

**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 contains VA procedures on employee/management relations. The pages in this issuance replace the corresponding page numbers in VA Directive 5021. Revised text is contained in [brackets]. These changes will be incorporated into the electronic version of VA Directive 5021 that is maintained on the Office of Human Resources Management Website. These changes are made in order to clarify that the burden of proof for Title 38 disciplinary actions is substantial evidence and changes the level of evidence from preponderance of evidence to substantial evidence involving Title 38 major adverse actions.
3. **RESPONSIBLE OFFICE:** The Human Resources Management Employee Relations and Performance Management Service (051), Office of the Deputy Assistant Secretary for Human Resources.
4. **RELATED HANDBOOK:** VA Handbook 5021, "Employee/Management Relations."
5. **RESCISSIONS:** None.

**CERTIFIED BY:**

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

/s/  
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**DISTRIBUTION:** Electronic Only

- i. **[Standard of Proof.** The degree of evidence necessary to sustain a disciplinary or major adverse action involving an action taken under this part. The standard of proof for these actions is substantial evidence.
  
- m. **Substantial Evidence.** The relevant evidence a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion even though other reasonable persons might disagree, or evidence that a reasonable mind would accept as adequate to support a conclusion. Substantial evidence is the burden of proof for actions taken under this part.
  
- n.] **Suspension.** The involuntary placement of an employee, for disciplinary reasons, in a non-duty, non-pay status for a temporary period of time.
  
- [o.] **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.)**

- 3. **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.)**

#### 4. **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. **[Burden of Proof.** When taking a disciplinary action against an employee covered by this part, the Department bears the burden of proving by substantial evidence the charges that form the basis for the action.

#### **c.] Procedural Entitlements**

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

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;
- (1) 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;
  - (2) The right to be represented by an attorney or other representative of the employee's choice at all stages of the case; and
  - (3) The right to grieve the disciplinary action, if any.

#### **[d.] 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.

#### **[e.] 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.

[f.] **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.

[g.] **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.

**[h.] 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.)**

**7. 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 [covered by this part], the Department bears the burden of proving by [substantial] 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:



- (a) **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.
- (b) **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.
- (c) **Verbatim Record.** A verbatim record shall be maintained of Board hearings (see subparagraph g below for further details).
- (d) **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.
- (e) **Scheduling of Hearing.** The hearing will be conducted on official Government time, and normally, without charge to leave of the employee(s) concerned.

**(f) 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. [The Department bears the burden of proving by substantial evidence the charges that form the basis for the action.]
- 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