recommendation on the Board Action form. In making this decision, the Network Director may seek additional advice and information.

(3) **Facility Directors.** The Board Action and all related documents will be forwarded to the Under Secretary for Health for review. The Under Secretary for Health shall, in consultation with appropriate VHA officials, comment on the Board recommendation and send these comments, the Board Action, and related documents through the Deputy Assistant Secretary for Human Resources Management to the Secretary for action. The Secretary may accept, reject, or modify the recommendation.

(4) **VA Central Office Employees.** The Board Action and all related documents will be forwarded through channels to the Office of Management Support (10A2). The Office of Management Support will forward the recommendation to the Under Secretary for Health who may approve, disapprove, or modify the recommendation.

(5) **Separations Requiring VHA Approval/Review.** All field facility recommendations for separation during probation requiring VHA summary review or approval (e.g., actions related to facility directors and requests for summary reviews for podiatrists and optometrists) are to be sent through the appropriate Network (10N/051). The material forwarded will include the Director's recommendation (where appropriate) and any other applicable comments; VA Form 10-2543, Board Action, (in duplicate); one copy of all related documents, including one copy of all Proficiency Reports prepared during the probationary period; and the employee's personnel folder.

i. **Action by Approving Authority.** The designated official will indicate final approval or disapproval of a Board finding or recommendation for retention by completing items 14, 15, and 16, except at VHA facilities in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, where recommendations of Summary Review Boards are approved by the Board and so noted on the board action form. If the recommendation made by the Board is modified by the designated official, the Board's recommendation will be disapproved, with the annotation that a memorandum regarding the modification is attached.

j. **Effecting Approved Recommendations**

(1) **Separation.** Separations under these procedures must be effected before completion of the probationary period. The employee will normally be given 15 calendar days notice, but the notice period may be shortened if necessary to effect the separation before completion of the probationary period.

(2) **Retention.** The employee will be notified if retention in VHA has been approved. A recommendation for retention does not preclude subsequent initiation of a summary review prior to completion of the probationary period.

k. **Reporting Separated Licensed Appointees to State Licensing/Registration Boards or License Monitoring Entities.** Approving officials are responsible for determining whether to report an individual who is separated as a result of the review, or resigns, or retires prior to the completion of the review process, to appropriate licensing/registration boards or license monitoring entities. In making such determinations, approving officials are responsible for ensuring adherence to the required procedures and time standards for VA-initiated reporting, prescribed in VHA Handbook 1100.19.

l. **Records.** All summary review board actions and associated proficiency reports are to be filed in the professional standards board folder whether or not the employee is separated or retained.

4. OTHER APPROPRIATE PENALTY ACTIONS

a. **General.** While the provisions of part II, this handbook, Disciplinary Procedures Under title 38, are not applicable to employees who have not completed the probationary period, in certain cases imposing a penalty action may be appropriate.

(1) These actions may be imposed during the probationary period to correct conduct deficiencies which are not serious enough to justify separation of an employee from the service.

(2) Penalty actions may be imposed as the result of a Professional Standards Board review of an employee's services or by supervisory officials independent of Board action if the employee's action(s) do not warrant peer review. Such actions may include Admonishments and Reprimands (see samples in appendix). Such actions may be issued without proposal letters.

b. **Approvals**

(1) The facility Director may designate supervisory officials at or above the service chief level to approve actions for probationary employees.

(2) The appropriate Network Director approves admonishments and reprimands for network employees, chiefs of staff and facility directors in their probationary periods. Appropriate officials at or above the service director level may approve admonishments and reprimands for VA Central Office employees in their probationary periods.

5. EMPLOYEE STATUS

a. **Status During Review.** In cases involving reviews under the provisions of this chapter, employees will be retained in a pay and active duty status in their current assignment. However, in those instances where it is determined that the employee's continued presence at the work site might pose a threat to employees or others, result in loss of or damage to Government property or otherwise jeopardize legitimate Government interests, the following alternatives may be considered:

(1) Detail the employee to another assignment;

(2) Allow the employee to take leave, or carry the employee as absent without leave if the employee has absented himself or herself from the work site without requesting leave;

(3) As a last resort, the employee may be placed in a paid non-duty status for a brief period pending a decision on whether a summary review is appropriate.

b. **Clinical Privileges.** At the initiation of a Summary Review board, careful consideration should be taken to determine whether a review of the employee's clinical privileges is also appropriate.

6. ABEYANCE AND FIRM CHOICE AGREEMENTS. A probationary separation may be held in abeyance if, at the request of the employee, the official authorized to approve the probationary separation approves an opportunity for the employee to participate in counseling or treatment. In affording the opportunity for rehabilitation of a disabling condition, applicable provisions of VA human resources and local policies will be followed. In such cases a firm choice or abeyance agreement may be entered into which provides that the employee shall seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973. An employee must complete counseling or treatment in sufficient time to provide an opportunity to review the employee's performance prior to the end of the probationary period.

CHAPTER 2. TITLE 5 PROBATIONARY/TRIAL PERIOD EMPLOYEES

1. SCOPE. This chapter contains the policy and procedure needed for taking actions against title 5 employees serving on a probationary period under 5 United States Code (U.S.C.), chapter 315 or 5 U.S.C., chapter 307 in the Department of Veterans Affairs (VA). This includes employees appointed under 38 U.S.C. 7401(3), i.e., certified and registered respiratory therapist, pharmacist, licensed and vocational practical nurse, physical therapist, and occupational therapist. General information regarding title 5 probationary periods is contained in VA Handbook 5005, part II, chapter 2, paragraph 9. Information concerning supervisory and Senior Executive Service probationary periods may be found in VA Handbooks 5005, Staffing, and 5027, Senior Executive Service, respectively.

2. RESPONSIBILITIES

a. Managers/Supervisors will continually review the services of employees serving in a probationary status. Supervisors must assure by active measures that the work records of unsatisfactory employees or of those whose services are merely borderline are promptly referred to appropriate officials for action.

b. The Chief, Human Resources Management, or designee, is responsible for:

(1) Assisting management officials with probationary procedures.

(2) Reviewing proposed probationary actions for conformance with Department and VHA policies and procedures.

(3) Advising employees about probationary procedures and rights.

3. TERMINATION OF PROBATIONERS FOR UNSATISFACTORY PERFORMANCE OR CONDUCT

a. VA may terminate an employee serving on a probationary or trial period because his/her work performance or conduct fails to demonstrate fitness or qualifications for continued employment. Employment is to be terminated by notifying employees in writing as to why they are being separated and the effective date of the action. The information in the notice as to why an employee is being terminated shall, as a minimum, consist of the conclusions as to the inadequacies of his performance or conduct.

b. Probation ends when the employee completes his or her scheduled tour of duty on the day before the anniversary date of the employee's appointment. For example, when the last workday is a Friday and the anniversary date is the following Monday, the probationer must be separated before the end of the tour of duty on Friday since Friday would be the last day the employee actually has to demonstrate fitness for further employment.

4. APPEAL RIGHTS TO THE MERIT SYSTEMS PROTECTION BOARD. Probationary employees may appeal to the Merit Systems Protection Board in writing the decision to terminate them for unsatisfactory performance or conduct based upon the following:

a. **Discrimination.** An employee may appeal to the Board under this chapter a termination not required by statutue which the employee alleges was based on partisan political reasons or marital status.

b. **Improper Procedure.** A probationer may appeal on the grounds that the termination was not effected in accordance with the procedural requirements of 5 CFR 315.805.

5. SEPARATION OF PERSONS WHO FAIL TO REGISTER UNDER SELECTIVE SERVICE LAW. An individual who is serving under a probationary appointment made on or after November 8, 1985, and is not exempt from registration, will be terminated under 5 CFR, part 300, subpart G if he has not registered as required, unless:

a. The individuals registers,

b. The individual is no longer eligible to register,

c. OPM determines in response to his explanation that his failure to register was neither knowing nor willful.

APPENDIX A.
TITLE 5 - TERMINATION DURING PROBATIONARY/TRIAL PERIOD

DATE
FOR OFFICIAL USE ONLY

Employee's Name
Service

SUBJECT: Termination During Probationary/Trial Period

1. At the time of your Career-Conditional/Veterans Readjustment Appointment on {DATE}, as a {POSITION TITLE}, you were informed that your first year of employment would be subject to a probationary/trial period. During this time, supervisors are required to study their employees' potential closely to determine whether they are qualified for satisfactory government service. When it becomes apparent that an employee's conduct, general character traits or capacity do not meet the requirements for satisfactory service, the supervisor is required to initiate action to separate the employee.

2. The {RECOMMENDING OFFICIAL/SERVICE), has recommended that you be terminated from your position for failure to qualify during your probationary/trial period. Your discharge is due to {INSERT REASON, E.G., UNACCEPTABLE ATTENDANCE}.

CITE REASON(S)

3. The effective date of your discharge will be {DATE}. You must properly clear the facility, turn in any government property and clear any indebtedness, prior to the release of your final paycheck.

4. If you feel this action is based on discrimination because of race, color, religion, sex, national origin, age or disabling condition, you may appeal this action by contacting the Office of Resolution Management (ORM) at 1-888-737-3361 within 45 calendar days of the date you receive this letter.

5. If you believe this termination is based on discrimination because of marital status or partisan political reasons, you may appeal this action to the Merit Systems Protection Board. Your appeal must be submitted in writing by certified mail or in person at any time after you receive this letter, but not later than 30 calendar days after the discharge has been effected. Copies of the Rules and Regulations of the Merit Systems Protection Board and Optional Form 283 are enclosed.

6. If you allege your termination is based on discrimination which includes reasons in both paragraphs 4 and 5 above, you may appeal to the Merit Systems Protection Board within 30 days, using the same procedure as set forth in paragraph 5.

7. If you have any questions concerning the above, please contact the {RECOMMENDING OFFICIAL/CHIEF HRMS}.

SIGNATURE

APPENDIX B. SAMPLE NOTICE OF SUMMARY REVIEW

FOR OFFICIAL USE ONLY

(Employee Name)
(Service)
VA Medical Center
(City), (State) (Zip)

SUBJECT: Summary Probationary Review and Convening of ___(type of Board)___ PSB
(Professional Standards Board)

1. This is to notify you that a PSB will be held on __(Date)__ at __(Time)__ in __(Place)__ to conduct a summary review of your performance during your probationary period and make recommendations concerning your retention in or separation from the Veterans Health Administration. The review is being held pursuant to 38 U.S.C. (United States Code) section 7403(b), and will be based upon available records and information furnished by you and others who may be called by the PSB.

2. The PSB is to review the following alleged deficiencies in your performance (and/or conduct, if appropriate): (Insert reasons for the review. The statement of reasons should be brief, but in sufficient detail for the employee to clearly understand why he or she may not be considered fully qualified and satisfactory.)

3. You are entitled to:

a. Review documents relied upon in initiating or recommending this summary Board review, subject to applicable disclosure restrictions;

b. An impartial review by the PSB;

c. Respond orally and/or in writing to the PSB concerning the reasons for the review; and

d. Be represented by an individual of your choice, provided the choice would not create a conflict of interest. This is not an adversarial proceeding, so your representative's role will be limited to assisting you in exercising your right to respond orally and/or in writing to the reasons for the review. However, any response to a request for information from the PSB during its review is considered a part of your reply. Accordingly, your representative may assist you in these matters.

4. Please notify me by (insert date normally no less than 3 workdays before the Board review date) whether you will attend the PSB meeting in person, submit a written statement, or both. Please include in your notice the name, address, and occupation of your representative, should you choose to have one. If you wish to submit a written statement to the Board, it is also to be submitted to me by the above date.

5. After review, the PSB will forward its recommendations to the {INSERT APPROPRIATE APPROVING OFFICIAL} for final decision. If the PSB finds you not to be fully qualified and

satisfactory, your separation will be recommended. You will be advised of the results of this review in writing.

6. Additional information about these procedures may be obtained by contracting (insert name of the appropriate human resources manager), at extension _____.

_____
(Signature)

Name (of Chairperson)
Chairperson,
Professional Standards Board

NOTE: A*pproving officials are responsible for ensuring adherence to the required procedures and time standards for VA initiated reporting of separated licensed healthcare employees to license monitoring entities as prescribed in VHA Manual M-2, Part I, Chapter 34.*

APPENDIX C. SAMPLE LETTER OF REPRIMAND

FOR OFFICIAL USE ONLY

(Employee Name)
(Service)
VA Medical Center
(City), (State) (Zip)

SUBJECT: Reprimand

1. You are hereby reprimanded for (example: being absent without leave for 8 hours on date and 8 hours on date. Your absence on both of these occasions was not authorized by your supervisor as required.)

2. A copy of this reprimand and any written reply that you may wish to make will be filed in your personnel folder. This reprimand may remain in your folder from 2 to 3 years, depending on your future conduct. It will be destroyed when it is withdrawn. (For reprimands for patient abuse, substitute "...may remain in your folder as long as you are with the Veterans Health Administration, or it may be withdrawn and destroyed at any time after 3 years, depending on your future conduct.")

NOTE: *Use the following paragraph for all penalty actions related to professional conduct or competence, and penalty actions for reasons other than professional conduct or competence if the employee is not covered by a negotiated grievance procedure.*

3. If you believe that this reprimand is unjustified, you may appeal the action under the VA grievance procedure. Your formal grievance must be submitted through your supervisor within 15 calendar days after you receive this reprimand. For further information about the VA grievance procedure, you may consult the Chief, Human Resources Management.

_____
(Signature and title of appropriate official)

APPENDIX D. SAMPLE LETTER OF ADMONISHMENT

FOR OFFICIAL USE ONLY

(Employee Name)
(Service)
VA Medical Center
(City), (State) (Zip)

SUBJECT: Admonishment

1. You are hereby admonished for (example: being absent without leave for 8 hours on date without the required authorization by your supervisor.)

2. A copy of this admonishment and any written reply that you wish to make will be filed in your personnel folder. This admonishment may remain in your folder from 6 months to 2 years, depending on your future conduct. It will be destroyed when it is withdrawn. (For admonishments of patient abuse, substitute "...may remain in your folder as long as you are with the Department of Veterans Affairs, or it may be withdrawn and destroyed at any time after 2 years, depending on your future conduct.")

NOTE: *Use the following paragraph for all penalty actions related to professional conduct or competence, and penalty actions for reasons other than professional conduct or competence if the employee is not covered by a negotiated grievance procedure.*

3. If you believe that this admonishment is unjustified, you may appeal the action under the VA grievance procedure. Your formal grievance must be submitted through your supervisor within 15 calendar days after you receive this admonishment. For further information about the VA grievance procedure, you may consult the Chief, Human Resources Management.

_____
(Signature and Title of appropriate official)

EMPLOYEE/MANAGEMENT RELATIONS

PART IV. EMPLOYEE GRIEVANCES AND ADMINISTRATIVE APPEALS

CONTENTS

PARAGRAPH PAGE

CHAPTER 1. GENERAL

1. POLICY IV-1
2. RESPONSIBILITIES IV-2

CHAPTER 2. TITLE 5, TITLE 38 (HYBRID) EMPLOYEES APPOINTED UNDER 38 U.S.C. 7401(3)

1. SCOPE IV-3
2. DEFINITIONS IV-3
3. OFFICIALS AUTHORIZED TO SETTLE GRIEVANCES IV-4
4. REPRESENTATION IV-5
5. TIME LIMITS FOR PROCESSING GRIEVANCE IV-5
6. INFORMAL GRIEVANCE PROCEDURE IV-6
7. FORMAL GRIEVANCE PROCEDURE IV-7
8. REJECTION OR CANCELLATION OF A GRIEVANCE IV-9
9. ROUTING FORMAL GRIEVANCES IV-10
10. DECISION ON GRIEVANCES IV-12
11. ADMINISTRATIVE APPEALS IV-13
12. TRAVEL EXPENSES IV-13
13. INFORMING EMPLOYEES IV-13
14. MATTERS EXCLUDED FROM COVERAGE IV-13

CHAPTER 3. TITLE 38 GRIEVANCES

1. SCOPE AND AUTHORITY IV-17
2. REFERENCES IV-17
3. OFFICIALS AUTHORIZED TO SETTLE GRIEVANCES IV-17
4. REPRESENTATION IV-18
5. TIME LIMITS FOR PROCESSING A GRIEVANCE IV-19
6. INFORMAL GRIEVANCE PROCEDURE IV-20
7. FORMAL GRIEVANCE PROCEDURE IV-20
8. GRIEVANCES OVER DISCIPLINARY AND ADVERSE ACTIONS IV-21
9. GRIEVANCE FILE IV-22
10. REJECTION, RETURN, OR CANCELLATION OF A GRIEVANCE IV-23
11. TECHNICAL REVIEW IV-24
12. REVIEW BY GRIEVANCE EXAMINER IV-24
13. DECISION ON GRIEVANCE IV-26

CONTENTS-CONTINUED

PARAGRAPH **PAGE**

CHAPTER 3. TITLE 38 GRIEVANCES - Continued

14. TRAVEL EXPENSES IV-27
15. INFORMING EMPLOYEES IV-27
16. MATTERS EXCLUDED FROM COVERAGE UNDER THE AGENCY GRIEVANCE PROCEDURE IV-27

APPENDICES

IV-A. SAMPLE GRIEVANCE FORMAT IV-A-1
IV-B. GRIEVANCE EXAMINER'S REPORT IV-B-1
IV-C. ADMINISTRATION OF OATHS – TITLE 38 ..... IV-C-1

PART IV. EMPLOYEE GRIEVANCES AND ADMINISTRATIVE APPEALS

CHAPTER 1. GENERAL

1. POLICY

a. **General**

(1) It is the policy of VA to identify, prevent, and make reasonable efforts to resolve employee dissatisfactions. Efforts will be made to resolve grievances informally. However, the filing of formal grievances is not to be discouraged or prevented.

(2) All individuals involved in grievance proceedings, whether employees, employee representatives, or members of management, are expected to be candid and to act in good faith, not only in following the letter of the grievance procedure, but in observing the underlying spirit and intent in attempting to resolve dissatisfactions. Supervisors are expected to give full and fair consideration to employee complaints and causes of dissatisfaction.

(3) Objective consideration of complaints or criticism affords a means of focusing attention on conditions which may require corrective action. It also provides a means within the organization of initiating and effecting desirable changes as well as taking preventive action.

(4) Fairness and promptness in handling grievances help to create a healthy climate for management-employee relationships and to provide effective services to veterans and beneficiaries.

b. **Freedom from Reprisal.** No employee will take or threaten to take any act of reprisal against another employee because the employee has exercised or expressed an intention to exercise rights provided by this part. Furthermore, no employee or employee representative will at any time be restrained, coerced, interfered with, discriminated against, or in any way treated prejudicially in connection with the exercising of rights under this grievance procedure.

c. **Consultation in Presenting Grievances.** An employee is entitled to communicate with and seek technical or procedural advice from any appropriate official including, but not limited to Human Resources Management staff, immediate and higher level supervisors, and Equal Employment Opportunity (EEO) Counselors.

d. **Official Time.** Grievants and their VA-employed representatives will have a reasonable amount of official time to present grievances if otherwise in a duty status.

e. **Informal Resolutions.** Nothing in these procedures shall prohibit reasonable attempts to resolve, at any time, a grievance that is being processed. Informal resolutions are encouraged at any stage of the grievance process. Management should explore alternative solutions to resolve employee grievances at the earliest stage possible since informal resolutions often avoid unnecessary costs related to lost productivity, poor morale, and diminished services.

f. **Nonconformity with Procedure.** Every effort will be made by both management and employees to conform to the prescribed grievance policy and procedure. However, minor technical violations, whether made by management or the employee, which do not affect the general equity with which a case is presented or handled, will not preclude proceeding with a grievance, nor invalidate any action or decision taken in connection with the grievance.

2. RESPONSIBILITIES

a. **The Under Secretary for Health and Other Key Management Officials.** The Under Secretary for Health and other key management officials are responsible for delegating authority to appropriate officials to decide grievances. The Under Secretary for Health and facility directors, as appropriate, will designate such officials in writing. (For title 38 employees only.)

b. **Management.** Management officials will be responsible for administering the VA grievance procedure and for bringing it to the attention of employees.

c. **Supervisors.** Supervisors are responsible for listening to employee complaints and attempting to clarify and make reasonable adjustments to address problems that arise in daily relationships with employees.

d. **Human Resources Officers.** Human Resources Officers and their staffs will provide guidance and technical advice to management and employees regarding the administration of the grievance procedure.

e. **Grievance Examiner.** Grievance examiners are responsible for making an impartial and objective inquiry regarding the merits of a grievance and for providing a report of findings and recommendations to the decision official as well as to all parties involved.

CHAPTER 2. TITLE 5 AND HYBRID TITLE 38 EMPLOYEES

1. SCOPE

a. **General.** This chapter establishes policies, principles, and procedures for the presentation and consideration of employee grievances.

b. **Employee Coverage.** This grievance procedure covers all VA employees, **except** for those listed in subparagraph c below.

c. **Exclusions.** The following employees are excluded from coverage:

(1) A noncitizen appointed under Civil Service Rule VIII, section 8.3 of title 5, Code of Federal Regulations;

(2) An alien appointed under section 1471(5) of title 22, United States Code;

(3) A VA physician, dentist, nurse, or other employee appointed under chapter 73 or 74 of title 38, United States Code. **This exclusion does not apply to full-time permanent Licensed Practical or Vocational Nurses, Licensed Physical Therapists, Certified or Registered Respiratory Therapists, Occupational Therapists and Pharmacists appointed under 38 U.S.C. 7401(3)**;

(4) An individual paid from funds as defined in section 2105(c) of title 5 (not applicable to the VA) or section 4202(5) of title 38, United States Code i.e., Excepted Service Veterans Canteen employees.

2. DEFINITIONS

a. **Grievance.** A request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction relating to employment which is subject to the control of agency management. Matters not covered by the grievance procedure are listed in paragraph 14 of this chapter.

b. **Employee.** May include a former employee of VA for whom a specific remedy can still be appropriately provided. For example, a former employee charged with 8 hours absence without leave (AWOL) who has requested that the 8 hours of pay be restored. Former employees must have filed a timely grievance in accordance with the provisions of this chapter in order to receive consideration.

c. **Bargaining Unit Employee.** An employee included in an appropriate unit as determined by the Federal Labor Relations Authority, for which a labor organization has been accorded exclusive recognition.

d. **Personal Relief.** A specific remedy directly benefiting the grievant, but may not include a request for disciplinary or other action affecting another employee.

e. **Grievance File.** A separate file subject to the Privacy Act which contains all documents related to the grievance. This file will include, but is not limited to, statements of witnesses, records or copies thereof, the report of the hearing when one is held, statements made by the parties to the grievance, and the decision.

f. **Decision Official.** An official designated to (1) receive and attempt to adjust formal grievances; (2) refer formal grievances for further review and inquiry; and (3) decide formal grievances based on the results of impartial reviews and recommendations.

g. **Days.** Calendar days.

3. OFFICIALS AUTHORIZED TO SETTLE GRIEVANCES

a. **Informal Grievance Procedure.** Responses required at the informal stage of the grievance will be made by the immediate supervisor or official with authority to settle the issue.

b. **Formal Grievance Procedure.** Authority to make a decision when the formal stage of the grievance procedure is reached will be exercised as follows:

(1) **Grievances of Facility Employees.** The facility Director will be the decision official on a grievance from an employee under his/her jurisdiction provided the matter to be resolved comes under the Director's authority. The Administration Head, Deputy Under Secretary, or Staff Office Director is responsible for designating an appropriate official on a case-by-case basis who may decide the formal grievance of an employee occupying a field position which is centralized to the Secretary or to a Administration Head, Deputy Under Secretary or Staff Office Director. The individual designated to decide the formal grievances of occupants of centralized positions should be the lowest official in the supervisory line who has authority to settle the grievance.

(2) **Grievances of Central Office Employees and Facility Employees Not Under the Jurisdiction of the Facility Director.** The Secretary, Under Secretary, Deputy Under Secretary, or Administration Head or Staff Office Director, as appropriate, is responsible for designating an appropriate official on a case-by-case basis who may decide the formal grievance of an employee in Central Office or an employee in the field who is not under the jurisdiction of a facility director.

(3) **Exceptions**

(a) The normal decision official, as designated in subparagraph (1) and (2) above, will not decide the grievance when:

1. The decision official is the official with whom the employee would take up the initial grievance in the informal stage;

2. The decision official does not have the authority to make a determination on the grievance issues; or

3. The decision official made the decision or took the action on which the employee's grievance is based.

(b) In these instances, the decision official will refer the grievance through channels, and another official will be designated to make the grievance decision.

4. REPRESENTATION

a. **Election of Representation.** An employee may present a grievance with or without representation.

b. **Designation of Representative.** An employee has the right to choose to be accompanied, represented, and advised by a representative of choice at any stage of the procedure. If a grievance is presented under the formal grievance procedure, designation of a representative will be in writing and will be submitted to the decision official. Any change of representative will be in writing.

c. **Disallowance of Designated Representative.** A representative may be disallowed by a line official because of priority needs of the service; unreasonable cost to the Government; conflict of position; or conflict of interest. The disallowance of a representative will be in writing, and will be issued within 5 days of receipt of the employee's designation of representative. The notice of disallowance will inform the employee of the basis on which the determination to disallow is made and the right of the employee to challenge the disallowance.

d. **Challenge of Disallowance of Designated Representative.** If informed that a designated representative has been disallowed, an employee may, within 5 days, challenge the disallowance in writing to the decision official. A challenge should state the reason for disagreeing with the disallowance and whether the employee wishes to proceed with the grievance or wait for a decision on the challenge. A final decision on a challenge of disallowance of a representative will be made no later than 10 days after receipt of the challenge by the appropriate official.

e. **Change of Designated Representative.** In the event that an employee changes representatives during the proceeding, any disallowance of representative or challenge regarding a disallowance will be resolved in the above manner.

5. TIME LIMITS FOR PROCESSING GRIEVANCES

a. **Time Limits.** A decision on a grievance will be issued within the shortest time frame possible. To ensure timely and orderly processing, the following time limits are established for each stage of the grievance procedure:

(1) 15 days from the date of the incident or action on which the grievance is based for the employee to initiate grievance.

(2) 10 days for completion of action under the informal procedure.

(3) 10 days for the employee to file a written grievance under the formal procedure after completion of action under the informal procedure.

(4) 10 days for the deciding official to adjust or refer a grievance for inquiry by an examiner or for technical review after an employee files a formal grievance.

(5) 30 days for completion of the inquiry when the examiner is appointed locally.

(6) 45 days for completion of the inquiry when the examiner is appointed by Central Office.

(7) 30 days for Central Office to issue technical reviews when requested to do so by the decision official.

(8) 15 days for issuance of the decision after the decision official receives the examiner's report of findings and recommendations or the Central Office technical review, unless the decision official takes exception to the findings and recommendations of an examiner.

b. **Delays in Processing Grievances.** Management officials should ensure that grievances are processed promptly. Management delays in any stage of the grievance procedure beyond the prescribed time limits will be explained to the employee and the employee's representative and will be documented for the record. Such delays should be rare and held to a minimum. If the employee delays in any stage of the grievance procedure, management will determine whether there was good cause and whether the grievance should continue to be processed. Such delays and explanations will be documented for the record. This includes any delay created by the denial of an employee's representative or by challenge to the denial.

6. INFORMAL GRIEVANCE PROCEDURE

a. **Presenting a Grievance Under the Informal Procedure.** An employee desiring consideration of a grievance must first seek informal adjustment of the matter through supervisory channels. The employee's request for informal adjustment of a grievance should be made as soon as possible, but not later than 15 days after the date of the incident or action upon which the grievance is based, or the date upon which the employee became aware of, or should have become aware of, the incident or action upon which the grievance is based. The initial presentation, which may be oral or written, is normally made to the immediate supervisor. Subsequent presentations must be in writing. If the grievance is presented orally, the employee must make clear that a grievance is being presented, in order to distinguish grievances from mere inquiries. Supervisors who receive oral grievances will prepare a written summary of the oral presentation and will notify the grievant of the decision in writing.

b. **Grievance on Continuing Condition or Practices.** An employee may present a grievance concerning a continuing practice or condition at any time. Situations caused by actions which were taken or were identified as of a given date (e.g., admonishments, reprimands, reassignments, shift or duty assignments,) are not considered continuing conditions for these purposes despite any continuing effects they may have.

c. **Resolving a Grievance.** The supervisor to whom a grievance has been presented for informal adjustment will attempt to resolve it as expeditiously as possible, seeking the advice and assistance of others where necessary, and will give the employee a written decision on the matter within 10 days from

the date of the request for informal consideration. If the relief sought is not granted, the employee should be advised of the right to present the grievance under the formal procedure.

d. **Mandatory Use of the Informal Procedure.** The employee must complete processing under the informal procedure before a grievance concerning the same matter will be accepted for processing under the formal procedure.

7. FORMAL GRIEVANCE PROCEDURE

a. **Presenting a Grievance Under the Formal Procedure.** If the employee is not satisfied with the informal answer, he/she may present the grievance in writing under the formal procedure. The formal grievance must be filed through supervisory channels within 10 days after receipt of the answer under the informal procedure. The time limit may be extended by management when good cause is shown by the employee. Normally, the formal grievance should be submitted through the employee's immediate supervisor.

b. **Contents of a Formal Grievance**

(1) The formal grievance will be in writing, will contain sufficient detail to identify and clarify the basis for the grievance, and will specify the personal relief requested by the employee. It will contain the following information:

(a) The specific action or incident on which the grievance is based; the date the action or incident occurred (if known), and the date the employee first learned of the action (if appropriate).

(b) The reasons for which the employee believes that the action was unjustified or that he/she was treated unfairly; and/or the specific policy (agency, facility, etc.), written agreement, or provision violated and how it affected the employee.

(c) The corrective action desired by the employee.

(2) A sample format for an employee's formal grievance is contained in appendix IV-A to this handbook.

(3) If the formal grievance does not contain a statement of the grievance giving essentially the information specified above, the decision official will return the grievance to the employee so that the necessary information may be furnished. If the employee fails to provide necessary information after being provided with an opportunity to do so, the decision official should reject the grievance following procedures contained in paragraph 8 of this chapter.

c. **Group Grievances.** When a group of employees has an identical formal grievance, it will be considered in the same manner as an individual complaint and the decision will be binding on all members of the group. The group will select one individual case for processing under the provisions of the formal grievance procedure.

d. **Routing Formal Grievances** The immediate supervisor or other official receiving the employee's formal grievance will refer it promptly through channels to the appropriate decision official.

e. **Grievance File**

(1) When a formal grievance is submitted, the Human Resources Officer will be notified promptly by the appropriate decision official.

(a) The Human Resources Officer will establish a grievance file, separate from the employee's personnel folder, which will contain:

1. The employee's grievance and designation of representative;

2. Notices;

3. Written replies;

4. Material or evidence used to support administrative action (e.g., if the grievance is based on a disciplinary or other administrative order);

5. Copies of relevant policies; and

6. Any other information considered appropriate for review in making a decision on the grievance.

(b) The grievance file will be expanded as more information is developed. If an examiner is appointed to inquire into a grievance, he/she will add appropriate information to the file based on any inquiry made.

(c) When grievances are filed by SES employees, the Deputy Assistant Secretary for Human Resources Management will perform the same functions as the Human Resources Officer.

(2) The grievance file must not contain any document that is not available to the employee or the employee's representative for review. Medical records which cannot be disclosed to the employee in accordance with 5 CFR 297.204(c) of OPM regulations or MP-1, part II, chapter 21, paragraph 1b cannot be included in the file. Information made available to the examiner which cannot be provided to the employee in the same form in which it was received, must be included in the file in a form which the employee can review or must not be used. In this regard, the file will not contain unsanitized, confidential, or personal records of employees other than the person filing the grievance (for example, appraisals of performance and personal qualifications).

f. **Nonconformity with Procedure**

(1) When an employee, either orally or in writing, presents a grievance to a supervisory or administrative official without following the provisions of the grievance procedure, such official will make certain that the employee is fully informed of the correct procedure and will inform the employee that VA requires that the grievance procedure be followed in the interest of prompt, orderly, and systematic handling of all cases.

(2) It is contemplated that every effort will be made by both management and employees to conform to the prescribed grievance policy and procedure. However, minor and unintentional technical violations, whether by management or the employee, which do not affect the general equity with which a case is presented or handled, will not in themselves preclude proceeding with a grievance, nor invalidate any action or decision taken in connection with the grievance.

g. **Grievance Based on an Administrative Decision.** Where an administrative decision or action affecting an employee forms the basis of the employee's grievance, the right to file a grievance will not be available to the employee until the effective date of the action on which the grievance is based. The grievance procedure itself will not delay the implementation of an administrative decision.

h. **Adjustment or Referral of a Grievance by Decision Official.** Unless the decision official rejects or returns the grievance for additional information, that official will review the employee's grievance and the grievance file and explore the possibility of adjusting the grievance to the employee's satisfaction. If the decision official is unable to resolve the grievance in a manner acceptable to the employee, the grievance will be referred for inquiry by an examiner or for technical review by an appropriate official within 10 days of the decision official's receipt of the formal grievance.

8. REJECTION OR CANCELLATION OF A GRIEVANCE

a. **Reasons for Rejection of a Grievance.** The decision official may reject a grievance for any of the following reasons:

(1) Does not furnish sufficient detail to clearly identify the matter being grieved;

(2) Does not specify the personal relief sought, or the specific relief is not personal to the grievant;

(3) Consists of a matter or matters that are not covered by the VA grievance procedure (see paragraph 14 of this chapter);

(4) Is not timely (see par. 5 for specific time limits).

b. **Written Notification of Rejection of a Formal Grievance.** The grievant and his or her representative will be notified in writing when a formal grievance is rejected and provided with the specific reasons for the rejection.

c. **Grievance May Not Be Rejected in the Informal Procedure.** A grievance may not be rejected in the informal procedure for any reason. If the grievance is not timely or does not meet criteria for processing under the grievance procedure, the employee should be so advised. However, the employee will be allowed to submit the grievance under the formal procedure if he/she so desires.

d. **Reasons for Cancellation of Grievance.** A grievance may be canceled, either wholly or partially, as appropriate, by the decision official under any of the following conditions:

(1) At the employee's request;

(2) Upon termination of the employee's employment, unless the personal relief sought by the employee can be granted after termination of employment;

(3) Upon the death of the employee, unless the grievance involves a question of pay;

(4) For failure of the employee to furnish required information; or

(5) For failure of the employee to duly proceed with advancement of the grievance.

e. **Written Notification of Cancellation of a Formal Grievance.** The grievant and his or her representative will be notified in writing when a grievance is canceled and provided with specific reasons for the cancellation.

9. ROUTING FORMAL GRIEVANCES

a. **Technical Review.** In cases where the facts are not in dispute and the primary issue involves only the interpretation of regulation or policy, instead of appointing an examiner, the decision official may forward the grievance for technical review and recommendations through appropriate channels to the Office of Human Resources Management (051). Situations where "the facts are not in dispute" are those instances where management essentially agrees with the grievant's statement of facts in the formal grievance, and the primary issue in dispute is regulatory or policy interpretation. The grievant and his or her representative will be provided with a copy of the decision official's letter to Central Office. Upon receipt of the request, the grievance will be forwarded to the appropriate organizational element in Central Office which has technical program responsibility in the matters disputed. A technical review will be conducted and resulting recommendations transmitted by an appropriate Central Office line official to the decision official who will resolve the grievance as indicated in paragraph 10 this chapter.

b. **Appointment of a Facility Grievance Examiner.** In cases where it is determined that an examiner is required, the decision official may appoint a subordinate employee to act as the grievance examiner. The grievance examiner will be fair, impartial, and objective, with demonstrated analytical and fact-finding skills. The grievance examiner will not be assigned cases in his or her service, division, or organizational component, and must be an employee who has not been involved in the matter being grieved and who does not occupy a position subordinate to any official who recommended, advised, made a decision, or who otherwise is or was involved in the matter being grieved. The grievant and any designated representative will be informed of the assignment. The examiner assigned will promptly review the case and determine the nature and scope of the inquiry appropriate to the issue(s) involved in the grievance.

c. **Appointment of a Grievance Examiner From Outside VA Facility.** Decision officials should make every effort to appoint a local examiner to investigate an employee grievance. However, there may be instances where this is not practicable due to the nature of the grievance and/or the unavailability of an appropriate individual to act as the grievance examiner. Such grievances should be forwarded to the next higher organizational level for assignment of a grievance examiner. Referral of such requests should be minimized and must provide justifications as to why the grievance could not be handled by a grievance examiner appointed at the local level. Two copies of the grievance file will be included with the

grievance. A copy of the grievance file will be maintained by the decision official. The grievant and his or her representative will be given a copy of the letter requesting appointment of a grievance examiner. An examiner will be appointed within 5 days after the request and required files are received. Grievance examiners will be authorized to visit the grievant's facility, if appropriate.

d. **Grievance Inquiry.** At the examiner's discretion, the grievance inquiry may consist of:

(1) The securing of documentary evidence, including such technical advice as may be needed;

(2) Personal or telephone interview (statements of witnesses obtained by the examiner should be under oath or affirmation, without a pledge of confidence);

(3) A group meeting;

(4) Hearing;

(5) Any combination of the above.

e. **Hearings**

(1) Formal hearings should be limited to grievances involving complex matters or where important factual matters are in dispute. The decision to schedule a hearing is the prerogative of the examiner.

(2) If a hearing is held, the examiner will determine how the hearing will be recorded and will have a verbatim transcript or written summary of the hearing prepared, including all pertinent documents submitted and accepted by him or her. When the hearing is recorded verbatim, the facility Director where the hearing is being held will provide the hearing room and services for recording the transcript and will ensure that the transcript reaches the examiner within 10 days after the hearing is held. The examiner will make the transcript a part of the record of the proceedings. When the hearing is not recorded verbatim, a summary of pertinent portions of the testimony will be made by the examiner. In cases where the examiner travels to a different facility, the examiner may use the services of the grievant's facility or his or her own facility to record the summary, whichever the examiner deems appropriate. The summary will constitute the report of the hearing and is made a part of the record of the proceedings.

f. **Administering Oaths or Affirmations.** Examiners are authorized to administer oaths or affirmations for purposes of this part. (See appendix IV-C.)

g. **Grievance File.** The examiner will ensure that the grievance file contains all documents related to the grievance, including evidence collected, statements of witnesses, notices and replies pertinent to the case, and the report of hearing when a hearing is held. On completion of the inquiry, the examiner will make the grievance file available to the employee and the employee's representative for review and comments. Their comments, if any, are due within 5 days after receipt of the grievance file and will be included in the file.

h. **Preparation of Examiner's Report.** After the employee and the employee's representative have been given an opportunity to review the grievance file, the examiner will prepare a report of findings and recommendations, and submit that report, with the grievance file, to the decision official. The examiner will also furnish the employee and the employee's representative with a copy of the report. Guidelines for the report are contained in appendix IV-B of this handbook, which should be provided to individuals assigned as examiners.

i. **Time Limits for Examiner's Report and Central Office Technical Reviews.** The examiner will submit the report and the grievance file to the decision official within 30 days for grievance examiners appointed locally or 45 days for grievance examiners appointed by a higher organizational level, after receipt of written notification of appointment as the grievance examiner. Central Office will issue a technical review within 30 days of receipt of such a request from the decision official.

10. DECISION ON GRIEVANCES

a. **Action by Decision Official - Examiner's Report.** Upon receipt of the grievance examiner's report of findings and recommendations, the decision official will:

(1) Accept the examiner's recommendation and issue a written decision to the employee within 15 days after the recommendation is received. The employee's representative will also receive a copy of the decision;

(2) Grant the relief sought by the employee, issuing the decision without regard to the examiner's recommendation; or,

(3) If the decision official determines that the examiner's recommendations are unacceptable, he or she will forward the examiner's recommendations and a specific statement of the basis for objection, with the grievance file, to the next higher supervisory level above the decision official. The decision official will also furnish the employee and the employee's representative with a copy of the statement on which the referral is based. The higher level review official will consult with the Office of Human Resources Management (051) and will render a final decision on the employee's grievance. Objections to the recommendations of the grievance examiner will be limited to the following grounds:

(a) The recommendations are contrary to law, regulation, or agency policy;

(b) The recommendations are not supported by the evidence; or,

(c) The recommendations would establish a precedent that would have a detrimental impact upon the efficient operation of VA.

b. **Higher Level Review.** In matters of judgment where the issues could have been decided more than one way, higher level review officials will not substitute their judgment for that of the grievance examiner, unless the examiner's recommendations fall into any of the three categories contained in subparagraph a(3) above.

c. **Action by Decision Official - Technical Review.** Central Office technical reviews and the resulting recommendations will be forwarded to the formal grievance decision official, and will serve as the basis for the final decision. The decision official will issue the decision to the employee within 15 days after the technical review is received from Central Office.

11. ADMINISTRATIVE APPEALS

a. **Agency Appeal.** When separated for cause, including performance deficiencies, employees without veterans preference appointed under authority of Schedule A or Schedule B who have completed 1 year of current continuous service in the same or similar positions are entitled to appeal the separation action to a higher level authority. In the decision letter on the separation, the employee will be informed of his or her appeal right to the appropriate Administration Head, Assistant Secretary or Staff Office Director, and of the right to a hearing prior to a final decision on the employee's appeal. Sample language, and other provisions of part I of this handbook, as appropriate, apply in taking such separation actions. An appeal may be submitted at any time after receipt of the decision, but not later than 15 days after the effective date of the action. Evidence files will be established when taking action to separate an employee covered by the provisions of this paragraph. The evidence file and the employee's personnel folder will be sent through channels to the Office of Human Resources Management when the employee has requested a hearing. The examiner assigned to conduct the hearing will do so in accordance with the provisions in paragraph 9e and will submit a report of findings and recommendations to the appropriate decision official within 30 days after completion of the hearing. The Administration Head, Assistant Secretary or Staff Office Director, or designee, will render a decision on the appeal within 20 days after receipt of the examiner's report. The decision will be final with no further right of administrative review of appeal.

b. **Appeals to Merit Systems Protection Board.** Employees with veterans preference who have completed 1 year of current continuous employment in a position outside the competitive service can appeal a separation to the Merit Systems Protection Board. The provisions of part I of this handbook, as appropriate, apply in taking such separation actions.

12. TRAVEL EXPENSES. Authorized travel expenses for grievance examiners assigned by VA Central Office will be borne by VA in accordance with Government travel regulations. Travel expenses of grievants and witnesses will be paid by VA where it is determined by a VA official or the grievance examiner that travel in connection with a grievance is necessary.

13. INFORMING EMPLOYEES. Information in this part should be brought to the attention of all employees. The text of this handbook is available electronically.

14. MATTERS EXCLUDED FROM COVERAGE. The following actions and complaints are excluded from coverage under the grievance procedure:

a. The content of published agency regulations and policy. An employee's allegation that locally established policy is in conflict with existing agency policy or regulations may be handled as indicated in paragraph 9a of this chapter;

b. A decision which is appealable to the MSPB (Merit Systems Protection Board) or subject to final administrative review by the OPM (Office of Personnel Management), the FLRA (Federal Labor Relations Authority), or the OWCP (Office of Workers' Compensation Programs) under law or regulations of the OPM, FLRA, or the OWCP; or any other matter for which final administrative authority lies outside VA;

c. Allegations of discrimination on the basis of race, color, religion, sex, national origin, age over 40 and/or disabling condition, in connection with any decision or action. Such allegations may only be pursued as complaints of discrimination, pursuant to regulations of the Equal Employment Opportunity Commission.

d. Nonselection for promotion from a group of properly ranked and certified candidates or failure to receive a non-competitive promotion;

e. A preliminary warning notice of an action which, if effected, would be covered under a grievance or appeal system or excluded from coverage by paragraph b above;

f. A return of a SES (Senior Executive Service) career appointee to the General Schedule or another pay system during the 1-year period of probation for less than fully successful executive performance;

g. Reassignment of an SES appointee;

h. An action which terminates a temporary promotion within a maximum period of 2 years and returns the employee to the position from which the employee was temporarily promoted, or reassigns or demotes the employee to a different position that is not at a lower grade and pay than the position from which the employee was temporarily promoted;

i. An action which terminates a term promotion at the completion of the project or specified period, or at the end of a rotational assignment, and returns the employee to the position from which promoted or to a different position of equivalent grade and pay in accordance with 5 CFR 335.102 (f);

j. The content of the critical elements and performance standards of an employee's position;

k. Nonadoption of a suggestion or disapproval of a quality step increase, performance award, or other kind of discretionary award, including SES performance awards and Presidential Rank awards for members of the SES;

l. Termination of an employee serving a probationary or trial period after initial appointment for unsatisfactory performance or conduct;

m. Termination of an SES career appointee during probation for unsatisfactory performance;

n. Evaluation of performance for a member of the Senior Executive Service;

o. Return of any employee from an initial appointment as a supervisor or manager to a nonsupervisory or nonmanagerial position for failure to satisfactorily complete the probationary period;

p. Relief specified that is not personal to the grievant or is not subject to the control of management;

q. A grievance over a matter covered by a negotiated grievance procedure;

r. A grievance of an individual from outside VA;

s. Grievances concerning the number of positions to be filled, or the grade level at which positions are advertised or filled;

t. An action taken in accordance with the terms of a formal agreement voluntarily entered into by an employee which: (a) assigns the employee from one geographical location to another or (b) returns an employee from an overseas assignment;

u. Separation of employees with less than 1 year of current continuous employment appointed under authority of Schedule A or Schedule B;

v. A performance appraisal or overall rating assigned under the performance evaluation system (requests for review of these should be processed in accordance with provisions contained in VA Directive and Handbook 5013, Performance Management Systems);

w. Terminations of temporary appointments.

CHAPTER 3. TITLE 38 GRIEVANCES

1. SCOPE AND AUTHORITY

a. **General.** This chapter governs employee grievances under the VA grievance procedure.

b. **Employee Coverage**

(1) This chapter applies to all permanent and probationary physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants, and expanded-function dental auxiliaries.

(2) A bargaining unit employee may elect to use the VA grievance procedure described in this chapter or the negotiated grievance procedure, but not both, in the case of a disciplinary or adverse action covered under part II of this handbook which does not involve a question of professional conduct or competence.

c. **Disciplinary and Adverse Actions Covered.** Disciplinary and adverse actions, other than title 38 adverse actions which involve questions of professional conduct or competence, are covered by the grievance procedures described in this chapter.

2. REFERENCES

a. Section 203 of the Department of Veterans Affairs Health-Care Personnel Act of 1991 (Pub. L. 102-40).

b. 38 U.S.C. 501(a), 512(a), 7421, 38 U.S.C. 7461-7464.

3. OFFICIALS AUTHORIZED TO SETTLE GRIEVANCES

a. **Informal Grievance Procedure.** The official who will make a decision on grievances filed at the informal stage will be the immediate supervisor, or lowest level official with authority to settle the issue.

b. **Formal Grievance Procedure.** Authority to make a decision when the formal stage of the grievance procedure is reached will be exercised as follows:

(1) **Grievances of Facility Employees.** The facility Director will be the decision official on a grievance from an employee under the facility Director's jurisdiction provided the matter to be resolved is one which is under the Director's authority. In grievances where one of the exceptions identified in subparagraph (3) of this paragraph exist, the grievance will be decided by the next higher level official with the authority to resolve the issue.

(2) **Grievances of VA Central Office Employees.** The Under Secretary for Health, or designee, will decide the formal grievance of VA Central Office employees unless one of the exceptions in subparagraph (3) of this paragraph applies. (VA Central Office employees include those individuals whose names appear on VA Central Office employment listings, but may be physically located in a

different geographic location.) In those cases, where exceptions exist, the Secretary is responsible for designating an appropriate official who may decide the formal grievance.

(3) **Exceptions.** The normal decision official, as designated in paragraph 3b, will not decide the grievance when that official:

(a) Is the official with whom the employee would take up the initial grievance at the informal stage;

(b) Does not have the authority to make a determination on the grievance issues; or

(c) Made the decision or took the action on which the employee's grievance is based.

4. REPRESENTATION

a. **Election of Representation.** An employee may present a grievance with or without representation.

b. **Designation of a Representative.** An employee has the right to be accompanied, represented, and advised by a representative of choice at any stage of the procedure. If a grievance is presented under the formal grievance procedure, designation of a representative will be in writing and will be submitted to the decision official. Any change of representative will be in writing.

c. **Disallowance of a Designated Representative**

(1) **Conflict of Position or Conflict of Interest.** An employee's representative who is employed by VA may be disallowed by the decision official because of conflict of position or conflict of interest. The disallowance of a representative will be in writing, and will be issued within 5 days of receipt of the employee's written designation of representative. The notice of disallowance will inform the employee of the basis on which the determination to disallow is made, and the right of the employee to challenge the determination.

(2) **Challenge of Disallowance of Designated Representative.** If informed that a designated representative has been disallowed, an employee may, within 5 days, challenge the disallowance in writing to the decision official. A challenge should state the reason for disagreeing with the disallowance, and whether the employee wishes to proceed with the grievance or wait for a decision on the challenge. The grievance decision official will make a final decision on a challenge of disallowance of a representative no later than 10 days after receipt of the challenge.

d. **Change of Designated Representative.** In the event that an employee changes representatives during the proceeding, any disallowance of representative or challenge regarding a disallowance will be resolved in the manner identified in paragraph 4c.

5. TIME LIMITS FOR PROCESSING A GRIEVANCE

a. **Time Limits.** A decision on a grievance will be issued within the shortest time frame possible. To ensure timely and orderly processing, the following time limits are established for each stage of the grievance procedure:

(1) **Informal Procedure**

(a) 15 days from the date of the incident or action on which the grievance is based for employee to initiate grievance. When an employee is informed of a final decision that has not yet been effected, the period to present a grievance is counted from the date of notification of the action.

(b) 10 days for the supervisor to complete the action under the informal procedure.

(2) **Formal Procedure**

(a) 10 days for employee to file a written grievance under the formal procedure after completion of the informal procedure, or 15 days from the date of service of a decision where a grievance originates at the formal process (see par. 8, this chapter).

(b) 10 days for deciding official to adjust, reject, or refer grievance for inquiry by examiner or for technical review after employee files formal grievance.

(c) 30 days for completion of the inquiry and submission of report when the examiner is appointed locally.

(d) 45 days for completion of the inquiry and submission of report when an examiner from outside the facility is appointed.

(e) 30 days for Central Office to issue technical reviews when requested to do so by the decision official.

(f) 15 days for issuance of the decision after the decision official receives the examiner's report of findings and recommendations or the Central office technical review.

b. **Grievance on Continuing Condition or Practices.** An employee may present a grievance concerning a continuing practice or condition at any time. Situations caused by actions which were taken or occurred on a specific date (e.g., admonishments, reprimands, or shift assignments) are not considered continuing conditions for these purposes despite any continuing effects they may have.

c. **Delays in Processing Grievances.** Management officials will ensure that grievances are processed promptly. Management delays in any stage of the grievance procedure beyond the prescribed time limits will be explained to the employee and the employee's representative. Such delays should be rare. If the employee delays in any stage of the grievance procedure, management will determine whether there was good cause and whether the grievance should continue to be processed. Such delays,

explanations, and determinations will be documented for the record. This includes any delay created by the denial of an employee's representative or by challenge to the denial.

6. INFORMAL GRIEVANCE PROCEDURE

a. **Presenting a Grievance Under Informal Procedure.** An employee desiring consideration of a grievance must first seek informal adjustment of the matter through supervisory channels. This informal procedure will not be utilized when grieving disciplinary and adverse actions, where grievances will be initiated at the formal step of the grievance procedure. The employee's request for informal adjustment of a grievance should be made as soon as possible, but not later than 15 days after the date of the incident or action upon which the grievance is based, or the date upon which the employee became aware of, or should have become aware of, the incident or action upon which the grievance is based. The initial presentation at the informal level may be oral or written and is normally made to the immediate supervisor. If the grievance is presented orally, the employee must make clear that a grievance is being presented, in order to distinguish grievances from mere inquiries. Supervisors who receive oral grievances will prepare a written summary of the oral presentation.

b. **Resolving a Grievance.** The supervisor to whom a grievance has been presented for informal adjustment will attempt to resolve it as expeditiously as possible, seeking the advice and assistance of others where necessary, and will give the employee a written decision on the matter within 10 days from the date of the request for informal consideration. If the relief sought is not granted, the employee shall be advised of the right to present the grievance under the formal procedure.

c. **Mandatory Use of the Informal Procedure.** Normally, the employee must complete processing under the informal procedure before a grievance will be accepted for processing under the formal procedure. However, when the authority to resolve the matter is reserved to the Secretary, the informal procedure will not be used. This informal procedure will not be utilized when grieving disciplinary and adverse actions, where grievances will be initiated at the formal step of the grievance procedure (see par. 8 of this chapter).

d. **Mandatory Acceptance of an Informal Grievance.** A grievance may not be rejected in the informal stage for any reason. If the grievance is not timely or does not meet criteria for processing under the grievance procedure, the employee should be so advised. However, the employee will still be permitted to submit the grievance under the formal procedure. Reasons for rejection of a grievance during the formal procedure are discussed in paragraph 10.

7. FORMAL GRIEVANCE PROCEDURE

a. **Presenting Grievance Under Formal Procedure.** If the employee is not satisfied with the decision at the informal stage, or is grieving a disciplinary or adverse action (see par. 8 of this chapter), the employee may present the grievance under the formal procedure. The formal grievance must be submitted in writing through the employee's immediate supervisor, within 10 days after completion of the informal procedure, or 15 days from the date of service of a decision where a grievance originates at the formal process (see par. 8, this chapter). The immediate supervisor or other official receiving the employee's formal grievance will refer it promptly through channels to the appropriate decision official. The time limit may be extended by management when good cause is shown by the employee.

b. **Contents of Formal Grievance**

(1) A formal grievance will be submitted in writing, will contain sufficient detail to identify and clarify the basis for the grievance, and will specify the personal relief requested by the employee. It will contain the following information:

(a) The specific action or incident on which the grievance is based, the date the action or incident occurred (if known), and the date the employee first learned of the action or incident (if appropriate).

(b) The reason(s) for which the employee believes that the action was unjustified or that the employee was treated unfairly; and/or the specific policy (department, facility, etc.), written agreement, or regulation violated and how it affected the employee.

(c) The corrective action desired by the employee.

(2) If the formal grievance does not contain a statement of the grievance giving essentially the information specified above, the decision official will return the grievance to the employee so that the necessary information may be furnished. If the employee fails to provide the necessary information after being provided with an opportunity to do so, the decision official should cancel the grievance following procedures contained in paragraph 10 of this chapter.

c. **Group Grievances.** When a group of employees has an identical formal grievance, it will be considered in the same manner as an individual complaint and the decision will be binding on all members of the group. The group will select one individual case for processing under the provisions of the formal grievance procedure.

d. **Decision Official.** The normal decision official will not decide the grievance when that official made the decision or took the action on which the employee's grievance is based. The grievance examiner and grievance decision official will be from outside the facility. See further guidance in paragraph 3, this chapter.

e. **Adjustment or Referral of Grievance by Decision Official.** Unless the decision official rejects or returns the grievance for additional information, that official will review the employee's grievance and the grievance file and explore the possibility of adjusting the grievance to the employee's satisfaction. If the decision official is unable to resolve the grievance in a manner acceptable to the employee, the grievance will be referred for inquiry by an examiner (see par. 12, of this chapter) or for technical review by an appropriate official (see par. 11 of this chapter) within 10 days of the decision official's receipt of the formal grievance.

8. GRIEVANCES OVER DISCIPLINARY AND ADVERSE ACTIONS

a. Grievances over disciplinary and adverse actions will be filed at the formal stage described in paragraph 7 of this chapter without first filing under the informal procedure. In cases of an adverse action, the employee is entitled to a hearing before a grievance examiner, if requested.

b. Grievances initiated under the formal stage must be filed within 15 days from the date of service of the decision letter as indicated by paragraph 5a of this chapter.

c. Except as provided in subparagraphs a and b above, all other provisions of this chapter apply.

9. GRIEVANCE FILE

a. When a formal grievance is submitted, Human Resources Management Service will be promptly notified by the appropriate decision official.

(1) Human Resources Management Service will establish a grievance file separate from the employee's personnel folder, which will contain:

(a) The employee's grievance and designation of representative (if applicable);

(b) Notices;

(c) Written replies;

(d) Material or evidence used to support administrative action (e.g., if the grievance is based on a disciplinary or other administrative action);

(e) Copies of relevant policies; and

(f) Any other information considered appropriate for review in making a decision on the grievance.

(2) The grievance file will be expanded as more information is developed. If an examiner is appointed to inquire into a grievance, the examiner will add appropriate information to the file based on any inquiry made.

(3) The examiner will ensure that the grievance file contains all documents related to the grievance, including evidence collected, statements of witnesses, notices and replies pertinent to the case, and the report of hearing when a hearing is held.

b. The grievance file must not contain any document that may not be reviewed by the employee or the employee's representative. Information added to the file by the examiner must be included in a form which the employee can review or such information cannot be used.

(1) Any use or disclosure of a record or information must comply with legal requirements for disclosure.

(2) A complete copy of the grievance file will be provided to the employee, upon request.

10. REJECTION, RETURN, OR CANCELLATION OF A GRIEVANCE

a. **Reasons for Rejection of a Grievance.** The decision official may reject a grievance only for one or more of the following reasons:

(1) The relief sought is not personal to the grievant. Relief in the form of a request to discipline another employee will not be considered appropriate;

(2) The matter(s) is(are) not covered by the VA grievance procedure (see par 16 of this chapter);

(3) The grievance was not filed in a timely manner (see par. 5, this chapter, for specific time limits). A grievance may be rejected under the formal procedure based on a failure to timely file at either the formal or informal stage.

b. **Written Notification of Rejection of Formal Grievance.** The grievant and the grievant's representative will be notified in writing when a formal grievance is rejected, and provided with the specific reason(s) for the rejection.

c. **Reasons for Return**

(1) Insufficient detail was furnished to clearly identify the matter being grieved;

(2) The personal relief sought is not specified.

d. **Written Notification of Return of Grievance.** The grievant and the grievant's representative will be notified in writing when a grievance is returned, and provided with the specific reason(s) for the return. A reasonable time will be identified for resubmission of the grievance.

e. **Reasons for Cancellation of Grievance.** A grievance may be canceled, either wholly or partially as appropriate, by the decision official under any of the following conditions:

(1) At the employee's request;

(2) Termination of the employee's employment, unless the personal relief sought by the employee involves monetary issue(s) and can be granted after termination of employment;

(3) Death of the employee, unless the grievance involves a matter which would have entitled the employee to pay or benefits;

(4) Failure of the employee to furnish required information after being notified in accordance with the procedures contained in paragraph 10d. of this chapter; or

(5) Failure of the employee to duly proceed with advancement of the grievance.

f. **Written Notification Of Cancellation of Formal Grievance.** The grievant and the grievant's representative will be notified in writing when a grievance is canceled, and provided with the specific reason(s) for the cancellation.

11. TECHNICAL REVIEW

a. In cases where the facts are not in dispute and the primary issue involves only the interpretation of regulation or policy, instead of appointing an examiner, the decision official may forward the grievance for technical review and recommendations through appropriate channels to the Office of Human Resources Management (051) in VA Central Office. Situations where "the facts are not in dispute" are those instances where management essentially agrees with the grievant's statement of facts in the formal grievance and the primary issue in dispute is regulatory or policy interpretation. The grievant and the grievant's representative will be provided with a copy of the decision official's referral letter to VA Central Office. Upon receipt of the request, the grievance will be forwarded to the appropriate organizational element in VA Central Office which has technical program responsibility in the matter(s) disputed. A technical review will be conducted and the resulting recommendations transmitted by an appropriate VA line official to the decision official, who will resolve the grievance as indicated in paragraph 13 of this chapter. Since the technical review is part of the grievance file, the employee is entitled to a copy, if requested.

b. Matters covered under part II of this handbook which are subject to review under the grievance procedure, may only be resolved through a technical review if the employee waives the right to a formal review by a grievance examiner. Such waivers shall be in writing.

12. REVIEW BY GRIEVANCE EXAMINER

a. **Appointment of Grievance Examiner**

(1) In cases where an examiner is required, the decision official may appoint a subordinate employee to act as the grievance examiner or request an examiner be appointed from outside the local area.

(2) Decision officials should make every effort to appoint a local examiner to investigate an employee grievance. There may be instances where this is not practicable due to the nature of the grievance and/or the unavailability of an appropriate individual to act as the grievance examiner.

(a) Such grievances will be forwarded to the Network Director for assignment of a grievance examiner.

(b) Referral of grievances to the Network Director should be minimized and must provide an explanation as to why the grievance could not be handled by a grievance examiner appointed at the local level.

(c) Two copies of the grievance file will be included with the grievance. A copy of the grievance file will be retained by the decision official.

(d) The grievant and the grievant's representative will be given a copy of the letter to the Network Director requesting appointment of a grievance examiner.

(e) An examiner will be appointed within 5 days after the request and required files are received.

(f) Grievance examiners appointed by the Network Director will be authorized to visit the grievant's facility, if appropriate.

(3) The grievance examiner will be fair, impartial, and objective, with demonstrated analytical and fact-finding skills. The grievance examiner will not be assigned cases in his or her work unit or service, and must be an employee who has not been involved in the matter being grieved and who does not occupy a position subordinate to any official who recommended, advised, made a decision, or who otherwise is or was involved in the matter being grieved. The grievant and any designated representative will be informed of the assignment. The examiner assigned will promptly review the case and determine the nature and scope of the inquiry appropriate to the issue(s) involved in the grievance.

(4) In cases arising from disciplinary actions involving professional conduct or competence as covered under part II of this handbook the grievance examiner will be selected from the panel of employees designated to serve on Disciplinary Appeals Boards. Notice of the grievance examiner's name on the panel list must have been provided at least 30 days prior to his or her selection as an examiner.

(5) The normal decision official will not decide the grievance when that official made the decision or took the action on which the employee's grievance is based. The grievance examiner and grievance decision official will be from outside the facility. See guidance in paragraph 3, this chapter.

b. **Formal Review.** At the examiner's discretion, the grievance inquiry may consist of:

(1) The securing of documentary evidence, including the solicitation of such technical advice as may be needed, or compelling expert VA testimony;

(2) Personal or telephone interviews (statements of witnesses obtained by the examiner should be under oath or affirmation, without a pledge of confidentiality);

(3) A group meeting;

(4) A hearing; or

(5) Any combination of the preceding.

c. **Hearings**

(1) Formal hearings should be limited to grievances involving complex matters or where important factual matters are in dispute. The decision to schedule a hearing is the prerogative of the examiner, except in grievances over adverse actions where the employee has the right to a hearing, if requested.

(2) If a hearing is held, the examiner will determine how the hearing will be recorded, and will have a verbatim transcript or written summary of the hearing prepared. The record will include all pertinent documents submitted and accepted by the examiner. The examiner will make the transcript a part of the record of the proceedings. When a verbatim transcript was not made, a summary of pertinent portions of the testimony will be made by the examiner. The summary will constitute the report of the hearing and is made a part of the record of the proceedings.

(3) The examiner's authority includes but is not limited to taking proper steps to expedite the hearing of evidence and ruling on all questions arising during the proceeding, such as admissibility of evidence and calling of witnesses.

(4) When the examiner determines that a verbatim transcript is required, the facility Director where the hearing is being held will provide the hearing room and services for preparing the transcript and will ensure that the transcript reaches the examiner within 10 days after the hearing is held.

(5) In cases where the examiner travels to a different facility, the examiner may use the services of the grievant's facility, the examiner's own facility, or both to prepare the summary, whichever the examiner deems appropriate.

d. **Administering Oaths or Affirmations.** For purposes of this part, examiners are authorized to administer oaths or affirmations to those individuals providing testimony relative to the grievance. (See appendix IV-C.)

e. **Preparation of Examiner's Report.** The examiner will prepare a report of findings and recommendations and submit that report with the grievance file to the decision official. The examiner will also furnish a copy of the report to the employee and the employee's representative. The examiner's report should include the rationale for the findings and recommendations.

f. **Time Limits for Examiner's Report.** Except in unusual cases, the time limit for submission of the report and the grievance file to the decision official is 30 days for local grievance examiners or 45 days for grievance examiners from outside the facility, after receipt of written notification of appointment as the grievance examiner.

13. DECISION ON A GRIEVANCE

a. **Action by Decision Official - Technical Review.** VA Central office technical reviews (paragraph 11a of this chapter) and the resulting recommendations will be forwarded to the formal grievance decision official, and will serve as the basis for the final decision. The decision official will issue the decision to the employee within 15 days after the technical review is received from VA Central office.

b. **Action by Decision Official - Examiner's Report.** Upon receipt of the grievance examiner's report of findings and recommendations, the decision official will accept, modify, or reject the examiner's recommendation(s) and issue a written decision to the employee within 15 days after the recommendation is received. The employee's representative will also receive a copy of the decision.

(1) If the decision official modifies or rejects the examiner's recommendation(s), the written decision will include a specific statement of the reason(s) for the modification or rejection. Modification or rejection of recommendations of the grievance examiner will be limited to the following grounds:

(a) The recommendation(s) are contrary to law, regulation, or published Department policy; and/or

(b) The recommendation(s) are not supported by the preponderance of the evidence.

(2) The decision official may elect to grant the relief sought by the employee without regard to the examiner's recommendation(s).

14. TRAVEL EXPENSES. Authorized travel expenses for grievance examiners will be borne by the VA facility employing the grievant in accordance with Government travel regulations. Travel expenses of grievants and witnesses will be paid by VA where it is determined by a VA official or the grievance examiner that travel in connection with a grievance is necessary.

15. INFORMING EMPLOYEES. The information contained in this chapter will be brought to the attention of all employees. The text of this chapter is available electronically to all employees or hard copies may be reviewed in the Human Resources Management office.

16. MATTERS EXCLUDED FROM COVERAGE UNDER THE AGENCY GRIEVANCE PROCEDURE. The following actions and complaints are excluded from coverage under the grievance procedure:

a. Adverse actions taken under part II of this handbook which involve a question of professional conduct or competence.

b. Disputes over whether a matter or question concerns, or arises out of, professional conduct or competence.

c. Separation during probationary period.

d. Complaints arising from failure to receive special advancement.

e. Complaints arising from failure to receive a promotion or reassignment.

f. Complaints arising from dissatisfaction with grade or pay on initial appointment.

g. Complaints arising from actions taken due to the individual's physical or mental condition.

h. Complaints arising from dissatisfaction with proficiency rating.

i. An action which terminates a temporary promotion within a maximum period of 2 years and returns the employee to the position from which the employee was temporarily promoted, or reassigns the employee to a different position that is not at a lower grade or pay than the position from which the employee was temporarily promoted.

j. The content of published VA or VHA regulations and policies. An employee's allegation that locally established policy is in conflict with existing Department policy or regulation may be handled as indicated in paragraph 11a of this chapter.

k. A decision which is subject to final administrative review by the Federal Labor Relations Authority (FLRA), or the Office of Workers' Compensation Programs (OWCP), under law or regulations of the FLRA or the OWCP; or any other matter for which final administrative authority lies outside VA.

l. Allegations of discrimination on the basis of race, color, religion, sex, national origin, age (over 40) and/or disability, in connection with any decision or action. Such allegations may only be pursued as complaints of discrimination, pursuant to regulations of the Equal Employment Opportunity Commission. Complaints of discrimination are excluded from the grievance procedure. However, other disputes related to the case are not precluded from review under the grievance procedures. Accordingly, a grievance concerning a matter or matters about which the employee has filed a complaint of discrimination must be rejected, either wholly or partially, as appropriate.

m. A preliminary warning notice of an action which, if effected, would be covered under a grievance or appeal system or excluded from coverage by other paragraphs of this chapter.

n. Disapproval of a suggestion, disapproval of a discretionary award or disagreement with the amount of an award.

o. A matter which includes specified relief that is not personal to the grievant or is not subject to the control of management.

p. A matter covered by a negotiated grievance procedure. However, an employee may elect to use the VA grievance procedure described in this part or the negotiated grievance procedure in the case of a disciplinary or adverse action covered under part II of this handbook which does not involve a question of professional conduct or competence.

q. A grievance of an individual from outside VA, except as provided in paragraph 2b of chapter 2 of this part.

r. Grievances concerning the number of positions to be filled, or the grade level at which positions are filled.

s. An action taken in accordance with the terms of a formal agreement voluntarily entered into by an employee.

t. Matters that are not directly related to the employee's conditions of employment.

u. Matters involving the methods, means or technology of performing work.

v. Determinations and authorizations, including those delegated by the Secretary, to approve, disapprove, change, discontinue special pay or to decide upon waivers of special pay refund obligations. Examples of these include, but are not limited to: determinations on special pay amounts relating to geographical locations, exceptional qualifications, executive positions, and scarce medical or dental specialties.

w. Designations of employees to serve on the panel from which members of Disciplinary Appeals Boards are selected, designations of employees to serve on Disciplinary Appeal Boards or the appointment of a grievance examiner.

x. All matters for which review procedures are already established in VA policy.

y. A decision not to remove an admonishment or reprimand from an employee's personnel folder prior to the expiration date.

APPENDIX A. SAMPLE GRIEVANCE FORMAT

TO: (Name, title, and mailing address)

SUBJ: Grievance

1. This is a (formal or informal) grievance under the VA grievance procedure.

2. The matter on which this grievance is based occurred on (give date) and is described in detail as follows: (Furnish sufficient detail to clearly identify the matter being grieved. Appropriate documents related to your grievance should be attached.)

3. The personal relief (i.e., corrective action) I seek is: (Specify clearly.)

NOTE: *"Personal relief" means a specific remedy directly benefiting the grievant and may not include a request for disciplinary or other action affecting another employee. Failure on the part of the grievant to provide sufficient information relating to the grievance or to clearly specify the personal relief requested will result in rejection of the grievance. It is preferable that the grievant personally deliver the grievance when practicable. When mailing is used, the postmark usually determines the filing date of the grievance.*

Signature Date

Attachments: (All attachments should be identified)

APPENDIX B. GRIEVANCE EXAMINER'S REPORT

Grievance examiners should consider the following factors in preparing a Report of Findings and Recommendations to respond to the decision official:

1. After completion of the inquiry, the examiner must prepare and provide to the decision official a Report of Findings and Recommendations. The report must show a determination of the factual issues in the grievance, based on analysis of evidence secured through the inquiry, and review of the grievance file. For each relevant and timely issue, the examiner must analyze and weigh the evidence.

2. If the examiner finds that the employee has a reasonable basis for the grievance, the examiner must then consider whether the adjustment the employee has requested is reasonable and should be recommended.

3. The examiner's findings for each relevant and timely issue may be organized along the following lines:

(a) Identification of the issue,

(b) Analysis and weighing of evidence pertinent to the issue,

(c) Statement of whether the employee's grievance is valid, and

(d) Whether the requested adjustment is appropriate.

(e) Reasons should be provided in regard to determinations made by the grievance examiner pertaining to any adjustments.

4. If the examiner excludes any matter raised in the grievance because the matter is not covered under the grievance system, the report should contain an explanation as to why it is not covered.

5. For grievance examiners appointed locally, the grievance file and the recommendations must be submitted to the decision official within 30 days of receipt of written notification of appointment as grievance examiner. For grievance examiners from outside the facility, the due date for submission is 45 days from receipt of the written notification of appointment.

6. The examiner must limit the findings and recommendations to those issues raised in the grievance.

7. The examiner will indicate in the report that the decision official must notify the grievant of the final decision within 15 calendar days after receipt of the report.

APPENDIX C. ADMINISTRATION OF OATHS - TITLE 38

The Chairperson and Secretary of the Disciplinary Appeals Board, as well as Grievance Examiners, are authorized to administer oaths during a hearing. The form of oath generally used is as follows:

"Do you solemnly swear that the testimony you are about to give in the case will be the truth, the whole truth, and nothing but the truth, so help you God?"

If the witness elects to affirm rather than to swear, the following may be used in lieu of the oath:

"Do you solemnly affirm, under the pains and penalties of perjury, that the testimony you are about to give in the case will be the truth, the whole truth, and nothing but the truth?"

EMPLOYEE/MANAGEMENT RELATIONS

PART V. TITLE 38 APPEALS TO THE DISCIPLINARY APPEALS BOARD

CONTENTS

PARAGRAPH PAGE

CHAPTER 1. GENERAL

1. SCOPE, AUTHORITY AND DEFINITIONS V-1
2. REPRESENTATION V-1
3. FILING AN APPEAL TO THE DISCIPLINARY APPEALS BOARD V-1
4 APPOINTMENT OF DISCIPLINARY APPEALS BOARDS V-2
5. JURISDICTION V-2
6. POWERS OF THE CHAIRPERSON OF THE DISCIPLINARY APPEALS BOARD V-2
7. PROCEDURE V-3
8. FORMAL HEARINGS V-4
9. DISCIPLINARY APPEALS BOARD DECISIONS V-7
10. REVIEW OF RECORDS V-9
11. TRAVEL V-10

CHAPTER 2. DESIGNATION OF PANEL MEMBERS

1. SCOPE V-11
2. RESPONSIBILITIES V-11
3. QUALIFICATION OF PANEL MEMBERS V-11
4. AVAILABILITY OF ROSTER V-11
5. PANEL DESIGNATIONS V-11
6. TRAINING V-11

PART V. TITLE 38 APPEALS TO THE DISCIPLINARY APPEALS BOARD

CHAPTER 1. GENERAL

1. SCOPE, AUTHORITY AND DEFINITIONS. This chapter applies to Department of Veterans Affairs (VA) employees holding a full-time, permanent appointment under 38 U.S.C. 7401(l) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included in this category are: physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants and expanded-function dental auxiliaries. These categories of individuals are included in the term "employee(s)" as used in this chapter unless otherwise specified. This chapter governs appeals of major adverse actions which arise out of, or which include, a question of professional conduct or competence in VA. Major adverse actions are suspensions (including indefinite suspensions), transfers, reductions in grade, reductions in basic pay, and discharges. A question of professional conduct or competence involves direct patient care and/or clinical competence. The term clinical competence includes issues of professional judgment.

2. REPRESENTATION. An employee of the Department may be designated by the decision official to represent management in any case before a Disciplinary Appeals Board. The decision official should direct requests for legal representation to the General Counsel or Regional Counsel, as appropriate.

3. FILING AN APPEAL TO THE DISCIPLINARY APPEALS BOARD

a. **Initiating an Appeal.** An employee subjected to a major adverse action which is based in whole or in part on a question of professional conduct or competence, may file a written notice of appeal to the Disciplinary Appeals Board under the provisions of this part. The employee may request a hearing before the Board. Any such request must be submitted in writing and accompany the employee's notice of appeal. The appeal must contain (1) the appellant's name, address, telephone number, designation of representative (if any), (2) a copy of the notice of action proposed and decision letter, (3) a statement as to whether the employee is requesting a hearing before the Board, (4) why the appellant believes the major adverse action taken was in error or should not have been taken, and (5) a statement describing the expected relief. The original appeal and the request for hearing, if any, must be submitted to the Under Secretary for Health or designee, through the Office of Human Resources Management (051), so as to be received within 30 days after the date of service of the written decision on the employee. Submission of the appeal must be by personal service, facsimile, or certified mail return receipt requested. A copy of the appeal must be served on the decision official who took the action being appealed and any management representative of record at the time of filing.

b. **Establishing Timeliness of an Appeal.** For purposes of computing the 30-day period for filing an appeal, the date of service of the written decision on the employee will be determined by the date of receipt by the employee of the personal delivery, the signed receipt of certified mail, or presumed to be 5 days after depositing the decision in the U.S. mail if no acknowledged receipt is available.

c. **Representation.** The employee may be represented by an attorney or other person of the employee's choice.

4. APPOINTMENT OF DISCIPLINARY APPEALS BOARDS

a. **General.** The Under Secretary for Health or designee shall appoint Disciplinary Appeals Boards in accordance with this chapter to hear appeals of major adverse actions involving questions of professional conduct or competence as defined in part II of this handbook. Such Boards shall be referred to as Disciplinary Appeals Boards. Each Board will be comprised of three VA employees, each of whom shall be of the same grade as, or be senior in grade to, the employee who is appealing the action. For purposes of this chapter, the term grade is defined by the provisions of 38 U.S.C. 7404, and the qualification standards issued pursuant to 38 U.S.C. 7402. (See VA Directive and Handbook 5005, Staffing.) At least two of the members of the Board shall be employed in the same category of position as the employee who is appealing the action. For purposes of this chapter, a member employed in the same category of position is one who is employed in the same occupation e.g., physician, nurse, dentist as the appellant and has sufficient professional knowledge to evaluate the specific issues of clinical competence and/or direct patient care involved in the appeal.

(1) One of the members of the Board shall be designated to function as Chairperson and one as Secretary to the Board.

(2) A copy of the notice of appointment will be sent to each Board member and the head of the appellant's facility.

b. **Substitute Members.** To facilitate operations, substitute member(s) may be authorized by telephone and later confirmed in writing for inclusion in the record of the Board proceeding.

c. **Technical Advisors.** Technical advisors are not members of the Disciplinary Appeals Board but may be relied upon to assist in the development and review of the case.

d. **Panel Notice.** Notice of a name being on the list will be provided at least 30 days prior to the selection of the individual to serve on a Board.

5. JURISDICTION

a. The Disciplinary Appeals Boards appointed under this chapter shall have exclusive jurisdiction to review any case which arises out of, or which includes, a question of professional conduct or competence, and in which a major adverse action was taken under part II of this handbook.

b. While it may not be possible in all cases for the Board to determine whether an appeal is properly before it without gathering additional information in a hearing, every effort should be made to make this determination prior to convening a hearing.

6. POWERS OF THE CHAIRPERSON OF THE DISCIPLINARY APPEALS BOARD. The Chairperson's authority includes, but is not limited to:

a. Taking proper steps to expedite the hearing of evidence, and speaking and acting for the Board;

b. Ruling on all questions arising during the proceedings, such as admissibility of evidence offered during the hearing, calling of witnesses, order of introduction of witnesses, etc.;

c. Obtaining further evidence concerning any issue under consideration by the Board at any stage of the proceedings;

d. Acting as the presiding officer, directing the regular and proper conduct of the proceedings, and authenticating, by his or her signature, instructions and proceedings of the Board;

e. Ruling on questions of disqualification of any member of the Board. In cases where the Chairperson is the challenged member, the question shall be resolved in accordance with paragraph 7e of this chapter;

f. Scheduling the specific hour and dates of hearings;

g. Closing the record;

h. Administering oaths or affirmations made by individuals giving testimony;

i. Ruling on motions from the parties; and

j. Calling witnesses on behalf of the Board.

7. PROCEDURE

a. **Determining Jurisdiction.** When a Board is convened to consider an appeal, the Board shall first determine whether the case is properly before it prior to considering the merits of the appeal. The Board shall determine whether the matter appealed is a major adverse action as defined in part II of this handbook, and whether it arises out of or includes a question of professional conduct or competence, and was filed timely. The determination of jurisdiction will be made as soon as practicable. The Board will make a record of its determination**.**

(1) The record of decision in any mixed case shall include a statement by the Board of its exclusive jurisdiction, citing 38 U.S.C. 7462(a) as the authority and the basis for such exclusive jurisdiction. A mixed case is one that includes both (a) a major adverse action arising out of, or including, a question of professional conduct or competence, and (b) a major adverse action which does not arise out of a question of professional conduct or competence or a disciplinary action.

(2) If necessary, the Board may develop the record to establish jurisdiction.

(3) If the Board determines that the appeal is not properly before it, e.g., that it lacks jurisdiction, the Board shall fully set forth its reasons, including a statement of the appropriate appeal procedure. The Under Secretary for Health will take appropriate action on the decision of the Board as described in paragraph 9e of this chapter.

b. **Type of Hearing.** The employee has the right to a hearing before the Board in connection with the appeal of a major adverse action. If the employee does not ask for a hearing before the Board, the Board may elect to conduct a hearing without the appellant or may consider the evidence of record, including any evidence developed by the Board. Formal hearings will be conducted in accordance with paragraph 8 of this chapter.

c. **Technical Advisors.** Employees may be designated to serve as technical advisors to the Board and assist in the development and review of the case.

d. **Presence of Board Members.** No Board hearing will proceed unless all members are present.

e. **Disqualification.** A Board member will be disqualified for service if the Chairperson rules that the Board member initiated or participated in the initiation of charges, had direct personal knowledge of the case or facts giving rise to the action, or if the Board member's relationship with the appellant or officials involved in recommending or deciding on the disputed action creates a question of bias. Any party to the case or member of the Board may make a motion to disqualify a Board member. The Chairperson will rule on the disqualification for service of any member of the Board. In cases where the Chairperson is the challenged member, or if a member of the Board questions the ruling of the Chairperson, the Board will make the ruling as to disqualification by majority vote in closed session.

f. **Mental/Physical Condition of Employee.** In the course of the hearing, if the appellant raises an issue of mental or physical condition in relation to the charges, the appellant will be given the opportunity to present evidence relating to the condition. If appropriate, the Board may refer the matter to a Physical Standards Board for review so that the Board may determine whether the matter was appropriately before the Board as an action under part II of this handbook, or whether it should have been processed under VA Directive and Handbook 5019, Occupational Health Services, for consideration of physical and/or mental incapacity. If, however, the appellant is alleging discrimination on the basis of a disabling condition, the employee should be referred to the EEO discrimination complaint process, which is the exclusive procedure for reviewing allegations of discrimination, and the hearing shall then proceed on the merits of the charges.

g. **Closing of Record.** At the conclusion of the hearing, the Chairperson will close the record unless he/she authorizes parties to submit written closing arguments, briefs, or documents identified for introduction into evidence. Should this be the case, the record will close on the date set by the Chairperson. If the appellant does not request an oral hearing, the record will close on the date the Board Chairperson sets as the final date for the receipt of submissions.

8. FORMAL HEARINGS

a. **Notifications**

(1) The Board Chairperson shall notify the appellant, the head of the facility, and any designated representatives when a hearing is scheduled. The initial notice from the Chairperson shall include the following:

(a) The names of the Board members and technical advisor(s) used;

(b) The specific hour and dates of the scheduled hearing;

(c) The date by which submissions must be made to the chairperson in connection with motions from the parties (e.g., to request rescheduling of hearing if good cause can be shown, as well as motions in other areas); and,

(d) The date by which witness lists must be exchanged, which must include statements as to what testimony each witness is expected to provide as well as any objections either party may have to the other's witnesses. Service will be by personal delivery or certified mail - return receipt requested.

(2) In addition to the above, the initial notices from the Chairperson should also inform the facility head of:

(a) The requirements to ensure that suitable hearing space is available and to arrange for a court reporter and any other administrative necessities;

(b) The date by which the appellant's (if applicable) and facility's representatives must be designated; and

(c) The requirement that within 15 days of receipt of the notice from the Chairperson, the facility must provide a complete tabbed and indexed evidence file to:

1. The Chairperson;

2. Each member of the Disciplinary Appeals Board;

3. The technical advisor;

4. The appellant; and

5. The Human Resources Management Programs and Policies Service (051).

b. **Scheduling the Hearing.** The hours and dates of the hearing are determined solely by the Chairperson. The hearing will be conducted on official Government time, and normally, without charge to leave of the employee(s) concerned.

c. **Location of Hearing.** The hearing will usually be held at the facility of the appellant.

d. **Public Hearing.** Disciplinary Appeals Board hearings are public; however, the appellant may request that the hearing be closed to protect the right to privacy. VA has the responsibility to protect the privacy of its beneficiaries and employees and confidential information concerning them. In such cases, the Chairperson may close a portion of the hearing to the public in order to protect the best interests of the appellant, a witness, the public, or any other person affected by the hearing. The Chairperson should obtain the advice of legal counsel on such issues.

e. **Exclusion of Individuals During Proceeding.** Prior to testifying, or if subject to recall, no witness will be permitted to hear the testimony being given by another witness unless the witness is the appellant, or is assisting in the representation of either party. In any event, the Chairperson of the Board will make the final determination on exclusion of individuals during any phase of the proceeding.

f. **Witnesses.** Both the appellant and management will have the right to call witnesses. The Chairperson will, on his/her own initiative, call such witnesses on behalf of the Board as the Chairperson deems necessary. The Chairperson has the final authority to determine the acceptability of any witness.

g. **Questioning of Witnesses.** The Chairperson will permit the parties to the case to ask questions of witnesses in order to ascertain all pertinent facts and is authorized to exclude irrelevant and/or unduly repetitious evidence. Both sides will have an opportunity to properly present and support their respective positions upon any question or matter presented to the Board for decision.

h. **Patients as Witnesses.** A patient, with the patient's consent, may be a witness provided there has been a medical determination that the patient has the capacity to testify and that the patient's appearance as a witness will not be detrimental to the patient's health and welfare.

i. **Oaths.** The Chairperson and Secretary of the Board shall have the authority to administer oaths or affirmations which will be made by all individuals giving testimony. (See appendix IV-C.)

j. **Record of Hearing**

(1) A verbatim record of the hearing proceedings will be prepared from written notes or mechanical recording and shall be maintained.

(a) Costs of transcription services will be borne by the facility where the appellant is or was employed. Contracts for transcription services will identify completion dates to ensure expeditious processing.

(b) The overnight receipt of transcripts is encouraged.

(c) If it would result in an undue burden or is otherwise impractical, the contract should provide for receipt within 2 weeks from the date on which the testimony occurred.

(2) The transcript will constitute part of the record.

(a) The record will be assembled by the Secretary of the Board, under the direction of the Chairperson, but the Board as a whole will be responsible for it.

(b) The record will be authenticated on VA Form 10-2543, Board Action, by the signature of all Board members and the technical advisor.

(3) The employee and/or his/her representative shall be provided a copy of the transcript of the formal hearing after authentication.

k. **Convening the Board.** The Chairperson will convene the Board, announce the name of the appellant (who will introduce his/her representative, if any), and announce the name of the Board members and technical advisor(s) present.

l. **Introduction of Evidence**

(1) In the opening statement, the Chairperson will give a brief summary of the issues set forth in the notice of proposed adverse action. The Chairperson will allow the introduction of evidence and call witnesses to testify in such order as the Chairperson sees fit.

(2) Any evidence file need not be formally introduced because it is already part of the record.

m. **Executive Sessions.** The Board will go into executive session for deliberation of questioned rulings of the Chairperson, Board findings, and Board recommendations. The Chairperson will announce such sessions. During executive sessions, only the Board members and such other individuals whose technical or professional advice or assistance is required by the Board, will be present. Executive sessions will be conducted off the record; however, the Chairperson will make the results a part of the record.

9. DISCIPLINARY APPEALS BOARD DECISIONS

a. **General.** After closing the record, but prior to returning to their duty facilities, the Board shall convene in closed session to attempt to reach a decision on the findings and penalty. If the Board determines that, due to the complexity of the issues or other compelling reasons, it is not feasible to reach a decision before returning to their duty facilities, the Board Chairperson shall ensure the Board's decision is rendered without any undue delay in order to meet established time frames.

b. **Findings**

(1) **Basis of Findings.** The findings of a Disciplinary Appeals Board will be based on the evidence presented, including evidence developed by the Board. The Board shall, with respect to each charge appealed, sustain the charge, dismiss the charge, or sustain the charge in part and dismiss the charge in part.

(2) **Deliberation and Voting on Findings.** Deliberation and voting on the findings will be held in closed sessions or through the use of teleconferences if face-to-face communication is not practical.

(a) The order in which the charges and specifications are to be voted upon will be determined by the Chairperson.

(b) Each member of the Board will indicate the member's individual finding on each charge.

(c) The majority opinion will rule.

(d) Minority opinions, if any, may be included on VA Form 10-2543.

(e) Technical advisors are not members of the Board and, therefore, do not possess any voting power.

c. **Decision.** The Board has full authority to render a decision on an appeal. The Board shall reach a decision within 45 calendar days of completion of the hearing, if a hearing is convened. In any event, a decision will be made by the Board no later than 120 calendar days after the appeal is received by the Under Secretary for Health or designee.

(1) If any charge is sustained in whole or in part, the Board shall approve the action as imposed; approve the action with modification, reduction, or exception; or reverse the action.

(2) If none of the charges are sustained in whole or in part, the Board will reverse the action.

d. **Preparation of VA Form 10-2543.** Following deliberation and voting on the findings and any penalty, VA Form 10-2543 will be prepared by the Disciplinary Appeals Board considering the case. The Chairperson of the Board will forward the complete record, including its findings and decision, signed and dated by all members of the Board and the technical advisor, through the Office of Human Resources Management (051) to the Under Secretary for Health for appropriate action. VA Form 10-2543 will contain supporting rationale for each of the findings.

e. **Action by the Under Secretary for Health.** The Under Secretary for Health shall execute the Board's decision in a timely manner, but in no case later than 90 calendar days after the Board's decision is received by the Under Secretary for Health. Pursuant to the Board's decision, the Under Secretary for Health may order reinstatement, award back pay in accordance with the Back Pay Act, and provide such other remedies as the Board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

(1) However, if the Under Secretary for Health finds a decision of the Board to be clearly contrary to the evidence or unlawful, the Under Secretary for Health may:

(a) reverse the decision of the Board; or

(b) vacate the decision of the Board and remand the matter to the Board for further consideration.

(2) If the decision, while not clearly contrary to the evidence or unlawful, is found to be not justified by the gravity of the charges, the Under Secretary for Health may mitigate the adverse action imposed.

(3) The Under Secretary for Health's execution of a Board's decision, or the mitigated action, if appropriate, shall be the final administrative action in the case.

f. **Remands.** In circumstances where the Under Secretary for Health vacates the Board's decision and remands the matter for further consideration, the Board shall normally render its subsequent decision within 45 calendar days of the completion of the hearing, if a hearing was convened after the remand.

(1) In any event, the Board's decision will be made no later than 90 calendar days after the remand is received by the Board Chairperson.

(2) If the remand is related solely to jurisdictional issues, then the Under Secretary for Health may establish a shorter resolution period.

g. **Case Record**

(1) The case record will consist of the notice of proposed adverse action, appellant's reply, if any, all evidence (documents or testimony) relied upon by the Board in reaching its decision, notice of decision to appellant, appellant's request for a hearing, Under Secretary for Health's or designee's appointment of Board, Board communications and notices related to the hearing, any Board rulings or submissions of the parties, verbatim record of any formal hearing, Board Action (VA Form 10-2543), Under Secretary for Health's execution of the Board's recommendation, and any Notification of Personnel Action (SF-50B).

(2) Major adverse action files which have been involved with an appeal to the Disciplinary Appeals Board will be maintained by the Office of Human Resources Management, Human Resources Management Programs and Policies Service (051). Records are maintained and disposed of in accordance with the records disposition authorities found in General Records Schedule 1 and VA Records Control Schedule 10-1, except where otherwise required to be retained for a longer period of time.

(3) One copy of notice of decision will be provided to the employee, the employee's representative, and the official who decided the adverse action. Any SF-50B, Notification of Personnel Action, will be filed in the employee's personnel folder.

10. REVIEW OF RECORDS

a. The Board Chairperson, upon request of an appellant (or the appellant's designated representative), may, in connection with the considerations of the Board, review confidential records or information covered by 38 U.S.C. 5701 and 7332 in accordance with 38 U.S.C. 7464(c)(1).

(1) The Board Chairperson may authorize the disclosure of such records or information to that employee (or representative) to the extent the Board considers appropriate for purposes of the proceedings of the Board.

(2) Decisions on requests to disclose records or information will be in writing.

b. In any such case, the Chairperson may direct that measures be taken to protect the personal privacy of individuals whose records are involved. Any person who uses or discloses a record or information under the provision of 38 U.S.C. 7464(c) for any purpose other than in connection with the proceedings of the Board is subject to a fine of not more than $5,000 in the case of a first offense and not more than $20,000 in the case of a subsequent offense.

11. TRAVEL

a. **Costs.** Funds to cover the travel and per diem costs of all Board members will be allotted from VA Central Office directly to the official facility of the individual Board member and VA employees who are required to assist the Board as directed by the Under Secretary for Health, or designee.

b. **Responsibilities for Expenses.** Travel expenses and subsistence expenses, or per diem allowance in lieu of subsistence expenses, for the purpose of attending the hearing will be borne by VA in accordance with Government Travel Regulations for the members of the Board and VA employees who are identified to assist the Board or to provide testimony. VA will not bear any expenses for the appellant or appellant's representative.

CHAPTER 2. DESIGNATION OF PANEL MEMBERS

1. SCOPE. This chapter governs to the designation of employees to serve on the panel from which Disciplinary Appeals Board members and grievance examiners, as appropriate, will be appointed to hear appeals of major adverse actions and disciplinary actions involving a question of professional conduct or competence.

2. RESPONSIBILITIES. The Under Secretary for Health or designee will periodically designate employees to serve on the panel.

3. QUALIFICATIONS OF PANEL MEMBERS. Individuals designated to serve on the panel must possess sufficient professional knowledge which would enable them to analyze, interpret, and evaluate written evidence and testimony and to make an impartial, objective, and well-reasoned decision.

4. AVAILABILITY OF ROSTER

a. VA shall announce, at least annually, the availability of a roster of employees on the panel. This announcement shall be made at all VHA field facilities and through publication in the Federal Register.

(1) A list of the names of employees on the panel shall be provided without charge upon written request by any person.

(2) The request should be forwarded to the Human Resources Management Programs and Policies Service (051) in VA Central Office.

b. Employees, employee organizations, and other interested parties may submit comments to the Under Secretary for Health concerning the suitability for service on the panel of any employee whose name appears on the list.

5. PANEL DESIGNATIONS. Decisions related to the designation or termination of the designation of any individual to serve on the panel are not subject to review under any grievance or appeal procedure.

6. TRAINING. All employees designated for the panel shall receive training in the functions and duties of Disciplinary Appeals Boards and grievance procedures.

EMPLOYEE/MANAGEMENT RELATIONS

PART VI. TITLE 38 SEPARATIONS NOT COVERED BY PARTS II OR III OF THIS HANDBOOK

CONTENTS

PARAGRAPH **PAGE**

1. SCOPE VI-1
2. POLICY VI-1
3. REGULATIONS AND PROCEDURES VI-1
4. REFERENCES VI-1
5. AUTHORITY AND RESPONSIBILITY VI-1
6. GENERAL VI-2
7. RESIGNATION VI-2
8. RETIREMENT VI-3
9. SEPARATION FOR DISABILITY VI-3
10. FAILURE TO MEET STATUTORY OR REGULATORY REQUIREMENTS VI-4
11. PRE-EMPLOYMENT SUITABILITY SEPARATIONS VI-4
12. ABANDONMENT OF POSITION VI-6
13. FAILURE TO ACCEPT REASSIGNMENT VI-7
14. SEPARATION FOR MILITARY SERVICE VI-7
15. INVOLUNTARY SEPARATION OF EMPLOYEES SERVING UNDER 38 U.S.C. 7405(a)(1)(A) VI-7
16. TERMINATION OF APPOINTMENTS MADE UNDER 38 U.S.C. 7306 ..... VI-8
17. TERMINATION OF APPOINTMENTS OF CONSULTANTS, ATTENDINGS, AND FEE-BASIS PERSONNEL VI-8
18. SEPARATION OF MEDICAL AND DENTAL RESIDENTS APPOINTED UNDER 38 U.S.C. 7406 ..... VI-8

PART VI. TITLE 38 SEPARATIONS NOT COVERED BY PARTS II OR III OF THIS HANDBOOK

1. SCOPE. This part contains procedures for the separation of individuals appointed under authority of 38 U.S.C. 7306, 7401(1), 7405 and 7406. Separations of probationary employees because they are not fully qualified and satisfactory are covered in part III, chapter 1 of this handbook. Discharges for disciplinary reasons of employees with permanent status appointed under section 7401(1) are covered under part II of this handbook, and the term involuntary separations as used in this part does not include such discharges. As used in this part, the term designee refers to a designee in Central Office. The term employee includes all employees covered by this part. This part does not apply in any way to employees appointed under 38 U.S.C. 7401(3). These employees are covered by applicable provisions of title 5, U.S.C.

2. POLICY

a. Separations and other actions under this part will be effected uniformly and fairly in accordance with management needs, the rights of the affected employees, and the requirements of applicable laws and regulations.

b. There will be no discrimination because of race, color, religion, national origin, sex or sexual orientation, lawful political affiliation, membership or nonmembership in a labor organization, marital status, nondisqualifying disability, age, or other irrelevant factors in any separation or other action under this part.

c. Appointments or designations under authority of 38 U.S.C. 7306 terminate on completion of the approved term of service unless sooner terminated for such cause as will promote the efficiency of the service. Normally employees whose appointments will terminate on the completion date should be informed at least 30 calendar days in advance as to whether their appointments will be terminated, extended, renewed, or converted, as appropriate.

d. The Secretary is the approving authority for involuntary separations under this part of employees in positions centralized to the Secretary.

3. REGULATIONS AND PROCEDURES. The Under Secretary for Health shall promulgate regulations and the Under Secretary for Health and designees shall establish procedures for the following actions under this part: separations because of resignation, retirement, disability, disqualification, abandonment of position, failure to accept reassignment, military service, and pre-employment suitability.

4. REFERENCES. 38 U.S.C., chapter 73 and 74.

5. AUTHORITY AND RESPONSIBILITY

a. **Secretary.** Approves involuntary separations of employees appointed under authority 38 U.S.C. 7306.

b. **Under Secretary for Health or Designees.** Except as indicated above, approves all involuntary separations of Central Office employees and Distinguished Physicians.

c. **Directors of Health Care Facilities.** Approve separations of employees, other than those listed in subparagraphs a and b above, and all voluntary separations of employees except for resignations and retirements.

d. **Human Resources Management Officers.** Determine that separations and other actions comply with applicable regulations and procedures, assist management officials with these actions, and advise employees about separations and review rights.

6. GENERAL

a. Effective dates are discussed under the paragraphs covering each of the various types of separation actions. The Office of Personnel Management (OPM) Operating Manual "Guide to Processing Personnel Actions" provides further instructions regarding establishment of effective dates, nature of actions, and amendment and cancellation of separation actions.

b. All employees should be informed of the rights and benefits to which they may be entitled upon leaving VA.

c. Exit interviews with employees who are voluntarily separated should be conducted by human resources officials. Supervisors may also interview employees to determine if the reasons for leaving relate to dissatisfaction with working conditions or personnel practices. This information may be used to identify possible problems which may impede the effective and efficient management of the unit and adversely affect employee retention.

7. RESIGNATION

a. Employee will be neither requested nor advised to resign.

b. Employees have the right to resign and may be advised of this right. An employee whose services are being reviewed for possible involuntary separation may resign at any time, and the resignation may not be delayed by administrative action.

c. Resignations may not be conditional.

d. The provisions of VHA Handbook 1100.18, regarding reporting to State licensing boards and license monitoring entities, must be followed in all instances after an employee whose standards of clinical practice are in questions resigns. Also, in accordance with VHA Handbook 1100.18, VA officials may not enter into any written or oral agreement which would prohibit or restrict the release of information to a State licensing board or license monitoring entity.

e. Resignations are processed according to instructions contained in VA Handbook 5005, Staffing. The reasons for an employee's resignation will be documented on Standard Form 50-B, Notification of Personnel Action, in accordance with instructions contained in OPM's Operating Manual "Guide to Processing Personnel Actions."

8. RETIREMENT

a. **Disability**

(1) Employees covered by the Civil Service System (CSRS) who have 5 or more years of civilian service may file for disability retirement under the provisions of 5 CFR 831.

(2) Employees covered by the Federal Retirement System (FERS) who have at least 18 months of civilian service may file for disability retirement under the provisions of 5 CFR 845. FERS employees may also be eligible for disability benefits under the Old-Age, Survivors, and Disability Insurance (OASDI) program administered by the Social Security administration.

(3) When an employee applies for disability retirement, the Human Resources Management Officer will process the application and forward it to the OPM. For centralized employees, the appropriate Central Office officials will be notified.

b. **Other Retirement.** The retirement provisions of title 5 U.S.C., including those for agency-initiated disability retirement, apply to employees covered by this part.

c. **Reporting to Licensing Boards.** The provisions VHA Handbook 1100.18, relating to reporting to State licensing boards and license monitoring entities, must be followed in all instances in which an employee whose standards of clinical practice are in question retires.

9. SEPARATION FOR DISABILITY

a. When a decision to separate an employee for disability is made under the provisions of VA Handbook 5019, the facility Director will inform the employee in writing, specifying the reasons for the separation and the date of the separation. The notice will either be given directly to the employee and the employee requested to acknowledge receipt, or mailed by certified mail at least 15 days in advance of the separation date. During the notice period the employee should be placed on sick leave, annual leave, or leave without pay, as appropriate. Employees who meet service requirements will be notified of disability retirement eligibility and procedures. The separation will not be delayed if the employee applies for retirement.

b. An employee in a noncentralized position may, within 10 days of the notice of separation, request a review of the action by the VISN. If a review is requested, the complete record of the case along with any statement or other evidence the employee desires to submit will be forwarded to the appropriate Network director. The Network Director may request additional information and/or medical evidence. If the employee requests review, the facility Director may choose to postpone the separation until a decision is reached.

c. The procedures of VHA Handbook 1100.18, regarding reporting to State licensing bodies and license monitoring entities, are for consideration whenever an employee is separated for disability and the nature of the disability may affect standards of clinical practice.

10. FAILURE TO MEET STATUTORY OR REGULATORY REQUIREMENTS. Employees are responsible for maintaining all qualifications required for appointment and for providing evidence of these qualifications, e.g., full and unrestricted licensure in a State, when requested. An employee who fails to meet or who fails to present evidence of meeting the statutory, e.g., 38 U.S.C.7402, or regulatory requirements for appointment will be separated. If it is determined that the employee willfully concealed the lack of or loss of a qualification, e.g., full and unrestricted license in a State, the separation will be made retroactive to the date the qualification was lost; otherwise the separation will be effected upon determination that the statutory or regulatory requirement is not met. The appointment of an individual who did not fully meet all statutory and regulatory requirements at the time of appointment will be canceled immediately upon discovery of the disqualification. The following provisions apply to separations or cancellations for disqualification:

a. The employee will be notified in writing of the separation or cancellation and, when applicable, of the right of review in subparagraph c below by the facility Director. For Central Office employees, the notification will be made by the Under Secretary for Health or designee. The notification should be given directly to the employee and the employee requested to acknowledge receipt, or mailed to the employee by certified mail.

b. In the case of the facility employees in positions centralized to the Under Secretary for Health, the facility Director will immediately notify the Network Director and appropriate Central Office official of the separation or cancellation for failure to meet statutory or regulatory requirements for appointment.

c. Facility employees, whose separations are approved by the facility Director, have the right to seek a post-separation or post-cancellation review of the action by the Network Director. A request for review must be made in writing through the facility Director. It must be delivered to the facility Director or designee by hand or postmarked within 15 calendar days of the date the notification of separation or cancellation was given to the employee or mailed by certified mail. The request for review must be based solely on evidence relating to the failure to meet statutory or regulatory requirements for appointment. If such a review is requested, the facility will forward a complete record of the case along with evidence submitted by the employee to the appropriate Network director.

d. If there is some doubt as to the legality of a facility employee's appointment, the facility Director may request a review by the Under Secretary for Health or designee. Requests for review should be submitted through the appropriate VISN to the Assistant Deputy Under Secretary for Health (10N_/051). If review is requested by the facility, the Director may choose to defer separation of the employee. The employee will be detailed to nonpatient care duties while the decision of the reviewing official is pending.

e. Individuals who knowingly and willfully conceal their failure to meet statutory and regulatory requirements may be subject to repayment of monies and benefits received as a result of this concealment.

11. PRE-EMPLOYMENT SUITABILITY SEPARATIONS

a. **General.** This paragraph contains procedures which will be used to separate employees appointed under 38 U.S.C. 7306 and 7401(1), for pre-employment suitability reasons unknown to VA officials at the time of appointment; i.e., pre-employment misconduct which is judged to make the employee

unsuitable for employment. Pre-employment misconduct includes delinquency or misconduct in prior employment; criminal, dishonest, infamous or notoriously disgraceful conduct; intentional false statement or deception or fraud on the employment application; habitual use of intoxicating beverages to excess; abuse of narcotics, drugs, or other controlled substances; reasonable doubt as to the loyalty of the person involved to the Government of the United States. Criteria contained in 5 CFR 731 should be used as a guide in determining if a particular act constitutes pre-employment misconduct. The procedures provided in this paragraph pertain only to pre-employment suitability matters and do not relate to an individual's conduct or performance as a VA employee.

b. **Procedures**

(1) **Standards Board.** Employees, whose pre-employment suitability is in question, will be given the opportunity to have their case reviewed by a Professional Standards Boards. If an employee requests such review, the Board will be designated by the appointing official. The employee's immediate and higher-level supervisors may not serve on the Board.

(2) **Notice to the Employee.** The Assistant Deputy Under Secretary for Health (10N) or the facility Director, as appropriate, will give written notice as described below. The notice will contain the following information:

(a) Notice of the opportunity for Board review and the pre-employment suitability allegation(s).

(b) The fact that separation may result if the allegations are sustained.

(c) The fact that the employee may chose to respond to the allegations:

1. Directly to the Assistant Deputy Under Secretary for Health (10N) or the facility Director, as appropriate;
or

2. Before a Professional Standards Board either orally or in writing and that an oral response may be made informally before the Board or in a full evidentiary hearing.

(d) The fact that the employee may be represented by counsel throughout the proceedings.

(e) The fact that if the employee chooses to respond orally before the Board, either informally or in a full evidentiary hearing, the employee must so notify the official designated in the notice within three workdays of receipt of the notice so that hearing arrangements can be made. The employee will, however, be given at least the full 15 workday notice period in which to prepare a response before the Board is scheduled.

(3) **Employee Reply.** The employee will be given 15 days from receipt or the notice of refusal to accept receipt of the notice to submit a reply.

(4) **Procedural Options.** The employee will be given the option of responding to the allegation(s) orally or in writing before a Board or personally to the Assistant Deputy Under Secretary for Health (10N) or designee or the facility Director as appropriate. Regardless of the option selected, the

employee will have the right to be represented by counsel. If the employee chooses to respond orally before a Board, the employee may elect to do so informally before the Board or in a full evidentiary hearing. An employee who chooses a full evidentiary hearing before the Board is entitled to challenge the evidence against the employee, to present evidence, and to call witnesses in the employee's own behalf.

c. **Review**

(1) If the employee did not elect a Board review, a designee of the Assistant Deputy Under Secretary for Health (10N) or facility Director, as appropriate, will review the evidence including any submitted by the employee. If the pre-employment suitability allegation(s) are supported, this official will recommend to the appointing official whether or not the employee should be separated. The recommendation will be based on the nature of the pre-employment misconduct and the implications it may have for the individual's conduct and performance as a VA employee. For facility employees, the recommendation will be forwarded through the Network Director (10N__/051).

(2) If the employee elected a Board review, the Board will review all evidence including any presented by the employee. If the Board finds that the pre-employment suitability allegations(s) are supported, it will recommend whether or not the employee should be separated. The Board should base its recommendation on the nature of the pre-employment misconduct and the implications it may have for the individual's conduct and performance as a VA employee. The Board's findings and recommendations will be documented on VA Form 10-2543, Board Action. The Board Action and supporting evidence, along with comments, will be forwarded to the appropriate approving official (i.e., the appointing official).

d. **Decision.** A decision by the approving official to separate will be effected within five workdays of the decision. There shall be no further appeal or review.

12. ABANDONMENT OF POSITION

a. When an employee appointed under 38 U.S.C 7306 or 7401(1) has been absent from duty without authorization for more than five consecutive workdays and all efforts to communicate with the individual have been unsuccessful, a letter signed by the official authorized (see paragraph 5 of this part) to approve separation will be sent to the employee's last known address by certified mail, return receipt requested. The letter will contain:

(1) The date unauthorized absence began and efforts made to contact the employee.

(2) Notice that if, within 10 days of the date the letter was mailed by certified mail, the employee does not return to duty or make satisfactory arrangements to do so, the employee will be separated for abandonment of position.

(3) A statement that if the employee does not wish to return to duty, the employee may resign if the resignation is submitted within 10 days specified in subparagraph (2).

(4) Statement that the employee is currently being carried in an absence without leave status.

(5) Notification that if separated for abandonment of position, the employee may request in writing a review of the action by the Under Secretary for Health or designee.

b. If the employee does not return to work or does not, in the judgment of the approving official, make satisfactory arrangement to do so, the separation will be effected at the end of the 10-day notice period. The approving official should take into consideration any presentation by the employee as to illness or disability or emergency circumstances preventing the employee from returning to work.

c. If, at any time prior to or during the 10-day notice period, the employee returns to duty or makes satisfactory arrangements to do so, the employee will be restored to duty or carried in an appropriate leave status. If appropriate, disciplinary action may be taken by processing the case under the provisions of parts II and III of this handbook. If arrangements are made to return the employee to duty, the individual will normally forfeit pay for the period of unauthorized absence. If warranted, however, substitution of annual or sick leave may be authorized.

d. An individual separated for abandonment of position by decision of a facility director may request a review of the action by the Under Secretary for Health or designee. If the Under Secretary for Health or designee determines that the employee did not abandon the position, the employee will be restored to duty. The decision of the Under Secretary for Health or designee is final.

13. FAILURE TO ACCEPT REASSIGNMENT. If separation for failure to accept reassignment is approved under VA Handbook 5005, part IV, the facility Director will give the employee an advance written notice of at least 30 calendar days. The notice of separation should either be given directly to the employee and the employee requested to acknowledge receipt or mailed to the employee by certified mail. The 30-day notice period begins on the day the employee is given the notification or on the date it is mailed.

14. SEPARATION FOR MILITARY SERVICE. Procedure involving separation for military service prescribed in VA Handbook 5005 will be followed for employees appointed under authority of 38 U.S.C. 7306 and 7401(1) and non-full-time employees appointed without time limit under authority of 38 U.S.C. 7405(a)(1)(A) and (B).

15. INVOLUNTARY SEPARATION OF EMPLOYEES APPOINTED UNDER 38 USC 7405(a)(1)(A)

a. In effecting involuntary separations of employees serving under 38 U.S.C. 7405, the procedural requirements prescribed for separations, such as reviews by Professional Standards Boards or Disciplinary Boards, do not apply.

b. Although not required, employees should, where feasible, be given such advance notice of separation as determined appropriate by the approving official.

c. The employee will not be entitled to a review of the involuntary separation.

d. The provisions of VHA Handbook 1100.18, relating to reporting to State licensing boards and license monitoring entities, must be followed in all instances in which an employee is separated whose standards of clinical practice are in question.

16. TERMINATION OF APPOINTMENTS MADE UNDER 38 U.S.C. 7306

a. Appointments or designations made under authority of 38 U.S.C. 7306, terminate on completion of the approved term of service unless terminated sooner for such cause as will promote the efficiency of the service or at the request of the employee.

b. Normally, employees whose appointments will terminate on completion of the approved term of service should be notified at least 30 calendar days in advance as to whether their appointments will be terminated, extended, or converted. (See VA Handbook 5005.)

17. TERMINATION OF APPOINTMENTS OF CONSULTANTS, ATTENDINGS, AND FEE-BASIS PERSONNEL. Appointments of fee-basis personnel appointed in accordance with instructions contained in VA Handbook 5005 will terminate on the date of termination specified in any time-limited appointment or at discretion of the appointing authority when the services of fee-basis personnel are no longer needed. Whenever possible, advance notice of termination should be given.

18. SEPARATION OF MEDICAL AND DENTAL RESIDENTS APPOINTED UNDER 38 U.S.C. 7406

a. When a noncareer medical or dental resident in an independent training program (accredited in the name of the VA facility) is proposed for separation because of deficiencies in performance, suitability, or conduct, the resident will be entitled to a review of the proposed termination by a House Staff Review Committee. The composition of the Committee will be as indicated in M-8, part II, chapter 1, except that persons in a position to prejudice the action of the Committee, such as immediate or higher-level supervisors, may not serve on the Committee. The procedures to be followed will be similar to those for probationary employees contained in part III of this handbook, except as indicated below:

(1) The findings and recommendation of the House Staff Review Committee will be sent, through the Deans Committee for their review and comments, to the facility Director for final decision. If the decision is to separate the individual, the separation will be effected within 15 calendar days after approval of the action.

(2) The resident will not be entitled to a further review of the separation decision.

b. When it is determined that a noncareer medical or dental resident in an integrated program (accredited in the name of the affiliated non-VA institution) should be separated for deficiencies in performance, suitability, or conduct, the VA clinical supervisor under whom the resident is assigned at the VA facility will prepare a separation recommendation and will send it, through the Chief of Staff and program director of the affiliated program for review and comment, to the VA facility Director for a decision. The recommendation must be supported by a thorough documentation of the individuals deficiencies. If the decision is to separate, the separation will be effected within 15 days after approval. (These procedures do not apply when a resident is no longer an approved participant in an integrated program. Such employees should be separated immediately upon notice from the affiliated institution.)

c. Facility directors may modify the provisions of this paragraph to meet the requirements of accrediting bodies.

d. Under normal conditions, the appointments of the residents will terminate on completion of the approved term of service.