

**EMPLOYEE/MANAGEMENT RELATIONS**

**1. REASON FOR ISSUE:** To revise Department of Veterans Affairs (VA) delegations of authority for title 38 appeals to a Disciplinary Appeals Board (DAB).

**2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This directive contains VA policies on employee/management relations. The pages in this directive replace the corresponding page numbers in VA Directive 5021. These changes will be incorporated into the electronic version of VA Directive 5021 that is maintained on the Office of Human Resources Management website at <http://vaww.va.gov/ohrm>. Significant changes include:

a. Delegates to the Deputy Under Secretary for Health for Operations and Management authority to make the final decision regarding the timeliness of an appeal to a DAB.

b. Delegates to the Deputy Under Secretary for Health the authority to execute decisions and to reverse, vacate and remand decisions to the DAB for further consideration.

**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:** None.

**CERTIFIED BY:**

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

/s/Robert N. MacFarland  
Assistant Secretary for  
Information and Technology

/s/William H. Campbell  
Acting Assistant Secretary for Human  
Resources and Administration

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**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. [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.]



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.)

## EMPLOYEE/MANAGEMENT RELATIONS

**1. REASON FOR ISSUE:** To revise Department of Veterans Affairs (VA) delegations of authority for title 38 appeals to a Disciplinary Appeals Board (DAB).

**2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This handbook contains mandatory VA procedures on employee/management relations. The pages in this handbook replace the corresponding pages in part V, Chapter 1 of VA Handbook 5021. These changes will be incorporated into the electronic version of VA Handbook 5021 that is maintained on the Office of Human Resources Management website at <http://vaww.va.gov/ohrm>. Significant changes include:

a. Delegates to the Deputy Under Secretary for Health for Operations and Management authority to make the final decision regarding the timeliness of an appeal to a DAB.

b. Delegates to the Deputy Under Secretary for Health the authority to execute decisions and to reverse, vacate and remand decisions to the DAB for further consideration.

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

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

**5. RESCISSIONS:** None.

**CERTIFIED BY:**

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

/s/Robert N. MacFarland  
Assistant Secretary for  
Information and Technology

/s/William H. Campbell  
Acting Assistant Secretary for Human  
Resources and Administration

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

**2. REPRESENTATION.** An employee of the Department may be designated by the decision official to represent management in any case before a Disciplinary Appeals Board. The decision official should direct requests for legal representation to the General Counsel or Regional Counsel, as appropriate.

**3. FILING AN APPEAL TO THE DISCIPLINARY APPEALS BOARD**

a. **Initiating an Appeal.** An employee subjected to a major adverse action, which is based in whole or in part on a question of professional conduct or competence, may file a written notice of appeal to the Disciplinary Appeals Board under the provisions of this part. The employee may request a hearing before the Board. Any such request must be submitted in writing and accompany the employee's notice of appeal. The appeal must contain (1) the appellant's name, address, telephone number, designation of representative (if any), (2) a copy of the notice of action proposed and decision letter, (3) a statement as to whether the employee is requesting a hearing before the Board, (4) why the appellant believes the major adverse action taken was in error or should not have been taken, and (5) a statement describing the expected relief. The original appeal and the request for hearing, if any, must be submitted to the Under Secretary for Health or designee, through the Office of Human Resources Management (051), so as to be received within 30 days after the date of service of the written decision on the employee. Submission of the appeal must be by personal service, facsimile, or certified mail return receipt requested. A copy of the appeal must be served on the decision official who took the action being appealed and any management representative of record at the time of filing.

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

#### 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.

(e) Technical advisors are not members of the Board and, therefore, do not possess any voting power.

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

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

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

d. **Preparation of VA Form 10-2543.** Following deliberation and voting on the findings and any penalty, VA Form 10-2543 will be prepared by the Disciplinary Appeals Board considering the case. The Chairperson of the Board will forward the complete record, including its findings and decision, signed and dated by all members of the Board and the technical advisor, through the Office of Human Resources Management (051) to the [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, Human Resources Management Programs and Policies Service (051). Records are maintained and disposed of in accordance with the records disposition authorities found in General Records Schedule 1 and VA Records Control Schedule 10-1, except where otherwise required to be retained for a longer period of time.

(3) One copy of notice of decision will be provided to the employee, the employee's representative, and the official who decided the adverse action. Any SF-50B, Notification of Personnel Action, will be filed in the employee's personnel folder.

**10. REVIEW OF RECORDS**

a. The Board Chairperson, upon request of an appellant (or the appellant's designated representative), may, in connection with the considerations of the Board, review confidential records or information covered by 38 U.S.C. 5701 and 7332 in accordance with 38 U.S.C. 7464(c)(1).

(1) The Board Chairperson may authorize the disclosure of such records or information to that employee (or representative) to the extent the Board considers appropriate for purposes of the proceedings of the Board.

(2) Decisions on requests to disclose records or information will be in writing.

b. In any such case, the Chairperson may direct that measures be taken to protect the personal privacy of individuals whose records are involved. Any person who uses or discloses a record or information under the provision of 38 U.S.C. 7464(c) for any purpose other than in connection with the proceedings of the Board is subject to a fine of not more than \$5,000 in the case of a first offense and not more than \$20,000 in the case of a subsequent offense.

## 11. TRAVEL

a. **Costs.** Funds to cover the travel and per diem costs of all Board members will be allotted from VA Central Office directly to the official facility of the individual Board member and VA employees who are required to assist the Board as directed by the Under Secretary for Health, or designee.

b. **Responsibilities for Expenses.** Travel expenses and subsistence expenses, or per diem allowance in lieu of subsistence expenses, for the purpose of attending the hearing will be borne by VA in accordance with Government Travel Regulations for the members of the Board and VA employees who are identified to assist the Board or to provide testimony. VA will not bear any expenses for the appellant or appellant's representative.