

EMPLOYEE/MANAGEMENT RELATIONS

- 1. REASON FOR ISSUE:** To issue Department of Veterans Affairs (VA) policy regarding employee/management relations.
- 2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This directive sets forth policies previously contained in numerous other issuances. No substantive changes have been made.
- 3. RESPONSIBLE OFFICE:** The Human Resources Management Programs and Policies Service (051), Office of the Deputy Assistant Secretary for Human Resources.
- 4. RELATED HANDBOOK:** VA Handbook 5021, "Employee/Management Relations."
- 5. RESCISSIONS:** Refer to the Transmittal Sheet for VA Directive 5001, "General Introduction and Administration."

CERTIFIED BY:

/s/
John A. Gauss
Assistant Secretary for
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**BY DIRECTION OF THE SECRETARY
OF VETERANS AFFAIRS:**

/s/
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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 VA employees holding a full-time, permanent appointment under 38 U.S.C. 7401(l) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included in this category are: physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants and expanded- function dental auxiliaries. Henceforth, "employee(s)" will be the term used to refer to the above categories in this section, unless otherwise specified.

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

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

2. REFERENCES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. DISCIPLINARY ACTIONS

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

b. Procedural Entitlements

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

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

1. The nature of the action proposed (e.g., admonishment);
 2. A statement of the specific charges upon which the proposed action is based, including names, dates, places, and other data sufficient to enable the employee to fully understand the charges and to respond to them;
 3. A statement of any specific law, regulation, policy, procedure, practice or other specific instruction (national, local or otherwise) that has been violated as it pertains to the charge(s), if applicable;
- (b) The right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;
 - (c) The right to a reasonable amount of time to submit the reply or replies (time limits may vary according to the circumstances but in no event should be less than five calendar days);
 - (d) The right to review the material relied upon to support the reasons for the proposed action;
 - (e) Identification of the official who will receive any oral and/or written replies;
- (2) The right to a written decision as soon as possible after the employee's reply has been fully considered or after the expiration of the time allowed for reply, if the employee does not reply;
 - (3) The right to be represented by an attorney or other representative of the employee's choice at all stages of the case; and
 - (4) The right to grieve the disciplinary action, if any.

c. Employee's Reply

- (1) If the employee requests an opportunity to reply orally, the decision official or designee will receive the employee's reply. Any official designated to receive the reply must have the authority to recommend what final decision should be made.
- (2) A written summary signed by the official hearing the oral reply must be made part of the record.

d. Arriving at a Final Decision

- (1) The decision official will give full and impartial consideration to the employee's reply, if any; the recommendation of the designee hearing an oral reply, if any oral reply was made; and all evidence of record. If the decision official finds one or more of the charges in the advance notice sustained, he or she will determine an appropriate action.
- (2) A decision adverse to the employee must be based only on the charges stated in the notice of proposed action. If none of the charges are sustained, either in whole or in part, no action may be imposed, regardless of any record of past discipline cited in the notice.
- (3) The penalty may not be more severe than that proposed in the notice of proposed action.

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

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

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

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

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

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

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

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

f. **Appeals of Disciplinary Actions**

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

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

g. **Withdrawal of Action**

(1) After 2 years, admonishments will be removed from the personnel folder and destroyed. However, in cases of patient abuse, an admonishment may be retained in the personnel folder

indefinitely. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management (HRM) Officer that the admonishment, including patient abuse cases, be withdrawn, if the employee's conduct so warrants.

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

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

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

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

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

6. MAJOR ADVERSE ACTIONS

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

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

c. Procedural Entitlements

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

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

1. The nature of the action proposed;

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

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

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

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

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

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

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

(f) Identification of the decision official;

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

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

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

d. Exceptions to 30-day Advance Notice. The requirement for a 30-day advance notice period may be shortened if there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (38 U.S.C. 7462(b)(1)(A)). This exception is concerned solely with shortening the advance notice period. In order for the "crime provision" or "crime exception" to be invoked, there must be reasonable cause to believe that the employee has committed a crime for which the employee may be imprisoned. The employee must still be afforded a reasonable amount of time, but not less than 7 days, to reply orally and/or in writing to a notice of proposed adverse action.

e. Employee's Reply

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

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

f. Arriving at a Final Decision on the Proposed Action

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

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

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

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

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

g. Decision

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

(2) A decision on a proposed major adverse action may be held in abeyance at the request of the employee and agreement by the deciding official, in order for the employee to seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973 (see 29 U.S.C. Section 701, et seq.). The employee must provide acceptable documentation for his or her request which, at a minimum, establishes both a qualifying handicapping condition and a causal connection between the handicapping condition and the cited misconduct and/or deficiency in performance. However, an abeyance of this nature may not exceed one year.

(3) The decision letter must contain the following:

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

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

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

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

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

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

h. Appeals of Major Adverse Actions

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

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

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

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

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

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

SECTION B. GRIEVANCES

1. SCOPE AND AUTHORITY

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

b. **Employee Coverage**

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

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

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

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

2. REFERENCES

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

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

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

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

4. DEFINITIONS

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

b. **Employee.** Any physician, dentist, podiatrist, optometrist, nurse, nurse anesthetist, physician assistant, or expanded-function dental auxiliary covered in the scope of this section. Former employees of VA are also included, but only in connection with a grievance over discharges or actions resulting in loss of pay or benefits (for example, a former employee charged with 8 hours absence without leave (AWOL) who has requested that the 8 hours of pay be restored). Former employees must have filed a timely grievance in accordance with the provisions of this appendix in order to receive consideration.

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

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

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

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

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

5. REPRESENTATION

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

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

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

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

6. TIME LIMITS FOR PROCESSING GRIEVANCE

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

(1) Informal Procedure

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

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

(2) Formal Procedure

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

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

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

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

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

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

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

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

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

7. INFORMAL GRIEVANCE PROCEDURE

a. Presenting Grievance Under Informal Procedure. An employee desiring consideration of a grievance must first seek informal adjustment of the matter through supervisory channels. This informal procedure will not be utilized when grieving disciplinary and major adverse actions, where grievances will be initiated at the formal step of the grievance procedure (see par. 9 of this sec.). The employee's request for informal adjustment of a grievance should be made as soon as possible, but not later than 15 days after the date of the incident or action upon which the grievance is based, or the date upon which the employee became aware of, or should have become aware of, the incident or action upon which the grievance is based (see par. 6a of this sec.).

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

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

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

8. FORMAL GRIEVANCE PROCEDURE

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

b. Contents of Formal Grievance

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

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

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

(c) The corrective action desired by the employee.

(2) If the formal grievance does not contain a statement of the grievance giving essentially the information specified above, the decision official will return the grievance to the employee so that the necessary information may be furnished. If the employee fails to provide the necessary information after being provided with an opportunity to do so, the decision official should cancel the grievance following procedures contained in paragraph 10 of this section.

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

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

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

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

9. GRIEVANCES OVER DISCIPLINARY AND MAJOR ADVERSE ACTIONS

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

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

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

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

10. REJECTION, RETURN, OR CANCELLATION OF A GRIEVANCE

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

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

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

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

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

c. **Reasons for Return**

- (1) Insufficient detail was furnished to clearly identify the matter being grieved;
- (2) The personal relief sought is not specified.

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

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

- (1) At the employee's request;
- (2) Termination of the employee's employment, unless the personal relief sought by the employee involves monetary issue(s) and can be granted after termination of employment;
- (3) Death of the employee, unless the grievance involves a matter which would have entitled the employee to pay or benefits;
- (4) Failure of the employee to furnish required information after being notified in accordance with the procedures contained in paragraph 10d of this section; or
- (5) Failure of the employee to duly proceed with advancement of the grievance.

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

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

11. TECHNICAL REVIEW

a. In cases where the facts are not in dispute and the primary issue involves only the interpretation of regulation or policy, instead of appointing an examiner, the decision official may forward the grievance for technical review and recommendations through appropriate channels to the Office of Human Resources Management (051) in VA Central Office. Situations where "the facts are not in dispute" are those instances where management essentially agrees with the grievant's statement of facts in the formal grievance, and the primary issue in dispute is regulatory or policy interpretation. The grievant and the grievant's representative will be provided with a copy of the decision official's referral letter to VA Central Office. Upon receipt of the request, the grievance will be forwarded to the appropriate organizational element in VA Central Office which has technical program responsibility in the matter(s) disputed. A technical review will be conducted and the resulting recommendations transmitted by an

appropriate VA Central Office line official to the decision official, who will resolve the grievance as indicated in paragraph 13 of this section. Since the technical review is part of the grievance file, the employee is entitled to a copy, if requested.

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

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

12. REVIEW BY GRIEVANCE EXAMINER

a. Appointment of Grievance Examiner

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

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

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

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

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

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

(3) A group meeting;

(4) A hearing; or

(5) Any combination of the preceding.

c. Hearings

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

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

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

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

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

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

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

13. DECISION ON GRIEVANCE

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

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

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

- (a) The recommendation(s) are contrary to law, regulation, or published Department policy; and/or
- (b) The recommendation(s) are not supported by the preponderance of the evidence.

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

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

14. MATTERS EXCLUDED FROM COVERAGE UNDER THE GRIEVANCE PROCEDURE.

The following actions and complaints are excluded from coverage under the grievance procedure:

- a. Major adverse actions taken under section A of this appendix which involve a question of professional conduct or competence.
- b. Disputes over whether a matter or question concerns, or arises out of, professional conduct or competence.
- c. Separation during probationary period.
- d. Complaints arising from failure to receive special advancement.
- e. Complaints arising from failure to receive a promotion or reassignment.
- f. Complaints arising from dissatisfaction with grade or pay on initial appointment.
- g. Complaints arising from actions taken due to the individual's physical or mental condition.
- h. Complaints arising from dissatisfaction with proficiency rating.
- i. An action which terminates a temporary promotion within a maximum period of 2 years and returns the employee to the position from which the employee was temporarily promoted, or reassigns the employee to a different position that is not at a lower grade or pay than the position from which the employee was temporarily promoted.
- j. The content of published VA or VHA regulations and policies. An employee's allegation that locally established policy is in conflict with existing Department policy or regulation may be handled as indicated in paragraph 11a of this section.
- k. A decision which is subject to final administrative review by the Federal Labor Relations Authority (FLRA), or the Office of Workers' Compensation Programs (OWCP), under law or regulations of the FLRA or the OWCP; or any other matter for which final administrative authority lies outside VA.
- l. Allegations of discrimination on the basis of race, color, religion, sex, national origin, age (over 40) and/or disability, in connection with any decision or action. Such allegations may only be pursued as complaints of discrimination, pursuant to regulations of the Equal Employment Opportunity

Commission. Complaints of discrimination are excluded from the grievance procedure. However, other disputes related to the case are not precluded from review under the grievance procedures. Accordingly, a grievance concerning a matter or matters about which the employee has filed a complaint of discrimination must be rejected, either wholly or partially, as appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION C. APPEALS TO THE DISCIPLINARY APPEALS BOARD

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

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

2. REFERENCES

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

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

3. FILING AN APPEAL TO THE DISCIPLINARY APPEALS BOARD

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

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

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

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

4. APPOINTMENT OF DISCIPLINARY APPEALS BOARDS

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

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

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

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

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

- a. Taking proper steps to expedite the hearing of evidence, and speaking and acting for the Board;
- b. Ruling on all questions arising during the proceedings, such as admissibility of evidence offered during the hearing, calling of witnesses, order of introduction of witnesses, etc.;
- c. Obtaining further evidence concerning any issue under consideration by the Board at any stage of the proceedings;
- d. Acting as the presiding officer, directing the regular and proper conduct of the proceedings, and authenticating, by his or her signature, instructions and proceedings of the Board;
- e. Ruling on questions of disqualification of any member of the Board. In cases where the Chairman is the challenged member, the question shall be resolved in accordance with paragraph 7e of this section;
- f. Scheduling the specific hour and dates of hearings;

- g. Closing the record;
- h. Administering oaths or affirmations made by individuals giving testimony;
- i. Ruling on motions from the parties; and
- j. Calling witnesses on behalf of the Board. (Authority: 38 U.S.C. 501(a).)

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

7. PROCEDURE

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

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

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

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

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

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

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

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

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

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

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

8. FORMAL HEARINGS

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

- (1) The names of the Board members and technical advisor(s) used;
- (2) The specific hour and dates of the scheduled hearing;
- (3) The date by which submissions must be made to the chairman in connection with motions from the parties, e.g., to request rescheduling of hearing if good cause can be shown, as well as motions in other areas; and,
- (4) The date by which witness lists must be exchanged, which must include statements as to what testimony each witness is expected to provide as well as any objections either party may have to the other's witnesses. Service will be by personal delivery or certified mail - return receipt requested.

b. **Exclusion of Individuals During Proceeding.** Prior to testifying or, if subject to recall, no witness will be permitted to hear the testimony being given by another witness unless the witness is the

appellant, or is assisting in the representation of either party. In any event, the Chairman of the Board will make the final determination on exclusion of individuals during any phase of the proceeding.

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

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

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

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

g. **Record of Hearing**

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

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

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

9. DISCIPLINARY APPEALS BOARD DECISIONS

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

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

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

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

c. **Action by the Under Secretary for Health.** The Under Secretary for Health shall execute the Board's decision in a timely manner, but in no case later than 90 calendar days after the Board's decision is received by the Under Secretary for Health. Pursuant to the Board's decision, the Under Secretary for Health may order reinstatement, award back pay in accordance with the Back Pay Act, and provide such other remedies as the Board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

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

(a) Reverse the decision of the Board; or

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

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

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

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

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

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

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

SECTION D. DESIGNATION OF PANEL MEMBERS

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

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

2. REFERENCES

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

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

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

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

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

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

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

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