

**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 Employee Relations and Performance Management Service (051), Office of the Deputy Assistant Secretary for Human Resources and Labor Relations.
- 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:**

**BY DIRECTION OF THE SECRETARY  
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## 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 [ ] physicians, dentists, podiatrists, optometrists, chiropractors, nurses, nurse anesthetists, physician assistants and expanded- function dental auxiliaries [holding a full-time, permanent appointment under 38 U.S.C. 7401(l) and part-time registered nurses, including those with an intermittent duty basis, appointed under 38 U.S.C. 7405(a)(1)(A) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b)]. 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 [(except for part-time registered nurses)] 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. Section 302 of the Veterans Healthcare, Capital Asset and Business Improvement Act of 2003 (Pub.L. 108-170).

c. Section 3 of the Department of Veterans Affairs Health Care Personnel Act of 2004 (Pub.L. 108-445).

d. [Section 601 of the Caregivers and Veterans Omnibus Health Services Act of 2010 Public Law (Pub. L.) 111-163.

e.] Title 38, United States Code, chapter 74.

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

a. **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.

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

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

d. **Disciplinary Appeals Board.** The three member board designated to hear a [full-time permanent] employee's appeal of a major adverse action which is based in whole or in part on a question of professional conduct or competence.

e. **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.)

f. **Major Adverse Actions.** These are suspension, transfer, reduction in grade, reduction in basic pay, and discharge based on conduct or performance. For purposes of this Directive, a reduction in basic pay includes a reduction in the market pay of a physician or dentist as a result of an involuntary reassignment or change in assignment taken for disciplinary reasons, i.e. conduct or performance reasons.

g. **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.

h. **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.

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 includes a reduction in the market pay of a physician or dentist as a result of an involuntary reassignment or change in assignment when taken for disciplinary reasons. However, this does not apply to reductions in pay other than basic pay, such as the loss of or reduction in physician or dentist performance pay, nurse executive special pay, 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. A reduction in market pay for a physician or dentist is considered a reduction in basic pay for purposes of this appendix only when the reduction results from an involuntary reassignment or change in assignment for conduct or performance reasons. [The loss of head nurse differential (two steps) due to the reassignment of a head nurse to another position that does not allow for this differential is not considered a major adverse action even when the reassignment is for cause. However, a major adverse action has occurred if the facility has established a specialty schedule for head nurses under the Locality Pay System and the reassignment for cause results in a change to a nurse pay schedule with a lower annual salary rate. This is also applicable if other employees in title 38 occupations, excluding physicians and dentists, are reassigned for cause from one annual salary rate table to a lower annual salary rate table (e.g., from a special rate authorized under 38 U.S.C. 7455 to a lower special rate table; from a special rate authorized under 38 U.S.C. 7455 to a regular rate.)] A change in assignment refers to a permanent change in official duty station, change in duty basis (i.e. to/from full-time, part-time or intermittent), change in tier, or a significant change in the duties of the position as determined by an appropriate management official.

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

k. **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.

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

m. **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.

**(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), 7421, 7461, 7462, and 7464.)**

## **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 (including reductions in physician and dentist market pay resulting from an involuntary reassignment or change in assignment when taken for conduct or performance reasons) 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 [if the employee is full-time permanent and 14 calendar days for part-time registered nurses]. 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 [full-time permanent] 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.

**[NOTE:** *There is no statutory requirement for a decision to be issued to a part-time registered nurse within 21 days of a reply, but a timely decision should be issued.*]

d. **Exceptions to 30-day Advance Notice.** The requirement for a 30-day advance notice period [for full-time permanent employees appointed under 38 U.S.C. 7401(1)] 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 also applicable to the 14-day advance notice period for part-time registered nurses appointed under 38 U.S.C. 7405]. 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 [full-time permanent] employee's reply(ies). [There is no statutory requirement for a decision to be issued within 21 days of a part-time registered nurse's reply, but a timely decision should be issued.]

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 [for full-time permanent employees and not less than 14 days from receipt of notice of proposed action for part-time registered nurses]) 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 [full-time permanent] employee may appeal to the Disciplinary Appeals Board under the provisions in section C of this appendix.

[(3) If the major adverse action involves or includes a question of professional conduct or competence, a part-time registered nurse may elect to seek review of the decision under the grievance procedure described in part IV, chapter 3 of this handbook.

(4)] Grievances or appeals over decisions to involuntarily reassign or change the assignment of a physician or dentist for disciplinary reasons resulting in a reduction in market pay are limited to a review of the decision to reassign or change the assignment. The decision to reduce the physician or dentist's market pay or the amount of the reduction is not subject to review under the grievance or appeal procedures. However, a physician or dentist may request reconsideration of the tier determination in accordance with VA Handbook 5007, Part IX, paragraph 11.

[(5)] If the [full-time permanent] 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.

[(6)] 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.

[(7)] 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, chiropractors, nurses, nurse anesthetists, physician assistants, and expanded-function dental auxiliaries who are not on time-limited appointments [and part-time registered nurses, including those with an intermittent duty basis, appointed under 38 U.S.C. 7405(a)(1)(A)].

(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 [issued to full-time permanent employees], other than major adverse actions which involve questions of professional conduct or competence, are covered by the grievance procedures described in this section. [These procedures also cover disciplinary and major adverse actions (as defined in VA Handbook 5021, Part II) issued to permanent and probationary part-time registered nurses appointed under 38 U.S.C. 7405(a)(1)(A). Part-time includes those registered nurses assigned to an intermittent tour of duty.]

**(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. Section 302 of the Veterans Healthcare, Capital Asset and Business Improvement Act of 2003 (Pub. L. 108-170)

c. Section 3 of the Department of Veterans Affairs Health Care Personnel Act of 2004 (Pub. L. 108-445).

d. [Section 601 of the Caregivers and Veterans Omnibus Health Services Act of 2010 Public Law (Pub.L.) 111-163.

e.] 38 U.S.C. 501(a), 7421, 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. **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.

b. **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.

c. **Employee.** Any physician, dentist, podiatrist, [chiropractor,] 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.

d. **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.

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

(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 [and Labor Relations] (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 [unless issued to a part-time registered nurse under 38 U.S.C. 7405(a)(1)(A)].

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, [regarding the approval, disapproval, or amount of market or performance pay granted to a physician or dentist in the Veterans Health Administration. Refer to VA Handbook 5007, part IX, paragraph 11 for information regarding the right to request reconsideration of a tier determination].

w. [Determinations and authorizations, including those delegated by the Secretary, regarding the approval, disapproval, or amount of special pay granted to a nurse executive in the Veterans Health Administration].

x. [Designations of employees to serve on the panel from which members of Disciplinary Appeals Boards are selected and the selection] of employees to serve on Disciplinary Appeal Boards, professional standards boards, compensation panels, or the appointment of a grievance examiner].

y. [All matters for which review procedures are already established in VA policy].

[z.] 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 (including reductions in market pay for physicians and dentists resulting from involuntary reassignments or changes in assignment when taken for conduct or performance reasons), 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. 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, chiropractors, 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. Section 302 of the Veterans Healthcare, Capital Asset and Business Improvement Act of 2003 (Pub. L. 108-170).
- c. Section 3 of the Department of Veterans Affairs Health Care Personnel Act of 2004 (Pub. L. 108-445).
- d. 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 may be by personal service, facsimile, [ ] certified mail[, or other confirmed delivery methods]. A copy of the appeal must be served on the decision official who took the action being appealed and any management representative of record.

## APPENDIX A

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, [confirmed delivery of the notice], or presumed to be 5 days after depositing the decision in the U.S. mail if [confirmation of delivery is unavailable]. The Deputy Under Secretary for Health for Operations and Management will make a final decision regarding the determination that an appeal is filed untimely. The employee will be notified in writing, by letter, of this final determination. There are no further administrative appeal rights regarding the issue of timeliness.

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 [Deputy] Under Secretary for Health.** [The Under Secretary for Health has delegated the authority to execute decisions made by Disciplinary Appeals Boards to the Deputy Under Secretary for Health.] The [Deputy] 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 [Deputy] Under Secretary for Health. Pursuant to the Board's decision, the [Deputy] 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 [Deputy] Under Secretary for Health finds a decision of the Board to be clearly contrary to the evidence or unlawful the [Deputy] 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 [Deputy] Under Secretary for Health may mitigate the adverse action imposed.

(3) The [Deputy] 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, [Deputy] 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), [Deputy] 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 revise the Department of Veterans Affairs (VA) policy regarding employee/management relations.
2. **SUMMARY OF CONTENTS/MAJOR CHANGES:** This policy rewrite clarifies and modifies the agency grievance processes and procedures outlined in Part IV, Chapters 1 and 2 of VA Handbook 5021. The pages in this issuance replace the corresponding page numbers in VA Handbook 5021. These changes will be incorporated into the electronic version of VA Handbook 5021, Employee-Management Relations, maintained on the [Office of the Chief Human Capital Officer SharePoint](#) and the [VA Publications website](#). This policy update includes, but is not limited to, the following changes:
  - a. Reorganizes Chapters 2 and 3 to provide clarification, such as officials authorized to decide grievances, requirement to assign grievance examiners except in specific circumstances, requesting additional information when necessary from grievant or grievance examiner.
  - b. Revises types of employees and matters excluded from the agency grievance procedures.
  - c. No longer requires grievances filed by title 5 or hybrid-title 38 employees resulting from disciplinary actions to be filed under the informal grievance procedure.
  - d. Abolishes administrative appeals for employees appointed under [5 C.F.R. 213, Subpart C, Schedule A or Schedule B](#).
  - e. Allows informal grievances to be rejected if the employee fails to provide additional information upon request or if the matter being grieved is excluded under the agency grievance procedures.
  - f. No longer requires title 5 and hybrid-title 38 employees and their representatives to be given an advanced copy of the grievance examiner's report.
  - g. Removed gender identity.
  - h. Revised to clarify that employees serving a probationary or trial period cannot file a grievance regarding termination after initial appointment. The clarifying language limiting the termination to unsatisfactory performance or conduct is deleted.

3. **RESPONSIBLE OFFICE:** Human Resources and Administration/ Operations, Security, and Preparedness (HRA/OSP) (006), Office of the Chief Human Capital Officer (OCHCO) (05), Employee Relations and Performance Management Service (051).
4. **RELATED DIRECTIVE:** VA Directive 5021, Employee/Management Relations.
5. **RESCISSION:** Not applicable.

**CERTIFIED BY:**

**BY DIRECTION OF THE SECRETARY  
OF VETERANS AFFAIRS:**

/s/  
Nathan Sanfilippo  
Acting Assistant Secretary for  
Enterprise Integration

/s/  
Mark R. Engelbaum  
Assistant Secretary for  
Human Resources and Administration/  
Operations, Security, and Preparedness

**DISTRIBUTION:** Electronic Only

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## EMPLOYEE/MANAGEMENT RELATIONS

## PART I. DISCIPLINARY AND ADVERSE ACTIONS UNDER TITLE 5

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## 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; [ ] 38 U.S.C. 7401(3) [; and 38 U.S.C. 7403(f)(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. [Suspension of more than 14 calendar days] 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 [ ] 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



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

b. [**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)].

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

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

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. [**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].

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

h. [**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].

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

j. [**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)].

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.

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(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 [and Labor Relations] 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. [Directors in VA Central Office (VACO) and field facility directors for Veterans Health Administration (VHA), Veterans Benefits Administration (VBA), and National Cemetery Administration (NCA) are defined in appendices B, C, D, and E of this part.]

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 [also see appendices B, C, D, and E for a more detailed reference chart by organization]:

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

(2) **Reprimand.** The official who may issue a letter of reprimand to an employee must be [in the employee's supervisory line] at the division or service chief level [or above] 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 [in the employee's supervisory line] 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 [in the employee's supervisory line] 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 [a higher level than the proposing official, and at or above] the director level in a field facility [(see definition for field facility director in appendices B, C, D, and E of this part),] or at [a level above the division chief level] in Central Office [provided that the higher level official is in the supervisory line.] 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 [as appropriate. Based on the circumstances of the case, actions may be proposed and decided by officials outside the employee's supervisory line in order to ensure no conflict of interest exists. When adverse actions are proposed and decided by officials outside the employee's supervisory chain, the concepts described in paragraph 6b(5) will be followed to determine the correct officials to propose and decide the action]. 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.

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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

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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 I, 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 [available on the [Office of Human Resources Management, Employee Relations](#) website]. 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.

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(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 [available on the [Office of Human Resources Management, Employee Relations](#) website].

(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:

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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 [and Labor Relations] (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 [is available on the [Office of Human Resources Management, Employee Relations website](#)].

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

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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 [is available on the [Office of Human Resources Management, Employee Relations](#) website].

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 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 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) [and 38 U.S.C. 7405(a)(1)(B) (i.e., part-time permanent hybrids and part-time or full-time temporary hybrids serving terms longer than one year)] 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;



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(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 [(see [Office of Human Resources Management, Employee Relations](#) Web site for sample)]:

(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

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made. 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 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 [hears] the oral reply, the [written] summary [of the reply must be provided to the employee. The employee must be given a reasonable period of time, generally not less than three work days, to review the written summary and respond to the accuracy of its content. Both the designee's written summary of the oral reply and the employee's response to the written summary will be included in the evidence file, and forwarded to the deciding official. The designee who hears the oral reply] may [include] a recommendation on the proposed action [but may not provide any supplementary information that was not contained in the evidence file or presented by the employee during the reply period].

(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 the [Office of Human Resources Management, Employee Relations](#) Web site for sample)]:

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 permanent hybrids) or 7405(a)(1)(B) (i.e., part-time permanent hybrids or part-time or full-time temporary hybrids serving terms longer than one year) 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 U.S.C. 7511 and 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, [chiropractors,] 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) and hybrid employees appointed under 38 U.S.C. 7405(a)(1)(B), who are part-time and have completed their probationary period or who are part-time or full-time temporary and have completed more than one year of service on an appointment not limited to one year or less, are covered by this chapter.*

b. Schedule C employees;

[c. Senior Executives in the Office of Inspector General;]

[d.] An individual appointed by the President; and,

[e.] 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.

[g. **Health and Human Services Sanctions List.** When an employee is excluded by the Health and Human Services Office of Inspector General, they are deemed ineligible for receipt of Federal health care funds for items or services they provide during the period of their exclusion. This includes salary, expenses, and fringe benefits associated with employment. Accordingly, when the name of a VHA employee or non-VHA employee who is paid with VHA funds, is posted on the Health and Human Services sanctions listing, the employee will receive a proposed removal notice immediately and provided rights in accordance with paragraph 7 of this chapter.]

## 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

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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[, available on the [Office of Human Resources Management, Employee Relations](#) website,] 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 the [Office of Human Resources Management, Employee Relations](#) Web site for sample)]:

(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;

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(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.

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## 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 written] summary [of the reply must be provided to the employee. The employee must be given a reasonable period of time, generally not less than three work days, to review the written summary and respond to the accuracy of its content. Both the designee's written summary of the oral reply and the employee's response to the written summary will be included in the adverse action file, and forwarded to the deciding official. The designee who hears the oral reply] may include a recommendation on the proposed action [but may not provide any supplementary information that was not contained in the evidence file or presented by the employee during the reply period.]

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.

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(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



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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 [(see the [Office of Human Resources Management, Employee Relations](#) Web site for sample)]:

(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 the sample letter on the [Office of Human Resources Management, Employee Relations](#) Website 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 [the [Office of Human Resources Management, Employee Relations](#) Web site for sample]).

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 [the [Office of Human Resources Management, Employee Relations](#) Website] 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

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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 [are available on the [Office of Human Resources Management, Employee Relations](#) website].

## 15. [SUSPENSIONS FOR MORE THAN 14 DAYS] IN THE SENIOR EXECUTIVE SERVICE

### a. Actions Covered

(1) The provisions of this paragraph apply only to [] a suspension for more than 14 days. [NOTE: The “Veterans Access, Choice, and Accountability Act of 2014” (Public Law 113-146, dated August 7, 2014) requires separate procedures for the removal and transfer of those in the Senior Executive Service (SES). For further guidance on these procedures contact the Corporate Senior Executive Management Office (CSEMO).]

(2) [A suspension for more than 14 days] 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 [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) [A suspension for more than 14 days in the SES will be proposed by an appropriate higher level official. Since members of the SES are centralized to the Secretary, the Secretary reserves the right to decide a suspension for more than 14 days against employees in the SES.]

(2) All procedural requirements for [a suspension for more than 14 days] discussed in this chapter must be met.

**PART I****CHAPTER 3****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 [calendar days] 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;

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(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 [calendar days for suspension actions].*

**TABLE OF PENALTIES FOR TITLE 5 AND TITLE 38 EMPLOYEES**

<b>NATURE OF OFFENSE</b>	<b>1ST OFFENSE</b>	<b>2ND OFFENSE</b>	<b>3RD OFFENSE</b>
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Attendance</b>			
1. Unexcused tardiness.	Admonishment Reprimand	Reprimand 7 days	7 days Removal
2. Unexcused or unauthorized absence.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
3. Leaving job to which assigned or VA premises, during working hours, without proper permission.	Admonishment Reprimand	Reprimand 7 days	14 days Removal
4. Obtaining or requesting leave under false pretense, or falsifying attendance record for self or another employee.	Reprimand Removal	14 days Removal	Removal
<b>Safety and Health</b>			
5. Smoking in unauthorized places or carrying of matches in explosive areas.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
6. Failure to report personal injury or accident.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
7. Failure to observe precaution for personal safety, posted rules, signs, written or oral safety instructions; failure to use protective clothing or equipment; or carry flammable materials into a hazardous area.	Admonishment 14 days	Reprimand Removal	14 days Removal
8. Violating traffic regulations, reckless driving, or improper operation of a motor vehicle while on VA premises or in a duty status.	Admonishment 14 days	Reprimand Removal	14 days Removal
9. Endangering the safety of or causing injury to anyone on VA premises.	Admonishment Removal	14 days Removal	Removal
10. Abuse of patients or beneficiaries.	Reprimand Removal	14 days Removal	Removal



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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Information and Security</b>			
11. Failure to safeguard confidential matter or access to such.	Admonishment Removal	Reprimand Removal	14 days Removal
12. [Offenses related to falsification:	[ ]	[ ]	[ ]
a.] Intentional falsification, misstatement, or concealment of material fact;	[Reprimand Removal	[14 days Removal	[Removal
[b. W]illfully forging or falsifying official Government documents;	Reprimand Removal	14 days Removal	Removal
[c. Willfully submitting or directing others to submit false data concerning wait times for health care or quality measures related to health care; or	Reprimand Removal	14 days Removal	Removal
d. R]efusal to cooperate in an investigative proceeding.	Reprimand Removal]	14 days Removal]	Removal]
13. Except as specifically authorized, disclosing or using direct or indirect 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	
14. Violation of the Privacy Act, HIPAA or other laws, regulations and/or policy pertaining to information disclosure.	Reprimand Removal	14 days Removal	Removal
<b>General Misconduct</b>			
15. Loafing, willful idleness, or waste of time.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
16. Careless or negligent workmanship resulting in waste or delay.	Admonishment Reprimand	Reprimand 14 days	14 days Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
17. Sleeping on duty.			
a. Where safety of patients, beneficiaries, members, employees or property is not endangered.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
b. Where safety of patients, beneficiaries, members, employees, or property may be endangered.	7 days Removal	Removal	
18. Deliberate failure or unreasonable delay in carrying out instructions.	Admonishment Reprimand	7 days 14 days	14 days Removal
19. Deliberate refusal to carry out any proper order from a supervisor having responsibility for the work of the employee; willful resistance to same.	Reprimand Removal	14 days Removal	Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>General Misconduct</b>			
20. Making false or unfounded statements, which are slanderous or defamatory, about other employees or officials.	Reprimand Removal	14 days Removal	Removal
21. Disrespectful, insulting, abusive, insolent, or obscene language or conduct to or about supervisors, other employees, patients, or visitors.	Reprimand Removal	14 days Removal	Removal
22. Fighting, threatening, attempting or inflicting bodily injury to another; engaging in dangerous horseplay. <b>NOTE:</b> <i>Penalty depends on such factors as provocation, extent of any injuries, and whether actions were defensive or offensive in nature.</i>	Reprimand Removal	14 days Removal	Removal
<b>Alcohol and Drug Related</b>			
23. Offenses related to intoxicants.			
a. Alcohol-related:			
(1) Unauthorized possession of alcoholic beverages while on VA premises.	Reprimand 7 days	14 days Removal	Removal
(2) Unauthorized use of alcoholic beverages while on VA premises.	Reprimand 14 days	14 days Removal	Removal
(3) Reporting to or being on duty while under the influence of alcohol.	Reprimand Removal	14 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.	14 days Removal	Removal	

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Alcohol and Drug Related</b>			
b. Drug-related:			
(1) Possession of an illegal drug or unauthorized possession of a controlled substance while on VA premises.	7 days Removal	14 days Removal	Removal
(2) Unauthorized use of an illegal drug or controlled substance while on VA premises.	14 days Removal	Removal	
(3) Reporting to or being on duty while under the influence of an illegal drug or unauthorized controlled substance.	14 days Removal	Removal	
(4) Sale or transfer of an illegal drug or controlled substance while on VA premises or in a duty status, or while any person involved is in a duty status.	14 days Removal	Removal	
(5) Refusal to take drug test.	Removal		
[(6) Unauthorized possession or diversion of a VA controlled substance for sale, transfer, or use.	Removal]		
<b>NOTE:</b> For offenses relating to VA's Drug-Free Workplace Program, see VA Directive and Handbook 5383.			
<b>Outside Activities / Financial Interest</b>			
24. Indebtedness; lack of good faith in paying just financial obligations.	Admonishment	Admonishment Reprimand	Reprimand Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
25. 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. <b>NOTE:</b> <i>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 VA, or tend to create in the minds of others a suspicion of prejudice or favoritism that would be of embarrassment to VA.</i>	Admonishment Removal	14 days Removal	Removal

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<b>NATURE OF OFFENSE</b>	<b>1ST OFFENSE</b>	<b>2ND OFFENSE</b>	<b>3RD OFFENSE</b>
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Outside Activities / Financial Interest</b>			
26. Gambling, unlawful betting, or the promotion thereof, on VA premises.	Reprimand 14 days	14 days Removal	Removal
27. Participating in a strike, work stoppage, sick-out, slowdown, or other job action.	Reprimand Removal	Removal	
28. 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	
29. Soliciting contributions for, or otherwise promoting, on premises occupied by VA, of any type of campaign which has not had appropriate VA endorsement.	Reprimand Removal	14 days Removal	Removal
30. Selling tickets, stocks, articles, or commodities or services on VA premises that has not had appropriate VA endorsement.	Reprimand Removal	14 days Removal	Removal
31. 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	
32. 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		

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
<b>Use of Government Property</b>			
33. Loss of, damage to, or unauthorized use of Government property:			
a. Through carelessness or negligence	Admonishment 14 days	14 days Removal	Removal
b. Through maliciousness or intent	Reprimand Removal	14 days Removal	Removal
34. Actual or attempted removal of Government property or other property from VA premises.	Reprimand Removal	14 days Removal	Removal
<b>Discrimination / EEO / Protected Activity</b>			
35. Sexual harassment.	Reprimand Removal	7 days Removal	14 days Removal
36. Discrimination based on race, color, sex, religion, national origin, age, marital status, political affiliation, or disability.	Reprimand Removal	7 days Removal	14 days Removal
37. 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	7 days Removal	Removal
38. 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.	14 days Removal	Removal	
39. Reprisal against an employee for exercising a right provided under 5 U.S.C. 71 (Federal Labor Management Relations Statute).	Reprimand Removal	7 days Removal	14 days Removal
40. Violation of an employee's constitutional rights (i.e., freedom of speech, association, religion).	Reprimand Removal	7 days Removal	14 days Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
<b>Offenses Prescribed in Statute</b>			
41. Failure to adhere to the rules governing the use of Government charge cards (purchase, travel, or fleet) and convenience checks.	Admonishment Removal	7 days Removal	14 days Removal
42. Prohibited personnel practice (5 U.S.C. 2302).	Reprimand Removal	14 days Removal	Removal
43. Willfully using or authorizing the use of Government passenger motor vehicle or aircraft for other than official purposes (31 U.S.C. 1349(b)).	30 days Removal	Removal	
44. 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)).  <b>NOTE:</b> <i>Penalty may need to be coordinated with Office of Special Counsel.</i>	Reprimand Removal	7 days Removal	14 days 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).  <b>NOTE:</b> <i>Actions based on Hatch Act violations will be initiated by the Office of Special Counsel.</i>	Removal   30 days Removal	   Removal	
46. 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. 7351).	Reprimand Removal	14 days Removal	Removal
47. Directing, expecting, or rendering services not covered by appropriations (5 U.S.C. 3103).	Removal		
48. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations for salaries (5 U.S.C. 5501).	Removal		
49. Action against national security	30 days	Removal	



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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
<b>Offenses Prescribed in Statute</b>			
(5 U.S.C. 7532).	Removal		
50. Mutilating or destroying a public record (18 U.S.C. 2071).	Removal		

]

**[APPENDIX B. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS FOR  
CENTRAL OFFICE (CO)]**

1. CO includes the national level administrations of Veterans Affairs (VA), Veterans Health Administration (VHA), Veterans Benefits Administration (VBA), and National Cemetery Administration (NCA).
2. Officials authorized to propose and decide actions identified in the table below are defined as follows:
  - a. Immediate Supervisor. The management official to whom the employee directly reports and who is responsible for assigning the employee's annual rating of record.
  - b. Division/Service Chief. The management official responsible for a division or service, which may include the supervision of other managers/supervisors.
  - c. Field Facility Director (Service Level Director). An SES management official who supervises a division/service in CO. Examples are as follows:
    - (1) CO: Deputy Assistant Secretary for Policy and Planning, Deputy Assistant Secretary for Human Resources and Administration
    - (2) VHA: Deputy Under Secretary for Health for Operations and Management, Deputy Under Secretary for Health for Policy and Services
    - (3) VBA: Deputy Under Secretary for Economic Opportunity, Deputy Under Secretary for Field Operations
    - (4) NCA: Deputy Under Secretary for Field Programs, Deputy Under Secretary for Management
3. Service Level Directors may re-delegate their authority for deciding adverse actions to a lower level official acting in their absence under certain circumstances. This delegation must be in writing and be included in the evidence file to show the delegation was authorized. The following constitutes circumstances when delegation is permissible:
  - a. the deciding official is on long-term leave, generally more than 30 calendar days, or
  - b. the position is vacant and another management official has been officially appointed as acting in that position.
4. Note 38 U.S.C. 713 allows for separate procedures for the removal and transfer of individuals in the Senior Executive Service (SES) or SES-equivalent employees. For further guidance on these procedures contact the Corporate Senior Executive Management Office (CSEMO).

**VA CENTRAL OFFICE**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	None (unless prescribed by a Bargaining Unit Agreement)	Immediate Supervisor or above in the supervisory line
Reprimand	None (unless prescribed by a Bargaining Unit Agreement)	Division/Service Chief or above in the supervisory line
Suspension of 14 Days or Less	Division/Service Chief or above in the supervisory line	Proposing Official or above in the supervisory line  The Secretary or designee retains the authority to make the final decision on the suspension of employees occupying positions centralized to the Secretary
Adverse Action	Division/Service Chief or above in the supervisory line	Service Level Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level  The Secretary or designee retains the authority to make the final decision on adverse actions involving employees occupying positions centralized to the Secretary]

**[APPENDIX C. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS FOR VETERANS HEALTH ADMINISTRATION (VHA) FIELD OFFICES**

1. Officials authorized to propose and decide actions identified in the table below are defined as follows:

- a. Immediate Supervisor. The management official to whom the employee directly reports and who is responsible for assigning the employee's annual rating of record.
- b. Division/Service Chief. The management official responsible for a division or service, which may include the supervision of other managers/supervisors.
- c. Field Facility Director (Medical Center Director/VISN Network Director). An SES or SES equivalent management official who oversees a Medical Center or VISN Network office.

2. Medical Center Directors/VISN Network Directors may re-delegate their authority for deciding adverse actions to a lower level official acting in their absence under certain circumstances. This delegation must be in writing and be included in the evidence file to show the delegation was authorized. The following constitutes circumstances when delegation is permissible:

- a. the deciding official is on long-term leave, generally more than 30 calendar days, or
- b. the position is vacant and another management official has been officially appointed as acting in that position.

3. Note 38 U.S.C. 713 allows for separate procedures for the removal and transfer of individuals in the Senior Executive Service (SES) or SES-equivalent employees. For further guidance on these procedures contact the Corporate Senior Executive Management Office (CSEMO).

**VETERANS HEALTH ADMINISTRATION**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	None (unless prescribed by a Bargaining Unit Agreement)	Immediate Supervisor or above in the supervisory line
Reprimand	None (unless prescribed by a Bargaining Unit Agreement)	Division/Service Chief or above in the supervisory line
Suspension of 14 Days or Less	Division/Service Chief or above in the supervisory line	Proposing Official or above in the supervisory line

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Adverse Action	Division/Service Chief or above in the supervisory line	Medical Center Director/VISN Network Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level]
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**[APPENDIX D. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS FOR VETERANS BENEFIT ADMINISTRATION (VBA) FIELD OFFICES**

1. Officials authorized to propose and decide actions identified in the table below are defined as follows:

- a. Immediate Supervisor. The management official to whom the employee directly reports and who is responsible for assigning the employee's annual rating of record.
- b. Division/Service Chief. The management official responsible for a division or service, which may include the supervision of other managers/supervisors.
- c. Field Facility Director (Regional Office Director). An SES or GS-15 management official who oversees a Regional Office.

2. Regional Office Directors may re-delegate their authority for deciding adverse actions to a lower level official acting in their absence under certain circumstances. This delegation must be in writing and be included in the evidence file to show the delegation was authorized. The following constitutes circumstances when delegation is permissible:

- a. the deciding official is on long-term leave, generally more than 30 calendar days, or
- b. the position is vacant and another management official has been officially appointed as acting in that position.

3. Note 38 U.S.C. 713 allows for separate procedures for the removal and transfer of individuals in the Senior Executive Service (SES). For further guidance on these procedures contact the Corporate Senior Executive Management Office (CSEMO).

**VETERANS BENEFITS ADMINISTRATION**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	None (unless prescribed by a Bargaining Unit Agreement)	Immediate Supervisor or above in the supervisory line
Reprimand	None (unless prescribed by a Bargaining Unit Agreement)	Division/Service Chief or above in the supervisory line
Suspension of 14 Days or Less	Division/Service Chief or above in the supervisory line	Proposing Official or above in the supervisory line
Adverse Action	Division/Service Chief or above in the supervisory line	Regional Office Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or GS-15 level]

**APPENDIX E. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS FOR  
NATIONAL CEMETERY ADMINISTRATION (NCA) FIELD OFFICES**

1. Officials authorized to propose and decide actions identified in the table below are defined as follows:

- a. Immediate Supervisor. The management official to whom the employee directly reports and who is responsible for assigning the employee's annual rating of record.
- b. Division/Service Chief. The management official responsible for a division or service, which may include the supervision of other managers/supervisors. For example, a foreman who supervises other foremen.
- c. Field Facility Director (Cemetery Director). A [ ] management official who oversees a National Cemetery.[ ]
- d. Executive Director. An SES management official who oversees a Network within NCA.

2. Cemetery Directors or Executive Directors may re-delegate their authority for deciding adverse actions to a lower level official acting in their absence under certain circumstances. This delegation must be in writing and be included in the evidence file to show the delegation was authorized. The following constitutes circumstances when delegation is permissible:

- a. the deciding official is on long-term leave, generally more than 30 calendar days, or
- b. the position is vacant and another management official has been officially appointed as acting in that position.

3. Note 38 U.S.C. 713 allows for separate procedures for the removal and transfer of individuals in the Senior Executive Service (SES). For further guidance on these procedures contact the Corporate Senior Executive Management Office (CSEMO).

**NATIONAL CEMETERY ADMINISTRATION**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	None (unless prescribed by a Bargaining Unit Agreement)	Immediate Supervisor or above in the supervisory line
Reprimand	None (unless prescribed by a Bargaining Unit Agreement)	Division/Service Chief or above in the supervisory line
Suspension of 14 Days or Less	Division/Service Chief or above in the supervisory line	Proposing Official or above in the supervisory line

Adverse Action	Division/Service Chief or above in the supervisory line	Cemetery/Executive Director or above in the supervisory line who is at a higher level than the proposing official [ ]
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## EMPLOYEE/MANAGEMENT RELATIONS

## PART II. DISCIPLINARY PROCEDURES UNDER TITLE 38

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**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 U.S.C. § 7401\(1\)](#) who have satisfactorily completed the probationary period required by [38 U.S.C. § 7403\(b\)](#). Included are:
    - (a) Physicians,
    - (b) Dentists,
    - (c) Podiatrists,
    - (d) Chiropractors,
    - (e) Optometrists,
    - (f) Nurses,
    - (g) Nurse anesthetists,
    - (h) Physician assistants, and
    - (i) Expanded-function dental auxiliaries.
  - [ ] (2) The provisions of this chapter apply to part-time registered nurses, including those with an intermittent duty basis, appointed under [38 U.S.C. § 7405\(a\)\(1\)\(A\)](#) who have satisfactorily completed the probationary period required by [38 U.S.C. § 7403\(b\)](#).
  - (3) Henceforth, "employee(s)" will be the term used to refer to the covered occupations in this chapter, unless otherwise specified.
  - (4) [ ] [T]his 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. § 7401\(3\)](#), [38 U.S.C. § 7405](#), except part-time registered nurses, [[38 U.S.C. § 7306](#)] or [38 U.S.C. § 7406](#).

**PART II****CHAPTER 1****2. AUTHORITY**

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

b. Section 302 of the Veterans Healthcare, Capital Asset and Business Improvement Act of 2003 (Pub. L. 108-170).

c. [Section 601 of the Caregivers and Veterans Omnibus Health Services Act of 2010 Public Law (Pub. L.) 111-163.

d.] 38 U.S.C. 501(a), 38 U.S.C. 7421.

[e.] Title 38, U.S.C., chapter 74.

[f.] Section 3 of the Department of Veterans Affairs Health Care Personnel Act of 2004 Public Law (Pub. L.) 108-445.

[g.] VA Standards of Conduct.

[h.] 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.

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- d. [For employees appointed under 38 U.S.C. § 7306, use the provisions of [38 U.S.C. § 713](#). Consult with Corporate Senior Executive Management Office (CSEMO) for additional guidance and VHA, Workforce Management and Consulting (WMC), Center of Expertise (COE).]

[ ]

[ ]

- e. Actions covered under this part are subject to the prohibited personnel practices listed in [5 U.S.C. \[§ 12302\]](#), which include but are not limited to], 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. **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.
- b. **[Business Day or Business Days.** Weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by the Office of Personnel Management. For calculation purposes, the period of 15 business days for a decision to be issued under these procedures begins on the first business day after the proposal is issued (e.g., delivered to the employee or, if mailed, the date mailed) to the employee.]
- [c.] **Discharge.** The involuntary separation of an employee from employment based on conduct or performance.
- [d.] **Disciplinary Actions.** These are adverse actions, other than major adverse actions, which include admonishment and reprimand based on conduct or performance.
- [e.] **Disciplinary Appeals Board.** The three[-]member Board designated to hear a full-time permanent [title 38] employee's appeal of major adverse action, which is based in whole or in part on a question of professional conduct or competence [(PCC)]
- [f.] **Grade.** The established grades for the positions covered by this chapter will be as defined by [38 U.S.C. \[§ 17404\]](#), and the qualification standards issued pursuant to [38 U.S.C. \[§ 17402\]](#). (See [VA Handbook 5005, Staffing.](#))

## Part II

## Chapter 1

- [g.] **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.
- [h.] **Major Adverse Actions.** These are suspension[s] (including indefinite suspension[s]), transfer[s], reduction[s] in grade, reduction[s] in basic pay, and discharge[s] based on conduct or performance[, i.e. for cause]. For purposes of this [h]andbook, a reduction in basic pay includes a reduction in the market pay of a physician[, podiatrist] or dentist as a result of an involuntary reassignment or change in assignment when taken for [cause]. The loss of head nurse differential (two steps) due to the reassignment of a head nurse to another position that does not allow for this differential is [ ] considered a major adverse action [ ] when the reassignment is for cause [as it is a reduction in basic pay]. [ A] major adverse action has [also] occurred if the facility has established a specialty schedule for [ ] employees in title 38 occupations, excluding physicians[, podiatrists] and dentists, [and the] reassign[ment is] for cause from one annual salary rate table to a lower annual salary rate table (e.g., from a special rate authorized under [38 U.S.C. \[§ 17455\]](#) to a lower special rate table; from a special rate authorized under [38 U.S.C. \[§ 17455\]](#) to a regular rate.)
- [i.] **Mixed Case.** This is a case that includes both:
- (1) A major adverse action arising out of, or including, a question of [PCC], and
  - (2) A major adverse action which does not arise out of a question of [PCC], or a disciplinary action.
- [j.] **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.
- [k.] **Professional Conduct or Competence.** A question of [PCC] involves direct patient care and/or clinical competence. The term clinical competence includes issues of professional judgment.
- [l.] **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. \[§ 17404\]](#), including above minimum entrance rates and special salary rates authorized under [38 U.S.C. \[§ 17455\]](#). This includes a reduction in the market pay of a physician[, podiatrist] or dentist as a result of an involuntary reassignment or change in assignment when taken for [conduct or performance-based] reasons[, i.e. for cause]. [The loss of head nurse differential (two steps) due to the reassignment of a head nurse to another position, that does not allow for this differential, is considered a major adverse action when the reassignment is for cause since it results in a reduction in the employee's basic pay.]

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However, this does not apply to other reductions in pay, such as the loss or reduction of:

- (1) Physician[, podiatrist] and dentist performance pay, and

- (2) Physician[, podiatrist] and dentist market pay, unless the reduction in market pay is the result of an involuntary reassignment or change in assignment taken for [conduct or performance-based] reasons[, i.e. for cause] [ ]. (Note: Reductions in market pay that are not the result of an involuntary reassignment or change in assignment for conduct or performance reasons are not covered by this chapter.)

[ ]

[(3)] Nurse Executive Special Pay,

[(4)] Other differentials,

[(5)] Allowances, or

[(6)] 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.

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

[n.] **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.

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

[p.] **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.

## 5. RESPONSIBILITIES[.]

- a. [ ] Under Secretary for Health, [ ] Deputy Under Secretary for Health, [Assistant] Under Secretary for Health for Operations [ ], 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;

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(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

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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 exists, consideration may be given to imposing an indefinite suspension.

- i 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 proposing to discharge the employee upon completion of the judicial proceedings or further investigation.
  - ii 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.
  - iii The Office of Inspector General [or] Office of General Counsel[OGC), including but not limited to District Counsel or Personnel Law Group,] 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).
  - i 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.
  - ii 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, [ ] or take other appropriate administrative action.

**c. Evidence File[.]**

- (1) [ ] [T]he evidence file must be assembled before the proposed notice is issued to the employee. The file must contain [all] 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). [The

evidence file must be provided to the employee at the time the proposal notice is issued.]

- (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 [District] 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 [ ] should be considered in determining the action to be taken. [Applicable mitigating and aggravating factors for consideration are contained in appendix A of this part.] 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) [The aggregate period for notice, reply, and decision on a proposed disciplinary action, whether or not it involves a question of PCC, may not exceed 15 business days. If an extension to the reply period is granted to the employee, the decision must still be issued within 15 business days of the issuance of the proposal].

[(2)] Before being released to the employee, a [written] notice of proposed action will be reviewed by the [servicing] Human Resources [(HR)] [ ] office for compliance with statutes, regulations, VA policies and other applicable requirements. [HR] 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 (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 [that the time limit for providing a written and/or oral reply is seven business days, and if the employee wants to give an oral reply, they must contact the deciding official within three business days after issuance of the proposal notice or a specific date and time for the oral reply can be provided in the notice];
- (f) A statement that the material relied upon to support the reasons for the proposed action [was provided to the employee at the time the proposal notice was issued];
- (g) A statement advising the employee of the official who will receive any oral and/or written replies;



- (h) A statement that [if it is decided to take the proposed action, such action will be effective after an oral and/or written reply is received but not less than seven business days from the date the employee received the proposal notice, if no reply is given, and a decision will be issued no later than 15 business days from receipt of the proposal notice]; 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 [within seven business days. Extensions to the seven-business-day reply period may be granted by the deciding official. The deciding official should consult with OGC, prior to granting an extension. Extensions will only be granted in the most exigent circumstances, recognizing that the statutory requirement to issue a decision within 15 business days after issuance of the proposal is still required if an extension to the reply period is granted.]
- (a) Any official designated to receive the reply must have the authority to recommend what final decision should be made.

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(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) [The deciding official will issue a written decision to the employee no later than the 15th business day from the day the employee received the proposal notice. A decision can be issued after an oral or written reply is received but not less than seven business days from the date the employee received the proposal notice if no reply is given.]
- [(2)] Before the decision is released to the employee, it will be reviewed by [the servicing HR official] for compliance with the statutes, regulations, VA policies, and other applicable requirements. Any comments the [servicing HR official] may have concerning technical aspects of the case will be presented to the decision official.
- [(3)] The decision letter will be dated and signed by the appropriate decision official.
- [(4)] 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 [PCC].
  - (b) A statement that consideration has been given to all evidence developed, including the employee's reply(ies).
    - i A written reply made by a representative on behalf of the employee is considered to be an employee's reply.
    - ii 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 [servicing HR] office.

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**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 (including reduction in physician[, podiatrist] and dentist market pay as a result of involuntary reassignment or change in assignment when taken for conduct or performance reasons) 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)] [The aggregate period for notice, reply, and decision on a proposed major adverse action issued to a full-time permanent employee appointed under [38 U.S.C. § 7401\(1\)](#), whether or not it involves a question of PCC, may

not exceed 15 business days, even if an extension to the reply period is granted.]

- [(2)] Prior to [imposing] a major adverse action, a full-time permanent employee must be given [7 business] days, and part-time registered nurses must be given 14 calendar days, [to give an oral reply and submit a written reply.]
- [(3)] Before being released to the employee, [the written] notice of proposed action will be reviewed by the [servicing HR and OGC] office for compliance with statutes, regulations, VA policies and other applicable requirements. [HR] will review the evidence and, as appropriate, provide guidance concerning the propriety of the action.

- [(4)] 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.  
[The time limit for providing an oral or written reply is 7 business days for full-time permanent employees and 14 calendar days for part-time registered nurses. Any full-time permanent employee wishing to give an oral response must contact the deciding official within three business days after issuance of the proposal notice unless a specific date and time for the oral reply is provided in the notice.]
  - (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.
    - i 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.
    - ii 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 [servicing HR] 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 full-time permanent employee will be given a written decision within [15 business] days of [the employee's] receipt of the [proposal notice]. There is no statutory requirement for a decision to be issued within [15 business days] for a part-time registered nurse[ ], but a timely decision should be issued.
  - (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 [after an oral and/or written reply is received or] not less than [7-business] days from the [date] the [full-time permanent] employee receives the notice[ ]. Such action will be effective not less than 14 [calendar] days from the day following the date the part-time registered nurse received the notice, except when invoking the crime provision.
  - (n) A statement [that] the material relied upon to support the reason(s) for the proposed action [was provided to the employee at the time the proposal notice was issued.] [ ]
  - (o) A statement that informs the employee that:
    - i 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.
    - ii Identifies the person with whom the employee should make arrangements for the use of official time.
  - (p) For physicians[, podiatrists,] and dentists, if the proposed action will result in a reduction in market pay, a statement that their market pay may be reduced should this proposed action be made effective.
- [(5)] 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).

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- (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 [Seven-Business]-[D]ay Advance Notice.** The requirement for a [7- business-]day advance notice period for full-time permanent employees appointed under [38 U.S.C. § 7401\(1\)](#) 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 also applicable to the 14-[calendar] day advance notice period for part-time registered nurses appointed under [38 U.S.C. § 7405](#). 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 [calendar] 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 [calendar] 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 [District] 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 [within 7-business days after issuance of the proposal]. 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.

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- (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-business]-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 [A]ppendix 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 [will issue] a [written] decision [to the full-time permanent employee no later than the 15<sup>th</sup> business] day [from the day the employee received the proposal notice. A decision can be issued after an oral or written reply is received but not less than seven business days from the date the employee received the proposal notice if no reply is given.] There is no statutory requirement for a decision to be issued [to] a part-time registered nurse[ within 15 business days,] but a timely decision should be issued. [ ]
  - (1) Before the decision is released to the employee, it will be reviewed by [the servicing HR] office for compliance with statutes, regulations, VA policies, and other applicable requirements. Any comments the [HR] 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. § 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 [PCC].
    - (c) A statement that consideration has been given to all evidence developed, including the employee's reply:

- i If the employee replies both orally and in writing, both must be mentioned.
- ii A written reply made by an authorized representative on behalf of the employee is considered to be an employee's reply.

- iii 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[, which will normally not be less than 7-business days from the date the employee received the proposal notice.] 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 [servicing HR] office.

j. **Appeals of Major Adverse Actions[.]**

(1) [General.]

- [(a)] The filing of an appeal under a grievance procedure or to the Disciplinary Appeals Board [(DAB)] 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.
- [(b)] If the action involves an involuntary reassignment or change in assignment of a physician[, podiatrist] or dentist based on conduct or performance[, for cause,] and [ ] results in a reduction in market pay, only the involuntary reassignment or change in assignment is subject to grievance or appeal. Neither the decision to reduce market pay as a result of an involuntary reassignment nor the amount of such reduction is subject to grievance or appeal under this chapter or Part V of this handbook. Refer to [VA Handbook 5007](#) [ ] for more information regarding the right to request reconsideration of a tier determination.

[ ]

- [(c)] If the major adverse action involves [the involuntary reassignment or change in assignment of a registered nurse from a head nurse position and results in a reduction in pay, only the involuntary reassignment or

change in assignment is subject to grievance or appeal. The reduction in pay or change in assignment resulting from the involuntary assignment is not grievable or appealable.]

(2) [Title 38 employees, excluding part-time registered nurses.

(a) In accordance with [38 U.S.C. § 7463](#),] if the major adverse action does not involve or include a question of [PCC:

i A non-bargaining unit] employee may elect to seek review of the decision under the [agency] grievance procedure described in [P]art IV, [C]hapter 3 of this handbook[, or

ii If the employee is covered by a collective bargaining agreement under [5 U.S.C. \[C\]hapter 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 [agency] grievance procedure [described] in [P]art IV, [C]hapter 3 of this handbook, but not both.

(A) The bargaining unit employee will elect which grievance procedure will be used.

(B) The timely filing of a grievance under either procedure [will] constitute an irrevocable election. Time limits for filing a [formal] grievance under the [agency grievance] procedure are governed by the provisions of [P]art IV, [C]hapter 3 of this handbook. Grievances filed under the negotiated grievance procedure must be filed in accordance with the provisions of the applicable collective bargaining agreement.

(C) The employee must be advised of the right to request a hearing in connection with a[n agency] grievance and advised that the request for a hearing must be submitted [in writing with the formal] grievance.

(b) If the major adverse action is based in whole, or in part on a question of [PCC], the full-time permanent employee may file an appeal to the [DAB] under the provisions [ ] [of] [P]art V, [C]hapter 1 of this handbook.

i An employee must be advised of the right to request a hearing before the [DAB] and advised the request for a hearing must be submitted with the [written] notice of appeal. If the employee does not request a hearing in the request for an appeal, the [DAB] may

elect to conduct a hearing or make a decision based on a review of the record.

- ii The employee must be provided with a copy of [P]art V. [C]hapter 1 of this handbook, which specifies the content requirements of an appeal.
- iii Appeals to a [DAB] must be submitted to the Under Secretary for Health, or designees, so as to be received within [7-business] days after the date of service of the written decision [to] the employee. The [7-business-]day time limit may not be extended.
- iv An issue of whether a matter or question concerns, or arises out of, [PCC] is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining and may not be reviewed by any other agency.

[(3)] [Part-time registered nurses:

- (a) If the major adverse action does not involve or include a question of PCC, a part-time registered nurse covered by a collective bargaining agreement under [5 U.S.C. Chapter 71](#) that includes disputes over these actions, may elect to appeal the action through the negotiated grievance procedure. A part-time registered nurse covered by a collective bargaining agreement may only elect to file an agency grievance under the provisions of Part IV, Chapter 3 of this handbook if the collective bargaining agreement does not include provisions for disputes over major adverse actions or if it involves PCC. Grievances filed under the negotiated grievance procedure must be filed in accordance with the provisions of the applicable negotiated grievance procedure.
- (b) DABs do not have the statutory authority (see [38 U.S.C. § 7461\(c\)](#)) to hear the appeal of major adverse actions issued to part-time registered nurses. Therefore, if the major adverse action involves or includes a question of PCC, a part-time registered nurse can only elect to seek review of the decision under the agency grievance procedure described in Part IV, Chapter 3 of this handbook].

**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.

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- 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 calendar] 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, 38 U.S.C. 7421
- c. Section 601 of the Caregivers and Veterans Omnibus Health Services Act of 2010 Public Law (Pub. L.) 111-163.
- d. VA Directive 5021.

**3. RESPONSIBILITIES**

a. **Delegations of Proposing and Decision Authorities for Disciplinary Actions (Admonishments and Reprimands).** [(See VA Handbook 5021, Part II, Appendix B for reference chart.)]

**(1) Field Employees**

(a) Non-centralized positions:

- 1. Proposing Official: Immediate supervisor [or above in the supervisory line].
- 2. Deciding Official: Service Chief[, ] or equivalent[, or above in supervisory line] 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 [or above in the supervisory line].
- 2. Deciding Official: Facility Director [or above in the supervisory line].

(c) Chiefs of Staff or senior medical officer:

- 1. Proposing Official: Facility Director [or above in the supervisory line].
- 2. Deciding Official: Network Director [or above in the supervisory line].

**NOTE:** Facility directors may issue supplemental delegations of authority to propose and decide disciplinary actions [(admonishments and reprimands)] involving employees in non-centralized



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positions under their jurisdiction. However, the authority to propose disciplinary action may not be delegated to an official at a lower level than the immediate supervisor, and the authority to decide disciplinary action may not be delegated to an official at a lower level than the service chief or equivalent [or Chief of Staff] or senior medical officer. Delegations must be in writing and may be issued as the Director deems appropriate. In exercising supplement[al] delegation authority, directors must ensure that [ ] the decision official in a [disciplinary] action [is] at a higher level than the proposing official [ ].

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- (2) Title 38 Medical Center Directors[. H]owever, note [38 U.S.C. \[§ 1713\]](#) allows for separate procedures for the removal and transfer of individuals in the Senior Executive Service (SES) or SES-equivalent employees. For further guidance on these procedures contact the Corporate Senior Executive Management Office (CSEMO).
  - (a) Proposing Official: Network Director or above in the supervisory line.
  - (b) Decision Official: [Supervisor one level] or above in the supervisory line.
- (3) Title 38 Employees in the Office of the Network Director[.]
  - (a) All employees except VISN [C]hief of [S]taff[, VISN] senior medical officer[, Chief Nursing Officer or Chief Quality Management Officer]:
    - i Proposing Official: VISN Chief of Staff or VISN senior medical officer or VISN Associate Director, as appropriate, or above in the supervisory line.
    - ii Decision Official: Network Director or above in the supervisory line.
  - (b) VISN Chiefs of Staff[, VISN senior medical officer[, VISN Chief Nursing Officer or VISN Chief Quality Management Officer]:
    - i Proposing Official: Network Director or above in the supervisory line.
    - ii Decision Official: [Supervisor one level] or above in the supervisory line.
- (4) Title 38 Employees in VA Central Office[.]
  - (a) Proposing Official: Immediate supervisor or above in the supervisory line.
  - (b) Decision Official: Next higher[-]level official in the supervisory line.
- b. **Delegations of Proposing and Decision Authorities for Major Adverse Actions Involving Reduction in Grade, Reduction in Pay (including reduction in physician[, podiatrist] and dentist market pay as defined in Chapter 1, paragraph 4 of this [h]andbook) Suspension, or Discharge.** (See Appendix B for reference chart.)
  - (1) Field Employees[.]
    - (a) Non-centralized positions:

- i Proposing Official: Service chief or equivalent or above in the supervisory line

[ ]

- ii Decision Official: Facility Director or above in the supervisory line (except that transfers will require the concurrence of the [Assistant] Under Secretary for Health for Operations[, or equivalent]).

(b) Service Chiefs and equivalent positions below the level of Chief of Staff or senior medical officer [or Associate Director for Patient Care/Nursing Services, or above in the supervisory line]:

1. Proposing Official: Chief of Staff or senior medical officer [or Associate Director for Patient Care/Nursing Services, or above in the supervisory line].

2. Decision Official: Facility Director [or above in the supervisory line].

(c) Chiefs of Staff or senior medical officer [or Associate Director for Patient Care/Nursing Services or above in the supervisory line]:

1. Proposing Official: Field Facility Director [or above in the supervisory line].

2. Decision Official: Network Director [or above in the supervisory line].

**NOTE:** Facility directors may issue supplemental delegations of authority to propose [ ] major adverse actions involving employees in non-centralized positions under their jurisdiction. However, the authority to propose major adverse actions may not be delegated to an official at a lower level than the service chief or equivalent. [For example, a delegation could be made to the Associate Director for Patient Care Services or the Chief of Staff but not to a section chief under a service line.] Delegations must be in writing and may be issued as the Director deems appropriate. In exercising supplement delegation 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 [keeping in mind the only official that may decide a major adverse action at a non-centralized field facility is the Facility Director].

## (2) Title 38 Medical Center Directors

(a) Proposing Official: Deputy Under Secretary for Health for Operations and Management [or above in the supervisory line].

(b) Decision Official: Under Secretary for Health [or above in the supervisory line].

## (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[, or above in the supervisory line].

2. Decision Official: Network Director [or above in the supervisory line].

(b) Centralized positions (to include VISN chiefs of staff or senior medical officer):

1. Proposing Official: Deputy Under Secretary for Health for Operations and Management [or above in the supervisory line].

2. Decision Official: Deputy Under Secretary for Health [or above in the supervisory line].

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**(4) Title 38 Employees in VA Central Office**

(a) Proposing Official: Service director level or above [in the supervisory line].

(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. [For example, a delegation could be made to the Associate Director for Patient Care Services or the Chief of Staff but not to a section chief under a service line.]

(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 [and Labor Relations].

**2. REPORTS.** The Deputy Assistant Secretary for Human Resources Management [and Labor Relations], 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. [The following] mitigating and aggravating factors [will] be considered [ ] [in determining the appropriate penalty.] [Each relevant factor must be addressed.]

(1) The mitigating and aggravating factors for Title 38 employees are as follows:

(a) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities. Facts to be considered may include:

1. Was the offense intentional or a result of negligence?
2. Was the offense important, meaningful, or considerable?
3. Was the offense committed maliciously or for gain?
4. Did the offense result in serious injury or death?
5. Was the offense repeated?

(b) The employee's job level and type of employment. Facts to be considered may include:

1. Does the employee have frequent contact with patients or the public?
2. Is the employee a supervisor or manager?
3. How prominent is the employee's position? What makes it a prominent position?

(c) The employee's past disciplinary record.

(d) The employee's work record. Facts to be considered may include:

1. What is the employee's length of VA service, length of overall total federal service (including military), and length of service in the position/role currently occupied?
2. What was the employee's performance on the job before the offense?
3. What is the employee's performance on the job since the offense?
4. Is the employee dependable?

(e) Management's confidence in the employee's ability to successfully perform and behave in the future. Facts to be considered may include:

1. Did the offense involve a breach of integrity or character flaw that significantly impacts management's confidence?

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2. Can the employee's supervisor rely on the employee to successfully perform in the future?
3. Can the employee's supervisor rely on the employee to refrain from misconduct in the future?

(f) Consistency of the penalty. Facts to be considered may include:

1. Using the Table of Penalties as a guideline only, is the penalty within the range for similar offenses as outlined in the Table?
2. What penalty was imposed on other employee(s), for the same or similar offenses, in the same organizational work unit doing similar work?

(g) The impact of the offense upon the reputation of the agency. Facts to be considered may include:

1. What is the notoriety or the potential notoriety of the offense outside the VA, e.g. media, Congress?
2. How and to what extent does the offense violate the agency's core values?
3. Has the offense impacted the veterans' or public's trust in the agency?

(h) The degree to which the employee either knew or should have known that the conduct in question was improper or that the standard of care was not met. Facts to be considered may include:

1. Are there any laws, regulations, directives or agency policies addressing the offense?
2. Was the employee trained or informed about the laws, regulations, directives or agency policies addressing the offense?
3. Would a reasonable person know that the offense was wrong without any special training?
4. Is it contrary to commonly accepted clinical practices?

(i) The potential for the employee's rehabilitation. Facts to be considered may include:

1. Has the employee accepted responsibility for the offense?
2. Has the employee shown remorse for the offense?
3. Has the employee taken any action to give the agency a reasonable belief that the offense will not recur?
4. Is there training or assistance available to prevent recurrence?

(j) Any mitigating circumstances surrounding the offense. Facts to be considered may include:

1. Were there any unusual job tension, personality problems, harassment, or other workplace stressors in the employee's work unit?
2. Was the employee provoked by others?
3. Was management made aware of any workplace stressors or provocations? If yes, what was management's response?



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(k) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future. Facts to be considered may include:

1. Were other sanctions considered before determining that this penalty was appropriate?]

**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 calendar days for suspension actions.*]

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TABLE OF PENALTIES FOR TITLE 5 AND TITLE 38 EMPLOYEES

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Attendance</b>			
1. Unexcused tardiness.	Admonishment Reprimand	Reprimand 7 days	7 days Removal
2. Unexcused or unauthorized absence.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
3. Leaving job to which assigned or VA premises, during working hours, without proper permission.	Admonishment Reprimand	Reprimand 7 days	14 days Removal
4. Obtaining or requesting leave under false pretense, or falsifying attendance record for self or another employee.	Reprimand Removal	14 days Removal	Removal
<b>Safety and Health</b>			
5. Smoking in unauthorized places or carrying of matches in explosive areas.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
6. Failure to report personal injury or accident.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
7. Failure to observe precaution for personal safety, posted rules, signs, written or oral safety instructions; failure to use protective clothing or equipment; or carry flammable materials into a hazardous area.	Admonishment 14 days	Reprimand Removal	14 days Removal
8. Violating traffic regulations, reckless driving, or improper operation of a motor vehicle while on VA premises or in a duty status.	Admonishment 14 days	Reprimand Removal	14 days Removal
9. Endangering the safety of or causing injury to anyone on VA premises.	Admonishment Removal	14 days Removal	Removal
10. Abuse of patients or beneficiaries.	Reprimand Removal	14 days Removal	Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Information and Security</b>			
11. Failure to safeguard confidential matter or access to such.	Admonishment Removal	Reprimand Removal	14 days Removal
12. [Offenses related to falsification:	[ ]	[ ]	[ ]
a.] Intentional falsification, misstatement, or concealment of material fact;	[Reprimand Removal	[14 days Removal	[Removal
[b. W]illfully forging or falsifying official Government documents;	Reprimand Removal	14 days Removal	Removal
[c. Willfully submitting or directing others to submit false data concerning wait times for health care or quality measures related to health care; or	Reprimand Removal	14 days Removal	Removal
d. R]efusal to cooperate in an investigative proceeding.	Reprimand Removal]	14 days Removal]	Removal]
13. Except as specifically authorized, disclosing or using direct or indirect 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	
14. Violation of the Privacy Act, HIPAA or other laws, regulations and/or policy pertaining to information disclosure.	Reprimand Removal	14 days Removal	Removal
<b>General Misconduct</b>			
15. Loafing, willful idleness, or waste of time.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
16. Careless or negligent workmanship resulting in waste or delay.	Admonishment Reprimand	Reprimand 14 days	14 days Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
17. Sleeping on duty.			
a. Where safety of patients, beneficiaries, members, employees or property is not endangered.	Admonishment Reprimand	Reprimand 14 days	14 days Removal
b. Where safety of patients, beneficiaries, members, employees, or property may be endangered.	7 days Removal	Removal	
18. Deliberate failure or unreasonable delay in carrying out instructions.	Admonishment Reprimand	7 days 14 days	14 days Removal
19. Deliberate refusal to carry out any proper order from a supervisor having responsibility for the work of the employee; willful resistance to same.	Reprimand Removal	14 days Removal	Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>General Misconduct</b>			
20. Making false or unfounded statements, which are slanderous or defamatory, about other employees or officials.	Reprimand Removal	14 days Removal	Removal
21. Disrespectful, insulting, abusive, insolent, or obscene language or conduct to or about supervisors, other employees, patients, or visitors.	Reprimand Removal	14 days Removal	Removal
22. Fighting, threatening, attempting or inflicting bodily injury to another; engaging in dangerous horseplay. <b>NOTE:</b> <i>Penalty depends on such factors as provocation, extent of any injuries, and whether actions were defensive or offensive in nature.</i>	Reprimand Removal	14 days Removal	Removal
<b>Alcohol and Drug Related</b>			
23. Offenses related to intoxicants.			
a. Alcohol-related:			
(1) Unauthorized possession of alcoholic beverages while on VA premises.	Reprimand 7 days	14 days Removal	Removal
(2) Unauthorized use of alcoholic beverages while on VA premises.	Reprimand 14 days	14 days Removal	Removal
(3) Reporting to or being on duty while under the influence of alcohol.	Reprimand Removal	14 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.	14 days Removal	Removal	

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Alcohol and Drug Related</b>			
b. Drug-related:			
(1) Possession of an illegal drug or unauthorized possession of a controlled substance while on VA premises.	7 days Removal	14 days Removal	Removal
(2) Unauthorized use of an illegal drug or controlled substance while on VA premises.	14 days Removal	Removal	
(3) Reporting to or being on duty while under the influence of an illegal drug or unauthorized controlled substance.	14 days Removal	Removal	
(4) Sale or transfer of an illegal drug or controlled substance while on VA premises or in a duty status, or while any person involved is in a duty status.	14 days Removal	Removal	
(5) Refusal to take drug test.	Removal		
[(6) Unauthorized possession or diversion of a VA controlled substance for sale, transfer, or use.	Removal]		
<b>NOTE:</b> For offenses relating to VA's Drug-Free Workplace Program, see VA Directive and Handbook 5383.			
<b>Outside Activities / Financial Interest</b>			
24. Indebtedness; lack of good faith in paying just financial obligations.	Admonishment	Admonishment Reprimand	Reprimand Removal

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3 <sup>RD</sup> OFFENSE
	Minimum	Minimum to Maximum	Minimum to Maximum
25. 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. <b>NOTE:</b> <i>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 VA, or tend to create in the minds of others a suspicion of prejudice or favoritism that would be of embarrassment to VA.</i>	Admonishment Removal	14 days Removal	Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum to Maximum	Minimum to Maximum	Minimum to Maximum
<b>Outside Activities / Financial Interest</b>			
26. Gambling, unlawful betting, or the promotion thereof, on VA premises.	Reprimand 14 days	14 days Removal	Removal
27. Participating in a strike, work stoppage, sick-out, slowdown, or other job action.	Reprimand Removal	Removal	
28. 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	
29. Soliciting contributions for, or otherwise promoting, on premises occupied by VA, of any type of campaign which has not had appropriate VA endorsement.	Reprimand Removal	14 days Removal	Removal
30. Selling tickets, stocks, articles, or commodities or services on VA premises that has not had appropriate VA endorsement.	Reprimand Removal	14 days Removal	Removal
31. 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	
32. 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		



NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
<b>Use of Government Property</b>			
33. Loss of, damage to, or unauthorized use of Government property:			
a. Through carelessness or negligence	Admonishment 14 days	14 days Removal	Removal
b. Through maliciousness or intent	Reprimand Removal	14 days Removal	Removal
34. Actual or attempted removal of Government property or other property from VA premises.	Reprimand Removal	14 days Removal	Removal
<b>Discrimination / EEO / Protected Activity</b>			
35. Sexual harassment.	Reprimand Removal	7 days Removal	14 days Removal
36. Discrimination based on race, color, sex, religion, national origin, age, marital status, political affiliation, or disability.	Reprimand Removal	7 days Removal	14 days Removal
37. 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	7 days Removal	Removal
38. 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.	14 days Removal	Removal	
39. Reprisal against an employee for exercising a right provided under 5 U.S.C. 71 (Federal Labor Management Relations Statute).	Reprimand Removal	7 days Removal	14 days Removal
40. Violation of an employee's constitutional rights (i.e., freedom of speech, association, religion).	Reprimand Removal	7 days Removal	14 days Removal

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NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
<b>Offenses Prescribed in Statute</b>			
41. Failure to adhere to the rules governing the use of Government charge cards (purchase, travel, or fleet) and convenience checks.	Admonishment Removal	7 days Removal	14 days Removal
42. Prohibited personnel practice (5 U.S.C. 2302).	Reprimand Removal	14 days Removal	Removal
43. Willfully using or authorizing the use of Government passenger motor vehicle or aircraft for other than official purposes (31 U.S.C. 1349(b)).	30 days Removal	Removal	
44. 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)).  <i>NOTE: Penalty may need to be coordinated with Office of Special Counsel.</i>	Reprimand Removal	7 days Removal	14 days 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).  <i>NOTE: Actions based on Hatch Act violations will be initiated by the Office of Special Counsel.</i>	Removal   30 days Removal	   Removal	
46. 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. 7351).	Reprimand Removal	14 days Removal	Removal
47. Directing, expecting, or rendering services not covered by appropriations (5 U.S.C. 3103).	Removal		
48. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations for salaries (5 U.S.C. 5501).	Removal		

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum/ Maximum	Minimum/ Maximum	Minimum/ Maximum
<b>Offenses Prescribed in Statute</b>			
49. Action against national security (5 U.S.C. 7532).	30 days Removal	Removal	
50. Mutilating or destroying a public record (18 U.S.C. 2071).	Removal		

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## **APPENDIX B. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS**

### **1. INSTRUCTIONS FOR USE OF TABLE[.]**

- a. Officials authorized to propose and decide actions for Veterans Health Administration (VHA) are defined as follows:
  - (1) Immediate Supervisor. The management official the employee directly reports to, and who signs the employee's performance rating.
  - (2) Division/Service Chief. The manager responsible for a division, service, or in some cases, is over managers/supervisors within a division/service.
  - (3) Facility Director. An SES or SES equivalent employee who oversees a Medical Center.
  - (4) Network Director. An SES or SES equivalent employee who oversees a VISN network within VHA.
- b. A Facility Director or Network Director may re-delegate their decision authority in writing to a lower level official acting in their absence under certain circumstances. This written delegation must be included in the evidence file to show the delegation was authorized. The following constitutes when delegation is permissible:
  - (1) the deciding official is on long-term leave, generally more than [15 business] days, or
  - (2) the position is vacant and another management official has been officially appointed as acting in that position.

**NOTE:** [38 U.S.C. § 713](#) allows for separate procedures for the removal and transfer of individuals in the Senior Executive Service (SES) or SES-equivalent employees. For further guidance on these procedures contact the Corporate Senior Executive Management Office (CSEMO).

## 2. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS[.]

### FIELD EMPLOYEES

#### NON-CENTRALIZED POSITIONS

Level of Disciplinary Action	Proposing Official	Deciding Official
Admonishment	Immediate supervisor or above in the supervisory line	Division/Service Chief or above in the supervisory line or Chief of Staff/senior medical officer who is at a higher level than the proposing official

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Reprimand	Immediate supervisor or above in the supervisory line	Division/Service Chief or above in the supervisory line or Chief of Staff/senior medical officer who is at a higher level than the proposing official
Major Adverse Action	Division/Service Chief or above in the supervisory line (except the Chief of Staff must propose any action that also involves the reduction or revocation of privileges)	Facility Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level (except that transfers will require concurrence of the Deputy Under Secretary for Health for Operations and Management)

**FIELD EMPLOYEES****SERVICE CHIEFS AND EQUIVALENT POSITIONS BELOW THE LEVEL OF CHIEF OF STAFF OR SENIOR MEDICAL OFFICER OR ASSOCIATE DIRECTOR FOR PATIENT CARE/NURSING SERVICES**

Level of Disciplinary Action	Proposing Official	Deciding Official
Admonishment	Chief of Staff or senior medical officer or Associate Director for Patient Care/Nursing Services or above in the supervisory line	Facility Director or above in the supervisory line who is at a higher level than the proposing official
Reprimand	Chief of Staff or senior medical officer or Associate Director for Patient Care/Nursing Services or above in the supervisory line	Facility Director or above in the supervisory line who is at a higher level than the proposing official
Major Adverse Action	Chief of Staff or senior medical officer or Associate Director for Patient Care/Nursing Services or above in the supervisory line	Facility Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level (except that transfers will require concurrence of the Deputy Under Secretary for Health for Operations and Management)

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**FIELD EMPLOYEES****CHIEF OF STAFF OR SENIOR MEDICAL OFFICER OR ASSOCIATE DIRECTOR FOR PATIENT CARE/NURSING SERVICES**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	Facility Director or above in the supervisory line	Network Director or above in the supervisory line who is at a higher level than the proposing official
Reprimand	Facility Director or above in the supervisory line	Network Director or above in the supervisory line who is at a higher level than the proposing official
Major Adverse Action	Facility Director or above in the supervisory line	Network Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level (except that transfers will require concurrence of the Deputy Under Secretary for Health for Operations and Management)

**FIELD EMPLOYEES****TITLE 38 MEDICAL CENTER DIRECTORS**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	Network Director or above in the supervisory line	Deputy Under Secretary for Health for Operations and Management or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level
Reprimand	Network Director or above in the supervisory line	Deputy Under Secretary for Health for Operations and Management or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level

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Major Adverse Action	Deputy Under Secretary for Health for Operations and Management or above in the supervisory line	Under Secretary for Health or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level
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**FIELD EMPLOYEES****TITLE 38 EMPLOYEES IN THE OFFICE OF THE NETWORK DIRECTOR****EXCEPT VISN CHIEF OF STAFF OR SENIOR MEDICAL OFFICER**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	VISN Chief of Staff or senior medical officer or VISN Associate Director as appropriate provided he/she is in the supervisory line, or above in the supervisory line	Network Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level
Reprimand	VISN Chief of Staff or senior medical officer or VISN Associate Director as appropriate provided he/she is in the supervisory line, or above in the supervisory line	Network Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level
Major Adverse Action	VISN Chief of Staff or senior medical officer or VISN Associate Director as appropriate provided he/she is in the supervisory line, or above in the supervisory line	Network Director or above in the supervisory line who is at a higher level than the proposing official, and is at the SES or SES equivalent level (except that transfers will require concurrence of the Deputy Under Secretary for Health for Operations and Management)



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**FIELD EMPLOYEES**

**TITLE 38 VISN CHIEFS OF STAFF OR SENIOR MEDICAL OFFICERS IN THE OFFICE OF  
 THE NETWORK DIRECTOR**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	Network Director or above in the supervisory line	Deputy Under Secretary for Health for Operations and Management or above in the supervisory line who is at a higher level than the proposing official
Reprimand	Network Director or above in the supervisory line	Deputy Under Secretary for Health for Operations and Management or above in the supervisory line who is at a higher level than the proposing official
Major Adverse Action	Deputy Under Secretary for Health for Operations and Management or above in the supervisory line	Deputy Under Secretary for Health or above in the supervisory line who is at a higher level than the proposing official

**VA CENTRAL OFFICE****TITLE 38 EMPLOYEES**

<b>Level of Disciplinary Action</b>	<b>Proposing Official</b>	<b>Deciding Official</b>
Admonishment	Immediate supervisor or above in the supervisory line	Next level official in the supervisory line who is at a higher level than the proposing official
Reprimand	Immediate supervisor or above in the supervisory line	Next level official in the supervisory line who is at a higher level than the proposing official
Major Adverse Action	Service Director level or above in the supervisory line	Under Secretary for Health or designee, who is at a higher level than the proposing official

**[PART III. PROBATIONARY PERIOD ACTIONS**

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## PART III. PROBATIONARY PERIOD ACTIONS

### CHAPTER 1. TITLE 38 PROBATIONARY SEPARATIONS

**1. PURPOSE.** This chapter provides the procedures for the separation of Veterans Health Administration (VHA) title 38 employees serving a probationary period under 38 U.S.C. § 7403(b). (See VA Handbook 5005, Staffing, for information regarding probationary periods.)

#### 2. REFERENCES.

- a. [38 U.S.C., Chapter 3](#), Department of Veterans Affairs
- b. [38 U.S.C. § 323](#), Office of Accountability and Whistleblower Protection
- c. [38 U.S.C. § 7306](#), Office of the Under Secretary for Health
- d. [38 U.S.C. § 7401](#), Appointments in Veterans Health Administration
- e. [38 U.S.C. § 7403\(b\)](#), Period of appointments; promotions
- f. [38 U.S.C. § 7405](#), Temporary full-time appointments, part-time appointments, and without-compensation appointments
- g. [38 U.S.C. § 7406](#), Residencies and internships
- h. [VA Directive 0500](#), Office of Accountability and Whistleblower Protection: Investigation of Whistleblower Disclosures and Allegations Involving Senior Leaders or Whistleblowing Retaliation

#### 3. DEFINITIONS.

- a. **Active-Duty Status.** Pay status including authorized overtime, holiday pay, or premium pay.
- b. **Approving Official.** The management official designated, as described in [paragraph 9.e.](#), to receive and take action regarding the findings and recommendations of a Summary Review Board (SRB), as described in [paragraph 9.f.](#)
- c. **Authorizing Official.** The management official designated, as described in [paragraph 8.a.](#), to appoint SRB members and to convene and coordinate SRBs.
- d. **Calendar Day.** Every day of the week including weekends and holidays.
- e. **Senior Leader.** The management officials covered by this policy for which the Office of Accountability and Whistleblower Protection (OAWP) has authority to

investigate for misconduct, retaliation, or poor performance pursuant to [38 U.S.C. § 323](#), as defined in [VA Directive 0500](#), Office of Accountability and Whistleblower Protection: Investigation of Whistleblower Disclosures and Allegations Involving Senior Leaders or Whistleblowing Retaliation. This includes but is not limited to Veterans Integrated Service Network (VISN) and VA Medical Center (VAMC) Directors and Deputy Directors, VISN and VAMC Chiefs of Staff or equivalent positions (e.g., Chief Medical Officers), and VISN and VAMC Associate Directors for Patient Care Services or equivalent positions (e.g., nurse executives), or Senior Executive Service Equivalents appointed under [38 U.S.C. § 7401\(1\)](#).

- f. **Separation.** The involuntary discharge of an employee from employment based on conduct and/or performance.
  - g. **Summary Review Board (SRB).** A group of title 38 employees who assess the separation or retention of a probationary title 38 employee.
4. **EMPLOYEES COVERED.** These procedures apply to the following employees serving a probationary period unless excluded under [paragraph 5](#), or the action is excluded under [paragraph 6](#):
- a. Those employees appointed under [38 U.S.C. § 7401\(1\)](#), e.g., physicians; dentists; podiatrists; chiropractors; optometrists; registered nurses (RNs); advanced practice nurses (APNs) (e.g., nurse practitioner, clinical nurse specialist, certified nurse anesthetists, certified nurse midwife); physician assistants; and expanded-function dental auxiliaries. For the purposes of this notice, all personnel appointed under [38 U.S.C. § 7401\(1\)](#) are covered by [38 U.S.C. § 7403\(b\)\(4\)](#).
  - b. Part-time RNs and APNs, including intermittent, serving on a temporary or permanent appointment under [38 U.S.C. § 7405\(a\)\(1\)\(A\)](#). (See [paragraph 6.b.](#) and [6.c.](#))
5. **EMPLOYEES EXCLUDED.** These procedures do not apply to the following:
- a. Employees appointed under [38 U.S.C., Chapter 3](#), or [38 U.S.C. §§ 7306, 7401\(2\), 7401\(3\), 7401\(4\)](#), or [7406](#).
  - b. Employees appointed under [38 U.S.C. § 7405](#), except part-time RNs and APNs serving on a temporary or permanent appointment.
  - c. Employees occupying positions described in [38 U.S.C. § 7405\(g\)\(3\)](#).
  - d. Employees appointed under title 5; including those in the Senior Executive Service.

**6. ACTIONS EXCLUDED.** This notice does not apply to the following:

- a. Separation of an RN or APN who is serving on a temporary full-time appointment under 38 U.S.C. § 7405.
- b. Separation of temporary part-time RNs or APNs appointed under 38 U.S.C. § 7405 with an established not to exceed (NTE) date of less than 2 years, who is being separated on the NTE date, and who has not completed a 2-year probationary period. (See VA Handbook 5005.)
- c. Separation of an intermittent temporary RN or APN appointed under 38 U.S.C. § 7405 with an established NTE date, who is being separated on the NTE date, and who has not completed a probationary period. (See VA Handbook 5005.)
- d. Separation under provisions of VA Handbook 5021, Part II, if applicable.

**7. RESPONSIBILITIES.**

- a. **Supervisors** will:
  - (1) Continually observe and evaluate the performance and conduct of employees serving in a probationary status.
  - (2) Promptly submit a request for an SRB to be convened when an employee engages in misconduct or is not performing at a level commensurate with the needs of VA to the appropriate Authorizing Official for action.
- b. **Probationary Review Boards (PRB)**, who are determining if a probationary employee is fully qualified and satisfactory in accordance with 38 U.S.C. § 7403(b)(4) and VA Handbook 5005, Staffing, may refer a request for an SRB to the appropriate Authorizing Official for action.
- c. **Authorizing Officials** will review requests from supervisors or PRBs to convene an SRB, and if they concur with the request, appoint, convene, and coordinate an SRB.
- d. **SRBs** will determine if a probationary employee is fully qualified and satisfactory to continue to work for VA and submit its findings and recommendations to the Approving Official.
- e. **Approving Officials** will review the findings and recommendations from the SRB and approve the Board Action as described in [paragraphs 9.e.](#) and [9.f.](#)

- f. **The Chief, Human Resources (HR) Management, or designee** will:
- (1) Assist management officials with probationary procedures;
  - (2) Review probationary actions for conformance with VA policies and procedures;
  - (3) Advise employees about probationary procedures;
  - (4) Serve as technical advisor to SRBs. This includes advising SRB members on policies and procedures related to conducting probationary reviews; and
  - (5) Ensure 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. (Consult with the appropriate VHA office responsible for credentialing and privileging records regarding inclusion of these records.)

## **8. AUTHORIZING OFFICIALS AND SRB MEMBERS.**

- a. The following identifies the appropriate Authorizing Officials and those responsible for coordinating and approving the appointment of SRB members pursuant to the probationary employee's occupation or organizational assignment:
- (1) For probationary employees in the Veterans Health Administration Central Office (VHACO):
    - (a) The Authorizing Official is the appropriate service director and equivalent positions or above.
    - (b) The appointment of SRB members by the Authorizing Official will be coordinated with the VISN HR office.
  - (2) For probationary VISN Directors:
    - (a) The Authorizing Official is the Assistant Under Secretary for Health for Operations (AUSHO).
    - (b) The appointment of SRB members by the Authorizing Official will be coordinated with VHA Workforce Management and Consulting (WMC) Center of Excellence (COE).
  - (3) For probationary VISN Chief Medical Officers (CMO), Quality Management Officers (QMO), or Chief Nursing Officers (CNO), or equivalent:
    - (a) The Authorizing Official is the VISN Director.

- (b) The appointment of SRB members by the Authorizing Official will be coordinated with VHA WMC COE.
- (4) For probationary employees in a VISN, except the CMOs, QMOs, or CNOs, or equivalent:
  - (a) The Authorizing Official is the CMOs, QMOs, or CNOs, or equivalent, depending on the probationary employee's organizational alignment.
  - (b) The appointment of SRB members by the Authorizing Official will be coordinated with VHA WMC COE.
- (5) For probationary VHA Facility/Medical Center Directors or Deputy VISN Directors (if appointed under [38 U.S.C. § 7401\(1\)](#) or other covered appointment authority; if appointed under [38 U.S.C. § 7401\(4\)](#) or other excluded authority, then they are excluded from this notice as discussed in paragraph 5):
  - (a) The Authorizing Official is the VISN Director.
  - (b) The appointment of SRB members by the Authorizing Official will be coordinated with the VHA WMC COE.
- (6) For probationary Medical Center Chiefs of Staff (COS), or equivalents:
  - (a) The Authorizing Official is the Facility Director.
  - (b) The appointment of SRB members by the Authorizing Official will be coordinated with VHA WMC COE.
- (7) For probationary Associate Directors for Patient Care Services (ADPCS), or equivalents:
  - (a) The Authorizing Official is the Facility Director.
  - (b) The appointment of SRB members by the Authorizing Official will be coordinated with the VHA WMC COE.
- (8) For probationary Assistant/Associate Chiefs, Nursing Services, and RNs, Grade IV:
  - (a) The Authorizing Official is the ADPCS, or equivalent.
  - (b) The appointment of SRB members by the Authorizing Official will be coordinated with the VISN CMO, QMO, or CNO, depending on the ADPCS's organizational alignment.

- (9) For all other VHA probationary facility employees:
  - (a) The Authorizing Official is the appropriate service chief, or equivalent.
  - (b) The appointment of SRB members by the Authorizing Official will be coordinated with the COS or ADPCS, or equivalent, depending on the probationary employee's organizational alignment.

**b. Composition of the SRB.**

- (1) The SRB will be comprised of a minimum of three Board members.
- (2) Persons selected to serve on the SRB will be fair, impartial, and objective.
- (3) The Authorizing Official should attempt to convene an SRB with three VA title 38 employees in the same occupation as the probationary employee being reviewed. However, if that is not possible or practical, at least one SRB member will be in the same title 38 occupation at the same grade or higher than the probationary employee being reviewed. The other two members must also be in a title 38 occupation. In the case of RNs or physician assistants, at least two SRB members will be in the same occupation. (When convening an SRB for a senior leader, the Authorizing Official must consult with WMC for assistance.)

**c. Other Considerations.**

- (1) If an Authorizing Official determines a local SRB meeting the requirements of this notice cannot be properly established, the Authorizing Official and the servicing HR office will facilitate the process for obtaining members from facilities other than the employee's facility to serve on an SRB.
- (2) Persons in a position to prejudice the action of an SRB, such as an employee's immediate or second-level supervisor, cannot serve on an SRB.

**9. SUMMARY REVIEW PROCEDURES.**

**a. Initiating a Summary Review.**

- (1) Summary reviews are limited to situations in which management is considering separating a probationary employee from Federal service due to performance and/or conduct deficiencies.
- (2) If a probationary employee's performance and/or conduct is deficient, the supervisor or PRB will submit a written request through supervisory lines to the appropriate Authorizing Official (see [paragraph 8](#) of this notice) that an SRB be convened.



- (3) An unsatisfactory proficiency rating is not required to separate a probationary employee. However, if the request is based on performance, sufficient documentation outlining the performance deficiencies must be included with the supervisor's or PRB's request as well as any information regarding the supervisor's efforts to address the deficiencies (e.g., counseling, training, modification of assignments, use of preceptors), if applicable.
  - (4) Evidence of the performance and/or conduct deficiencies must be included with the request submitted by the supervisor or PRB for the summary review by the SRB.
  - (5) Supervisors and PRBs can initiate a request for a summary review by an SRB at any time during the probationary period but must ensure there is sufficient time to conduct the review and process the separation, if applicable, prior to the expiration of the employee's probationary period.
  - (6) Supervisors will, in addition to requesting an SRB, refer the following types of allegations to OAWP pursuant to [VA Directive 0500](#):
    - (a) Allegations of misconduct, poor performance, or whistleblower retaliation made against a probationary title 38 senior leader; or
    - (b) Allegations of whistleblower retaliation made against probationary employees who are supervisors.
    - (c) When referring the allegations, the supervisor will notify OAWP that an SRB has also been requested. Such a referral should be described and included in the supervisor's request for an SRB. If the PRB submits a request to the Authorizing Official for an SRB, the Authorizing Official should notify OAWP that an SRB has been requested.
  - (7) If a supervisor receives an OAWP recommendation for disciplinary action regarding a title 38 probationary employee's performance and/or conduct deficiencies, including retaliation, the supervisor will request an SRB and attach OAWP's recommendation, and the referenced supporting documentation, to the request. If there was a prior request for an SRB before the conclusion of OAWP's investigation (e.g., if there was a referral to OAWP contemporaneous with a prior SRB request regarding the same employee as described in paragraph [9.a.\(6\)](#), a new request for an SRB will be made based on OAWP's recommendation).
- b. **Employee's Status During Review.** Employees will normally be retained in an active-duty status in their current assignment during the summary review. See VA Handbook 5021, Part II in those instances where it is determined the employee's continued presence at the work site might pose a threat to patient

care, employees or others, result in loss of damage to Government property, or otherwise jeopardize legitimate Government interests.

c. **Conducting a Summary Review.**

- (1) If the Authorizing Official concurs with the request from the supervisor or PRB that a summary review is warranted, an SRB will be convened promptly. Authorizing Officials will consult with the servicing HR office, who will facilitate the SRB process.
- (2) If there was a contemporaneous referral to OAWP with the request for an SRB, as described in paragraph [9.a.\(6\)](#), to ensure timely action is taken, an Authorizing Official should, if they concur with the request, convene an SRB without awaiting the outcome of the OAWP referral or investigation. When convening an SRB for a senior leader, the Authorizing Official must consult with VHA WMC COE.
- (3) Written notification to the appointed SRB members will be completed via memorandum or email by the Authorizing Official.
- (4) The primary purpose of the SRB is to review the evidence submitted by the supervisor or PRB and determine whether the employee is fully qualified and satisfactory to continue to work for VA.
- (5) The Chief, HR Management, or designee, will serve as the technical advisor to the SRB.
- (6) After review of the evidence submitted by the supervisor or PRB with their request, the SRB members and HR technical advisor will convene at least once in person, telephonically or via video teleconference to discuss the evidence, findings, and recommendations.

d. **Findings and Recommendations of the SRB.** Upon completion of the review, the SRB may recommend separation or retention of the employee. The SRB's findings and recommendation will be recorded on [VA Form 10-2543](#), Board Action. The Board Action must contain the following:

- (1) A brief summary of the performance and/or conduct deficiencies;
- (2) An analysis of material evidence relating to the asserted deficiencies described in the supervisor or PRB's request;
- (3) A finding, based on that analysis, of whether the probationary employee is fully qualified and satisfactory, including which deficiencies, if any, were supported by the evidence and contributed to that finding; and

- (4) A recommendation to separate or retain the employee based on the findings resulting from the analysis.

**NOTE:** Adverse (e.g., admonishments and reprimands) and major adverse (e.g., suspensions, reduction in grade/pay) actions may not be issued to probationary title 38 employees. The SRB's recommendation will be to retain or separate the employee based on the findings of each issue.

- e. **Approving Authority on SRB Recommendation.** This section provides guidance regarding the appropriate designated Approving Official and actions to be taken when an SRB is convened to conduct a review of the following employees covered by this Notice:

- (1) VHACO Employees.

- (a) The completed Board Action and evidence will be sent to the service director in VHACO or equivalent positions or above, for review. The reviewer may comment on the SRB's recommendation prior to forwarding the Board Action and related documents to the Assistant Under Secretary for Health (AUSH), or equivalent, who is the Approving Official. If comments are provided by the reviewer, they shall be summarized in a memorandum attached to the Board Action.
- (b) The AUSH, or equivalent, will review the Board Action and evidence to ensure the SRB has provided a thorough analysis of the performance and/or conduct deficiencies and provided an explanation of its findings and recommendation. If the SRB does not provide sufficient analysis to support its findings and recommendations, the AUSH, or equivalent, will return the Board Action to the SRB with a written explanation of the deficiencies identified for modification.
- (c) Upon review and consideration of the Board Action and evidence, the AUSH, or equivalent, must effect the SRB's recommendation to retain or separate the probationary employee on the Board Action.

- (2) VISN Directors.

- (a) The completed Board Action and evidence will be sent to the AUSHO, or equivalent. The reviewer may comment on the SRB's recommendation prior to forwarding the Board Action and related documents to the Deputy Under Secretary for Health (DUSH), who is the Approving Official. If comments are provided by the reviewer, they shall be summarized in a memorandum attached to the Board Action.

- (b) The DUSH will review the Board Action and evidence to ensure the SRB has provided a thorough analysis of the performance and/or conduct deficiencies and provided an explanation of its findings and recommendation. If the SRB does not provide sufficient analysis to support its findings and recommendations, the Board Action should be returned to the SRB with the deficiencies identified for modification. If the SRB does not provide sufficient analysis to support its findings and recommendations, the DUSH will return the Board Action to the SRB with a written explanation of the deficiencies identified for modification.
  - (c) Upon review and consideration of the Board Action and evidence, the DUSH must effect the SRB's recommendation to retain or separate the probationary employee, on the Board Action.
- (3) VISN CMOs, QMOs, and CNOs, or equivalent.
  - (a) The completed Board Action and evidence will be sent to the VISN Director for review. The reviewer may comment on the SRB's recommendation prior to forwarding the Board Action and related documents to the AUSHO, or equivalent, who is the Approving Official. If comments are provided by the reviewer, they shall be summarized in a memorandum attached to the Board Action.
  - (b) The AUSHO, or equivalent, will review the Board Action and evidence to ensure the SRB has provided a thorough analysis of the employee's performance and/or conduct deficiencies and provided an explanation of its findings and recommendation. If the SRB does not provide sufficient analysis to support its findings and recommendations, the AUSHO, or equivalent, will return the Board Action to the SRB with a written explanation of the deficiencies identified for modification.
  - (c) Upon review and consideration of the complete Board Action and evidence, the AUSHO, or equivalent, must effect the SRB's recommendation to retain or separate the probationary employee on the Board Action.
- (4) VISN Employees, except for the CMOs, QMOs, and CNOs.
  - (a) The completed Board Action and evidence will be sent to the CMO, QMO, or CNO, as applicable, for review. The reviewer may comment on the SRB's recommendation prior to forwarding the Board Action and related documents to the VISN Director, who is the Approving Official. If comments are provided by the reviewer, they shall be summarized in a memorandum attached to the Board Action.

- (b) The VISN Director will review the Board Action and evidence to ensure the SRB has provided a thorough analysis of the employee's performance and/or conduct deficiencies and provided an explanation of its findings and recommendation. If the SRB does not provide sufficient analysis to support its findings and recommendations, the VISN Director will return the Board Action to the SRB with a written explanation of the deficiencies identified for modification.
  - (c) Upon review and consideration of the complete Board Action and evidence, the VISN Director must effect the SRB's recommendation to retain or separate the probationary employee on the Board Action.
- (5) Facility/Medical Center Directors/Deputy VISN Directors (if appointed under [38 U.S.C. § 7401\(1\)](#) or other covered appointment authority; if appointed under [38 U.S.C. § 7401\(4\)](#) or other excluded authority, then they are excluded from this notice as discussed in [paragraph 5](#)).
  - (a) The completed Board Action and evidence will be sent to the VISN Director for review. The reviewer may comment on the SRB's recommendation prior to forwarding the Board Action and related documents to the AUSHO, or equivalent, who is the Approving Official. If comments are provided by the reviewer, they shall be summarized in a memorandum attached to the Board Action.
  - (b) The Board Action and evidence will be submitted to the AUSHO, or equivalent, to ensure the SRB has provided a thorough analysis of the performance and/or conduct deficiencies and provided an explanation of its findings and recommendation. If the SRB does not provide sufficient analysis to support its findings and recommendations, the AUSHO, or equivalent, will return the Board Action to the SRB with a written explanation of the deficiencies identified for modification.
  - (c) Upon review and consideration of the Board Action and evidence, AUSHO, or equivalent, must effect the SRB's recommendation to retain or separate the probationary employee on the Board Action.
- (6) Medical Center COS, or equivalent, and ADPCS, or equivalent appointed under an authority covered by this notice ([see paragraph 4](#)).
  - (a) The completed Board Action and evidence will be sent to the Facility/Medical Center Director for review. The reviewer may comment on the SRB's recommendation prior to forwarding the Board Action and related documents to the VISN Director, who is the Approving Official. If comments are provided by the reviewer, they shall be summarized in a memorandum attached to the Board Action.

- (b) The Board Action and evidence will be submitted to the VISN Director to ensure the SRB has provided a thorough analysis of the performance and/or conduct deficiencies and provided an explanation of its findings and recommendation. If the SRB does not provide sufficient analysis to support its findings and recommendations, the VISN Director will return the Board Action to the SRB with a written explanation of the deficiencies identified for modification.
  - (c) Upon review and consideration of the Board Action and evidence, the VISN Director must effect the SRB's recommendation to retain or separate the probationary employee on the Board Action
- (7) Employees other than those specifically addressed in paragraphs [9.e.\(1\)](#) through (6).
  - (a) The completed Board Action and evidence will be sent to the facility COS or ADPCS, as appropriate, for review. The reviewer may comment on the SRB's recommendation prior to forwarding the Board Action and related documents to the Facility/Medical Center Director, who is the Approving Official. If comments are provided by the reviewer, they shall be summarized in a memorandum attached to the Board Action.
  - (b) The Board Action and evidence will be submitted to the Facility/Medical Center Director to ensure the SRB has provided a thorough analysis of the performance and/or conduct deficiencies and provided an explanation of its findings and recommendation. If the SRB does not provide sufficient analysis to support its findings and recommendations, Facility/Medical Center Director will return the Board Action to the SRB with a written explanation of the deficiencies identified for modification.
  - (c) Upon review and consideration of the Board Action and evidence, the Facility/Medical Center Director must effect the SRB's recommendation to retain or separate the probationary employee on the Board Action

**f. Action by Approving Official.**

- (1) The Approving Official (see [paragraph 9.e.](#) of this policy) will indicate final approval of the SRB's recommendation by completing items 14, 15 and 16 on [VA Form 10-2543](#), Board Action.
- (2) If the Approving Official is aware of an ongoing review or investigation by OAWP, including via a referral made contemporaneously with the SRB request per [paragraph 9.a.](#), the Approving Official must notify OAWP of the

SRB recommendation and the date the separation was or will be imposed, if applicable.

g. **Effecting Recommendation.**

- (1) **Separation.** Separations under these procedures must be effected before completion of the probationary period but no later than 7 calendar days from the date of the approved Board Action. The employee will be provided a separation memorandum and a copy of the Board Action.
- (2) **Retention.** A decision by the SRB to retain the employee does not preclude initiation of a subsequent summary review prior to completion of the probationary period. The employee will be provided a memorandum and a copy of the Board Action.

h. **Reporting Separated Licensed Employees to State Licensing/Registration Boards and License Monitoring Entities.** Designated Approving Officials are responsible for determining whether to report a current employee or a former employee, who may have separated, resigned, or retired, to appropriate licensing/registration boards or license monitoring entities. In making such determinations, designated Approving Officials must ensure adherence to the required procedures and time standards for VA-initiated reporting as prescribed in VHA policies or standard operating procedures.

i. **Reporting to the National Practitioners Data Bank (NPDB).** If a Licensed Independent Practitioner with privileges is separated during their probationary period due to substandard care, professional misconduct, or professional incompetence, the procedures in VHA policies or standard operating procedures should be followed regarding the employee's right to a fair hearing prior to filing a report with the NPDB.]

**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 [or trial] period under title 5 Code of Federal Regulations (CFR) Parts 315 or 307 in the Department of Veterans Affairs (VA). This includes employees appointed under 38 U.S.C. 7401(3), i.e., permanent full-time hybrids, and employees appointed under 38 U.S.C. 7405(a)(1)(B), i.e. part-time hybrids and part-time or full-time temporary hybrids serving on an appointment not limited to one year less, who have not completed a probationary period. General information regarding title 5 probationary periods is contained in VA Handbook 5005, part II, chapter 2, section A, paragraph 9. Information regarding probationary periods for permanent part-time and full-time hybrid employees is contained in VA Handbook 5005, part II, chapter 3, section F, paragraph 4 and VA Handbook 5005, part II, chapter 2, paragraph 9a. Information concerning supervisory and Senior Executive Service probationary periods may be found in VA Handbooks 5005, part III, Staffing, and 5027, part III, 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 policies and procedures.
- (3) Advising employees about probationary procedures and rights.

**3. [EXCLUSIONS]**

a. Any individual who meets one or more of the following definitions will not be covered by this chapter:

- (1) An individual in the competitive service who is not serving a probationary or trial period under an initial appointment;
- (2) An individual in the competitive service who has completed one (1) year of current continuous service under an appointment that was not a temporary appointment limited to one (1) year or less;
- (3) A preference eligible in the excepted service who has completed one (1) year of current continuous service in the same or similar positions in an Executive agency, the United States Postal Service, or the Postal Rate Commission;



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(4) An individual in the excepted service (other than a preference eligible) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service;

(5) An individual in the excepted service (other than a preference eligible) who has completed two (2) years of current continuous service in the same or similar position in an Executive agency under an appointment that was not a temporary appointment limited to one (1) year or less.

b. Use the procedures outlined in VA Handbook 5021, Part I, for employees who are not covered by this chapter.]

#### 4. [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. [VA may also terminate an employee serving on a probationary period for reasons based in whole or in part on conditions arising before the employee's appointment. Use procedures outlined in 5 CFR 315.805 for probationary pre-employment actions.

c. 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.]

5. [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 statute 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.]

[ ]

[6. 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 individual registers for the Selective Service and submits a new statement of Selective Service registration status, including his date of birth, to VA; or,
- b. The individual is age twenty-six (26) or older and OPM determines that his failure to register was neither knowing nor willful, after the individual submits a written request for a determination by OPM and an explanation of why he failed to register.]

**[EMPLOYEE/MANAGEMENT RELATIONS**

**PART IV. AGENCY GRIEVANCES**

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## PART IV. AGENCY GRIEVANCES

### CHAPTER 1. GENERAL

#### 1. POLICY.

##### a. **General.**

- (1) It is the policy of VA to identify, prevent, and make reasonable efforts to resolve employee dissatisfaction. 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 grievance procedure, but in observing the underlying spirit and intent in attempting to resolve dissatisfaction. 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 that 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, the servicing Human Resources (HR) office, immediate and higher-level supervisors, and Equal Employment Opportunity (EEO) counselors.

- d. **Duty Time.** Grievants and their VA-employed representatives, if any, will have a reasonable amount of duty time to present grievances if otherwise in a duty status.

- e. **Informal Resolutions.** Nothing in these procedures will 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 procedures. 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 processed, will not preclude proceeding with a grievance, nor invalidate any action or decision taken in connection with the grievance. This provision does not require the acceptance of a grievance that is not filed in accordance with the timelines of this policy unless good cause can be shown for its untimeliness.

## 2. RESPONSIBILITIES.

- a. **Under Secretaries, Assistant Secretaries, Other Key Officials, Deputy Assistant Secretaries, or equivalent, and field Facility Directors** may delegate authority to appropriate officials to decide grievances. Delegations will be made in writing.
- b. **Human Resources (HR) Officials** will provide guidance and technical advice to management and employees regarding the administration of the VA grievance procedure.
- c. **Supervisors and managers** will:
  - (1) Receive employee concerns and attempt to clarify and make reasonable adjustments to address problems that arise in daily relationships with employees prior to becoming subject of a grievance; and
  - (2) Administer the VA grievance procedures and bring the process to the attention of employees, when appropriate.
- d. **Grievance examiners** will conduct an impartial and objective inquiry regarding the merits of a grievance and submit a report of findings and recommendations to the deciding official, employee, and representative, if applicable.

## CHAPTER 2. AGENCY GRIEVANCE PROCESS FOR TITLE 5 AND HYBRID-TITLE 38 EMPLOYEES

1. **SCOPE.** This chapter establishes policies, principles, and procedures for grievances filed by title 5 and hybrid-title 38 employees.
2. **EMPLOYEES COVERED.** This chapter applies to all title 5 and hybrid-title 38 employees appointed under [38 U.S.C. § 7401\(3\)](#) and [38 U.S.C. § 7405](#), and Senior Executive Service (SES), scientific and professional (ST) and senior level (SL) employees, except for those employees listed in paragraph 3.
3. **EMPLOYEES EXCLUDED.**
  - a. Title 5 and hybrid-title 38 bargaining unit employees unless the collective bargaining agreement under which the employee is covered specifically excludes the matter from being grieved.
  - b. All title 38 employees appointed under [38 U.S.C. §§ 7401\(1\)](#) or [7306](#), and those occupations listed in [38 U.S.C. § 7401\(1\)](#) who are appointed under [38 U.S.C. § 7405](#), e.g., part-time, temporary physicians, registered nurses, dentists.
  - c. A noncitizen appointed under [5 C.F.R. § 8.3](#).
  - d. An alien appointed under [22 U.S.C. § 1471\(5\)](#).
  - e. Employees who are defined as senior executives covered by [38 U.S.C. § 713](#), and who are issued a disciplinary or adverse action pursuant to this statute.
  - f. An individual paid from funds as defined in [5 U.S.C. § 7202\(5\)](#), i.e., excepted service Veterans Canteen employees.
4. **DEFINITIONS.**
  - a. **Bargaining Unit Employee.** An employee occupying a position that is included in an appropriate unit as described by the Federal Labor Relations Authority (FLRA), for which a labor organization has been accorded exclusive recognition.
  - b. **Calendar Day.** Each day of the week, to include weekends. Note that if a deadline falls on a non-business day, the deadline will be extended to the next business day, which is Monday through Friday, excluding Federal holidays. For example, if the 10<sup>th</sup> calendar day for filing a grievance falls on a Saturday, Sunday, or Federal holiday, the deadline is extended to the next business day.
  - c. **Deciding Official.** The management official designated to:

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- (1) Receive the grievance, and adjust the matter to the grievant's satisfaction, cancel, reject, refer for technical review, or assign a grievance examiner in response to an informal or formal grievance, if applicable; and/or
    - (2) Decide formal grievances based on the results of impartial reviews and recommendations.
  - d. **Employee.** A current VA employee or a former VA employee in situations where a specific remedy can still be appropriately provided. For example, a former employee charged with eight hours absence without leave (AWOL) who has requested that the eight 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.
  - e. **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 that is subject to the control of management.
  - f. **Grievance Examiner.** Employee assigned by the deciding official for making an impartial and objective inquiry regarding the merits of a grievance and for providing a report of findings and recommendations to the deciding official and all parties involved.
  - g. **Grievance File.** A separate file subject to the Privacy Act that contains all documents related to the grievance. This file will include, but is not limited to, statements of witnesses, records or copies thereof, statements made by the parties to the grievance, and the decision.
  - h. **Negotiated Grievance Procedure.** A grievance procedure provided by a collective bargaining agreement under which an employee is included.
  - i. **Personal Relief.** A specific remedy directly benefiting the grievant, or group of grievants, but may not include a request for disciplinary or other action affecting another employee.
- 5. DISCIPLINARY ACTIONS COVERED.** Disciplinary actions are defined as admonishments, reprimands and suspensions of 14-calendar days or less. Bargaining unit employees cannot file a grievance under these procedures unless a collective bargaining agreement prohibits the filing of a negotiated grievance involving a disciplinary action.
- 6. MATTERS EXCLUDED FROM COVERAGE UNDER THIS CHAPTER.** The following matters 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 Department

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policy or regulations may be handled as indicated in paragraph 12.g. of this chapter.

- b. All matters for which review/complaint procedures are already established in VA policy.
- c. A matter not subject to the control of management, e.g., resignation, retirement.
- d. A matter that includes specified relief not personal to the grievant.
- e. A grievance of an individual from outside VA, except as provide in paragraph 12.f.(1)(b) of this chapter.
- f. Grievances concerning the number of positions to be filled, or the grade level at which positions are advertised or filled.
- g. Matters involving the method, means or technology of performing work.
- h. Matters that are not directly related to the employee's conditions of employment.
- i. Non-selection for promotion from a list of properly certified eligible candidates or failure of an employee appointed under [38 U.S.C. § 7401\(3\)](#) or [38 U.S.C. § 7405\(a\)\(1\)\(B\)](#) to receive a non-competitive promotion.
- j. Matters involving a detail, reassignment, or change in organizational alignment, including supervisory change.
- k. An action that 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.
- l. An action that 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 C.F.R. § 335.102\(f\)](#).
- m. Return of any employee from an initial appointment as a supervisor or manager to a non-supervisory or non-managerial position for failure to satisfactorily complete the probationary period.
- n. Termination of temporary appointments.
- o. Termination of an employee serving a probationary or trial period after initial appointment.



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- p. Separation of employees with less than 2 years of current continuous employment appointed under authority of [5 C.F.R. 213, Subpart C, Schedule A or Schedule B](#).
- q. Separation of non-preference eligible hybrid-title 38 employees with less than 2 years of current continuous service.
- r. Oral or written counseling.
- s. A proposed disciplinary or adverse action notice that, if effected, would be covered under another grievance or appeal system, or excluded from coverage by other paragraphs of this chapter.
- t. A decision not to remove an admonishment or reprimand from an employee's personnel folder prior to the expiration date.
- u. A decision that is appealable to the Merit Systems Protection Board (MSPB) or subject to final administrative review by the Office of Personnel Management (OPM), the FLRA, or the Office of Workers' Compensation Programs (OWCP) under law or regulations of OPM, FLRA, or OWCP; or any other matter for which final administrative authority lies outside VA.
- v. Allegations of discrimination on the basis of race, color, religion, sex (including pregnancy, and sexual orientation), 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 Equality Employment Opportunity Commission. Complaints of discrimination are excluded from the grievance procedure; however, other non-discriminatory disputes related to the case are not precluded from review under the grievance procedure. 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.
- w. A matter covered by a negotiated grievance procedure.
- x. An action taken in accordance with the terms of a formal agreement voluntarily entered into by an employee.
- y. The content of an employee's performance plan, including critical and noncritical elements.
- z. A performance appraisal, summary rating, special rating, or overall rating assigned under the performance appraisal system (requests for review of these should be processed in accordance with provisions contained in [VA Directive and Handbook 5013, Performance Management Systems](#)).

- aa. Disapproval of a suggestion, disapproval of a discretionary award or bonus or incentive, or disagreement with the amount of an award. Awards, bonuses, and incentives include, but are not limited to, incentive pay such as critical skills incentive; cash awards; quality step increases; time-off awards; honor awards; recruitment, retention, and relocation incentives, student loan repayment.
- bb. Adverse actions taken under [38 U.S.C. § 713](#). A return of an SES career appointee to the General Schedule or another pay system during the 1-year period of probation for less than fully successful executive performance.
- cc. Termination of an SES career appointee during probation for unsatisfactory performance.
- dd. Evaluation of performance for a member of the SES.
- ee. Any matter excluded for a member of the SES as outlined in [VA Directive and Handbook 5027, Senior Executive Service](#).

## 7. OFFICIALS AUTHORIZED TO DECIDE GRIEVANCES.

- a. **Informal Grievance Procedure.** The official who will make a decision on informal grievances will be the immediate supervisor or lowest level official with the authority to resolve the grievance. For example, if an Associate Director requires the reassignment of an employee from one service line under their jurisdiction to another service line in their jurisdiction, the employee will file the informal grievance with the Associate Director versus the first-line supervisor or service chief as those management officials did not order the reassignment. Additionally, if the basis of the grievance is regarding the employee's immediate supervisor, the next higher-level official in the employee's supervisory line will decide the issue. (See exceptions in subparagraph c.)
- b. **Formal Grievance Procedure.** Authority to make a decision on formal grievances will be as follows:
  - (1) Grievances of Field Facility Employees. The Facility Director, for purposes of this part includes but is not limited to Veteran Integrated Service Network (VISN) Directors, Veterans Benefit Administration (VBA) Regional Office Directors and National Cemetery Administration (NCA) Directors, will be the deciding official on a grievance from an employee under their jurisdiction provided the matter to be resolved is one which is under the Facility Director's authority.
  - (2) Grievances of VA Central Office Employees and Employees Not Under the Jurisdiction of a Facility Director. The Secretary, Under Secretary, Deputy Under Secretary, 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 VA Central Office or an employee who is not under the jurisdiction of a facility/area/regional director.

**c. Exceptions.**

- (1) The deciding official designated in paragraphs 7.b.(1) and (2) will not decide the grievance when:
  - (a) The deciding official is the official with whom the employee would file the initial grievance in the informal stage;
  - (b) The deciding official does not have the authority to make a determination on the grievance issue; or
  - (c) The deciding official made the decision, approved the action, or took the action on which the employee's grievance is based.
- (2) In these instances, the deciding official will refer the grievance to the next higher-level official in the supervisory line, and that official will be the deciding official or they may designate another official to make the grievance decision.

**8. TIME LIMITS FOR FILING A GRIEVANCE.**

- a. Time Limits.** To ensure timely and orderly processing, the following time limits are established for filing a grievance:

- (1) Informal Procedure.
  - (a) Employees have 15-calendar days from the date of the incident or action on which the grievance is based to initiate a written grievance under the informal procedure.
  - (b) When an employee is informed of an administrative decision that has not yet been effected, the period to file a grievance is counted from the date the employee received written notification of the decision, e.g., date the employee received a written decision regarding cancellation of a telework agreement.
  - (c) An employee must first utilize the informal grievance procedure except in cases in which the employee is grieving a disciplinary action. (See paragraph 5 of this chapter.)
- (2) Formal Procedure.

- (a) Employees have 10-calendar days to file a written grievance under the formal procedure after receiving a written response under the informal procedure or if a written decision under the informal procedure is not received and there was no explanation for the delay as prescribed in subparagraph d.
  - (b) Employees have 15-calendar days after receiving a written disciplinary action decision e.g., admonishment, reprimand, suspension of 14-calendar days or less, to file a written grievance under the formal procedure.
- 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 that were taken or identified as of a given date, e.g., admonishments, reprimands, shift/duty assignments, are not considered continuing conditions for these purposes despite any continuing effects they may have.
- c. **Effecting an Action or Decision.** The grievance procedure will not delay the implementation of the disciplinary action or administrative decision.
- d. **Delays in Processing Grievances.** Management officials will ensure that grievances are processed promptly. Management delays at any stage of the grievance procedure beyond the prescribed time limits will be explained to the employee and the employee's representative in writing and will be included in the record. Such delays by management 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 submitted by the grievant or their representative in writing and included in the record.

## 9. REPRESENTATION.

- a. **Grievant.**
  - (1) **Election of Representation.** An employee may present a grievance with or without representation.
  - (2) **Designation of a Representative.** An employee has the right to be accompanied, represented, and advised by a representative of their choice at any stage of the procedure. Designation of a representative will be in writing and will be submitted at the time of submission of the grievance. Any change of representative will be in writing.
  - (3) **Disallowance of a Designated Representative.** A deciding official may disallow a representative 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-calendar days of receipt of the employee's written designation of representative. The written notice of disallowance will inform the employee of the basis of the determination to disallow the representative and the right of the employee to challenge the disallowance.

- (4) **Challenge of Disallowance of Designed Representative.** If informed that a designated representative has been disallowed, an employee may, within 5-calendar days, challenge the disallowance in writing to the deciding official. A challenge will 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 deciding official will make a final decision on a challenge of disallowance of a representative no later than 10-calendar days after receipt of the challenge.
- (5) **Change of Designated Representative.** In the event that an employee changes their representative during the proceeding, any disallowance of the newly named representative, or challenge regarding a disallowance of the newly named representative, will be resolved in accordance with subparagraphs (3) and (4) of this paragraph.

**b. Agency.**

- (1) **Election of Representation.** The agency may elect to have a representative assigned to the grievance.
- (2) The agency representative for the grievance will not be the same individual assigned to provide advice and guidance to the grievance examiner about any technical or procedural matters.

## **10. PROCEDURAL REQUIREMENTS FOR INFORMAL AND FORMAL GRIEVANCES.**

- a. **Group Grievances.** If a group of employees has an identical grievance, the group will select one individual case for processing under the provisions of the informal grievance procedure and identify the employee, by name, who will be the spokesperson for the group. Once the informal grievance process has been exhausted, the group of employees may file a formal grievance, and the decision will be binding on all members of the group.

**b. Grievance File.**

- (1) Upon receipt of an informal or formal grievance, the supervisor or deciding official will contact the servicing HR office who will establish a grievance file, separate from the employee's personnel folder, which will contain:

- (a) The employee's written grievance and designation of representative, if any;
  - (b) A copy of any information from the informal grievance procedure including the deciding official's written reply to the employee, if applicable;
  - (c) Material or evidence used to support the administrative action, e.g., if the grievance is based on a disciplinary action or other administrative order;
  - (d) Copies of relevant policies, if any; and
  - (e) Any other information considered appropriate for review in making a decision on the grievance.
- (2) When grievances are filed by SES, ST or SL employees, the Executive Director, Corporate Senior Executive Management Office (CSEMO), or designee, will perform the HR functions.
- (3) The grievance file will be expanded as additional information is developed. If a grievance examiner is appointed to review the grievance, they will add appropriate information to the file based on information received during the review.
- (4) The grievance file must not contain any document that is not available to the employee or the employee's representative for review. Medical records that cannot be disclosed to the employee in accordance with applicable statutes, regulations, etc. cannot be included in the file, or must be properly redacted if permissible. Information will not be made available to the grievance examiner that cannot be provided to the employee. All information provided to the grievance examiner will be in a format that can be released to the employee or the employee's representative. Additionally, the file will not contain non-sanitized, confidential, or personal records of employees other than the person filing the grievance, e.g., performance appraisals, personal qualifications. Consult with the Office of General Counsel (OGC) and/or a Privacy Officer for additional guidance.

## **11. INFORMAL GRIEVANCE PROCEDURE.**

### **a. Filing an Informal Grievance.**

- (1) An employee must first use the informal grievance procedure except in cases in which the employee is grieving a disciplinary action (see paragraphs 5 and 8.a.(2)(b) of this chapter), or when the authority to resolve a matter is reserved to the Secretary. The employee's written informal grievance must be made no later than 15-calendar 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 paragraph 8 of this chapter.) The time limit may be extended by management when good cause is shown by the employee, e.g., extended illness.

- (2) The informal grievance will usually be presented to the employee's immediate supervisor unless it must be filed with a higher-level official. (See paragraph 7 of this chapter for officials authorized to receive and decide informal/formal grievances.)
  - (3) The grievance must be in writing but can be submitted via memo, email or fax to the appropriate management official. The employee's written submission must clearly indicate they are filing a grievance.
- b. **Contents of an Informal Grievance.** The written informal grievance will contain all of the following applicable information:
- (1) The specific issue upon which the grievance is based, including the date the employee first learned of the issue;
  - (2) The rule, regulation, or policy the employee believes was violated, if applicable; the reason(s) the employee believes the issue or action was unjustified; and how it affected the employee;
  - (3) Any relevant evidence or documentation related to the specific issue upon which the grievance is based; and
  - (4) The personal relief desired by the employee. This relief must be specific to the employee initiating the grievance.
- c. **Processing an Informal Grievance.**
- (1) The supervisor or higher-level management official who receives the grievance will notify the servicing HR office immediately that a grievance has been filed.
  - (2) If the informal grievance does not contain the applicable information specified in paragraph 11.b. of this chapter, the supervisor will return the grievance to the employee and advise them in writing that they will be given 5-calendar days to supply all of the necessary missing information. If the employee fails to provide all of the missing information after being provided with an opportunity to do so, the supervisor may reject the grievance following the procedures contained in paragraph 12.e. of this chapter.

- (3) The supervisor or higher-level management official, in consultation with the servicing HR office, will determine if the matter being grieved is excluded from coverage under this chapter. (See paragraph 6 of this chapter.) If the matter is excluded, the grievance will be rejected in accordance with paragraph 12.e. of this chapter.
- (4) If the matter is not excluded from coverage, the supervisor or higher-level management official will normally meet with the employee to discuss the contents of the grievance and will prepare a written summary of the meeting.
- (5) Within 10-calendar days from receipt of the written grievance, the supervisor or higher-level management official will issue a written decision. (See paragraph 8.d. of this chapter for information regarding delays in processing grievances.) If the specified relief is not granted, the written decision will advise the employee they have 10-calendar days from receipt of the informal decision to file a formal grievance and advise the employee of the deciding official with whom to present the formal grievance.

## **12. FORMAL GRIEVANCE PROCEDURE.**

### **a. Filing a Formal Grievance.**

- (1) If the employee is not satisfied with the informal grievance decision, or is grieving a disciplinary action, e.g., reprimand, suspension of 14-calendar days or less, they may present the grievance in writing under the formal procedure.
- (2) The formal grievance will be presented in writing to the deciding official authorized to decide formal grievances as outlined in paragraph 7 of this chapter. The grievance must be in writing but can be submitted via memo, email or fax to the deciding official. The employee's written submission must clearly indicate they are filing a grievance.
- (3) The formal grievance must be filed with the deciding official as follows:
  - (a) Within 10-calendar days after receipt of the written informal grievance decision, or
  - (b) Within 15-calendar days after receiving an admonishment, reprimand or a 14-calendar day or less suspension decision notice.
- (4) The time limit may be extended by management when good cause is shown by the employee, e.g., extended illness.



- b. **Contents of a Formal Grievance.** The written formal grievance will contain sufficient detail to identify and clarify the basis for the grievance and will specify the personal relief requested by the employee.
- (1) If grieving a disciplinary action, the following information must be submitted:
    - (a) The grievance will include a copy of the proposal notice, if applicable, and decision notice on which the grievance is based, and the date the employee received the disciplinary action decision notice;
    - (b) The reason(s) for which the employee believes the action was unjustified or how they were treated unfairly, and/or the specific policy (department, facility, etc.), written agreement, or regulation violated and how it affected the employee;
    - (c) Any relevant evidence or documentation related to the specific issue upon which the grievance is based; and
    - (d) The personal relief desired by the employee. The relief must be specific to the employee initiating the grievance.
  - (2) If grieving an issue other than a disciplinary action, the following information must be submitted:
    - (a) Information regarding the incident on which the grievance is based, the date the incident occurred (if known), and the date the employee first learned of the incident (if appropriate);

The reason(s) for which the employee believes the action was unjustified or how they were treated unfairly, and/or the specific policy (department, facility, etc.), written agreement, or regulation violated and how it affected the employee;
    - (b) The personal relief desired by the employee. The relief must be specific to the employee initiating the grievance; and
    - (c) A copy of the informal written grievance decision issued to the employee.
- c. **Action by Deciding Official Upon Receipt of Formal Grievance.** One of the following options must be selected:
- (1) Appointment of Grievance Examiner. The deciding official must assign a grievance examiner within 10-calendar days of receipt of the formal grievance unless they return the grievance for additional information; reject or cancel the grievance; grant the relief sought by the employee; adjust the

grievance to the employee's satisfaction; or request a technical review. (See paragraph 12.d. for additional information about grievance examiners.)

- (2) **Request Additional Information.** If the formal grievance does not contain all of the applicable information specified in paragraph 12.b, the deciding official will return the grievance to the employee and advise them in writing they will be given 5-calendar days to supply all of the necessary missing information. If the employee fails to provide all of the missing information after being provided with an opportunity to do so, the deciding official may reject the grievance following procedures contained in paragraph 12.e. of this chapter.
- (3) **Reject or Cancel Formal Grievance.** The deciding official may reject or cancel a formal grievance under certain circumstances as outlined in paragraphs 12.e. and 12.f. of this chapter.
- (4) **Grant Relief or Adjustment of Formal Grievance.** Upon receipt, the deciding official will review the employee's written grievance and the grievance file and consider the possibility of granting the relief sought by the employee or adjusting the grievance to the employee's satisfaction. If a decision is made to grant the relief or adjust the relief sought, the deciding official and grievant will memorialize the terms of the agreement in writing to include a statement that the grievance matter is resolved. The agreement must be signed by both parties. (Also see paragraph 12.d.(4)(c) of this chapter.)
- (5) **Request Technical Review.** In cases where the facts are not in dispute and the issue involves only the interpretation of regulation or policy, instead of appointing a grievance examiner, the deciding official will forward the grievance within 10-calendar days of receipt to the Office of the Chief Human Capital Officer (OCHCO) Employee Relations and Performance Management Service (ER&PMS) (051). (See paragraph 12.g. of this chapter.)

**d. Review by Grievance Examiner.**

- (1) **Appointment of a Grievance Examiner.**
  - (a) The deciding official must appoint a grievance examiner unless they return the grievance for additional information; reject or cancel the grievance; grant the relief sought by the employee; adjust the grievance to the employee's satisfaction; or request a technical review. A grievance examiner will be appointed within 10-calendar days from receipt of the grievance.

- (b) 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 deciding official as well as to all parties involved. The grievance examiner will be selected based on their ability to be fair, impartial, and objective. The grievance examiner should possess demonstrated analytical and factfinding skills.
- (c) The deciding official will appoint a subordinate employee to act as the grievance examiner unless the deciding official determines it is appropriate to appoint an examiner from another organization in accordance with paragraph 12.d.(1)(d) of this chapter. If a subordinate employee is appointed as a grievance examiner, they will not be assigned cases within their service, division, or supervisory line. Additionally, the subordinate employee 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.
- (d) While deciding officials should make every effort to appoint a subordinate grievance examiner to investigate an employee's grievance, there may be instances in which it is not practical to appoint a subordinate grievance examiner due to the nature of the grievance and/or the unavailability of an appropriate individual to act as a grievance examiner (e.g., specific technical knowledge is required about the issue being grieved). The following procedure will be used if a decision is made that a grievance examiner from outside the deciding official's area of supervision needs to be appointed:
  - i The grievance will be forwarded to the next higher-level official within the administration, e.g., Network Director, Area Director, for assignment of a grievance examiner.
  - ii An explanation as to why the grievance could not be assigned to a grievance examiner within the deciding official's area of supervision must be included with the transmittal of the grievance to the higher-level official.
  - iii Two copies or an electronic version of the grievance file will be included with the request for the higher-level official to appoint a grievance examiner.
  - iv The grievant and their representative will be given a copy of the letter sent to the higher-level official requesting appointment of a grievance examiner.

- v An examiner will be appointed by the higher-level official within 5-calendar days after receiving the request from the facility.
    - vi Grievance examiners appointed by the higher-level official will be authorized to visit the grievant's facility, if appropriate.
  - (e) Once the grievance examiner has been appointed, the grievant and any designated representative will be informed of the assignment in writing and provided with a copy of the initial grievance file.

(2) Grievance Examiner's Review.

- (a) The grievance 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.
- (b) At the grievance examiner's discretion, the review of the grievance may consist of:
  - i The securing of documentary evidence, including the solicitation of technical advice or compelling expert VA testimony as may be needed;
  - ii Personal or telephone interviews (statements of witnesses obtained by the grievance examiner should be under oath or affirmation, without a pledge of confidentiality);
  - iii Written statements;
  - iv A group meeting; or
  - v Any combination of the above.
- (c) Grievance examiners have the discretion to determine if interviews are to be conducted in person, via telephone or videoconferencing. Summaries of each interview must be included in the grievance file unless transcription services are used. In those instances, a copy of the transcript will be included in the grievance file.
- (d) If the grievance examiner is located outside of the commuting area and decides to conduct face-to-face interviews, travel expenses for the grievance examiner will be authorized and borne by the grievant's facility in accordance with Federal travel regulations. Travel expenses of witness(es) will be paid by the grievant's facility where it is determined by a facility official or the grievance examiner that travel in connection with a grievance is necessary.

- (e) Administering Oaths of Affirmations. Grievance examiners are authorized to administer oaths or affirmations to those individuals being interviewed or providing testimony relative to the grievance.
- (3) Grievance File and Report.
  - (a) Time Limits for Submission. The grievance examiner will submit the grievance file and a report to the deciding official within 45-calendar days after receipt of the assignment as a grievance examiner.
  - (b) Grievance File. The grievance examiner will ensure the grievance file contains all documents related to the grievance, including evidence collected, witness statements, interview summaries or transcripts, notices, and replies pertinent to the case.
  - (c) Preparation of Examiner's Report. The grievance examiner will prepare a report of findings and recommendations and submit it with the grievance file to the deciding official. The report should contain:
    - i A brief summary of the case, including a list of the issues;
    - ii An analysis and finding on any procedural issues, if applicable;
    - iii An analysis of material evidence relating to each issue;
    - iv A finding on each issue, including what issues were sustained/not sustained, and;
    - v A recommendation based on the analysis of the findings.
- (4) Action by a Deciding Official Based upon a Grievance Examiner's Report. Upon receipt of the grievance examiner's report of findings and recommendations, the deciding official will:
  - (a) Review the report to ensure the grievance examiner has provided a thorough analysis of the issue(s) and an explanation of their findings and recommendations. If there are deficiencies, the report should be returned to the grievance examiner with the deficiencies noted for modification and a deadline in which the report should be resubmitted with the deficiencies addressed;
  - (b) Accept the grievance examiner's recommendation and issue a written decision with a copy of the grievance examiner's report to the grievant, with a copy to the grievant's representative, within 15-calendar days after the recommendation is received; or

- (c) Grant the relief sought by the grievant, i.e., issuing the decision without regard to the grievance examiner's recommendation, and issue a written decision with a copy of the grievance examiner's report provided to the grievant and the grievant's representative, confirming the relief being granted; or
- (d) Modify or reject the grievance examiner's recommendation(s).
  - i Modification or rejection of recommendations of the grievance examiner will be limited to the following reasons:
    - (A) The recommendation(s) are contrary to law, regulation, or agency policy; or
    - (B) The recommendation(s) 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 the VA.
  - ii OGC must be consulted to determine if there is sufficient justification to modify or reject the grievance examiner's recommendation.
  - iii If modification or rejection is appropriate, the written decision with a copy of the grievance examiner's report will be provided to the grievant, and the grievant's representative, and will include a specific statement of the reason(s) for the modification or rejection.

**e. Rejection of Grievance.**

- (1) Reasons for Rejection of a Grievance. The deciding official may reject an informal or formal grievance, either wholly or partially as appropriate, for any of the following reasons after consultation with the servicing HR office:
  - (a) Grievant did not furnish all of the applicable required information as specified in paragraphs 11.b. or 12.b. of this chapter after being provided with an opportunity to supply missing information;
  - (b) The grievance consists of a matter or matters that are not covered by the VA grievance procedures (see paragraph 6 of this chapter); or
  - (c) The grievance is not timely, as provided in paragraph 8 of this chapter regarding specific time limits.

- (2) Written Notification of Rejection of Grievance. The grievant and their representative, if applicable, will be notified in writing if a grievance is rejected and provided with the specific reason(s) for the rejection.

**f. Cancellation of Grievance.**

- (1) Reasons for Cancellation of Formal Grievance. A grievance may be cancelled, either wholly or in part as appropriate, by the deciding official under any of the following conditions after consultation with the servicing HR office:
  - (a) At the grievant's request;
  - (b) Upon termination of the grievant's employment, unless the personal relief sought by the grievant can be granted after termination of employment;
  - (c) Upon the death of the grievant, unless the grievance involves a question of pay; or
  - (d) Failure of the grievant to duly proceed with advancement of the grievance.
- (2) Written Notification of Cancellation of Formal Grievance. The grievant and their representative, if applicable, will be notified in writing when a grievance is cancelled and provided with the specific reason(s) for the cancellation.

**g. Technical Review.**

- (1) In cases where the facts are not in dispute and the issue involves only the interpretation of regulation or policy, instead of appointing a grievance examiner, the deciding official will forward the grievance for technical review and recommendation through appropriate channels to OCHCO ER&PMS at [vaco51erpms@va.gov](mailto:vaco51erpms@va.gov). OCHCO ER&PMS will assign the technical review of the grievance to the program office responsible for the interpretation of the regulation or policy within 7-calendar days of receipt if a technical review is deemed appropriate. Situations in which "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 a regulatory or policy interpretation. For example, a question concerning management's ability to grant authorized absence for weather-related events might meet the criteria of a technical review. A grievance regarding whether the issuance of a disciplinary action is warranted is not appropriate for a technical review.

- (2) The grievant and their representative, if applicable, will be provided with a copy of the deciding official's referral letter to OCHCO ER&PMS.
- (3) The technical review will be conducted by the appropriate program office, and its recommendation will be transmitted in writing to the deciding official within 30-calendar days after OCHCO ER&PMS's receipt of the request.
- (4) The deciding official will issue the decision and a copy of the program office's technical review and recommendations to the grievant and their representative, if applicable, within 15-calendar days after the technical review is received from the program office. The deciding official will provide the relief requested by the grievant if warranted based on the results of the technical review. If the relief is not warranted based on the results of the technical review it will not be granted.



## **CHAPTER 3. AGENCY GRIEVANCE PROCESS FOR TITLE 38 EMPLOYEES**

- 1. SCOPE.** This chapter establishes policies, principles, and procedures for grievances filed by title 38 employees.
- 2. EMPLOYEES COVERED.** This chapter applies to:
  - a. All permanent and probationary title 38 employees appointed to occupations included in [38 U.S.C. § 7401\(1\)](#), e.g., physicians; dentists; podiatrists; chiropractors; optometrists; registered nurses, including nurse practitioners, nurse anesthetists, clinical nurse specialists; physician assistants; and expanded-function dental auxiliaries.
  - b. All part-time registered nurses, including those with an intermittent duty basis, appointed under [38 U.S.C. § 7405](#), who have completed the 2-year probationary period.
  - c. Full-time permanent bargaining unit employees, appointed under [38 U.S.C. § 7401\(1\)](#), may elect to use the VA grievance procedure described in this chapter or the negotiated grievance procedure, but not both, in the case of an adverse or major adverse action that does not involve a question of professional conduct or competence (PCC).
  - d. Employees appointed under [38 U.S.C. § 7306](#), except for removal from Federal service.
- 3. EMPLOYEES EXCLUDED.**
  - a. All title 5 and hybrid-title 38 employees.
  - b. Employees appointed under [38 U.S.C. § 7405](#), except part-time registered nurses, including those with an intermittent duty basis, who have completed the 2-year probationary period.
  - c. Employees appointed under [38 U.S.C. § 7401\(4\)](#).
  - d. An individual paid from funds as defined in [5 U.S.C. § 7202\(5\)](#), i.e., excepted service Veterans Canteen employees.
  - e. Residents.
  - f. A noncitizen appointed under [5 C.F.R. § 8.3](#).
  - g. An alien appointed under [22 U.S.C. § 1471\(5\)](#).
  - h. Employees who are defined as senior executives covered by [38 U.S.C. § 713](#), and who are issued a disciplinary or adverse action pursuant to that statute.

#### 4. DEFINITIONS.

- a. **Adverse Action.** For purposes of this chapter, an adverse action is an admonishment or reprimand.
- b. **Bargaining Unit Employee.** An employee included in an appropriate unit as described by the Federal Labor Relations Authority (FLRA), for which a labor organization has been accorded exclusive recognition.
- c. **Calendar Day.** Each day of the week, to include weekends. Note that if a deadline falls on a non-business day, the deadline will be extended to the next business day, which is Monday through Friday, excluding Federal holidays. For example, if the 10<sup>th</sup> calendar day for filing a grievance falls on a Saturday, Sunday, or Federal holiday, the deadline is extended to the next business day.
- d. **Deciding Official.** The management official designated to:
  - (1) Receive the grievance, and adjust the matter to the grievant's satisfaction, cancel, reject, refer for technical review, or assign a grievance examiner in response to an informal or formal grievance, if applicable; and/or
  - (2) Decide formal grievances based on the results of impartial reviews and recommendations.
- e. **Employee.** A current VA employee or a former VA employee in situations where a specific remedy can still be appropriately provided. For example, a former employee charged with eight-hours absence without leave (AWOL) who has requested that the eight 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.
- f. **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 that is subject to the control of management.
- g. **Grievance Examiner.** Employee assigned by the deciding official for making an impartial and objective inquiry regarding the merits of a grievance and for providing a report of findings and recommendations to the deciding official and all parties involved.
- h. **Grievance File.** A separate file subject to the Privacy Act that contains all documents related to the grievance. This file will include, but is not limited to, statements of witnesses, records or copies thereof, statements made by the parties to the grievance, and the decision.
- i. **Major Adverse Actions.** Suspensions (including indefinite suspensions), transfers, reductions in grade, reductions in basic pay, and discharges based on

conduct or performance, i.e., for cause. For purposes of this handbook, a reduction in basic pay includes a reduction in the market pay of a physician, dentist, or podiatrist as a result of an involuntary reassignment or change in assignment when taken for cause. The loss of head nurse differential (two steps) due to the reassignment of a head nurse to another position that does not allow for this differential is considered a major adverse action when the reassignment is for cause as it is a reduction in basic pay. A major adverse action also occurs if the facility reassigns a title 38 employee (excluding physicians, dentists, and podiatrists) who is on a specialty schedule and the reassignment results in a change from one annual salary rate table to a lower annual salary rate table, e.g., for a special rate authorized under 38 U.S.C. § 7455 to a lower special rate table; from a special rate authorized under 38 U.S.C. § 7455 to a regular rate.

- j. **Negotiated Grievance Procedure.** A grievance procedure provided by a collective bargaining agreement under which an employee is included.
- k. **Personal Relief.** A specific remedy directly benefiting the grievant, or group of grievants, but may not include a request for disciplinary or other action affecting another employee.
- l. **Professional Conduct or Competence (PCC).** A question of PCC involves direct patient care and/or clinical competence. The term clinical competence includes issues of professional judgment. Professional relates to the employee's occupation versus demonstrating professionalism that is expected of any Government employee.

**5. ADVERSE AND MAJOR ADVERSE ACTIONS COVERED.** The following matters are covered unless specifically excluded:

- a. Adverse and major adverse actions as taken under Part II of this handbook, other than title 38 major adverse actions that involve a question of PCC.
- b. Adverse or major adverse actions involving a question of PCC issued to non-probationary part-time registered nurses.
- c. Adverse or major adverse actions that do not involve a question of PCC issued to non-probationary part-time registered nurses covered by a collective bargaining unit agreement if the agreement does not cover grievances involving adverse or major adverse actions.

**6. MATTERS EXCLUDED FROM COVERAGE UNDER THIS CHAPTER.** The following matters are excluded from coverage under the grievance procedure:

- a. 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 12.h. of this chapter.

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- b. All matters for which review procedures are already established in VA policy.
- c. A matter that includes specified relief that is not personal to the grievant.
- d. A matter not subject to the control of management (e.g. resignation, retirement).
- e. A grievance of an individual from outside VA, except as provided in paragraph 12.g of this part.
- f. Grievances concerning the number of positions to be filled, or the grade level at which positions are filled.
- g. Matters involving the methods, means or technology of performing work.
- h. Matters that are not directly related to the employee's conditions of employment.
- i. Complaints arising from failure to receive a promotion or reassignment.
- j. Matters involving a detail, reassignment, or change in organizational alignment, including supervisory change.
- k. An action that terminates a temporary promotion within 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.
- l. Complaints arising from dissatisfaction with grade or pay on initial appointment or failure to receive performance pay.
- m. Determinations and authorizations, including those delegated by the Secretary, regarding the approval, disapproval, or amount of market or performance pay granted to those employees covered by such provisions in [VA Handbook 5007, Pay Administration](#). Refer to VA Handbook 5007 for information regarding the right to request reconsideration of a tier determination.
- n. Determinations and authorizations, including those delegated by the Secretary, regarding the approval, disapproval, or amount of special pay granted to a nurse executive in VHA.
- o. Complaints arising from failure to receive special advancement.
- p. Disputes over whether a matter or question concerns, or arises out of, PCC.
- q. Actions involving credentialing and privileging, e.g., placement on a focused professional peer evaluation, summary suspension of privileges, reduction of privileges, revocation of privileges.
- r. Adverse actions taken under [38 U.S.C. § 713](#).

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- s. Separations covered by Part III or Part VI of this handbook, e.g., separation during probationary period, failure to meet statutory or regulatory requirement, pre-employment fitness, medical inability.
- t. Oral or written counselings.
- u. A proposed adverse or major adverse action notice that, if effected, would be covered under a grievance or appeal system, or excluded from coverage by other paragraphs of this chapter.
- v. A decision not to remove an admonishment or reprimand from an employee's personnel folder prior to the expiration date.
- w. Major adverse actions taken under Part II of this handbook that involve a question of PCC unless issued to a part-time registered nurse appointed under [38 U.S.C. § 7405\(a\)\(1\)\(A\)](#).
- x. Designations of employees to serve on the panel from which members of Disciplinary Appeals Boards (DAB) are selected and the selection of employees to serve on DABs, professional standards boards, compensation panels, or the appointment of grievance examiners.
- y. Allegations of discrimination on the basis of race, color, religion, sex (including pregnancy and sexual orientation), 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 Equality Employment Opportunity Commission. Complaints of discrimination are excluded from the grievance procedure; however, other non-discriminatory disputes related to the case are not precluded from review under the grievance procedure. 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.
- z. A decision that is subject to final administrative review by the 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.
- aa. A matter covered by a negotiated grievance procedure. However, an employee, excluding part-time registered nurses, may elect to use the VA grievance procedure described in this part or the negotiated grievance procedures in the case of an adverse or major adverse action that does not involve a question of PCC, as covered under Part II of this handbook. (See paragraph 5 of this part for additional information.)
- bb. An action taken in accordance with the terms of a formal agreement voluntarily entered into by an employee.

- cc. Complaints arising from actions taken due to the individual's physical or mental condition, e.g., requirement to undergo a special physical examination to determine fitness for duty, decision of Physical Standards Boards.
- dd. Complaints arising from dissatisfaction with a proficiency report or rating, or a performance plan summary rating or final rating, if applicable.
- ee. Disapproval of a suggestion, disapproval of a discretionary award or bonus or incentive, or disagreement with the amount of an award. Awards, bonuses, and incentives include, but are not limited to, incentive pay such as critical skills incentives; cash awards; step increases as described in [VA Handbook 5017: Employee Recognition and Awards](#), time-off awards; honor awards; recruitment, retention, and relocation pay; student loan repayment.

## 7. OFFICIAL AUTHORIZED TO DECIDE GRIEVANCES.

- a. **Informal Grievance Procedure.** The official who will make a decision on informal grievances will be the immediate supervisor or lowest level official with the authority to resolve the grievance. For example, if an Associate Director requires the reassignment of an employee from one service line under their jurisdiction to another service line in their jurisdiction, the employee will file the informal grievance with the Associate Director versus the first-line supervisor or service chief as those management officials did not have the authority to order the reassignment. Additionally, if the basis of the grievance is regarding the employee's immediate supervisor, the next higher-level official in the employee's supervisory line will decide the issue. (See exceptions in subparagraph c.)
- b. **Formal Grievance Procedure.** Authority to make a decision on formal grievances will be as follows:
  - (1) Grievances of Field Facility Employees. The Facility Director includes but not is limited to Veteran Integrated Service Network (VISN) Directors, Veterans Benefit Administration (VBA) Regional Office Directors and National Cemetery Administration (NCA) Directors, will be the deciding official on a grievance from an employee under their jurisdiction provided the matter to be resolved is one which is under the Facility Director's authority.
  - (2) Grievances of VA Central Office Employees and Employees Not Under the Jurisdiction of a Facility Director. The Secretary, Under Secretary, Deputy Under Secretary, 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 VA Central Office or an employee who is not under the jurisdiction of a facility/area/regional director.
- c. **Exceptions.**

- (1) The deciding official designated in paragraphs 7.b.(1) and (2) of this chapter will not decide the grievance when:
  - (a) The deciding official is the official with whom the employee would take up the initial grievance in the informal stage;
  - (b) The deciding official does not have the authority to make a determination on the grievance issues; or
  - (c) The deciding official made the decision, approved the action, or took the action on which the employee's grievance is based.
- (2) In these instances, the deciding official will refer the grievance to the next higher-level official in the supervisory line, and that official will be the deciding official or they may designate another official to make the grievance decision.

## 8. TIME LIMITS FOR FILING A GRIEVANCE.

- a. **Time Limits.** To ensure timely and orderly processing, the following time limits are established for filing a grievance:
  - (1) Informal Procedure.
    - (a) Employees have 15-calendar days from the date of the incident or action on which the grievance is based to initiate a written grievance under the informal procedure.
    - (b) When an employee is informed of an administrative decision that has not yet been effected, the period to file a grievance is counted from the date the employee received written notification of the decision, e.g., the date the employee received a written decision regarding cancellation of telework agreement.
    - (c) An employee must first utilize the informal grievance procedure except in cases in which the employee is grieving an adverse action or major adverse action. (See paragraph 5 of this chapter.)
  - (2) Formal Procedure.
    - (a) Employees have 10-calendar days to file a written grievance under the formal procedure after receiving a written response under the informal procedure or if a written decision under the informal, procedure is not received and there was no explanation for the delay as prescribed in subparagraph d.

- (b) Employees have 15-calendar days after receiving a written adverse action or major adverse action decision, e.g., admonishment, reprimand, suspension, that does not involve a question of PCC, to file a written grievance under the formal procedure.
- 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 that were taken or identified as of a given date, e.g., admonishments, reprimands, shift/duty assignments, are not considered continuing conditions for these purposes despite any continuing effects they may have.
- c. **Effecting an Action or Decision.** The grievance procedure will not delay the implementation of the adverse action, major adverse action or administrative decision.
- d. **Delays in Processing Grievances.** Management officials will ensure that grievances are processed promptly. Management delays at any stage of the grievance procedure beyond the prescribed time limits will be explained to the employee and the employee's representative in writing and will be included in the record. Such delays by management 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 submitted by the grievant or their representative in writing and included in the record.

## 9. REPRESENTATION.

- a. **Grievant.**
  - (1) **Election of Representation.** An employee may present a grievance with or without representation.
  - (2) **Designation of a Representative.** An employee has the right to be accompanied, represented, and advised by a representative of their choice at any stage of the procedure. Designation of a representative will be in writing and will be submitted at the time of submission of the grievance. Any change of representative will be in writing.
  - (3) **Disallowance of a Designated Representative.** A deciding official may disallow a representative 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- calendar days of receipt of the employee's written designation of representative. The written notice of disallowance will inform the employee of the basis of the determination to disallow the representative and the right of the employee to challenge the disallowance.



- (4) **Challenge of Disallowance of Designed Representative.** If informed that a designated representative has been disallowed, an employee may, within 5- calendar days, challenge the disallowance in writing to the deciding official. A challenge will 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 deciding official will make a final decision on a challenge of disallowance of a representative no later than 10-calendar days after receipt of the challenge.
- (5) **Change of Designated Representative.** In the event that an employee changes their representative during the proceeding, any disallowance of the newly named representative, or challenge regarding a disallowance of the newly named representative, will be resolved in accordance with subparagraphs (3) and (4).

b. **Agency.**

- (1) Election of Representation. The agency may elect to have a representative assigned to the grievance.
- (2) The agency representative for the grievance will not be the same individual assigned to provide advice and guidance to the grievance examiner about any technical or procedural matters.

## 10. PROCEDURAL REQUIREMENTS FOR INFORMAL AND FORMAL GRIEVANCES.

- a. **Group Grievances.** If a group of employees has an identical grievance, the group will select one individual case for processing under the provisions of the informal grievance procedure and identify the employee, by name, who will be the spokesperson for the group. Once the informal grievance process has been exhausted, the group of employees may file a formal grievance, and the decision will be binding on all members of the group.
- b. **Grievance File.**
  - (1) Upon receipt of an informal or formal grievance, the supervisor or deciding official will contact the servicing HR office who will establish a grievance file, separate from the employee's personnel folder, which will contain:
    - (a) The employee's written grievance and designation of representative, if any;
    - (b) A copy of any information from the informal grievance procedure including the deciding official's written reply to the employee, if applicable;

- (c) Material or evidence used to support the administrative action, e.g., if the grievance is based on an adverse action or major adverse action or other administrative order;
  - (d) Copies of relevant policies, if any; and
  - (e) Any other information considered appropriate for review in making a decision on the grievance.
- (2) When grievances are filed by senior executives appointed under 38 U.S.C. § 7401(4) or 38 U.S.C. § 7306, the Executive Director, Corporate Senior Executive Management Office (CSEMO), or designee, will perform the HR functions.
- (3) The grievance file will be expanded as more information is developed. If a grievance examiner is appointed to review the grievance, they will add appropriate information to the file based on information received during the review.
- (4) The grievance file must not contain any document that is not available to the employee or the employee's representative for review. Medical records that cannot be disclosed to the employee in accordance with applicable statutes, regulations, etc. cannot be included in the file, or must be properly redacted if permissible. Information will not be made available to the grievance examiner that cannot be provided to the employee. All information provided to the grievance examiner will be in a format that can be released to the employee or the employee's representative. Additionally, the file will not contain non-sanitized, confidential, or personal records of employees other than the person filing the grievance, e.g., performance appraisals, personal qualifications. Consult with the Office of General Counsel (OGC) and/or a Privacy Officer for additional guidance.

## **11. INFORMAL GRIEVANCE PROCEDURE.**

### **a. Filing an Informal Grievance.**

- (1) An employee must first utilize the informal grievance procedure except in cases in which the employee is grieving an adverse action or major adverse action (see paragraphs 5 and 8.a.(2)(b) of this chapter), or when the authority to resolve a matter is reserved to the Secretary. The employee's written informal grievance must be made no later than 15-calendar 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 paragraph 8 of this chapter.) The time limit may be extended by management when good cause is shown by the employee, e.g., extended illness.

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- (2) The informal grievance will usually be presented to the employee's immediate supervisor unless it must be filed with a higher-level official. (See paragraph 7 of this chapter for officials authorized to receive and decide informal/formal grievances.)
  - (3) The grievance must be in writing but can be submitted via memo, email or fax to the appropriate management official. The employee's written submission must clearly indicate they are filing a grievance.
- b. **Contents of an Informal Grievance.** The written informal grievance will contain all of the following applicable information:
- (1) The specific issue upon which the grievance is based, including the date the employee first learned of the issue;
  - (2) The rule, regulation, or policy the employee believes was violated, if applicable; the reason(s) the employee believes the issue or action was unjustified; and how it affected the employee;
  - (3) Any relevant evidence or documentation related to the specific issue upon which the grievance is based; and
  - (4) The personal relief desired by the employee. This relief must be specific to the employee initiating the grievance.
- c. **Processing an Informal Grievance.**
- (1) The supervisor or higher-level management official who receives the grievance will notify the servicing HR office immediately that a grievance has been filed.
  - (2) If the informal grievance does not contain the applicable information specified in paragraph 11.b. of this chapter, the supervisor will return the grievance to the employee and advise them in writing that they will be given 5-calendar days to supply all of the necessary missing information. If the employee fails to provide all of the missing information after being provided with an opportunity to do so, the supervisor may reject the grievance following the procedures contained in paragraph 12.f. of this chapter.
  - (3) The supervisor or higher-level management official, in consultation with the servicing HR office, will determine if the matter being grieved is excluded from coverage under this chapter. (See paragraph 6 of this chapter.) If the matter is excluded, the grievance will be rejected in accordance with paragraph 12.f. of this chapter.

- (4) If the matter is not excluded from coverage, the supervisor or higher-level management official will normally meet with the employee to discuss the contents of the grievance and will prepare a written summary of the meeting.

Within 10-calendar days from receipt of the written grievance, the supervisor or higher-level management official will issue a written decision. (See paragraph 8.d. of this chapter for information regarding delays in processing grievances. (If the specified relief is not granted, the written decision will advise the employee they have 10-calendar days from receipt of the informal decision to file a formal grievance and advise the employee of the deciding official with whom to present the formal grievance.

## **12. FORMAL GRIEVANCE PROCEDURE.**

### **a. Filing a Formal Grievance.**

- (1) If the employee is not satisfied with the informal grievance decision or is grieving a covered adverse or major adverse action, they may present the grievance in writing under the formal procedure. (See paragraphs 5 and 8.a.(2)(b) of this chapter.)
- (2) The formal grievance will be presented in writing to the deciding official authorized to decide formal grievances as outlined in paragraph 7 of this chapter. The grievance must be in writing but can be submitted via memo, email or fax to the deciding official. The employee's written submission must clearly indicate they are filing a grievance.
- (3) The formal grievance must be filed with the deciding official as follows:
  - (a) Within 10-calendar days after receipt of the written informal grievance decision, or
  - (b) 15-calendar days after receiving an adverse or major adverse action decision notice.
- (4) The time limit may be extended by management when good cause is shown by the employee, e.g., extended illness.

### **b. Contents of a Formal Grievance.** The written formal grievance will contain sufficient detail to identify and clarify the basis for the grievance and will specify the personal relief requested by the employee.

- (1) If grieving an adverse or major adverse action, the following information must be submitted:

- (a) The grievance will include a copy of the proposal notice and decision notice upon which the grievance is based, and the date the employee received the decision notice;
  - (b) The reason(s) for which the employee believes the action was unjustified or how they were treated unfairly, and/or the specific policy (department, facility, etc.), written agreement, or regulation violated and how it affected the employee;
  - (c) Any relevant evidence or documentation related to the specific issue upon which the grievance is based;
  - (d) A statement regarding whether they want a hearing, if the action is a discharge; and
  - (e) The personal relief desired by the employee. The relief must be specific to the employee initiating the grievance.
- (2) If grieving an issue other than an adverse action or major adverse action, the following information must be submitted:
- (a) Information regarding the incident on which the grievance is based, the date the incident occurred (if known), and the date the employee first learned of the incident (if appropriate); and
  - (b) The reason(s) for which the employee believes the action was unjustified or how they were treated unfairly, and/or the specific policy (department, facility, etc.), written agreement, or regulation violated and how it affected the employee; and
  - (c) The personal relief desired by the employee. The relief must be specific to the employee initiating the grievance; and
  - (d) A copy of the informal written grievance decision issued to the employee.

**c. Action by Deciding Official Upon Receipt of Formal Grievance.**

- (1) Appointment of Grievance Examiner. The deciding official must assign a grievance examiner within 10-calendar days of receipt of the formal grievance unless they return the grievance for additional information; reject or cancel the grievance; grant the relief sought by the employee; adjust the grievance to the employee's satisfaction; or request a technical review. (See paragraph 12.e. for additional information about grievance examiners.)

- (2) **Request Additional Information.** If the formal grievance does not contain all of the applicable information specified in paragraph 12.b., the deciding official will return the grievance to the employee and advise them in writing they will be given 5-calendar days to supply all of the necessary missing information. If the employee fails to provide all of the missing information after being provided with an opportunity to do so, the deciding official may reject the grievance following procedures contained in paragraph 12.f. of this chapter.
- (3) **Reject or Cancel Formal Grievance.** The deciding official will reject or cancel a formal grievance under certain circumstances as outlined in paragraphs 12.f. and g of this chapter.
- (4) **Grant Relief or Adjustment of Formal Grievance.** Upon receipt, the deciding official will review the employee's written grievance and the grievance file and consider the possibility of granting the relief sought by the employee or adjusting the grievance to the employee's satisfaction. If a decision is made to grant the relief or adjust the relief sought, the deciding official and grievant will memorialize the terms of the agreement in writing to include a statement that the grievance matter is resolved. The agreement must be signed by both parties. (Also see paragraph 12.e.(4)(c) of this chapter.)
- (5) **Request Technical Review.** In cases where the facts are not in dispute and the issue involves only the interpretation of regulation or policy, instead of appointing a grievance examiner, the deciding official will forward the grievance within 10-calendar days of receipt to the Office of the Chief Human Capital Officer (OCHCO) Employee Relations and Performance Management Service (ER&PMS) (051). (See paragraph 12.h. of this chapter.)

**d. Grievances over Adverse and Major Adverse Actions.**

- (1) Where an adverse action or major adverse action forms the basis of the employee's grievance, the right to file a grievance commences on the date in which the employee receives written notice, (i.e., the decision notice). The grievance procedure will not delay the implementation of the disciplinary or major adverse action.
- (2) Grievances over adverse actions, e.g., admonishments reprimands, whether involving a question of PCC or not, will be filed at the formal stage described in paragraph 7.b. of this chapter without being filed under the informal procedure.
- (3) Grievances over major adverse actions, e.g., suspensions, reduction in grade/pay, discharge, not involving a question of PCC, will be filed at the formal stage described in paragraph 7.b. of this chapter without first filing under the informal procedure. The employee is entitled to a hearing before

a grievance examiner if the major adverse action imposed is a discharge and the employee requests a hearing in the formal grievance submission.

- (4) For full-time permanent title 38 employees appointed under [38 U.S.C. § 7401\(1\)](#), major adverse actions involving a question of PCC, including a major adverse action that contains charges that are both PCC and non-PCC, may only be appealed to the DAB as provided in Part V of this handbook.
- (5) For part-time registered nurses appointed under [38 U.S.C. § 7401\(a\)\(1\)](#), major adverse actions involving a question of PCC, including a major adverse action that contains charges that are both PCC and non-PCC, may only be grieved in accordance with this chapter, and a DAB-trained grievance examiner will be appointed.
- (6) Grievances initiated under the formal stage must be filed within 15-calendar days from the date of service of the decision notice as indicated in paragraph 7.b. of this chapter.

**e. Review by Grievance Examiner.**

- (1) Appointment of a Grievance Examiner.
  - (a) The deciding official must appoint a grievance examiner unless they return the grievance for additional information; reject or cancel the grievance; grant the relief sought by the employee; adjust the grievance to the employee's satisfaction; or request a technical review. A grievance examiner will be appointed within 10-calendar days from receipt of the grievance.
  - (b) 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 deciding official as well as to all parties involved. The grievance examiner will be selected based on their ability to be fair, impartial, and objective. The grievance examiner should possess demonstrated analytical and factfinding skills.
  - (c) In cases arising from adverse actions issued to title 38 employees appointed under [38 U.S.C. § 7401\(1\)](#) involving PCC as covered under Part II of this handbook, the grievance examiner must be selected from the panel of employees designated to serve on a DAB. A list of trained DAB members can be obtained by contacting OCHCO ER&PMS (051) at [vaco051cacgohrm@va.gov](mailto:vaco051cacgohrm@va.gov). The grievance examiner does not have to be a subordinate employee but must be from the list of trained DAB members.

- (d) In cases arising from adverse actions or major adverse actions for part-time registered nurses involving PCC as covered under Part II of this handbook, the grievance examiner must be selected from the panel of employees designated to serve on a DAB. A list of trained DAB members can be obtained by contacting OCHCO ER&PMS (051) at [vaco051cacgohrm@va.gov](mailto:vaco051cacgohrm@va.gov). The grievance examiner does not have to be a subordinate employee but must be from the list of trained DAB members.
- (e) The deciding official will appoint a subordinate employee to act as the grievance examiner unless the deciding official determines it is appropriate to appoint an examiner from another organization in accordance with paragraph 12.e.(1)(e) of this chapter. If a subordinate employee is appointed as a grievance examiner, they will not be assigned cases within their service, division, or supervisory line. Additionally, the subordinate employee 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. (Also see paragraphs 12.e.(1)(c) and (d).)
- (f) While deciding officials should make every effort to appoint a subordinate grievance examiner to investigate an employee's grievance, there may be instances in which it is not practical to appoint a subordinate grievance examiner due to the nature of the grievance and/or the unavailability of an appropriate individual to act as a grievance examiner, e.g., specific technical knowledge is required about the issue being grieved, DAB-trained employee is unavailable. (See paragraphs 12.e.(1)(c) and (d)). The following procedure will be used if a grievance examiner outside of the deciding official's area of supervision needs to be appointed unless the grievance involves a DAB-trained grievance examiners as prescribed in paragraphs 12.e.(1)(c) and (d)):
  - i. The grievance will be forwarded to the next higher-level official within the administration, e.g., Network Director, Area Director, for assignment of a grievance examiner.
  - ii. An explanation as to why the grievance could not be assigned to a grievance examiner within the deciding official's area of supervision must be included with the transmittal of the grievance to the higher-level official.
  - iii. Two copies or an electronic version of the grievance file will be included with the request for the higher-level official to appoint a grievance examiner.



- iv. The grievant and their representative will be given a copy of the letter sent to the higher-level official requesting appointment of a grievance examiner.
        - v. An examiner will be appointed by the higher-level official within 5-calendar days after receiving the request from the facility.
        - vi. Grievance examiners appointed by the higher-level official will be authorized to visit the grievant's facility, if appropriate.
  - (g) Once the grievance examiner has been appointed, the grievant and any designated representative will be informed of the assignment in writing and provided with a copy of the initial grievance file.

(2) Grievance Examiner's Review.

- (a) The grievance 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.
- (b) At the grievance examiner's discretion, the review of the grievance may consist of:
  - i The securing of documentary evidence, including the solicitation of technical advice or compelling expert VA testimony as may be needed;
  - ii In person or telephone interviews (statements of witnesses obtained by the grievance examiner should be under oath or affirmation, without a pledge of confidentiality);
  - iii Written statements;
  - iv A group meeting; or
  - v Any combination of the above.
- (c) Grievance examiners may conduct interviews in person, via telephone or videoconferencing; it is their decision, except in the case of a hearing. When a hearing is conducted, it will be facilitated similar to a DAB hearing, e.g., testimony will be taken and transcribed, the grievant or their representative will be able to question witnesses.
- (d) Hearings.
  - i Hearings will be limited to grievances involving the discharge of the grievant if such hearing is requested.

When a hearing is requested by a discharged grievant, the grievance examiner will have a verbatim transcript of the hearing prepared, including all pertinent documents submitted and accepted by them. The facility where the hearing is being held will provide the hearing room and services for recording the transcript and will ensure the electronic transcripts reach the grievance examiner within 7-calendar days after the hearing is held. The grievance examiner will make the transcript a part of the record of the proceedings.

- ii The grievance 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 proceedings, such as admissibility of evidence and calling of witnesses. The grievance examiner should consult with an HR Specialist or District Counsel attorney who is not serving as the agency's technical representative when appropriate.
  - (e) If the grievance examiner is located outside of the commuting area and decides to conduct face-to-face interviews, travel expenses for the grievance examiner will be authorized and borne by the grievant's facility in accordance with Federal travel regulations. Travel expenses of witness(es) will be paid by the grievant's facility where it is determined by a facility official or the grievance examiner that travel in connection with a grievance is necessary.
  - (f) Administering Oaths of Affirmations. Grievance examiners are authorized to administer oaths or affirmations to those individuals being interviewed or providing testimony relative to the grievance.
- (3) Grievance File and Report.
- (a) Time Limits for Submission. The grievance examiner will submit the grievance file and a report to the deciding official within 45-calendar days after receipt of the assignment as a grievance examiner.
  - (b) Grievance File. The grievance examiner will ensure the grievance file contains all documents related to the grievance, including evidence collected, witness statements, notices, interview summaries or transcripts of the hearing, if a hearing is held, and replies pertinent to the case.
  - (c) Preparation of Examiner's Report. The grievance examiner will prepare a report of findings and recommendations and submit it with the grievance file to the deciding official. The report should contain:
    - i A brief summary of the case, including a list of the issues;

- ii An analysis and finding on any procedural issues, if applicable;
      - iii An analysis of material evidence relating to each issue;
      - iv A finding on each issue, including what issues were sustained/not sustained, and;
      - v A recommendation based on the analysis of the findings.
- (4) Action by a Deciding Official Based upon a Grievance Examiner's Report. Upon receipt of the grievance examiner's report of findings and recommendations, the deciding official will:
  - (a) Review the report to ensure the grievance examiner has provided a thorough analysis of the issue(s) and an explanation of their findings and recommendations. If there are deficiencies, the report should be returned to the grievance examiner with the deficiencies noted for modification and an established deadline in which the report should be resubmitted with the deficiencies addressed.
  - (b) Accept the grievance examiner's recommendation and issue a written decision to the grievant, with a copy to the grievant's representative, within 15-calendar days after the recommendation is received; or
  - (c) Grant the relief sought by the grievant, i.e., issuing the decision without regard to the grievance examiner's recommendation, and issue a written decision with a copy of the grievance examiner's report provided to the grievant, and the grievant's representative, confirming the relief being granted; or
  - (d) Modify or reject the grievance examiner's recommendation(s).
    - i Modification or rejection of recommendations of the grievance examiner will be limited to the following reasons:
      - (A) The recommendation(s) are contrary to law, regulation, or agency policy; or
      - (B) The recommendation(s) are not supported by the evidence; or
      - (C) The recommendation(s) would establish a precedent that would have a detrimental impact upon the efficient operation of the VA.

- ii OGC must be consulted to determine if there is sufficient justification to modify or reject the grievance examiner's recommendation.
- iii If modification or rejection is appropriate, the written decision with a copy of the grievance examiner's report will be provided to the grievant, and the grievant's representative, and will include a specific statement of the reason(s) for the modification or rejection.

**f. Rejection of Grievance.**

- (1) Reasons for Rejection of a Grievance. The deciding official may reject an informal or formal grievance, either wholly or partially as appropriate, for any of the following reasons after consultation with the servicing HR office:
  - (a) Grievant did not furnish all of the applicable required information as specified in paragraphs 11.b. or 12.b. in this chapter after being provided with an opportunity to supply missing information;
  - (b) The grievance consists of a matter or matters that are not covered by the VA grievance procedures (see paragraph 6 of this chapter); or
  - (c) The grievance is not timely, as provided in paragraph 8 of this chapter regarding specific time limits.
- (2) Written Notification of Rejection of Grievance. The grievant and their representative, if applicable, will be notified in writing if a grievance is rejected and provided with the specific reason(s) for the rejection.

**g. Cancellation of Grievance.**

- (1) Reasons for Cancellation of Formal Grievance. A grievance may be cancelled, either wholly or in part as appropriate, by the deciding official under any of the following conditions after consultation with the servicing HR office:
  - (a) At the grievant's request;
  - (b) Upon termination of the grievant's employment, unless the personal relief sought by the grievant can be granted after termination of employment;
  - (c) Upon the death of the grievant, unless the grievance involves a question of pay; or
  - (d) Failure of the grievant to duly proceed with advancement of the grievance.

- (2) Written Notification of Cancellation of Formal Grievance. The grievant and their representative, if applicable, will be notified in writing when a grievance is cancelled and provided with the specific reason(s) for the cancellation.

**h. Technical Review.**

- (1) In cases where the facts are not in dispute and the issue involves only the interpretation of regulation or policy, instead of appointing a grievance examiner, the deciding official will forward the grievance for technical review and recommendation through appropriate channels to OCHCO ER&PMS at [vaco51erpms@va.gov](mailto:vaco51erpms@va.gov). OCHCO ER&PMS will assign the technical review of the grievance to the program offices responsible for the interpretation of the regulation or policy within 7-calendar days of receipt if a technical review is deemed appropriate. Situations in which “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 a regulatory or policy interpretation. For example, a question concerning management’s ability to grant authorized absence for weather-related events might meet the criteria of a technical review. A grievance regarding whether the issuance of an adverse or major adverse action is warranted is not appropriate for a technical review.
- (2) The grievant and their representative, if applicable, will be provided with a copy of the deciding official’s referral letter to OCHCO ER&PMS.
- (3) The technical review will be conducted by the appropriate program office, and its recommendation will be transmitted in writing to the deciding official within 30-calendar days after OCHCO ER&PMS’s receipt of the request.
- (4) The deciding official will issue the decision and a copy of the program office’s technical review and recommendations to the grievant and their representative, if applicable, within 15-calendar days after the technical review is received from the program office. The deciding official will provide the relief requested by the grievant if warranted based on the results of the technical review. If the relief is not warranted based on the results of the technical review it will not be granted.]

## EMPLOYEE/MANAGEMENT RELATIONS

## PART V. TITLE 38 APPEALS TO THE DISCIPLINARY APPEALS BOARD

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**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. \[§ 17401\(l\)\]](#) who have satisfactorily completed the probationary period required by [38 U.S.C. \[§ 17403\(b\)\]](#). Included in this category are: physicians, dentists, podiatrists, chiropractors, 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 [PCC] in VA. Major adverse actions are suspensions (including indefinite suspensions), transfers, reductions in grade, reductions in basic pay (including reductions in market pay for physicians[, podiatrists] and dentists resulting from involuntary reassignments or changes in assignments when taken for conduct and performance reasons) and discharges. A question of [PCC] 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 [District] 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 [PCC], 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 [the Chief Human Capital Officer] (051), so as to be received within [7-business] days after the date of service of the written decision on the employee. Submission of the appeal must be by personal service, facsimile, certified mail, or other confirmed delivery method. 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 [7-business]-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, confirmed delivery of the notice, or presumed to be [5-calendar] days after depositing the decision in the U.S. mail if confirmation of delivery is unavailable. The [Assistant] Under Secretary for Health for Operations [ ] will make a final decision regarding the determination that an appeal is filed untimely. The employee will be notified in writing, by letter, of this final determination. There are no further administrative appeal rights regarding the issue of timeliness.



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 [ ]. 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 [Deputy] Under Secretary for Health will take appropriate action on the decision of the Board as described in paragraph 9e of this chapter.

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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 [Employee Relations and Performance Management] 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.

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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 [[the Office of Human Resources Management, Employee Relations](#) Web site for sample letters].)

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.

#### 1. 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 [and Labor Relations] (051) to the Deputy 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 has delegated the authority to execute decisions made by Disciplinary Appeals Boards to the Deputy Under Secretary for Health. The Deputy 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 Deputy Under Secretary for Health. Pursuant to the Board's decision, the Deputy 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 Deputy Under Secretary for Health finds a decision of the Board to be clearly contrary to the evidence or unlawful, the Deputy 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 Deputy Under Secretary for Health may mitigate the adverse action imposed.

(3) The Deputy 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 Deputy 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 Deputy 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, Deputy 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), Deputy 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 [and Labor Relations] Human Resources Management [Employee Relations and Performance Management] 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.



## PART V

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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 [and Labor Relations Employee Relations and Performance Management] 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.

**PART VI. TITLE 38 SEPARATIONS NOT COVERED BY  
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**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 (a)(1)(A), 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) [and part-time registered nurses who have successfully completed a probationary period] 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) or 38 U.S.C. 7405(a)(1)(B). 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. [The procedures under part III of this handbook can be used for the separation of probationary employees appointed under 38 U.S.C. 7401(1) or non-probationary, part-time registered nurses appointed under 38 U.S.C. 7405(a)(1)(A) due to disability. The procedures regarding reasonable accommodation are applicable for all employees appointed under 38 U.S.C. 73 and 74.

b.] 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.

[c.] 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.

[d.] 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.

[f. Individuals whose names appear on the Health and Human Services sanctions listing and are deemed ineligible for receipt of Federal health care funds, will be determined as not meeting statutory requirements. These employees will be notified in writing and discharged immediately.]



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## 11. [SEPARATION PROCEDURES DUE TO REASONS OF PRE-EMPLOYMENT FITNESS.

### a. General.

- (1) Criteria contained in [5 C.F.R. Part 731](#) should be used in determining if a particular act constitutes pre-employment misconduct.

**Note:** The procedures in 5 C.F.R. Part 731 are not applicable, just the criteria. The procedures provided below must be used.

- (2) The procedures in this policy do not apply to title 38 employees serving a probationary period and are not applicable to an employee's conduct, performance, or fitness matters arising after appointment as a VA employee.

### b. Authorities.

- (1) [38 U.S.C. § 7421](#)
- (2) [VA Directive and Handbook 5001, System of VA Human Resources Management Directives and Handbooks General Introduction and Administration](#)

### c. Definitions. For this paragraph, the following terms apply:

- (1) Business Days. Weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by the Office of Personnel Management, or the employee's assigned facility is closed for regular business, e.g., inclement weather.
- (2) Deciding Official. The management official designated to make a decision regarding the separation of an employee. (See [VA Handbook 5021, Part II, Chapter 2 and Appendix B.](#))
- (3) Proposing Official. The management official who issues a notice of proposed disciplinary or major adverse action, e.g., proposed reprimand, any suspension, removal, reduction in grade or basic pay. (See [VA Handbook 5021, Part II, Chapter 2 and Appendix B.](#))

### d. Procedures.

- (1) Notification. The proposing official, who is the same official who can propose a major adverse action, will give a written notice with the following information to the employee:
  - (a) Notice of the pre-employment fitness allegation(s).

- (b) A statement that separation may result if the allegations are sustained.
  - (c) A statement that the employee may respond to the allegations orally and/or in writing to the deciding official.
  - (d) A statement that the employee may have a representative.
  - (e) A statement that if the employee chooses to respond orally, the employee must notify the official designated in the notice, within 3 business days of receipt of the notice for a meeting to be scheduled. The employee will be given 7 business days in which to issue a written reply, regardless of whether an oral reply is requested or not.
- (2) **Employee Reply.** The employee will be given 3 business days from receipt of the notice to request a meeting with the deciding official and 7 business days from receipt of the notice to submit a written reply. The deciding official will generally meet with the employee within 7 business days after the employee requests a meeting.
  - (3) **Reaching a Decision.** The deciding official will review the evidence, including any submitted by the employee. If the pre-employment fitness allegation(s) are supported, the deciding official will determine whether the employee should be separated. The decision will be based on the criteria set forth in [5 C.F.R. Part 731](#), and more generally, the nature of the pre-employment misconduct and the implications it may have for the individual's conduct and performance as a VA employee.
  - (4) **Decision Notice.** A written decision from the deciding official will generally be issued to the employee within 7 business days after the employee has provided an oral and/or written reply, whichever is later.
  - (5) **Effecting the Decision.** A decision to separate will generally be affected upon the date in which the decision is issued but no later than 5 calendar days after issuance of the decision.

**e. Appeal.** There is no further right to appeal or review.]

## **12. ABANDONMENT OF POSITION.**

- a. When an employee appointed under 38 U.S.C. §§ [7306](#), or [7401\(1\)](#), or a part-time registered nurse appointed under 38 U.S.C. § [7405\(a\)\(1\)\(A\)](#) 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)[, EXCLUDING PART-TIME REGISTERED NURSES]**

a. In effecting involuntary separations of employees serving under 38 U.S.C. 7405(a)(1)(A), [excluding temporary or permanent part-time registered nurses,] the procedural requirements prescribed for separations, such as reviews by Professional Standards Boards or Disciplinary Boards, do not apply. [The procedures for the separation of a probationary part-time registered nurse, including those with an intermittent duty basis, appointed under 38 U.S.C. 7405(a)(1)(A), are covered in part III, chapter 1 of this handbook or other applicable section of this chapter, i.e. failure to meet statutory or regulatory requirements, pre-employment suitability separations, etc. The procedures for the separation of a non-probationary part-time registered nurse, including those with an intermittent duty basis, appointed under 38 U.S.C. 7405(a)(1)(A), are covered in part II, chapter 1 of this handbook, or other applicable section of this chapter, i.e. failure to meet statutory or regulatory requirements, pre-employment suitability separations, etc.]

- 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[s 1100.17 and] 1100.18, relating to reporting to State licensing boards[, the National Practitioner Data Bank,] 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. [ACTIONS FOR EMPLOYEES APPOINTED] UNDER [38 U.S.C. \[§\] 7306](#).** Use the provisions of [38 U.S.C. § 713](#) for taking action against those employees appointed under the authority of [38 U.S.C. § 7306](#). Consult with Corporate Senior Executive Management Office (CSEMO) for additional guidance and VHA, Workforce Management and Consulting (WMC), Center of Expertise (COE).

**17. TERMINATION OF APPOINTMENTS OF CONSULTANTS, ATTENDING, 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 it is proposed by a supervising attending or VA Program or Site Director to separate a noncareer medical or dental resident because of deficiencies in performance, suitability, or conduct, the resident will be entitled to due process, including a review of the proposed termination. The facility Director will appoint an Ad Hoc Resident Review Committee for this purpose. The composition of the Committee will be as specified in VHA [Directive 1400.09(1),] Education of Physicians and Dentists[ ]. Persons in a position to prejudice the action of the Committee, such as immediate or higher-level supervisors, may not serve on the Committee, but may be called by the Committee to provide information. A resident may be placed on immediate administrative leave during the fact-finding investigation whenever there is a perceived threat to patient or public safety.
- b. The due process procedures to be followed will be similar to those for title 38 probationary employees contained in [P]art III, [C]hapter 1 of this handbook, except as indicated below:
  - (1) The following procedures for due process must be followed in the event that dismissal proceedings are initiated involving a resident in an accredited, VA-sponsored program:
    - (a) Opportunity for the trainee to learn the allegations being investigated or remediated;
    - (b) Opportunity to respond orally and/or in writing to the allegations;
    - (c) Assistance by an individual of the resident's choice (independent faculty, peer, or other), provided the choice would not create a conflict of interest. This process is not an adversarial procedure. The assistant's role is limited to aiding the resident in responding orally

and/or in writing to the reasons for the review [ ] but not answering questions on behalf of, the resident.

- (d) The findings and recommendation of the Ad Hoc Review Committee will be sent to the facility Director for final decision. The recommendation must be supported by a thorough documentation of the individual's deficiencies.
  - (e) The facility Director's written decision will be issued to the resident.
- (2) Appeal process for any adverse decision.
- (a) If a decision is made to separate, the resident will have five working days to submit a written response, and any other relevant information, to the facility Director for reconsideration.
  - (b) The Director and Chief of Staff, in consultation with the facility's designated educational officer, i.e. Associate Chief of Staff for Education, will hear the appeal.
  - (c) If the decision to separate is sustained after reconsideration, the resident will be notified in writing and the decision to separate will be effected within 15 calendar days.
  - (d) The resident will not be entitled to any further review of the separation decision.
- (3) The following procedures for due process must be followed in the event that dismissal proceedings are initiated involving a noncareer medical or dental resident in an integrated program (accredited in the name of the affiliated non-VA institution):
- (a) The Ad Hoc committee's findings and recommendations will be sent 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 thorough documentation of the individual's deficiencies.
  - (b) If the decision is to separate the resident from VA's program, the separation will be effected within 15 days after approval.
  - (c) A resident in an affiliated program will not be entitled to further VA review of the separation decision.

**NOTE:** Further investigation and action will be at the discretion of the sponsoring institution and program. VA cannot terminate individuals in an affiliated program from the training program but may prohibit



them from training at the VA. Dismissal from the training program is at the discretion of the sponsoring institution, which will be required to afford appropriate due process and appeal procedures.

- (d) A resident who is no longer enrolled in an approved, affiliated program (due to dismissal, suspension or other adverse actions) may not be engaged in VA clinical activities and will be dismissed from the VA assignment immediately. Per [VHA Directive 1400.09(1)], VA expects that changes in a resident's status or performance issues that occur at a non-VA site be communicated to the VA in a timely manner as these may impact eligibility for VA clinical rotations.
- c. Facility directors may modify the provisions of this paragraph to meet the requirements of accrediting bodies.
- d. Under normal conditions, the appointments of residents will terminate on completion of the approved term of service.

**PART VII. ACTIONS TAKEN AGAINST SUPERVISORS  
FOR WHISTLEBLOWER RETALIATION**

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**PART VII. ACTIONS TAKEN AGAINST SUPERVISORS  
FOR WHISTLEBLOWER RETALIATION**

**CHAPTER 1. GENERAL**

1. **SCOPE.** This policy provides guidance on the procedures for taking disciplinary action against supervisors who have been determined to have committed a prohibited personnel action (PPA). Chapter 2 of this part covers actions taken against supervisors for a PPA under the provisions of 38 U.S.C. § 731. Chapter 3 of this part covers actions taken against supervisors for a PPA under 5 U.S.C. § 7515. Actions involving a supervisor who has committed a PPA that is covered by 38 U.S.C. § 731 will be taken under that authority. (See Chapter 3, paragraph 4.a.)
2. **REFERENCES.**
  - a. [5 U.S.C. § 2302](#), Merit System Principles, Prohibited personnel practices
  - b. [5 U.S.C. § 6103\(a\)](#), Hours of Work, Holidays
  - c. [5 U.S.C. § 7103](#), Labor-Management Relations, Definitions; application
  - d. [5 U.S.C. Chapter 75](#), Adverse Actions
  - e. [5 U.S.C. § 7503\(a\)](#), Adverse Actions, Cause and procedure
  - f. [5 U.S.C. § 7513\(a\)](#), Adverse Actions, Cause and procedure
  - g. [5 U.S.C. § 7515](#), Adverse Actions, Discipline of supervisors based on retaliation against whistleblowers
  - h. [41 U.S.C. § 4705\(b\)](#), Protection of contractor employees from reprisal for disclosure of certain information.
  - i. [41 U.S.C. § 4712\(a\)\(1\)](#), Enhancement of contractor protection from reprisal for disclosure of certain information
  - j. [5 C.F.R. Part 752](#), Subpart B, Adverse Actions, Regulatory Requirements for Suspension for 14 days or less
  - k. [5 C.F.R. Part 1201.4\(p\)](#), Merit Systems Protection Board, General definitions
  - l. [38 U.S.C. § 713](#), Employees, Senior executives: removal, demotion, or suspension based on performance or conduct
  - m. [38 U.S.C. § 714](#), Employees, Employees: removal, demotion, or suspension based on performance or conduct
  - n. [38 U.S.C. Ch. 74, Subchapter V](#), Disciplinary and Grievance Procedures

- o. [38 U.S.C. § 731](#), Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints
- p. [VA Directive 0500](#), Office of Accountability and Whistleblower Protection: Investigation of Whistleblower Disclosures and Allegations Involving Senior Leaders or Whistleblower Retaliation

### 3. DEFINITIONS.

- a. **Business day(s).** Weekdays, which are Monday through Friday, except when such a day is designated as a Federal holiday by the Office of Personnel Management or the employee's assigned facility is closed for regular business, e.g., inclement weather. For calculation purposes, the period for a decision to be issued under these procedures begins on the first business day after the proposal is issued to the employee (e.g., hand delivered to the employee or, if mailed, the date received or 5 calendar days after mailed).
- b. **Deciding official.** Those individuals delegated authority to decide an action proposed under 38 U.S.C. §§ 713, 714, and 5 U.S.C. § 7515 as described in Chapter 4 of this part, or other disciplinary authority, if applicable.
- c. **Demotion or demote.** The involuntary transfer of a supervisor with a reduction in grade and annual rate of pay to a position that the deciding official determines is appropriate, and for which the covered employee is qualified.
- d. **Insufficient evidence.** Evidence that fails to refute the determination that the supervisor committed a PPA.
- e. **Personnel Action.** The following are considered personnel actions under this part:
  - (1) Appointment;
  - (2) Promotion;
  - (3) Action taken under the provisions of 5 U.S.C. Ch. 75, 38 U.S.C. §§ 713 or 714, or 38 U.S.C. Ch. 74, or other corrective action;
  - (4) Detail, transfer, or reassignment;
  - (5) Reinstatement;
  - (6) Restoration;
  - (7) Reemployment;
  - (8) Performance evaluation under the provisions of VA Directive and Handbook 5013;

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- (9) Decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, or performance evaluation, or other action described as a personnel action in this part;
  - (10) Decision to order psychiatric testing or examination;
  - (11) Implementation or enforcement of any nondisclosure policy, form, or agreement; or
  - (12) Any other significant changes in duties, responsibilities, or working conditions.
- f. **Preponderance of the evidence.** The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.
- g. **Prohibited Personnel Action (PPA) under 38 U.S.C. § 731.** A PPA under 38 U.S.C. § 731 is described as any of the following actions taken by a supervisor or management official:
- (1) Taking or failing to take a personnel action in violation of 5 U.S.C. § 2302 against an employee relating to the employee—
    - (a) Making a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Inspector General of the Department, the Special Counsel, or Congress;
    - (b) Providing information or participating as a witness in an investigation of a whistleblower disclosure made to the Assistant Secretary for Accountability and Whistleblower Protection, the Inspector General of the Department, the Special Counsel, or Congress;
    - (c) Participating in an audit or investigation by the Comptroller General of the United States;
    - (d) Refusing to perform an action that is unlawful or prohibited by the Department; or
    - (e) Engaging in communications that are related to the duties of the position or are otherwise protected.
  - (2) Preventing or restricting an employee from making an action described in any of subparagraphs (a) through (e) of paragraph (1).
  - (3) Conducting a negative peer review or opening a retaliatory investigation because of an activity of an employee that is protected by 5 U.S.C. § 2302.

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- (4) Requesting a contractor to carry out an action that is prohibited by 41 U.S.C. §§ 4705(b) or 4712(a)(1), as the case may be.
- h. **Prohibited Personnel Action (PPA) under 5 U.S.C. § 7515.** A PPA under 5 U.S.C. § 7515 is described as any of the following actions as described in 5 U.S.C. § 2302(b)(8), (9), and (14) when supervisors or management officials:
  - (1) Take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
    - (a) Any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
      - i Any violation of any law, rule, or regulation, or
      - ii Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs;
    - (b) Any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
      - i Any violation (other than a violation of this section) of any law, rule, or regulation, or
      - ii Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or
    - (c) Any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (b) that is—
      - i Not classified; or
      - ii If classified—
        - (A) Has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 ([50 U.S.C. § 3003](#))); and

- (B) Does not reveal intelligence sources and methods.
- (2) Take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
- (a) The exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
- i With regard to remedying a violation of paragraph (8); or
- ii Other than with regard to remedying a violation of paragraph (8);
- (b) Testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (a)(i) or (ii);
- (c) Cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
- (d) Refusing to obey an order that would require the individual to violate a law, rule, or regulation.
- (3) Access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in 5 U.S.C. § 2302(b).
- i. **Proposal Notice.** A memorandum from the proposing official to a supervisor that provides advance notice of a proposed action taken under such authorities as 38 U.S.C. § 713, 5 U.S.C. Chapter 75, 38 U.S.C. §§ 7461–7464, or other applicable disciplinary authority.
- j. **Proposing Official. Those individuals delegated authority to propose an action** taken under such authorities as 38 U.S.C. § 713, 5 U.S.C. Chapter 75, 38 U.S.C. Ch. 74, or other applicable disciplinary authority.
- k. **Removal.** The involuntary separation of a supervisor from the civil service.
- l. **Retaliation or Retaliating.** Retaliation includes but is not limited to instances in which:
- (1) A supervisor takes or fails to take a personnel action in violation of 5 U.S.C. § 2302 (see paragraph 3.j. or k. of this chapter) or prevents or restricts an employee from making an action for the following reasons:

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- (a) Making a whistleblower disclosure to the Office of Accountability and Whistleblower Protection, Office of Inspector General, Office of Special Counsel, or Congress;
  - (b) Providing information or participating as a witness in an investigation of a whistleblower disclosure made to Office of Accountability and Whistleblower Protection, Office of Inspector General, Office of Special Counsel, or Congress;
  - (c) Participating in an audit or investigation by the Comptroller General of the United States;
  - (d) Refusing to perform an action that is unlawful or prohibited by VA; or
  - (e) Engaging in communications that are related to the duties of the position or are otherwise protected, including communications protected by 5 U.S.C. § 2302(b)(8) and (9.)
- (2) A supervisor prevents or restricts an employee from taking an action described in paragraph 3.r.(1) of this chapter.
- (3) A supervisor conducts a negative peer review or opens a retaliatory investigation because of an activity that is protected by 5 U.S.C. § 2302 (see paragraph 3.j. or k. of this chapter).
- m. **Supervisor.** An employee who is a supervisor as defined in 5 U.S.C. § 7103(a)(10).
- n. **Suspension or Suspend.** Placing a supervisor, for reasons of misconduct, in a temporary status without duties and pay.
- o. **Whistleblower Disclosure.** A disclosure of information by a VA employee, or individual applying to become a VA employee, which the employee or individual reasonably believes evidences:
- (1) A violation of a law, rule, or regulation; or
  - (2) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.



## CHAPTER 2. ACTIONS TAKEN IN ACCORDANCE WITH 38 U.S.C. § 731

1. **SCOPE.** To provide guidance on the procedures for taking disciplinary action against supervisors who have been determined to have committed a PPA under 38 U.S.C. § 731.
2. **EMPLOYEES COVERED.** All VA supervisors as defined in 5 U.S.C. § 7103(a)(10), including those in the Senior Executive Service (SES), SES equivalent, and supervisors appointed to positions under the provisions of 38 U.S.C. Chapters 73 and 74.
3. **EMPLOYEES EXCLUDED.** Any employee who does not meet the definition of supervisor under 5 U.S.C. § 7103(a)(10) or paragraph 2 of this chapter.
4. **TAKING AN ACTION.**
  - a. **Authority.** An action based on a determination covered by 38 U.S.C. § 731 will be proposed under an existing authority used for taking disciplinary, adverse, or major adverse actions, e.g., 5 U.S.C. §§ 7501-7504 for suspensions of 14 calendar days or less; 5 U.S.C. §§ 7511-7514 for suspensions of 15 calendar days or more, demotions, or removals; 38 U.S.C. § 714 for suspensions of 15 calendar days or more, demotions, or removals; 38 U.S.C. § 713; 38 U.S.C. §§ 7461-7463. The procedures of 38 U.S.C. § 731 will supersede any conflicting procedures in the existing statutory authority used to take the action. The appeal rights of the existing statutory authority used to take the action will apply because 38 U.S.C. § 731 does not identify separate appeal rights.
  - b. **Basis for Action.** For purposes of taking an action against a supervisor under 38 U.S.C. § 731, a PPA means any of the following:
    - (1) Taking or failing to take a personnel action in violation of 5 U.S.C. § 2302 against an employee:
      - (a) For making a whistleblower disclosure to Office of Accountability and Whistleblower Protection, Office of Inspector General, Office of Special Counsel, or Congress;
      - (b) Providing information or participating as a witness in an investigation of a whistleblower disclosure made to Office of Accountability and Whistleblower Protection, Office of Inspector General, Office of Special Counsel, or Congress;
      - (c) Participating in an audit or investigation by the Comptroller General of the United States;
      - (d) Refusing to perform an action that is unlawful or prohibited by VA; or

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- (e) Engaging in communications that are related to the duties of the position or are otherwise protected, including communications protected by 5 U.S.C. § 2302(b)(8) and (9). (See paragraph 3.j.(8) and (9) of Chapter 1 of this part.)
  - (2) Preventing or restricting an employee from taking an action described in paragraph 4.b.(1) of this chapter.
  - (3) Conducting a negative peer review or opening a retaliatory investigation because of an activity of an employee that is protected by 5 U.S.C. § 2302. (See paragraph 3.j. of Chapter 1 of this part.) Requesting a contractor to carry out an action that is prohibited by 41 U.S.C. § 4705(b) or 4712(a)(1), as the case may be.
- c. **Determination.** A disciplinary action will be proposed against a supervisor if it is determined by one of the following entities, that the supervisor committed a PPA as described in paragraph 4.b. of this chapter:
- (1) The Secretary;
  - (2) The Office of Inspector General; or
  - (3) One of the following, unless the matter is under appeal:
    - (a) An administrative judge;
    - (b) Merit Systems Protection Board (MSPB), including an MSPB administrative judge;
    - (c) Office of Special Counsel;
    - (d) An arbitrator or adjudicating body whom the VA and union have selected to adjudicate a matter in accordance with an applicable contract; or
    - (e) A Federal judge.

A determination is a written finding by one of the officials or entities identified in (1) through (3) that the supervisor engaged in a PPA.

d. **Penalty.**

- (1) In accordance with 38 U.S.C. § 731(a), the level of penalty to be imposed is as follows:
  - (a) A suspension of no less than 12 calendar days and not more than removal for the first offense in which a supervisor is determined to have committed a PPA; and

- (b) A removal for the second offense in which a supervisor is determined to have committed a PPA.
- (2) When proposing an adverse or major adverse action against a supervisor for a PPA covered by this statute, the proposing official may propose more than one adverse or major adverse action in the same proposal notice, e.g., a demotion and a suspension, if the total severity of the adverse or major adverse actions do not exceed the levels specified in paragraph 4.d.(1)(a) of this chapter.
- (3) In accordance with 5 U.S.C. § 1214(f), if an action is initiated against a supervisor resulting from an investigation conducted by the Office of Special Counsel, no disciplinary or adverse action will be taken against the supervisor without the approval of the Office of Special Counsel.

**e. Imposing the Action.**

- (1) A written proposal notice will be drafted, in collaboration with the servicing Human Resources (HR) office, to ensure compliance with applicable statutes, regulations, VA policies, collective bargaining agreements, and any other applicable requirements before being released to the employee. The servicing HR office will review the evidence and provide a technical review of the action. The Office of General Counsel (OGC) will provide legal review prior to the issuance of the proposal notice.
- (2) A supervisor is entitled to 10 calendar days following issuance of a proposed action to provide a written reply and furnish evidence in support of their response to the reasons cited in the proposed action regardless of the authority used to propose the disciplinary, adverse, or major adverse action described in this chapter.
- (3) The supervisor will be afforded all rights prescribed in the applicable authority under which the action is proposed, e.g., 38 U.S.C. § 713, 38 U.S.C. § 714, 5 U.S.C. Ch. 75, 38 U.S.C. §§ 7461-7463.
- (4) The action will be imposed after the 10-calendar-day period has expired if the supervisor does not furnish any evidence as indicated in paragraph 4.d.(2) of this chapter, or if the deciding official determines that such evidence furnished by the supervisor is not sufficient to reverse the determination to propose the action. (See paragraph 3.f. of Chapter 1 of this part.)
- (5) If the proposing official proposes more than one adverse action as described in paragraph 4.d.(2) of this chapter, the deciding official may impose both adverse actions or may choose to impose only one of the proposed actions, if the action meets the requirements of paragraph 4.d.(1) of this chapter.

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- (6) The supervisor is entitled to a written decision and the specific reasons for reaching the decision at the earliest practicable date.
- (7) A supervisor against whom an action is taken under this section is entitled to appeal the action in accordance with the authority used to take the action, e.g., 5 U.S.C. Ch. 75, 38 U.S.C. §§ 713, 714, or 7461-7463.

### CHAPTER 3. ACTIONS TAKEN IN ACCORDANCE WITH 5 U.S.C. § 7515

1. **SCOPE.** To provide guidance on the procedures for taking disciplinary action against supervisors who have been determined to have committed a PPA under 5 U.S.C. § 7515.
2. **EMPLOYEES COVERED.** All title 5 and hybrid-title 38 supervisors as defined in 5 U.S.C. § 7103(a)(10), including those in the SES.
3. **EMPLOYEES EXCLUDED.**
  - a. Any employee who does not meet the definition of supervisor under 5 U.S.C. § 7103(a)(10).
  - b. Supervisors appointed under 38 U.S.C. § 7401(1) or in occupations included in 38 U.S.C. § 7401(1) who are appointed under 38 U.S.C. § 7405.
4. **TAKING AN ACTION.**
  - a. **Relationship with 38 U.S.C. § 731.** Some determinations that a PPA occurred might fall under the provisions of both 38 U.S.C. § 731 and 5 U.S.C. § 7515. For example, a determination that a PPA occurred violating 38 U.S.C. § 731(c)(1)(A) will likely also violate 5 U.S.C. § 7515(a)(2). In these cases, the proposing and deciding officials will propose and decide an action in accordance with 38 U.S.C. § 731 (see Chapter 2 of this part.) Questions concerning which authority to use should be directed to OGC.
  - b. **Basis for Action.** For the purposes of taking an action against a supervisor under 5 U.S.C. § 7515, a PPA means any of the following:
    - (1) Taking or failing to take an action in violation of 5 U.S.C. § 2302(b)(8) and (9) (see Chapter 1, paragraph 3.k.(1) and (2) of this part); or
    - (2) Accessing the medical record of an employee or applicant for employment as part of, or in furtherance of, any conduct described in 5 U.S.C. § 2302(b)(1) through (13) (see Chapter 1, paragraph 3.k.(3) through of this part).
  - c. **Standard of Action.** The standard of action for disciplinary or adverse actions taken under these provisions is for such cause as will promote the efficiency of the service.
  - d. **Determination.**
    - (1) A disciplinary action will be proposed against a supervisor if it is determined by one of the following entities that the supervisor committed a PPA as described in paragraph 4.b. of this chapter:

- (a) The Secretary;
  - (b) The Office of Inspector General; or
  - (c) One of the following, unless the matter is under appeal:
    - i An administrative judge;
    - ii MSPB, including an MSPB administrative judge;
    - iii Office of Special Counsel;
    - iv An arbitrator or adjudicating body whom the VA and union have selected to adjudicate a matter in accordance with an applicable contract; or
    - v A Federal judge.
- (2) A determination is a written finding by one of the officials or entities identified in (a)-(c), that the supervisor engaged in a PPA.
- e. **Penalty.** In accordance with 5 U.S.C. § 7515(b)(1)(A), the level of penalty to be proposed is as follows:
  - (1) A suspension of no less than 3 calendar days for the first PPA committed by the supervisory employee. The proposing official may propose an additional action determined appropriate, including a reduction in grade or pay; and
  - (2) A removal for the second PPA committed by the supervisory employee.
    - (a) When proposing an adverse action against a supervisor for a PPA covered by this statute, the proposing official may propose a suspension of not less than 3 calendar days and a demotion. (See paragraph 4.e.1.(a).)
    - (b) In accordance with 5 U.S.C. § 1214(f), if an action is initiated against a supervisor resulting from an investigation conducted by the Office of Special Counsel, no disciplinary or adverse action will be taken against the supervisor without the approval of the Office of Special Counsel.
- f. **Suspensions of 14 Calendar Days or Less.** The procedures under this chapter must be used for taking a suspension of 14 calendar days or less if a determination has been made that a supervisor has engaged in whistleblower retaliation. (The provisions of Part II of this handbook cannot be used).

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- (1) A written proposal notice will be reviewed by the servicing HR office for compliance with applicable statutes, regulations, VA policies, collective bargaining agreements, and any other applicable requirements before being released to the employee. The servicing HR office will review the evidence and provide a technical review of the action. Consultation with OGC is recommended prior to the issuance of the proposal notice.
  - (2) A supervisor is entitled to written proposal notice that states the specific reasons for the proposed action.
  - (3) The proposal will inform the supervisor that they have the right to review the material that is relied on to support the reasons given in the proposal notice.
  - (4) A supervisory employee will be granted no more than 14 calendar days after the date on which the supervisor received the notice to submit a written reply, and furnish evidence in support of their response to the reasons cited in the proposed action.
  - (5) The supervisor has a right to be represented by an attorney or other representative.
  - (6) If the supervisor does not furnish any evidence by the end of the 14-calendar-day period, or if the deciding official determines that such evidence is insufficient to reverse the action proposed, the action will be imposed after the 14-calendar-day period has expired. (See definition of insufficient evidence located in Part VII, Chapter 1 of this handbook.)
  - (7) If the proposing official proposed a penalty higher than the minimum penalty required or proposed an additional penalty, e.g., a demotion and at least a 3-day suspension, the deciding official may mitigate the penalty if the supervisor provided evidence sufficient to support a lower penalty. For a first offense, the penalty may only be mitigated to the lowest mandatory level. The penalty of removal is required for a second offense if substantiated by the evidence.
  - (8) The supervisor is entitled to a written decision and the specific reasons at the earliest practicable date but to the extent practicable, a decision should be issued within 15 business days of the conclusion of the employee's opportunity to respond.
  - (9) A supervisor may grieve the disciplinary action in accordance with VA grievance procedures outlined in VA Handbook 5021, Part IV, if applicable.
- g. **Suspensions of 15 calendar days or more, demotions or removal.** The procedures under this chapter and paragraph must be used for taking a suspension of 15 calendar days or more, demotion and/or removal, if a

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determination has been made that a supervisor has engaged in whistleblower retaliation. The provisions of Part II of this handbook cannot be used.

- (1) The provisions of Chapter 3, paragraph 4.f.(1) through (8) of this part are applicable to suspensions of 15 calendar days or more, demotions and/or removals.
- (2) A supervisor against whom an action is taken under this section is entitled to appeal to MSPB under 5 U.S.C. § 7701 if the action taken is a 15-calendar-day suspension or more, a demotion or removal, seek corrective action from the Office of Special Counsel, or file a discrimination complaint through the Office of Resolution Management, Diversity, and Inclusion.



**CHAPTER 4. DELEGATIONS FOR ACTIONS TAKEN IN ACCORDANCE WITH  
38 U.S.C. § 731 AND 5 U.S.C. § 7515**

1. **SCOPE.** The chapter governs the delegations of authority for actions taken in accordance with 38 U.S.C. § 731 and 5 U.S.C. § 7515.
2. **5 U.S.C. § 7515.** If the Secretary is responsible for determining whether a supervisor has committed a PPA under 5 U.S.C. § 7515, the Secretary may not delegate that responsibility.
3. **DELEGATIONS UNDER 38 U.S.C. § 713 WHEN TAKING AN ACTION REQUIRED UNDER 38 U.S.C. § 731.** Unless the provisions of VA Directive and Handbook 5025, Senior Executive Service, or other guidance prescribed by the Corporate Senior Executive Management Office, the following delegations are applicable:
  - a. **Proposing Official.** Supervisor who is at least one supervisory level above and within the same supervisory line as the receiving employee, or other individual who is otherwise delegated such authority by the Secretary.
  - b. **Deciding Official.** Supervisor who is at least one supervisory level above and within the same supervisory line as the proposing official, or other individual who is otherwise delegated such authority by the Secretary.
  - c. **Grievance Official.** Secretary, Deputy Secretary, Under Secretary, Assistant Secretary that is appointed by the President and confirmed by the Senate, and other key officials who are appointed by the President and confirmed by the Senate, or other individual delegated such authority by the Secretary.
4. **DELEGATIONS WHEN TAKING AN ACTION REQUIRED UNDER 38 U.S.C. § 731.** For disciplinary, adverse, and major adverse actions imposed against a supervisor under the provisions of 38 U.S.C. § 731, the proposing officials and deciding officials prescribed in Part II and III of this handbook will be applicable, or any other applicable delegations of authority approved by the Secretary.
5. **DELEGATIONS WHEN TAKING AN ACTION REQUIRED UNDER 5 U.S.C. § 7515.**
  - a. For suspensions, demotions, and removals taken against supervisors covered by 38 U.S.C. § 713 but imposed under the provisions of 5 U.S.C. § 7515, the proposing officials and deciding officials as defined in paragraph 3 of this chapter are applicable or any other applicable delegations of authority approved by the Secretary.
  - b. For disciplinary and adverse actions imposed against all other supervisors covered under the provisions of 5 U.S.C. § 7515, the proposing officials and deciding officials prescribed in Part II of this handbook will be applicable or any other applicable delegations of authority approved by the Secretary.

**PART VIII. NOTATION OF ADVERSE FINDINGS IN  
OFFICIAL PERSONNEL FOLDER AFTER RESIGNATION**

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## **PART VIII. NOTATION OF ADVERSE FINDINGS IN OFFICIAL PERSONNEL FOLDER AFTER RESIGNATION**

### **CHAPTER 1. GENERAL**

- 1. PURPOSE.** This part governs the requirement in accordance with [5 U.S.C. § 3322](#) that a notation be entered into an employee's electronic Official Personnel Folder (eOPF) if an employee resigns prior to the resolution of a personnel investigation when an adverse finding results from the personnel investigation.
- 2. REFERENCES.**
  - a. [5 U.S.C. § 3322](#), Voluntary Separation Before Resolution of Personnel Investigation.
  - b. OPM memorandum titled "Implementing Policy Guidance for [5 U.S.C. § 3322](#) – Voluntary Separation Before Resolution of Personnel Investigation," dated May 7, 2018.
- 3. DEFINITIONS.**
  - a. **Adverse Finding.**
    - (1) A written determination that a proposed adverse personnel action is substantiated by the deciding official identified in the proposal for that action; or
    - (2) A written determination from those entities that conduct personnel investigations (see paragraph 5.a.(1)(a) through (e)) that allegations regarding the former employee's misconduct or performance are supported; or
    - (3) A written finding from an EEOC administrative judge or a Final Agency Decision from OEDCA that substantiates an employee's misconduct or performance deficiencies by a preponderance of the evidence.
  - b. **Adverse Personnel Action.**
    - (1) A proposed suspension of 15 calendar days or more, including indefinite suspensions, reduction in grade or pay, and removal issued to a title 5 or hybrid title 38 employee; and
    - (2) A proposed suspension of 1 calendar day or more, reduction in grade or pay, transfer, or removal issued to a title 38 employee.

- c. **Appeal Notation.** A written notice placed into a former employee's eOPF by the VA if the former employee files an appeal with the Merit System Protection Board (MSPB) disputing the permanent notation in the eOPF.
- d. **Calendar Day(s).** Each day of the week, to include weekends. Note that if a deadline falls on a non-business day, the deadline will be extended to the next business day, which is Monday through Friday, excluding Federal holidays. For example, if the 30th calendar day for filing a response falls on a Saturday, Sunday, or Federal holiday, the deadline is extended to the next business day.
- e. **Deciding Official.** The management official who can determine whether adverse findings are supported such that a permanent notation is required pursuant to [5 U.S.C. § 3322](#). (See Chapter 3.)
- f. **Decision.** A written memorandum from the deciding official to the former employee that states the:
  - (1) Decision of the deciding official in response to the initial notification;
  - (2) Basis and specific reasons for the decision;
  - (3) Right to appeal to MSPB under 5 U.S.C. § 7701; and
  - (4) Requirement that an MSPB appeal must be filed no later than 30 calendar days after the effective date of the decision if a permanent notation is to be placed in the eOPF.
- g. **Permanent Notation.** A document placed in a former employee's eOPF after the individual has been given advanced notice and a right to reply following their resignation while under investigation for alleged performance or conduct deficiencies.
- h. **Preponderance of the Evidence.** The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.
- i. **Resolution of the Personnel Investigation.** This occurs when the VA has obtained the available facts relevant to the alleged behavior. No adverse finding can be determined until the personnel investigation (see paragraph 5.a.(1)) is concluded.
- j. **Supporting Documentation.** The information used to substantiate the adverse finding (e.g., the report of personnel investigation, including the evidence, facts, statements, and data), as well as any written response and additional evidence provided by the former employee.

## CHAPTER 2. PROCEDURES

1. **SCOPE.** These procedures apply when notating adverse findings in the eOPF of a former employee who was the subject of a personnel investigation and resigned before the resolution of such investigation.
2. **EMPLOYEES COVERED.** These procedures apply to former employees who served in the:
  - a. Competitive service at the time of resignation.
  - b. Excepted service at the time of resignation, including those appointed under [38 U.S.C. Chapters 73](#) and [74](#).
3. **EMPLOYEES EXCLUDED.** These procedures do not apply to SES employees.
4. **ACTION COVERED.** If an employee resigns after a personnel investigation has been initiated and the VA subsequently upholds its adverse finding, the VA must include a permanent notation on the permanent side of the former employee's eOPF. This notation is only made after the employee is given an opportunity to reply to the adverse finding.
5. **PROCEDURES.**
  - a. **Application.** This process only applies when the employee resigned during a personnel investigation that resulted in an adverse finding. For the purposes of this process:
    - (1) Personnel Investigation includes:
      - (a) A proposed adverse personnel action as defined in Chapter 1, paragraph 3.b. of this part; or
      - (b) An administrative investigation conducted by the following entities in which the former employee was the subject of the personnel investigation and the investigation focused on alleged or potential performance or conduct deficiencies:
        - i Office of the Inspector General;
        - ii Office of Accountability and Whistleblower Protection;
        - iii Administrative Investigation Boards as defined in VA Handbook 0700, titled Administrative Investigation Boards and Factfindings;
        - iv Office of Resolution Management, Diversity and Inclusion;

v Equal Employment Opportunity Commission;

vi Office of Employment Discrimination Complaint Adjudication (OEDCA); or

vii Office of Medical Inspector.

- (2) **Resignation.** An employee whose separation from Federal service is initiated by the employee rather than a separation initiated by the VA or another Federal agency. Retirements are not considered resignations for purposes of this part. A proposed order under this part will be issued if an employee resigns after being issued a proposed adverse action but prior to a decision being issued, if the deciding official makes an adverse finding. Resignations that occur following the issuance of an adverse personnel action decision are not covered by this part.
- (3) **Adverse finding.** An adverse finding is made as defined in Chapter 1, paragraph 3.a. of this part. No adverse finding can be made until the resolution of the personnel investigation. Resolution of the personnel investigation occurs when the investigative entity has issued its final report to the VA indicating its findings/conclusions, including the available facts relevant to the allegations and the evidence file.

**b. Timelines.**

- (1) The aggregate period for initial notification, reply, and decision for placing a notation in an eOPF is 40 calendar days after resolution of the personnel investigation if the employee resigns.

**NOTE:** If an employee resigns after the issuance of a proposed adverse action, the SF-50 will still be annotated in accordance with OPM's Guide to Processing Personnel Actions. This annotation is separate and apart from the requirements of [5 U.S.C. § 3322](#).

- (2) Within five calendar days following receipt of the resolution of the investigation and supporting documentation, the deciding official will provide initial written notification to the former employee of the adverse finding that resulted from the personnel investigation.
- (3) The former employee will be given the opportunity to provide a written reply to the deciding official within 30 calendar days of receipt of the initial notice.
- (4) After the reply period but not later than 40 calendar days after receipt of the resolution of the personnel investigation, the deciding official must review the reply and decide, based upon the preponderance of the evidence, whether the adverse finding was justified.

- (5) The written decision will be issued to the former employee as soon as possible after the deciding official has signed the decision memo but generally no later than three business days.

**c. Initial Notification.**

- (1) Within five calendar days following receipt of the resolution of the investigation and supporting documentation, the deciding official will provide initial written notification to the former employee of the adverse finding that resulted from the personnel investigation.
- (2) The written initial notification must:
  - (a) Inform the former employee of the personnel investigation's adverse finding;
  - (b) Summarize the adverse finding against the former employee;
  - (c) Include a statement informing the former employee that a copy of the adverse finding and any supporting documentation was provided with the issuance of the initial notification;
  - (d) Notify the former employee of the opportunity to provide a written reply regarding the adverse finding to the deciding official within 30 calendar days of receipt of the initial notification; and
  - (e) State the right to furnish affidavits and other documentary evidence indicating why the adverse finding was unwarranted.
- (3) A copy of the adverse finding and any supporting documentation that substantiates the adverse finding, e.g., the report of investigation, including the evidence, facts, statements, and data, will be provided to the former employee with the initial notification.

**d. Decision.**

- (1) After the reply period but not later than 40 calendar days after the receipt of resolution of the personnel investigation, the deciding official must review any reply received and decide, based upon the preponderance of the evidence, whether the adverse finding was justified. If a determination is made that the adverse finding was justified by a preponderance of the evidence, a permanent notation is required to be included in the former employee's eOPF.
- (2) A written decision will be issued to the former employee as soon as possible.
- (3) The written decision must include:

- (a) The decision of the deciding official regarding whether the adverse finding was justified;
  - (b) Basis and specific reasons for the decision; and
  - (c) Right to appeal to MSPB, including the time limit within which an appeal must be filed with MSPB, the address of the appropriate MSPB Regional Office, and an indication that a copy of the MSPB regulations and appeal form is attached or the website information is provided.
- e. **Permanent Notation in eOPF.** If the deciding official finds the adverse finding was justified, a permanent notation must be documented in the eOPF. The permanent notation will:
  - (1) State the former employee was subject to a personnel investigation resulting in an adverse finding and resigned prior to the resolution of the investigation;
  - (2) Summarize the adverse finding;
  - (3) State the final decision was made after the former employee was allowed to reply;
  - (4) Summarize the former employee's response to the adverse finding; and
  - (5) State the former employee was provided notification of the right to file an appeal to MSPB.
- f. **Appeal.**
  - (1) If a former employee files an appeal to MSPB disputing the permanent notation pursuant to [5. U.S.C. § 3322\(c\)](#), the deciding official's servicing HR office will enter a notation of the appeal into the former employee's eOPF within two weeks of the date the agency was notified the appeal was filed. The appeal notation will include a summary of the employee's response.
  - (2) If the VA is the prevailing party, the deciding official must remove the appeal notation from the former employee's eOPF within two weeks of the MSPB decision, but the permanent notation will remain.
  - (3) If the former employee is the prevailing party, the deciding official must remove the permanent notation and the appeal notation from the former employee's eOPF within two weeks of the MSPB decision.



### **CHAPTER 3. OFFICIALS AUTHORIZED TO MAKE NOTATIONS OF ADVERSE FINDINGS IN OFFICIAL PERSONNEL FOLDER AFTER RESIGNATION**

- 1. SCOPE.** This chapter provides information regarding the officials granted the authority to issue an initial notification, written decision, and make a permanent notation in an employee's eOPF if an employee resigns prior to the resolution of a personnel investigation when an adverse finding results from the personnel investigation.
- 2. DECIDING OFFICIALS.** In accordance with Part I and Part II of this handbook and any other applicable delegations of authority approved by the Secretary, those individuals who are delegated as deciding officials for the purposes of issuing a decision on an adverse or major adverse action will be the same officials authorized to issue an initial notification, written decision and permanent notation in an eOPF in accordance with the provisions of [5 U.S.C. § 3322](#) and in this part of the handbook.