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CHAPTER 8. DISCIPLINARY AND GRIEVANCE PROCEDURES

SECTION 1. DISCIPLINARY AND MAJOR ADVERSE ACTIONS

8.1 SCOPE

a. This section governs disciplinary and major adverse actions based on conduct or performance in the Department of Veterans Affairs (VA).

(1) The provisions of this section apply to VA employees holding a full-time, permanent appointment under 38 United States Code (U.S.C.) 7401(l) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included are:

- (a) Physicians,
- (b) Dentists,
- (c) Podiatrists,
- (d) Optometrists,
- (e) Nurses,
- (f) Nurse anesthetists,
- (g) Physician assistants, and
- (h) Expanded-function dental auxiliaries.

(2) Henceforth, "employee(s)" will be the term used to refer to the covered occupations in this section, unless otherwise specified.

(3) This section should be used in conjunction with MP-5, Part II, Chapter 8, Section A, "Disciplinary and Major Adverse Actions."

b. Excluded from the provisions of this section are interns and residents appointed pursuant to 38 U.S.C. 7406. Probationers and 7405 appointees are also excluded.

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

8.02 AUTHORITY

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

b. Title 38, U.S.C. Chapter 74.

c. VA Standards of Conduct.

d. Standards of Ethical Conduct for Employees -of the Executive Branch, 5 Code of Federal Regulations (CFR) 2635.

8.03 POLICY

a. Employees are expected to maintain the highest standards of honesty, integrity, impartiality, conduct, and effectiveness. Whenever an employee's performance of duty or professional competence is determined to be unsatisfactory; or when an employee's professional or personal conduct is not satisfactory, prompt and appropriate, disciplinary or major adverse action, or other corrective action will be taken. The policy of VA is to maintain standards of conduct and efficiency which will promote the best interests of VA.

b. Disciplinary or major adverse actions will be taken when it is evident that other supervisory techniques have failed to correct a given problem, or would be inappropriate. Actions taken should be consistent with the precept of like penalties for like offenses, with due consideration of any extenuating circumstances.

c. Employees are entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case. Employees must identify their chosen representative in writing. A representative who is employed by VA may be disallowed by the facility Director because of:

(1) Conflict of position, or

(2) Conflict of interest.

d. Actions covered under this supplement are subject to:

(1) The prohibited personnel practices listed in 5 U.S.C. 2302;

(2) Prohibitions against discrimination because of race, color, religion, sex, national origin, age, or handicapping condition;

(3) Marital status or partisan political reasons; or

(4) Reprisal for the proper exercise of an employee's legal or administrative appeal rights.

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

8.04 DEFINITIONS

Unless otherwise noted, the following definitions apply to the basic chapter and this supplement 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 Official Personnel Folder (OPF) for 2 years.

c. **Reprimand.** An official letter of censure to an employee for an act of misconduct or deficiency in competence. A reprimand is a more severe disciplinary action than an admonishment. This letter normally remains in the employee's OPF for 3 years.

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

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

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

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

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

i. **Reduction in Basic Pay.** The involuntary reduction, based on conduct or performance, of the annual rate of basic pay to which an employee is entitled under 38 U.S.C. 7404, including above minimum entrance rates and special entrance rates authorized under 38 U.S.C. 7455. This does not apply to other reductions in pay, such as the loss of:

- (1) Physician or dentist special pay or head nurse differential,
- (2) Other differentials,
- (3) Allowances, or

(4) Premium pay such as:

(a) Standby,

(b) On-call,

(c) Shift,

(d) Overtime,

(e) Sunday,

(f) Holiday,

(g) Night work,

(h) Hazardous duty, and

(i) Interim geographic adjustment.

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

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

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

m. **Mixed Case.** This is a case that includes both:

(1) A major adverse action arising out of, or including, a question of professional conduct or competence, and

(2) A major adverse action which does not arise out of a question of professional conduct or competence, or a disciplinary action.

n. **Grade.** The established grades for the positions covered by this chapter will be as defined by 38 U.S.C. 7404, and the qualification standards issued pursuant to 38 U.S.C. 7402 (see MP-5, Pt. II, Ch. 2, and its supplement).

o. **Official Time.** Time granted to an employee and/or representative to review the material relied upon to support a proposed action, to prepare a reply, and to secure affidavits, if the employee is otherwise in a duty status.

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

8.05 RESPONSIBILITIES

a. The Under Secretary for Health, Deputy Under Secretary for Health, Chief Network Officer, other officials in the Office of the Under Secretary (38 U.S.C. 7306(a), VISN Directors, other key Veterans Health Administration (VHA) officials and field facility Directors are responsible for:

(1) Administering policy concerning disciplinary and major adverse actions in conformance with requirements of statute and this section, and reviewing existing policies and recommending appropriate changes.

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

(3) Ensuring that supervisors properly exercise their disciplinary and major adverse action authorities.

(4) Ensuring that appropriate mechanisms are in place to inform employees of VA policy governing disciplinary and major adverse actions, and that this policy and related materials are available for review in the Office of Human Resources Management.

(5) Ensuring that appropriate mechanisms are in place to inform employees of VA standards of ethical conduct and related responsibilities as well as other laws, rules and regulations governing VA expectations of acceptable conduct.

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

(1) Developing Department policy on disciplinary and major adverse actions.

(2) Providing technical advice and guidance to management officials and field facility Human Resources Management officials.

(3) Ensuring that all necessary and required training is accomplished.

c. Supervisors are responsible for:

(1) Informing all employees of the requirements for acceptable conduct (e.g., standards of ethical conduct).

(2) Gathering, analyzing, and developing the facts concerning each situation where a disciplinary or major adverse action may be appropriate.

(3) Initiating appropriate and timely actions.

d. Human Resources Managers are responsible for:

(1) Ensuring that all employees are made aware of VA policy concerning disciplinary and major adverse actions, and that this policy and related materials are available for review in Human Resources Management Service.

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

(3) Assisting supervisors and management officials at all levels with:

(a) Disciplinary and major adverse action matters;

(b) Applying and providing guidance on interpretations of regulations and statutes;

(c) Recommending sound Human Resources Management practices;

(d) Reviewing existing policies and procedures, and recommending appropriate changes

(4) Reviewing disciplinary and major adverse actions prior to issuance to ensure compliance with VA policy and advising the decision official as necessary.

(5) Assisting management in informing employees of the rules for acceptable conduct and for clarifying such rules.

(6) Advising employees and answering their questions regarding their rights in disciplinary and major adverse action matters.

(7) Providing guidance on interpretations of disciplinary and major adverse action procedures, policies, regulations, and statutes.

e. Employees are responsible for:

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

(2) Obtaining advice from authoritative VA officials (supervisors, Human Resources Management officials, Regional Counsels, ethics counselors, etc.) on any unclear or questionable rules of conduct prior to engaging in the conduct.

(3) Maintaining an acceptable level of professional competence.

(4) Providing full and truthful answers during any inquiry or investigation.

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

8.06 DETERMINING THE FACTS

a. Inquiry and Investigation

(1) When an incident occurs which may result in a potential disciplinary or major adverse action, inquiry will be made into the incident or situation as soon as possible to obtain the facts and determine what action, if any, is warranted.

(a) Ordinarily, a preliminary inquiry will be made by the appropriate line supervisor. As appropriate, it may be necessary for other management officials to make the preliminary inquiry.

(b) A further investigation may be warranted depending on the nature and seriousness of the incident, (e.g., administrative investigation). Investigating officials will seek information concerning the matter from the employee(s) who is alleged to have committed the offense and from any other persons who may have pertinent information about the incident(s).

(c) The resulting information will be documented. Signed statements, preferably under oath, are the best form of documentation, and should be obtained, whenever possible, from employees interviewed. (The authority to take sworn statements must be exercised in accordance with 38 U.S.C. 5711 and its implementing regulations.) Failure to obtain a signed statement from the employee involved will not, in and of itself, serve to preclude taking the action, particularly where sufficient information is otherwise obtained from the employee, or the nature of the situation makes it impractical or unnecessary to obtain a written statement.

(d) Evidence will be developed impartially and an effort will be made to resolve any conflicting statements by developing additional evidence. Material which cannot be disclosed to the employee or to the employee's representative may not be used to support a disciplinary or major adverse action (see par. 8.06a(3)(c)).

(2) All employees are required to provide full and truthful answers during any inquiry or investigation. Failure to do so may be grounds for disciplinary or adverse action. The only time

employees are entitled to remain silent, without threat of disciplinary or adverse action, is if they may potentially incriminate themselves in a criminal offense. Employees claiming such a right must state this as their reason in order for the right to apply. The assistance of the Regional Counsel or General Counsel, as appropriate, will be obtained in determining whether immunity from prosecution may be granted (also see par. 8.06a(3)).

(3) Official Investigation Reports or Official Inquiries

(a) It is not necessary for a supervisor to inquire into an incident in accordance with the instructions identified in paragraph 8.06a(1) where sufficient information is available from other official sources.

1. These sources include, but are not limited to reports of:

- a. A VA Central Office or Office of Inspector General investigation,
- b. A field examination conducted by a representative of the Office of Regional Counsel, or
- c. Other official investigations conducted under the authority of MP-1, Part 1, Chapter 2.

2. Where the information appears to be inadequate, the Human Resources Manager should be consulted concerning the necessity for the development of additional information.

(b) The same principle applies to official investigations of other government agencies, whether Federal, State, or local, if the agency which conducted the investigation allows the use of the investigatory material, or part of it:

1. In cases involving criminal matters, it is the policy of VA to cooperate with appropriate law enforcement agencies.

2. In obtaining evidence and/or coordinating such matters, the assistance of the Regional Counsel or General Counsel, and Office of Inspector General, as appropriate, should be obtained.

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

(d) Confidentiality for certain quality assurance records and documents is provided for in 38 CFR Part 17.

1. Certain restrictions may apply regarding the use of these records and documents as evidence to support taking a disciplinary or major adverse action.

2. It may be necessary to initiate an independent investigation to develop evidence which can be used in a disciplinary or major adverse action.

3. The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained. when questions arise concerning confidentiality and coverage by the provisions of 38 CFR Part 17.

b. Status of Employee Pending Inquiry or Investigation

(1) **Continue in Current Duty Status.** Ordinarily, the employee will be retained in a pay and active duty status in the employee's current position, grade, and salary level during any inquiry or investigation.

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

(a) Detailing the employee to other duties to eliminate any threat to safety, to VA's mission, or to Government property (MP-5, Pt. II, Ch. 11);

(b) Granting the employee leave (annual, sick, or leave without pay). In certain circumstances when the employee has failed to request leave or report for duty, or it is determined that granting the requested leave is inappropriate, a charge of absence without leave may be used (MP-5, Pt. II, Ch. 7);

(c) As a last resort, placing the employee in a paid non-duty status pending completion of the inquiry or investigation, preparation of the charges, and/or during the notice period of a discharge or a proposed indefinite suspension (par. 8.06b(3)), may be appropriate. Care should be taken to ensure that this is for the shortest practicable period. This is an option in those unusual instances where management determines that a detail or granting leave may not be possible or is impractical.

(3) Indefinite Suspension

(a) In cases where management foresees a need for considerable time to complete its inquiry or investigation, and subsequently make a determination in a case; and when the potential of a threatening situation exists, consideration may be given to imposing an indefinite suspension.

1. The primary benefits of the indefinite suspension are the expeditious removal of the employee from the premises with the retained option of either reinstating or discharging the employee upon completion of the judicial proceedings or further investigation.

2. Action should be taken to propose the employee's discharge as soon as sufficient information is available to support charges against the employee concerning the act(s) of misconduct regardless of any subsequent judicial proceedings.

3. The Office of Inspector General, Regional Counsel, or Office of General Counsel should be consulted to ensure that there is appropriate coordination with the prosecuting office.

(b) Any indefinite suspension must be based on the need to have the employee away from the worksite pending inquiry, investigation, or the medical examination process. During the advance notice period of a proposed indefinite suspension, the employee may be placed in a non-duty paid status, if necessary. Further, in cases involving the commission of a crime, the "crime provision" procedure may be appropriate (see par. 8.09e).

(c) An indefinite suspension must specify the condition(s) or event(s) that will end the suspension (e.g., completion of the investigation of probable criminal conduct and the taking of any administrative action that may be warranted).

1. The employee may not be suspended without such a completion point set out in the proposal, and the suspension cannot continue once the conditions for completion have been met.

2. At the completion of the suspension, management must either return the employee to the employee's position, detail, or reassign the employee to another position, discharge the employee or take other appropriate administrative action.

c. Evidence File

(1) If a proposed disciplinary or major adverse action is contemplated, the evidence file must be assembled before the proposed notice is issued to the employee. The file must contain the evidence upon which the notice of proposed action is based, and which supports the charges in that notice (including notices of past disciplinary and/or major adverse action, if such action forms part of the basis for the penalty proposed).

(2) Additional evidence acquired after the issuance of a notice of proposed action may be added without necessitating reissuance of the notice except when the additional evidence forms the basis for initiating new reasons for proposing the action, or it is determined that a different action should be proposed. If an employee requests and is provided with a copy of the evidence file, copies of any material added to the evidence file must also be provided. Any use or disclosure of a record or information must comply with legal requirements for disclosure.

d. **VA Beneficiary Records.** The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained where questions arise concerning the use of VA beneficiary records in taking an action covered under this section. Specifically, the use of VA beneficiary records must be in accordance with the requirements of confidentiality provided in 38 U.S.C. 5701, 5705, and 7332; and the Privacy Act at 5 U.S.C. 552a.

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

8.07 DETERMINING APPROPRIATE ACTION

a. General. After determining the facts in a case, the responsible official authorized to initiate action should consider the Table of Penalties contained in Appendix 8A. Any extenuating or mitigating circumstances or the contributing factors which may have some bearing on the situation, including past record, should be considered in determining the action to be taken. The initiating official will consult with the Human Resources Management Service regarding the propriety of the disciplinary or major adverse action being considered.

b. Progressive Discipline

(1) The level or type of discipline which, in the supervisor's judgment, is commensurate with the employee's misconduct and will most likely correct the misconduct, is a commonly applied principle.

(a) It is most applicable in repeated infractions of a minor nature (e.g., brief tardiness). It does not prohibit issuance of a more severe penalty (e.g., suspension or discharge) prior to issuance of each and every lesser penalty.

(b) For example, it is not always appropriate to issue an admonishment and/or a reprimand prior to issuance of a suspension or discharge.

(c) Sound supervisory discretion and judgment must be applied in all cases when fully considering the nature of the offense and any aggravating and/or mitigating circumstances.

(d) The concept of progressive discipline and the recommended guidance provided by the Table of Penalties (see App. 8A) are not intended to preclude the exercise of discretion in determining appropriate action, but rather to serve as aids to maintaining consistency.

(2) Examples of reasons that may warrant considering a more severe disciplinary action (e.g., suspension without prior reprimand) are:

- (a) The facts of the case,
- (b) Degree of willfulness of the employee's violation of VA conduct rules,
- (c) The seriousness of the misconduct or deficiency in competence, and
- (d) The resultant impact on VA operations.

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

8.08 DISCIPLINARY ACTIONS

a. **Types of Disciplinary Actions.** This paragraph applies to admonishments and reprimands, based on conduct or performance (refer to par. 8.04 for definitions).

b. Notice of Proposed Action

(1) Before being released to the employee, a notice of proposed action will be reviewed by Human Resources Management Service for compliance with statutes, regulations, VA policies and other applicable requirements. Human Resources Management officials will review the evidence and, as appropriate, provide guidance concerning the propriety of the action.

(2) The advance notice of proposed action must contain the following information:

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

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

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

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

(e) A statement of the amount of time the employee has to submit the reply or replies (time limits may vary according to the circumstances, but in no event should be less than 5 calendar days);

(f) A statement that the material relied upon to support the reasons for the proposed action will be made available to the employee and the employee's representative upon request;

(g) A statement advising the employee of the official who will receive any oral and/or written replies;

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

(i) A statement that the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case (see par. 8.03c). The employee's designation of a representative must be made in writing.

c. Employee's Oral Reply

(1) If the employee requests an opportunity to reply orally, the decision official, or designee, will receive the employee's reply.

(a) Any official designated to receive the reply must have the authority to recommend what final decision should be made.

(b) The right to reply orally includes the right to be given a reasonable opportunity to make any plea which the employee believes might influence the final decision in the employee's case.

(c) The employee must be permitted to plead extenuating circumstances or make any other argument the employee deems proper.

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

d. Arriving at a Final Decision

(1) The decision official will give full and impartial consideration to:

(a) The employee's written reply, if any;

(b) The recommendation of the designee to hear an oral reply, if any oral reply was made; and

(c) All evidence of record.

(2) If the decision official finds one or more of the charges in the advance notice sustained, the decision official will determine an appropriate action.

NOTE: *The Table of Penalties for examples of offenses and penalties (see App. 8A) will be considered in determining an appropriate penalty.*

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

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

(5) An employee's failure to reply may be considered, but by itself may not be considered an admission of the charges. The burden of proof rests with management to support its reasons for the action.

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

(a) The new notice will include a new advance notice period and another opportunity to reply orally and/or in writing.

(b) A procedural defect is detrimental to the employee's substantive rights when it is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

(7) If it is determined that the appropriate penalty is a major adverse action, the procedures outlined in paragraph 8.09 .will apply.

e. Decision

(1) Before the decision is released to the employee, it will be reviewed by Human Resources Management Service for compliance with the statutes, regulations, VA policies, and other applicable requirements. Any comments the Human Resources Management Service may have concerning technical aspects of the case will be presented to the decision official.

(2) The decision letter will be dated and signed by the appropriate decision official.

(3) The decision letter will be in writing and contain the following information:

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

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

1. A written reply made by a representative on behalf of the employee is considered to be an employee's reply.

2. If the employee replies both orally and in writing, both replies must be mentioned.

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

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

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

(f) A statement informing the employee of the length of time the action will be retained in the employee's OPF.

(g) A statement advising the employee that a further explanation of the employee's appeal rights may be obtained by consulting Human Resources Management Service.

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 MP-5, Part II, Chapter 8, Section B, and Chapter 8, Section II, of this supplement.

(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 the basic chapter. 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 the basic chapter, but not both.

(a) The employee shall elect which grievance procedure will be used.

(b) The timely filing of a grievance under either procedure shall constitute an irrevocable election. Grievances filed under the negotiated grievance procedure must be filed in accordance with the provisions of the applicable negotiated grievance procedure.

(c) Reference should be made to the negotiated agreement for the appropriate steps and time limits.

g. Withdrawal of Action

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

(3) Upon expiration of the specified time frame or receipt of a valid request for early withdrawal (i.e., after 6 months for an admonishment) of a disciplinary action, Human Resources Management Service will return the action to the supervisor for destruction. If the request for early withdrawal is initiated by a supervisor below the level of the official who issued the action, it must be approved at or above the level of the initial decision official.

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

(5) Once an admonishment or reprimand is withdrawn, it may not be used as a past disciplinary record in connection with any future proposed disciplinary or major adverse action. This should be considered in determining whether a disciplinary action should be withdrawn early, particularly with respect to actions which were based on patient abuse.

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

(7) Since the admonishment or reprimand may be appealed under the grievance procedure initially and, except in patient abuse cases, will automatically be removed from the OPF 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.

8.09 MAJOR ADVERSE ACTIONS

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

b. Burden of Proof and Appropriateness of Penalty

(1) Prior to initiating a major adverse action, officials involved in the decision making process must consider the burden of proof which must be met in order to sustain the action on appeal. When taking a major adverse action against an employee, the Department bears the burden of proving by a preponderance of evidence the charges that form the basis for the action.

(2) The Department must establish that the penalty chosen is within the tolerable limits of reasonableness.

c. Notice of Proposed Action

(1) Prior to taking a major adverse action, the employee must be given 30 calendar days advance written notice of the action proposed.

(2) Before being released to the employee, a notice of proposed action will be reviewed by Human Resources Management Service for compliance with statutes, regulations, VA policies and other applicable requirements. Human Resources Management officials will review the evidence and, as appropriate, provide guidance concerning the propriety of the action.

(3) The advance notice of proposed action must contain the following information:

(a) The nature of the action proposed.

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

(c) Any specific law, regulation, policy, procedure, practice, or other specific instruction (national, local or otherwise) that has been violated as it pertains to each charge.

(d) The right to reply orally or in writing, or both orally and in writing to the deciding official, or designee, and to submit affidavits and other documentary evidence in support of the reply by a specified date. Time limits may vary according to the particular circumstances in each case. The employee must be allowed a minimum of 7 days from date of receipt of the notice of proposed action, but no more than 30 days from date of the written notice of charges. The proposing or deciding official may grant extensions beyond 30 days only when good cause is shown.

(e) A statement of the employee's past disciplinary record when such record is to be relied upon as evidence or considered as part of the basis for the proposed action.

1. Specific previous infractions and penalties will be cited and identified and the employee will be advised that the employee may reply orally or in writing, or both orally and in writing, with respect to those previous infractions.

2. The statement will advise the employee that the employee may submit supporting evidence, including affidavits, and may make a statement concerning the use to be made of the past record in determining proper action (see par. 8.09d).

(f) A statement that the employee has the right to representation by an attorney or other representative of the employee's choice at all stages of the case, and that the designation of a representative must be in writing. The representative may be disallowed if the individual's activities as a representative would cause a conflict of position or conflict of interest.

(g) A statement that if the employee has any questions about the reasons for the proposed action, the employee may contact the official who signed the advance notice or Human Resources Management Service for further explanation.

(h) Identification of the decision official.

(i) A statement that any written reply must be submitted through supervisory channels to the decision official and that the decision official, or designee, will receive the employee's oral reply.

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

(k) A statement that the employee will be given a written decision within 21 days of receipt of the employee's reply, if any, or of the expiration of the reply period if no reply is made.

(l) A statement advising the employee of the duty and pay status in which the employee will be carried during the notice period.

(m) A statement that if it is decided to take the proposed action, such action will be effective not less than 30 days from the day following the date the employee receives the notice, except when invoking the crime provision (see par. 8.09e).

(n) A statement informing the employee where the material relied upon to support the reason(s) for the proposed action will be available for review by the employee and or the employee's designated representative. Generally, the evidence file should be maintained in Human Resources Management Service.

(o) A statement that informs the employee that:

1. The employee will be allowed a specific number of hours of official duty time (if otherwise in an active duty status) for:

- a. Reviewing the notice;
- b. Preparing a written and/or oral reply; and
- c. Securing affidavits.

2. Identifies the person with whom the employee should make arrangements for the use of official time.

(4) Policies relating to notice requirements regarding reductions and revocations of privileges, reporting to the State Licensing Boards and National Practitioners Data Bank (NPDB), should be reviewed to determine their applicability to specific cases. Statements regarding such should be included, as appropriate.

d. Past Discipline. Management should consider the recency of any past disciplinary actions that form part of the basis for the proposed action. Consideration should be given to the use of any actions which are more than 3 years old, even if they have remained in the OPF. They should be examined closely to ensure their relevance to the proposed action before they are used to support such action:

(1) If cited, the previous disciplinary record will not be set forth as a current charge(s), but will be stated in a paragraph separate from the current charge(s).

(2) Counselings and charges of Absence Without Leave (AWOL) without concurrent disciplinary action are not disciplinary actions and may not be included in the past record paragraph.

(a) Counselings may be cited in a separate paragraph and may be considered in determining appropriate action against an employee. If such counselings are cited, the counseling must have been in writing and must be included in the evidence file used to support the proposed action.

(b) Any reference to letters or memoranda of counseling in the proposal letter must be sufficiently clear so as to enable the employee to comment on the consideration that should be given to the counseling in determining the final action.

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

(1) Normally, this provision would be used in conjunction with a proposal to remove or suspend indefinitely while awaiting a final disposition of a case. In those situations in which the retention of the employee in an active duty status would be inappropriate, but where management wishes to defer final judgment until completion of judicial proceedings, or where usable evidence to substantiate a discharge is not yet available, an indefinite suspension should be proposed (see par. 8.06b(3)).

(2) To invoke the crime provision and process a discharge or indefinite suspension with a curtailed notice period, the following actions should be taken:

(a) If not otherwise in a previously approved leave status, notify the employee in writing that the employee is being put immediately in a non-duty status with pay.

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

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

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

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

f. Status of Employee During Advance Notice Period

(1) Ordinarily, the employee will be retained in a pay and active duty status in the employee's current position, grade, and salary level, during the period pending a decision on a proposed action.

(2) During the advance notice period of a proposed action, it may be necessary to remove the employee from the worksite. In those instances where it is determined that the employee's continued presence at work during the advance notice period might pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the following alternatives can be considered:

(a) Detailing the employee to other duties to eliminate any threat to safety, to VA's mission, or to Government property;

(b) Granting the employee leave (annual, sick, leave without pay). In certain circumstances, when the employee has failed to request leave, failed to report for duty, or it is determined that granting the requested leave is inappropriate, a charge of AWOL may be used;

(c) Curtailing the notice period when the Department can invoke the "crime provision"; or

(d) Placing the employee in a paid non-duty status (i.e., authorized absence for timekeeping purposes) during all or part of the advance notice period, if none of these other alternatives are available.

g . Employee's Reply and Official Time

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

(a) The right to reply orally includes the right to a reasonable opportunity to make any plea which the employee believes might influence the final decision in the employee's case.

(b) The employee must be permitted to plead extenuating circumstances or make any other arguments the employee deems proper.

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

(3) The official time allowed for the employee to reply will depend on the facts and circumstances of each individual case.

(a) In most cases, up to 8 official duty hours may be deemed sufficient.

(b) For more complex cases, more than 8 hours may be allowed.

(c) Since the time spent by the employee in reviewing the evidence and preparing the reply may be spread over several days (i.e., 7-day reply period), documentation should be kept as to how much official duty time is used each day.

(d) If the employee requests additional official time beyond what was originally approved, the request may be honored if it is reasonable.

h. Arriving at Final Decision on the Proposed Action

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

(2) The decision official will give full and impartial consideration to the employee's reply, if any, and all evidence of record. If the decision official finds that one or more of the charges in the advance notice are sustained, the decision official will determine the appropriate action. The Table of Penalties for examples of offenses and penalties in Appendix 8A, will be considered in determining the appropriate penalty.

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

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

(5) An employee's failure to reply may be considered, but by itself may not be considered an admission of the charges. The burden of proof rests with management to support the charges upon which the action is based.

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

(a) The reissued notice will provide a new advance notice period and another opportunity to reply both orally and/or in writing.

(b) A procedural defect is detrimental to the employee's substantive rights when it is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

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

(8) Officials involved in taking a major adverse action against an employee must observe the prohibitions against improper "ex parte" communications. Department officials may communicate with each other during the decision-making process; however, it is improper for an interested party (e.g., supervisor, proposing official), to pressure the decision official into making a particular decision. Such communications may support reversal of the action upon appeal.

i. **Decision.** The deciding official shall render a decision in writing within 21 days of the deciding official's receipt of the employee's reply(ies) or close of business following the date identified to reply if the employee does not reply. The decision will be delivered to the employee at least 5 days prior to the effective date of the action, whenever possible. The 5 day period does not apply in cases where there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed (see par. 8.09e).

(1) Before the decision is released to the employee, it will be reviewed by Human Resources Management Service for compliance with statutes, regulations, VA policies, and other applicable requirements. Any comments Human Resources Management Service may have concerning technical aspects of the case will be presented to the deciding official.

(2) A decision on a proposed major adverse action may be held in abeyance at the request of the employee and agreement by the deciding official, in order for the employee to seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973 (see 29 U.S.C. Section 701, et seq.).

(a) The employee must provide acceptable documentation for this request which, at a minimum, establishes both a qualifying handicapping condition and a causal connection between the handicapping condition and the cited misconduct and/or deficiency in performance.

(b) An abeyance of this nature may not exceed 1 year.

(3) The decision letter must contain the following:

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

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

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

1. If the employee replies both orally and in writing, both must be mentioned.

2. A written reply made by an authorized representative on behalf of the employee is considered to be an employee's reply.

3. It is good practice for a statement to be made regarding consideration that was given to any aggravating or mitigating factors.

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

(e) A statement of the effective date (not less than 30 days from receipt of notice of proposed action), if the action imposed is a major adverse action. In the case of a suspension, the inclusive dates of the suspension will be stated. In the case of an indefinite suspension, the ending date is determined by the completion of specified conditions and/or events.

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

(g) A statement advising the employee that a further explanation of the employee's appeal rights may be obtained by consulting Human Resources Management Service.

j. Appeals of Major Adverse Actions

(1) The filing of an appeal under a grievance procedure or to the Disciplinary Appeals Board will not affect the implementation of the major adverse action. The action should be effected on the date specified in the decision letter regardless of whether an appeal is filed.

(2) If the major adverse action does not involve or include a question of professional conduct or competence, an employee may elect to seek review of the decision under the grievance procedure described in section B of the basic chapter (MP-5, Pt. II, Ch. 8). 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 the basic chapter, but not both.

(a) The employee shall elect which grievance procedure will be used.

(b) The timely filing of a grievance under either procedure shall constitute an irrevocable election. Time limits for filing a grievance under the VA procedure are governed by the provisions of Section B of the basic chapter. Grievances filed under the negotiated grievance procedure must be filed in accordance with the provisions of the applicable negotiated agreement.

(c) The employee must be advised of the right to request a hearing in connection with a grievance, and, advised that the request for a hearing must be submitted with the grievance.

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

(a) An employee must be advised of the right to request a hearing before the Board, and advised that the request for a hearing must be submitted with the notice of appeal. If the employee does not request a hearing in the request for an appeal, the Board may elect to conduct a hearing or make a decision based on a review of the record.

(b) The employee must be provided with a copy of Section C of the basic chapter which specifies the content requirements of an appeal.

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

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

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

8.10 SERVICE OF DOCUMENTS

It is best for a supervisor to deliver a notice to the employee personally and to obtain the employee's dated, written acknowledgment of receipt so as to show the date and fact of receipt. Supervisors may wish to have a witness present in order to corroborate delivery of the notice.

a. If the employee refuses to sign, the supervisor should so note this on the acknowledgment copy.

b. In those instances where the letter cannot be personally delivered to the employee, it should be sent by certified mail-return receipt requested, in order to establish that the letter was received. A copy should also be sent by regular mail in the event the certified mail is not delivered and/or the employee fails to obtain it from the Postal Service after being notified to do so. In these instances, date of service will be presumed to be 5 days after posting the letter.

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

SECTION II. GRIEVANCES

8.11 POLICY

a. General

(1) It is the policy of VA to identify, prevent, and make reasonable efforts to resolve employee dissatisfactions. Efforts will be made to resolve grievances informally. The filing of formal grievances is not to be discouraged or prevented.

(a) 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.

(b) Objective consideration of complaints or criticism affords a means of focusing attention on conditions which may require corrective action. It also provides a means within the organization of initiating and effecting desirable changes, as well as taking preventive action.

(c) Fairness and promptness in handling grievances help to create a healthy climate for management-employee relationships and to provide effective services to veterans and beneficiaries.

(2) This section supplements MP-5, Part II, Chapter 8, Section B, which contains basic procedures for handling grievances. This supplement is to be used with the basic chapter, and contains delegations of authority for processing grievances.

b. **Freedom from Reprisal.** No employee will take or threaten to take any act of reprisal against another employee because the employee has exercised or expressed an intention to exercise rights provided by this section. Furthermore, no employee or employee representative will at any time be restrained, coerced, interfered with, discriminated against, or in any way treated prejudicially in connection with the exercising of rights under this grievance procedure.

c. **Consultation in Presenting Grievances.** An employee, in presenting a grievance, is entitled to communicate with and seek technical or procedural advice from any appropriate official including, but not limited to Human Resources Management Service, immediate and higher level supervisors, and Equal Employment Opportunity (EEO) Counselors.

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

e. **Informal Resolutions.** Nothing in these procedures shall prohibit reasonable attempts to resolve, at any time, a grievance that is being processed. Informal resolutions are encouraged at any stage of the grievance process. Management should explore alternative solutions to resolve employee grievances at the earliest stage possible, since informal resolutions often avoid unnecessary costs related to lost productivity, poor morale, and diminished services.

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

f. **Nonconformity with Procedure.** Every effort will be made by both management and employees to conform to the prescribed grievance policy and procedure. However, minor technical violations, whether made by management or the employee, which do not affect the general equity with which a case is presented or handled, will not preclude proceeding with a grievance, nor invalidate any action or decision taken in connection with the grievance.

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

8.12 RESPONSIBILITIES

a. **Management Officials.** Management officials will be responsible for administering the VA grievance procedure and for bringing it to the attention of employees.

b. **Supervisors.** Supervisors are responsible for listening to employee complaints and attempting to clarify and make reasonable adjustments to address problems that arise in daily relationships with employees.

c. **Human Resources Management Officers.** The Human Resources Management Officers and their staff will provide guidance and technical advice to management officials, supervisors, and employees regarding the administration of the grievance procedure.

d. **Grievance Examiner.** Grievance Examiners are responsible for making an impartial and objective inquiry regarding the merits of a grievance and for providing a report of findings and recommendations to the decision official as well as the parties involved.

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

8.13 OFFICIALS AUTHORIZED TO SETTLE GRIEVANCES

a. **Informal Grievance Procedure.** The official who will make a decision on grievances filed at the informal stage will be the immediate supervisor, or lowest level official with authority to settle the issue.

b. **Formal Grievance Procedure.** Authority to make a decision when the formal stage of the grievance procedure is reached will be exercised as follows:

(1) **Grievances of Facility Employees.** The facility Director will be the decision official on a grievance from an employee under the facility Director's jurisdiction provided the matter to be resolved is one which is under the Director's authority. In grievances where one of the exceptions identified in subparagraph (3) of this paragraph exist, the grievance will be decided by the next higher level official with the authority to resolve the issue.

(2) **Grievances of VA Central Office Employees.** The Under Secretary for Health, or designee, will decide the formal grievance of VA Central Office employees unless one of the exceptions in subparagraph (3) of this paragraph applies. (VA Central Office employees include those individuals whose names appear on VA Central Office employment listings, but may be physically located in a different geographic location.) In those cases, where exceptions exist, the Secretary is responsible for designating an appropriate official who may decide the formal grievance.

(3) **Exceptions.** The normal decision official, as designated in subparagraph 8.13b, will not decide the grievance when that official:

- (a) Is the official with whom the employee would take up the initial grievance at the informal stage;
- (b) Does not have the authority to make a determination on the grievance issues; or
- (c) Made the decision or took the action on which the employee's grievance is based.

Authority: 38 U.S.Ch 8 501(a), 512(a), 7421, 38 U.S.C. 7461-7464.

8.14 DISALLOWANCE OF DESIGNATED REPRESENTATIVE

a. The disallowance of a representative will be in writing, and will be issued within 5 days of receipt of the employee's written designation of representative. The notice of disallowance will inform the employee of the basis on which the determination to disallow is made, and the right of the employee to challenge the reason(s) given for disallowance (see MP-5, Pt. II, Ch. 8, Sec. B., par. 5).

b. **Challenge of Disallowance of Designated Representative.** If informed that a designated representative has been disallowed, an employee may, within 5 days, challenge the disallowance in writing to the decision official. A challenge should state the reason for disagreeing with the disallowance, and whether the employee wishes to proceed with the grievance or wait for a decision on the challenge. The grievance decision official will make a final decision on a challenge of disallowance of a representative no later than 10 days after receipt of the challenge.

c. **Change of Designated Representative.** In the event that an employee changes representatives during the proceeding, any disallowance of representative or challenge regarding a disallowance will be resolved in the manner identified in subparagraphs 8.14a, and b.

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

8.15 INFORMAL GRIEVANCE PROCEDURE

a. The informal procedure will not be used for grievances involving disciplinary and major adverse actions. In those instances, grievances must be initiated at the formal stage of the grievance process (see MP-5, Pt. II, Ch. 8, Sec. B).

b. The initial presentation at the informal level may be oral or written and is normally made to the immediate supervisor. If the grievance is presented orally, the employee must make clear that a grievance is being presented, in order to distinguish grievances from mere inquiries. Supervisors who receive oral grievances will prepare a written summary of the oral presentation.

c. A grievance may not be rejected in the informal stage for any reason. If the grievance is not timely or does not meet criteria for processing under the grievance procedure, the employee should be so advised. However, the employee will still be permitted to submit the grievance under the formal procedure. Reasons for rejection of a grievance during the formal procedure are discussed in MP-5, Part II, Chapter 8, Section B, paragraph 10.

8.16 GRIEVANCE FILE

a. When a formal grievance is submitted, Human Resources Management Service will be promptly notified by the appropriate decision official.

(1) Human Resources Management Service will establish a grievance file separate from the employee's personnel folder, which will contain:

(a) The employee's grievance and designation of representative (if applicable);

(b) Notices;

(c) Written replies;

(d) Material or evidence used to support administrative action (e.g., if the grievance is based on a disciplinary or other administrative action);

(e) Copies of relevant policies; and

(f) Any other information considered appropriate for review in making a decision on the grievance.

(2) The grievance file will be expanded as more information is developed. If an examiner is appointed to inquire into a grievance, the examiner will add appropriate information to the file based on any inquiry made.

(3) The examiner will ensure that the grievance file contains all documents related to the grievance, including evidence collected, statements of witnesses, notices and replies pertinent to the case, and the report of hearing when a hearing is held.

b. The grievance file must not contain any document that may not be reviewed by the employee or the employee's representative. Information added to the file by the examiner must be included in a form which the employee can review or such information cannot be used.

(1) Any use or disclosure of a record or information must comply with legal requirements for disclosure.

(2) A complete copy of the grievance file will be provided to the employee, upon request.

8.17 REVIEW BY GRIEVANCE EXAMINER

a. Locating a Grievance Examiner

(1) Decision officials should make every effort to appoint a local examiner to investigate an employee grievance.

(2) There may be instances where this is not practicable due to the nature of the grievance and/or the unavailability of an appropriate individual to act as the grievance examiner.

(a) Such grievances will be forwarded to the VISN Director for assignment of a grievance examiner.

(b) Referral of grievances to the VISN Director should be minimized and must provide an explanation as to why the grievance could not be handled by a grievance examiner appointed at the local level.

(c) Two copies of the grievance file will be included with the grievance. A copy of the grievance file will be retained by the decision official.

(d) The grievant and the grievant's representative will be given a copy of the letter to the VISN Director requesting appointment of a grievance examiner.

(e) An examiner will be appointed within 5 days after the request and required files are received.

(f) Grievance examiners appointed by the VISN Director will be authorized to visit the grievant's facility, if appropriate.

b. Hearing Record

(1) When the examiner determines that a verbatim transcript is required, the facility Director where the hearing is being held will provide the hearing room and services for preparing the transcript, and will ensure that the transcript reaches the examiner within 10 days after the hearing is held.

(2) In cases where the examiner travels to a different facility, the examiner may use the services of the grievant's facility, the examiner's own facility, or both to prepare the summary, whichever the examiner deems appropriate.

c. Preparation of Examiner's Report. On completion of the inquiry, 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.

8.18 TRAVEL EXPENSES

Authorized travel expenses for grievance examiners will be borne by the VA facility employing the grievant in accordance with Government travel regulations. Travel expenses of grievants and witnesses will be paid by VA where it is determined by a VA official or the grievance examiner that travel in connection with a grievance is necessary.

Authority: 5 U.S.C. Chapter 57; 38 U.S.C. 501(a), 7421, 38 U.S.C. 7461-7464.

8.19 INFORMING EMPLOYEES

Information in Section II will be brought to the attention of all employees. Copies of section II will be made available for review by employees upon request.

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

SECTION III. APPEALS TO THE DISCIPLINARY APPEALS BOARD

8.20 SCOPE

Section III relates to appeals of major adverse actions which arise out of (or which include) a question of professional conduct or competence in VA. This section supplements MP-5, Part II, Chapter 8, Section C, and is to be used in conjunction with the basic chapter.

8.21 REPRESENTATION

An employee of the Department may be designated by the decision official to represent management in any case before a Disciplinary Appeals Board. The decision official should direct requests for legal representation to the General Counsel or District Counsel, as appropriate (see MP-5, Pt. II, Ch. 8, Sec. C, par. 3c).

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

8.22. FILING AN APPEAL TO THE DISCIPLINARY APPEALS BOARD

The employee requesting an appeal must submit the original appeal and request for hearing, if any, to the Under Secretary for Health through the Office of Human Resources Management, Customer Advisory and Consulting Group (051B). A copy of the appeal must also be served to the decision official.

8.23 APPOINTMENT OF A DISCIPLINARY APPEALS BOARD

a. Upon receipt of a notice of appeal, the Under Secretary for Health, or designee, will appoint, in writing, three panel members to constitute the Board.

(1) One of the members of the Board shall be designated to function as Chairman, 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.

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

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.

8.24 JURISDICTION

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 (see MP-5, Pt. II, Ch. 8, Sec. C, par. 7a).

8.25 FORMAL HEARINGS

a. **Notifications.** In addition to the requirements set forth in MP-5, Part II, Chapter 8, Section C, paragraph 8a, the initial notices from the Chairman should inform the facility head of:

(1) The requirements to ensure that suitable hearing space is available, and to arrange for a court reporter, and any other administrative necessities;

(2) The date by which the appellant's (if applicable) and facility's representatives must be designated; and

(3) The requirement that within 15 days of receipt of the notice from the Chairman, the facility must provide a complete tabbed and indexed evidence file to:

(a) The Chairman;

(b) Each member of the Disciplinary Appeals Board;

(c) The technical advisor;

(d) The appellant; and

(e) The Customer Advisory and Consulting Group (051B)

b. **Scheduling the Hearing.** The hours and dates of the hearing are determined solely by the Chairman.

c. **Location of Hearing.** The hearing will usually be held at the facility of the appellant.

d. **Public Hearing.** Disciplinary Appeals Board hearings are public; however, the appellant may request that the hearing be closed to protect the right to privacy. VA has the responsibility to protect the privacy of its beneficiaries and employees, and confidential information concerning them. In such cases, the Chairman may close a portion of the hearing to the public in order to protect the best interests of the appellant, a witness, the public, or any other person affected by the hearing. The Chairman should obtain the advice of legal counsel on such issues.

e. **Questioning of Witnesses.** The Chairman will permit the parties to the case to ask questions of witnesses in order to ascertain all pertinent facts and is authorized to exclude irrelevant and/or unduly repetitious evidence. Both sides will have an opportunity to properly present and support their respective positions upon any question or matter presented to the Board for decision.

f. **Patients as Witnesses.** A patient, with the patient's consent, may be a witness provided there has been a medical determination that the patient has the capacity to testify and that the patient's appearance as a witness will not be detrimental to the patient's health and welfare.

g. **Convening the Board.** The Chairman will convene the Board, announce the name of the appellant (who will introduce their representative, if any), and announce the name of the Board members and technical advisor(s) present.

h. **Introduction of Evidence.**

(1) In the opening statement, the Chairman will give a brief summary of the issues set forth in the notice of proposed adverse action. The Chairman will allow the introduction of evidence and call witnesses to testify in such order as the Chairman sees fit.

(2) Any evidence file need not be formally introduced because it is already part of the record.

i. **Executive Sessions.** The Board will go into executive session for deliberation of questioned rulings of the Chairman, Board findings, and Board recommendations. The Chairman will announce such sessions. During executive sessions, only the Board members and such, other individuals, whose technical or professional advice or assistance is required by the Board, will be present. Executive sessions will be conducted off the record, however the Chairman will make the results a part of the record.

j. Record of Hearing

(1) A verbatim record of the hearing proceedings will be prepared from stenographic notes or mechanical recording.

(a) Costs of transcription services will be borne by the facility where the appellant is or was employed. Contracts for transcription services will identify completion dates to ensure expeditious processing.

(b) The overnight receipt of transcripts is encouraged.

(c) If it would result in an undue burden or is otherwise impractical, the contract should provide for receipt within 2 weeks from the date on which the testimony occurred.

(2) The transcript will constitute part of the record.

(a) The record will be assembled by the Secretary of the Board, under the direction of the Chairman, but the Board as a whole will be responsible for it.

(b) The record will be authenticated on VA Form 10-2543, Board Action, by the signature of all Board members and the technical advisor.

(3) Refer to MP-5, Part II, Chapter 8, Section C, paragraph 8g for additional requirements.

8.26 DISCIPLINARY APPEALS BOARD DECISIONS

a. **General.** After closing the record, but prior to returning to their duty facilities, the Board shall convene in closed session to attempt to reach a decision on the findings and penalty. If the Board determines that, due to the complexity of the issues or other compelling reasons, it is not feasible to reach a decision before returning to their duty facilities, the Board Chairman shall ensure the Board's decision is rendered without any undue delay in order to meet the time frames outlined in MP-5, Part II, Chapter 8, Section C, paragraph 9.

b. Findings

(1) **Basis of Findings.** The findings of a Disciplinary Appeals Board will be based on the evidence presented, including evidence developed by the Board.

(2) **Deliberation and Voting on Findings.** Deliberation and voting on the findings will be held in closed sessions or through the use of teleconferences if face-to-face communication is not practical.

(a) The order in which the charges and specifications are to be voted upon will be determined by the Chairman.

(b) Each member of the Board will indicate the member's individual finding on each charge.

(c) The majority opinion will rule.

(d) Minority opinions, if any, may be included on VA Form 10-2543.

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

c. **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 Chairman 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 (051B) to the Under Secretary for Health for appropriate action. VA Form 10-2543 will contain supporting rationale for each of the findings.

d. **Remands.** In circumstances where the Under Secretary for Health vacates the Board's decision and remands the matter for further consideration, the Board shall normally render its subsequent decision within 45 calendar days of the completion of the hearing, if a hearing was convened after the remand.

(1) In any event, the Board's decision will be made no later than 90 calendar days after the remand is received by the Board Chairman.

(2) If the remand is related solely to jurisdictional issues, then the Under Secretary for Health may establish a shorter resolution period.

e. **Remedies.** 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.

f. **Case Record**

(1) 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, Customer Advisory and Consulting Group (051B). 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.

(2) One copy of notice of decision will be provided to the employee, the employee's representative, and the official who decided the major adverse action. Any Standard Form (SF) 50B, Notification of Personnel Action, will be filed in the employee's OPF.

Authority: 38 U.S.C. 501(a), 71421, 38 U.S.C. 7461-7464.

8.27 REVIEW OF RECORDS

a. The Board Chairman, 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 Chairman 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 Chairman 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.

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

8.28 TRAVEL

a. **Costs.** Funds to cover the travel and per diem costs of all Board members will be allotted from VA Headquarters 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.

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

SECTION IV. DESIGNATION OF PANEL MEMBERS

8.29 SCOPE

This section relates to the designation of employees to serve on the panel from which Disciplinary Appeals Board members and grievance examiners, as appropriate, will be appointed to hear appeals of major adverse actions and disciplinary actions involving a question of professional conduct or competence. This section supplements MP-5, Part II, Chapter 8, Section D, and is to be used in conjunction with the basic chapter.

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

8.30 QUALIFICATIONS OF PANEL MEMBERS

Individuals designated to serve on the panel must possess sufficient professional knowledge which would enable them to analyze, interpret, and evaluate written evidence and testimony and to make an impartial, objective, and well-reasoned decision.

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

8.31 AVAILABILITY OF ROSTER

a. VA shall announce, at least annually, the availability of a roster of employees on the panel. This announcement shall be made at all VHA field facilities and through publication in the Federal Register.

(1) A list of the names of employees on the panel shall be provided without charge upon written request by any person.

(2) The request should be forwarded to the Customer Advisory and Consulting Group (051B) in VA Headquarters.

b. Employees, employee organizations, and other interested parties may submit comments to the Under Secretary for Health concerning the suitability for service on the panel of any employee whose name appears on the list.

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

SECTION V. DELEGATIONS

8.32 SCOPE

This section contains the authorities as delegated by the Under Secretary for Health for proposing and deciding on disciplinary and major adverse actions. The Under Secretary for Health retains the authority to appoint individuals as members of the Disciplinary Appeals Board Panel.

Authority: 38 U.S.C. 7461.

8.33 AUTHORITY

- a. Title 38, U.S.C., Chapter 74.
- b. MP-5, Part II, Chapter 8.

8.34 RESPONSIBILITY

a. Delegations of Proposing and Decision Authorities for Disciplinary Actions (admonishments and reprimands):

(1) Field Employees

(a) Non-centralized positions:

- 1. Proposing Official: Immediate supervisor.
- 2. Decision Official: Service chief.

(b) Service Chiefs and other centralized positions below the level of Chief of Staff:

- 1. Proposing Official: Chief of Staff.
- 2. Decision Official: Facility Director.

(c) Chiefs of Staff:

- 1. Proposing Official: Facility Director.
- 2. Deciding Official: VISN Director.

(2) Title 38 Medical Center Directors

- (a) Proposing Official: VISN Director.
- (b) Decision Official: Chief Network Officer.

(3) Title 38 Employees in the Office of the VISN Director

- (a) All employees except VISN Chiefs of Staff:

1. Proposing Official: VISN Chief of Staff or VISN Associate Director, as appropriate.
2. Decision Official: VISN Director.

(b) VISN Chiefs of Staff:

1. Proposing Official: VISN Director.
2. Decision Official: Chief Network Officer.

(4) Title 38 Employees in VA Central Office

(a) Proposing Official: Immediate supervisor.

(b) Decision Official: Next higher level official.

b. Delegations of Proposing and Decision Authorities for Major Adverse Actions Involving Reduction in Grade, Reduction in Pay, Suspension, or Discharge:

(1) Field Employees

(a) Non-centralized positions:

1. Proposing Official: Service chief.

2. Decision Official: Facility Director (except that transfers will require the concurrence of Chief Network Officer).

(b) Service Chiefs and other centralized positions below the level of Chief of Staff:

1. Proposing Official: Chief of Staff.

2. Decision Official: Facility Director.

(c) Chiefs of Staff:

1. Proposing Official : VAMC Director

2. Decision Official: VISN Director

(2) Title 38 Medical Center Directors

(a) Proposing Official: Chief Network Officer.

(b) Decision Official: Under Secretary for Health.

(3) Title 38 Employees in the Office of the VISN Director

(a) Non-centralized positions:

1. Proposing Official: VISN Chief of Staff or VISN Associate Director, as appropriate.
2. Decision Official: VISN Director.

(b) Centralized positions (to include VISN Chiefs of Staff):

1. Proposing Official: Chief network Officer.
2. Decision Official: Deputy Under Secretary for Health.

(4) Title 38 Employees in VA Central Office

(a) Proposing Official: Service director level or above.

(b) Decision Official: Under Secretary for Health, or designee.

c. Supplemental Delegations. Facility Directors may issue supplemental delegations of authority to propose and/or decide actions involving employees in non-centralized positions under their jurisdiction. However, such authority may not be delegated to officials at lower levels than those authorized to propose and/or decide the action in subparagraphs 8.34a and 8.34b.

(1) Delegations must be in writing and may be issued as the Director deems appropriate.

(2) In exercising this authority, Directors must ensure that delegations are consistent with the statutory requirement that the decision official in a major adverse action must be at a higher level than the proposing official.

SECTION VI. REPORTS

8.35 SCOPE

This section describes information which may periodically be required by the Office Of Human Resources Management.

8.36 REPORTS

The Deputy Assistant Secretary for Human Resources Management, may periodically require field stations to provide information regarding disciplinary and adverse actions.

- a. Field stations will be notified, as needed.

b. This information will include, but not be limited to:

- (1) Occupation (to include specialty),
- (2) Basis of action,
- (3) Action proposed, and
- (4) Final decision.

c. If the action was appealed or grieved, the information should include:

- (1) Identification of the procedure used, and
- (2) The disposition of any such appeal or grievance.

TABLE OF PENALTIES**1. INSTRUCTIONS FOR USE OF TABLE**

a. **General.** This Appendix will be used as a guide in the administration of disciplinary and major adverse actions to help ensure that like actions are taken for like offenses. The table is designed to be sufficiently broad to include most types of offenses, but is not intended to be an exhaustive listing of all offenses. For other offenses, appropriate penalties may be prescribed by decision officials for application within their jurisdiction, consistent with the range of penalties for comparable offenses listed in the table. Disciplinary penalties will generally fall between the ranges indicated in the guide, but in unusual circumstances greater or lesser penalties may be imposed. In determining action to be taken in a specific case, mitigating and aggravating factors should be considered such as length of service, past employment record, the potential for improved behavior, etc.

b. Application of Table

(1) Progressive Discipline. Offenses need not be identical in order to support progressively more severe adverse action against an employee. For example, an employee who has received an admonishment for being absent without leave (AWOL) can receive a reprimand for sleeping on duty, and possibly be suspended or discharged for a third offense unrelated to the two previous infractions.

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

(3) This guide does not cover all offenses for which adverse penalties are expressly provided by law or Civil Service regulation. A further listing of penalties prescribed by statute, regulation, or Executive Order is contained in 5 CFR 735.

(4) Where appropriate, alternate penalties may be used in place of discharge as provided in this chapter, except as noted for the offense described in item 28 of the table. Alternate penalties include reduction in grade, reduction in basic pay, and transfer.

(5) Discharge action will be taken whenever required by law or regulation or whenever warranted by the facts in the individual case. Usually progressively more severe penalties will be administered before discharge action is initiated, unless the offense is so serious that it warrants discharge action.

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

2. RANGE OF PENALTIES FOR STATED OFFENSES

NOTE: "Days" specified in this table refer to suspension and represent work days. The following abbreviations will be used throughout this appendix: Admonishment - Adm.; Reprimand - Repr.; Discharge - Disch.; Minimum - Min.; Maximum - Max.; Department of Veterans Affairs - VA; Equal Employment Opportunity - EEO; and United States Code - U.S.C.

Nature of Offense	1st Offense		2nd Offense		3rd Offense	
	Min.	Max.	Min.	Max.	Min.	Max.
1. Unexcused tardiness.	Adm.-	Repr.	Repr.-	5 days	5 days-	Disch.
2. Unexcused or unauthorized absence.	Adm.-	Repr.	Repr.-	10 days	10 days-	Disch.
3. Leaving job, VA premises, or job to which assigned during working hours, without proper permission.	Adm.-	Repr.	Repr.-	5 days	10 days-	Disch.
4. Loafing, willful idleness, or waste of time.	Adm.-	Repr.	Repr.-	10 days	10 days-	Disch.
5. Carelessness or negligence resulting in waste or delay.	Adm.-	Repr.	Repr.-	10 days	10 days-	Disch.
6. Violating traffic regulations, reckless driving on VA premises, or improper operation of motor vehicle.	Adm.-	10 days	Repr.-	Disch.	10 days-	Disch.
7. Failure to observe precaution for personal safety, posted rules, signs, written or oral safety instructions, or to use protective clothing or equipment.	Adm.-	10 days	Repr.-	Disch.	10 days-	Disch.

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
8. Smoking in unauthorized places or carrying of flammables, e.g., matches, in explosive areas.	Adm.-Repr.	Repr.-10 days	10 days-Disch.
9. Endangering the safety of or causing injury to personnel through carelessness or negligence.	Adm.-Disch.	10 days-Disch.	Discharge
10. Failure to report personal injury or accident.	Adm.-Repr.	Repr.-10 days	5 days-15 days
11. Failure to safeguard confidential matter.	Adm.-Repr.	Repr.-10 days	10 days-Disch.
12. Deliberate failure or unreasonable delay in carrying out instructions.	Adm.-Repr.	3 days-10 days	10 days-Disch.
13. Sleeping on duty:			
a. Where safety of patients, beneficiaries, members of the public, employees, or property is not endangered.	Adm.-Repr.	Repr.-Disch.	10 days- Disch.
b. Where safety of patients, beneficiaries, members of the public, employees, or property is endangered.	5 days-Disch.	Discharge	
14. Abuse of patients or beneficiaries.	Repr.-Disch.	10 days-Disch.	Discharge

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
15. Fighting, threatening, attempting, or inflicting bodily injury to another; engaging in dangerous horseplay. (Penalty depends on such factors as provocation, extent of any injuries, and whether actions were defensive or offensive in nature.)	Repr.-Disch	10 days-Disch.	Discharge
16. Disrespectful conduct, use of insulting abusive or obscene language to or about other personnel.	Repr.-Disch.	10 days-Disch.	Discharge
17. Insubordination. i.e., deliberate refusal to carry out any proper order from, or insolent, abusive or obscene language toward, immediate or other supervisor having responsibility for the work of the employee; willful resistance to same.	Repr.-Disch.	10 days-Disch.	Discharge
18. Offenses related to intoxicants. Actions involving these offenses should be reviewed to ensure the requirements of Drug and Alcohol Abuse Program are met.			

Nature of Offense	1st Offense Min. M ax.	2nd Offense Min. Max.	3rd Offense Min. Max.
a. Alcohol-related:			
(1) Unauthorized possession of alcoholic beverages while on VA premises or in duty status.	Repr.- 5 days	10 days - Disch.	15 days-Disch.
(2) Unauthorized use of alcoholic beverages while on VA premises or in duty status.	Repr. - 10 days	15 days- Disch.	Discharge
(3) Reporting to or being on duty while under the influence of alcohol.	Repr. 10 days	15 days - Disch.	Discharge
(4) Sale or transfer of an alcoholic beverage while on VA premises or in a duty status, or while any person involved is in a duty status.	10 days- Disch.	Discharge	
b- Drug-related:			
(1) Unauthorized possession of a drug or controlled substance while on VA premises or in a duty status.	5 - 10 days	15 days-Disch.	Discharge

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
(2) Unauthorized use of a drug or controlled substance while on VA premises or in a duty status.	10 days-Disch.	15 days-Disch.	Discharge
(3) Reporting to or being on duty while under the influence of a drug or controlled substance.	15 days- Disch.	Discharge	
(4) Sale or transfer of a drug or controlled substance while on VA premises or in a duty status, or while any person involved is in a duty status.	15 days - Disch.	Discharge	
(5) Refusal to take drug test, as required.	Adm. Disch.	15 days- Disch.	Discharge
19. Sexual harassment	Repr.-Disch.	5 days-Disch.	10 days-Disch.
20. Gambling, unlawful betting on VA premises.	Repr.-10 days	10 days-Disch.	Discharge
21. Promotion of gambling on VA premises.	Repr.-Disch.	15 days-Disch.	Discharge
22. Indebtedness-lack of good faith in paying just financial obligations; such as failure without good cause to make or live up to arrangements to pay a debt that the employee admits is owed or that is supported	Admonishment	Adm. - Repr.	5 days - Disch.

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
by court judgment, or that represents a tax or other financial obligation to the United States (U.S.) Government or to State and local government.			
23. Theft of Government property.	Repr.-Disch.	10 days-Disch.	Discharge
24. Making false or unfounded statements, which are slanderous or defamatory, about other VA personnel or officials.	Repr. -Disch.	10 days - Disch.	Discharge
25. Falsifying attendance record for self or another employee.	Repr. - Disch.	10 days - Disch.	Discharge
26. Intentional falsification, misstatement, or concealment of material fact in connection with employment or any investigation, inquiry or other proper proceeding; or willfully forging or falsifying official Government records or documents.	Repr. - Disc	10 days - Disch.	Discharge

Nature of Offense	1st Offense Min. M ax.	2nd Offense Min. Max.	3rd Offense Min. Max.
27. Loss of, damage to, or unauthorized use of Government property			
a. Through carelessness	Adm.-15 days	10 days - Disch.	Discharge
b. Through maliciousness or intent.	Repr. - Disch.	10 days- Disch.	Discharge

NOTE: *For willful use or authorization of the use of any Government vehicle for other than official purposes, the prescribed penalty is suspension for not less than 30 days or removal (31 U.S.C. 1349(b); see item number 39g).*

28. Owing any interest in, or receiving any, wages, salary, dividends, profits, gratuities, or services from any educational institution operated for profit in which an eligible veteran, or person is pursuing a course of education or training under 38 U.S.C. 34, 35 and 36, where it is determined that detriment will result to the U.S. or to eligible veterans, or persons by reason of such interest or

Discharge

29. Participation in any type of outside activities, or relationships with contractors, lenders, or others engaged in business with VA or relationships with those seeking contracts, which would be contrary to the best interests of VA and the veterans it serves. Penalty action will be determined on the basis of whether the activities, or relationships,

Adm.-Discharge

10 days-Discharge

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
<p>might result in a conflict between the private interest of the employee and the employee's duty and obligation to VA, or tend to create in the minds of others a suspicion of prejudice or favoritism that would be of embarrassment to VA.</p>			
<p>30. Except as specifically authorized to do so, disclosing or using directly or indirectly information obtained as a result of employment in VA, which is of a confidential nature or which represents a matter of trust, or any other information so obtained of such character that its disclosure or use would be contrary to the best interests of the Government, VA, or the veterans it serves.</p>	Repr.-Disch.	Discharge	
<p>31. Borrowing from, or lending money to, any beneficiary or claimant of VA; or borrowing</p>	Repr.- Disch.	Discharge	
<p>32. Soliciting contributions for, or otherwise promoting, on premises occupied by VA, any national or local welfare or other type of campaign which has not had appropriate VA endorsement.</p>	Repr.-Disch.		

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
33. Selling tickets, stocks, articles, commodities, or services on VA premises. This prohibition is not to be construed as prohibiting employees from engaging in bona fide activities on premises occupied by VA, of a recognized employee union, group, organization, or association, as provided or in other applicable Department policies.	Repr.-Disch.	10 days-Disch.	Discharge
34. Accepting gifts or gratuities (whether in the form of goods, money, services, purchases at discount, entertainment, or similar favors) from claimants or beneficiaries of VA, or individuals or firms doing business with or having contractual relations with VA, except as authorized by conduct regulations.	Repr.-Disch.	Discharge	
35. Violation of Privacy Act.	Repr.-Disch.	10-days-Disch.	Discharge
36. Prohibited personnel practice (Reference: 5 U.S.C. 2302).	Repr.-Disch.	10-days-Disch.	Discharge
37. Participating in a strike, work stoppage, sick-out, slowdown, or other job action.	Discharge		

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
38. Offenses Related to Supervisory/Managerial Observance of Employee Rights:			
a. Discrimination based on race, color, sex, religion, national origin, age, marital status, political affiliation, or handicap.	Repr.-Disch.	5 days-Disch.	10 days-Disch.
b. Interference with an employee's exercise of, or reprisal against an employee for exercising a right to grieve, appeal or file a complaint through established procedures.	Repr.-Disch.	5 days-Disch	Discharge
c. Reprisal against an employee for providing information to the Office of Inspector General, Office of Special Counsel, an EEO investigator, or for testifying in an official proceeding. NOTE: <i>Penalty may require coordination with the Office of Special Counsel.</i>	10 days-Disch.	Discharge	
d. Reprisal against an employee for exercising a	Repr.-Disch.	5 days-Disch.	10 days-Disch.

Nature of Offense	1st Offense Min. M ax.	2nd Offense Min. Max.	3rd Offense Min. Max.
right provided under 5 U.S.C. 71 (Federal Labor-Management Relations Statute).			
e. Violation of an employee's constitutional rights (i.e. freedom of speech and/or association and/or religion).	Repr.-Disch.	5 days-Disch.	10 days-Disch.
39. Offenses Prescribed in Statute:			
a. Finding by the Merit Systems Protection Board (MSPB) of refusal	Repr.-Disch.	Discharge	
to comply with MSPB order or of violation of statute causing issuance of Special Counsel complaint (5 U.S.C. 1215).			
<i>NOTE: Penalty may need to be coordinated with Office of Special Counsel.</i>			
b. Directing or rendering services not covered by appropriations (5 U.S.C. 3103).	Discharge		
c. Prohibited Political Activity:			
(1) Violation of prohibition against Political contributions (5 U.S.C. 7323).	Discharge		

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
(2) Violation of prohibition against campaigning or influencing elections (5 U.S.C. 7324 and 7325). NOTE: <i>Actions based on Hatch Act violations will be initiated by the Office of Special Counsel.</i>	30 days-Disch.	Discharge	
d. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations for salaries (5 U.S.C. 5501).	Discharge		
e. Soliciting contributions for a gift for a superior; making a donation as gift to a superior; accepting a gift from an employee receiving less pay (5 U.S.C. 7351).	Repr.-Disch.	10 days-Disch.	Discharge
f. Action against national security (5 U.S.C. 7532).	30 days- Disch.	Discharge	
g. Willfully using or authorizing the use of a government passenger motor vehicle or aircraft for other than official purposes (31 U.S.C. 1349(b)). NOTE: <i>30-days for this offense means calendar days.</i>	30 days - Disch.	Discharge	

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Chapter 8

APPENDIX 8A

Nature of Offense	1st Offense Min. Max.	2nd Offense Min. Max.	3rd Offense Min. Max.
h. Willfully mutilating or destroying a public record (18 U.S.C. 2071).	Discharge		

SAMPLE LETTERS

Appendix 8B consists of sample letters of disciplinary and major adverse actions. When using the samples, necessary modifications should be made to comply with local circumstances such as negotiated agreement provisions or local station policies. Advisory guidance is shown in bold print.

NOTE: When issuing any letter of this nature, an extra copy of the letter should be provided upon which the employee acknowledges receipt by signature and date. Should the employee refuse to acknowledge receipt of the letter by signature, the supervisor and/or a witness should attest to the employee's receipt by noting the circumstance, signing and dating.

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1. SAMPLE NOTICE OF PROPOSED DISCIPLINARY ACTION (This letter is applicable for Admonishments and Reprimands)

FOR OFFICIAL USE ONLY

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

SUBJ: Proposed Reprimand (or other action)

1. It is proposed to reprimand you based on the following reason:

On (date), you were absent without leave for 8 hours. You failed to obtain permission from your supervisor for the absence as required. Your action violated (cite specific section of the Code of Federal Regulations (CFR) which has been violated.)

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

After each charge, cite specific section of CFR which has been violated (e.g., your actions, as described above, violated 38 CFR 0.735-10(a), etc.).

2. You have the right to reply to this notice orally, or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of your reply, showing why the charge(s) is(are) unfounded and any other reasons why you should not be reprimanded.

You will be given until the close of business (date) to reply to these reasons orally or in writing, or both orally and in writing, and to submit any affidavits or other documentary evidence. Your written reply should be submitted through me to the (deciding official). The (deciding official) will receive your oral reply or will designate an official or officials to receive it.

At least 5 calendar days are required

4. The evidence upon which this notice of proposed action is based will be available for your review in the Human Resources Management Service, Room -.

5. You may be represented by an attorney or other representative of your choice at all stages of this matter. Any representative must be designated in writing.

SAMPLE NOTICE OF PROPOSED DISCIPLINARY ACTION - - Continued

6. On a previous occasion you were admonished for 8 hours absence without leave(AWOL). This past record will be taken into account in determining proper disciplinary action, if one or more of the above reasons is sustained You may reply orally or in writing, or both orally and in writing, with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. In this regard, you may make a statement expressing your views as to the consideration to be given such past record in determining proper action.

For use only if past record will be considered. Citation of past record is not considered a current reason. Copies of the past record must be included in the evidence file, if used.

7. The final decision to effect the action proposed has not been made. The (title of deciding official), who will make the final decision, will give full and impartial consideration to any replies, if submitted. You will be informed in writing of the final decision as soon as possible after your reply has been considered or (date - 5 calendar days) if you do not reply.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

2. SAMPLE DECISION LETTER FOR DISCIPLINARY ACTION

FOR OFFICIAL USE ONLY

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

SUBJ: Reprimand

1. In connection with the notice of proposed reprimand dated _____, a decision has been made to reprimand you based on the following reason(s):

Reason I as stated in the notice of proposed reprimand is sustained.

2. In reaching this decision, your (written/oral) reply(ies) has been carefully considered along with all of the evidence developed.

3. This decision also takes into account that this is the second offense of this nature within the past 3 months. On (date) you were admonished for AWOL.

Past record may be cited, if considered appropriate.

4. A copy of this reprimand will be placed in your Official Personnel Folder . This reprimand may remain in your folder for 3 years or it may be withdrawn and destroyed after 2 years depending entirely on your future behavior and attitude.

A reprimand for patient abuse should read "may remain in folder as long as you are employed by VA or it may be withdrawn and destroyed after 2 years, etc. An admonishment for patient abuse should read "may remain in folder as long as you are employed by VA or it may be withdrawn and destroyed after 6 months."

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

6. The sustained reason does not involve a question of professional conduct or competence. Therefore, if you believe that this reprimand is unjustified, you may appeal the action under the VA grievance procedure or the negotiated grievance procedure, but not both. You shall be deemed to have exercised your option to appeal this action at such time

Negotiated grievance procedure is an option only when the action does not involve a question of professional conduct or competence. Language may vary based on specific provisions of the negotiated grievance procedure.

SAMPLE DECISION LETTER FOR DISCIPLINARY ACTION - - Continued

as you timely file a grievance under either procedure. Your grievance must be submitted through me to (decision official) within (number of days) after you receive this reprimand. For further information about the grievance procedure, you may consult the Office of Human Resources Management.

or

6. The sustained reason involves a question of professional conduct or competence. Therefore, if you believe that this action is unjustified, you may appeal the action under the VA grievance procedure. Your grievance must be submitted through me to (decision official) within 15 days after you receive this reprimand.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

3. SAMPLE NOTICE OF PROPOSED MAJOR ADVERSE ACTION (This letter is applicable for suspensions, transfers, reductions in grade, reductions in basic pay, and discharges based on conduct or performance.)

FOR OFFICIAL USE ONLY

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

SUBJ: Proposed Discharge

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

I. On (date), at approximately 9:00 a.m. you allowed patient John Doe to bring a bottle of whiskey on the hospital premises despite the fact that it was your duty to prevent patients from introducing alcoholic beverages on the hospital premises. Your action violated (cite specific section of CFR which has been violated).

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

II. At 10:00 a.m., approximately one hour after the incident, you were ordered by your immediate supervisor Mr. John Smith, to report at once to the Chief, Security Service, and explain your neglect of duty. However, you told Mr. Smith neglect of duty. However, you told Mr. Smith that you refused to do so. Although he repeated the order, you still did not report to the Chief. Your action violated (cite specific section of CFR which has been violated).

After each charge, cite specific section of CFR which has been violated (e.g., your actions, as described above, violated 38 CFR 0.735-10(a), etc.)

III. At 10:00 a.m., immediately following your refusal to carry out the above-mentioned order, you struck Mr. Smith several times with your fists and knocked him down onto the floor. Your action violated (cite specific section of CFR which has been violated).

FOR OFFICIAL USE ONLY

SAMPLE NOTICE OF PROPOSED MAJOR ADVERSE ACTION - - Continued

2. You have the right to reply to this notice orally, or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of your reply, showing why the charge(s) is (are) unfounded and any other reasons why your discharge should not be effected. You will be given until the close of business (date) to reply to these reasons orally or in writing, or both orally and in writing, and to submit any affidavits or other documentary evidence. Your written reply should be submitted through me to the (deciding official). The (deciding official) will receive your oral reply or will designate an official or officials to receive it.

At least 7 calendar days is required, but no more than 30, unless good cause is shown.

3. The evidence on which this notice of proposed action is based will be available for your review in the personnel office, Room ____ . You will be allowed ____ hours of official duty time for reviewing the evidence relied on to support the reasons in this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

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

4. On two previous occasions you refused to follow orders given to you by your supervisor. After the first occasion you were admonished by letter of (date) and after the second you were reprimanded by letter of (date). This past record will be taken into account in determining proper disciplinary action, if one or more of the above reasons is sustained. You may reply orally

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

SAMPLE NOTICE OF PROPOSED MAJOR ADVERSE ACTION - - Continued

or in writing, or both orally and in writing, with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. In this regard, you may make a statement expressing your views as to the consideration to be given such past record in determining proper action.

5. You may be represented by an attorney or other representative of your choice at all stages of this matter. Any representative must be designated in writing.

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

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

8. You will be given a written decision within 21 days of the receipt of your reply(ies) or, the close of business on (same date as in paragraph 2), if you do not reply.

9. Consistent with the mandate in the Department of Veterans Affairs Health-Care Amendments Act of 1985 (Pub. L. 99-166), it is the-policy of VA to report to the State licensing boards those terminated (voluntarily or otherwise) health-care professionals whose professional clinical practice appears to have so significantly failed to conform to generally accepted standards of clinical professional practice as to raise reasonable concerns for the safety of patients. Please be advised that, in the event you are found not to meet standards of care, consideration will be given whether, under these criteria, you should be reported to the State licensing board(s).

This paragraph is to be used only in a proposed discharge.

10. You will be retained in an active duty status during the advance notice period (indicate duty status, i.e., leave, non-pay, or other status as appropriate).

SAMPLE NOTICE OF PROPOSED MAJOR ADVERSE ACTION - - Continued

*11. If you have any, questions about the reasons why your removal is proposed, contact me, or the Human Resources Management Service (give location) for further explanation.

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

*In cases of proposed discharges or suspensions involving issues of professional conduct or competence, the following paragraph should be included, (renumber paragraph 11, as appropriate):

11. Should a decision be made to discharge you (or suspend you for more than 30 days) on the basis of professional conduct or competence, the discharge may be concurrent with the revocation (or suspension) of your clinical privileges. This information may be reported through the State Licensing board(s) to the National Practitioner Data Bank (NPDB).

4. SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE

FOR OFFICIAL USE ONLY

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

SUBJ: Discharge

1. In connection with the notice of proposed discharge dated_____, a decision has been made to discharge you from employment with VA, effective (date), based on the following reasons:

Reasons I and II as stated in the notice of proposed discharge are sustained Reason III is not sustained.

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed. This decision also takes into consideration your past disciplinary record as cited in your notice of proposed discharge. Your previous record was an aggravating factor in determining an appropriate penalty.

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

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

Applicable only if action considers past record.

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

4. SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE - - Continued

4. Since reason I as stated in the notice of proposed discharge involves a question of professional conduct or competence, you have the right to appeal this decision to the Disciplinary Appeals Board and to request a formal hearing before the Board. Your request for a formal hearing must be submitted in writing in conjunction with your appeal. The appeal must be submitted through the Office of Human Resources Management, Customer Advisory and Consulting Group (051B) to the Under Secretary for Health, (address), so as to be received no later than 30 calendar days after your receipt of this decision.

Even though only one of the reasons sustained provides the right to appeal this decision to a Disciplinary Appeals Board, all sustained reasons will be considered by the Board.

*5. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or handicap, you may file a complaint of discrimination with VA in accordance with EEO discrimination complaint procedures.

*6. Should you elect to file a complaint of discrimination with VA, your complaint will be processed in accordance with EEOC regulations at 29 CFR 1613, Subpart D. If you elect to file a complaint of discrimination, you may do so only after contacting a VA EEO Counselor who will attempt to informally resolve the matter. You must contact the counselor within 45 calendar days of the effective date of this personnel action. A complaint is deemed filed on the date it is received or by an appropriate VA official designated to receive complaints, or on the date postmarked if addressed to such VA official.

7. A copy of MP-5, Part II, Chapter 8, Section C is attached to provide you with necessary information regarding an appeal to the Disciplinary Appeals Board. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Service.

(Signature of appropriate official)

Enclosure

FOR OFFICIAL USE ONLY

*Paragraphs 5 and 6 should only be used if allegations of discrimination have been raised by the employee.

5. SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS NOT INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE

FOR OFFICIAL USE ONLY

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

SUBJ: Discharge

1. In connection with the notice of proposed discharge dated _____, a decision has been made to discharge you from employment with VA, effective(date), based on the following reasons:

Reasons I and II as stated in the notice of proposed discharge are sustained.
Reason III is not sustained.

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed. This decision also takes into consideration your past disciplinary record as, cited in your notice of proposed discharge. Your previous record was an aggravating factor in determining an appropriate penalty.

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

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

Applicable only if action considers past record.

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

5. SAMPLE DECISION LETTER FOR MAJOR ADVERSE ACTIONS NOT INVOLVING A QUESTION OF PROFESSIONAL CONDUCT OR COMPETENCE - - Continued

4. Since reasons I and II as stated in the notice of proposed discharge do not involve a question of professional conduct or competence, you may appeal this action under the VA grievance procedure or the negotiated grievance procedure, but not both. You shall be deemed to have exercised your option to appeal this action at such time as you timely file a grievance under either procedure. Your grievance must be submitted through me to (decision official) (number of days) after you receive this letter. If you elect to file a grievance through the VA grievance procedure in connection with this action, you have the right to request a hearing. Any request for a hearing must be submitted in your grievance. For further information about the grievance procedure, you may consult the Human Resources Management Service.

The grievance procedure is an option only when the action does not involve a question of professional conduct or competence. Language may vary based on specific provisions of the negotiated grievance procedure.

*5. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or handicap, you may file a complaint of discrimination with VA in accordance with EEO discrimination complaint procedures.

*6. Should you elect to file a complaint of discrimination with VA, your complaint will be processed in accordance with EEOC regulations at 29 CFR 1613, Subpart D. If you elect to file a complaint of discrimination, you may do so only after contacting a VA EEO Counselor who will attempt to informally resolve the matter. You must contact the counselor within 45 calendar days of the effective date of this personnel action. A complaint is deemed filed on the date it is received by an appropriate VA official designated to receive complaints, or on the date postmarked if addressed to such VA official.

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

(Signature of appropriate official)

Enclosure

FOR OFFICIAL USE ONLY

*Paragraphs 5 and 6 should only be used if allegations of discrimination have been raised by the employee.

SAMPLE PROPOSED INDEFINITE SUSPENSION* (Invoking the "Crime Provision")

(Name of Employee)

(Organizational Element)

(City, State and ZIP Code)

SUBJ: Proposed Indefinite Suspension

(investigation of probable criminal conduct on your part). Should this proposal result in an indefinite suspension and should subsequent administrative determination so warrant, a proposal

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

(Describe criminal activity and give date, times and place). On _____ you were arrested by (_____) and charged with (cite criminal charge). _____ate you were Name of Court or Grand Jury. Because of imprisonment may be imposed.

3. In light of the seriousness of this situation and on the basis that it is incompatible with your pending investigation of this criminal activity.

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

(date - not less than 7 calendar days)

to submit affidavits and other documentary evidence in support of your reply. Your written reply should be submitted through me to the (deciding official). The deciding official will receive your

6. **SAMPLE PROPOSED INDEFINITE SUSPENSION** - Continued

6. The evidence on which this notice of proposed action is based will be available for review in the Human Resources Management Service, Room _____. You will be allowed _____ hours of official duty time for reviewing the evidence relied on to support the reasons in this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

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

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

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

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

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

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

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

(Signature of appropriate official)

FOR OFFICIAL USE ONLY

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

7. SAMPLE DECISION - INDEFINITE SUSPENSION (This letter is for use only in conjunction with the "Crime Provision.")

FOR OFFICIAL USE ONLY

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

SUBJ: Indefinite Suspension

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

2. This indefinite suspension is based on the following reasons:

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

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

4. (See Sample Decision Letters for Major Adverse Actions, Appendix 8B, for sample wording on employee appeal rights).

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

(Signature of appropriate official)

Enclosure

FOR OFFICIAL USE ONLY

FIRM CHOICE, LAST CHANCE, AND ABEYANCE AGREEMENTS

1. Appendix 8C is intended to provide guidance and sample language for the use and construction of these instruments in certain problem situations. Although they may be useful in various circumstances, they are particularly helpful in dealing with situations requiring reasonable accommodation.

2. Case law pertaining to "firm choice," "last chance," and "abeyance" agreements is constantly evolving. When questions arise in this area, officials should contact their District Counsel or General Counsel, as appropriate, or the Customer Advisory and Consulting Group (051B) in VA Headquarters.

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1. SAMPLE FIRM CHOICE LETTER

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

(Date)

(Name and Address of Employee)

SUBJ: Firm Choice Letter

1. Based on your past conduct (and/or performance), which has already been discussed with you (see attached letters of counseling), we have reason to believe that you have a substance abuse problem which warrants professional help.
2. For this reason, we are formally referring you to the VA Employee Assistance Program (EAP), so that an assessment and appropriate referral can be made for you. This offer of assistance is an opportunity period for you to address your serious work-related problems and resolve them. The VA EAP is a confidential and free resource, and no record of details of your participation in EAP will be placed in your Official Personnel Folder. Although the referral to EAP and your participation in rehabilitation is voluntary, you should understand that this is to offer you a "firm choice" - either seek and complete the prescribed treatment for your problem or accept the consequences of your misconduct. In this regard you are being given the opportunity to seek, and successfully complete, (an inpatient and/or outpatient) substance abuse program.
3. You have (number calendar days from receipt of this letter to enroll yourself in (an inpatient or outpatient) program for this purpose. Whether or not you elect to use the VA EAP, within this (number) day period you must provide documentation regarding the program prior to entry, including the time which will be required for participation and any leave which you will request, so that (appropriate official) can determine whether the program can be approved. If (appropriate official) approves the program, you will be granted appropriate leave (annual, sick, or leave without pay) provided you have properly requested such leave in advance and the type of leave requested is appropriate.
4. You must also sign the attached release of information and return it to (appropriate official). A release of information is needed so that (appropriate official) can contact your counselor to discuss your enrollment, and your continued participation in the program.

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

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

NOTE to manager: *If an action is being held in abeyance, use the following:*

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

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

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

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

NOTE to manager: *If an action is being held in abeyance, use the following:*

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

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

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

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

NOTE to manager: *If an action is being held in abeyance, use the following:*

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

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

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

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

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

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

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

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

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

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

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

Signature of Appropriate Official

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

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

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

NOTE to manager: *If an action is being held in abeyance, use the following:*

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

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

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

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

NOTE to manager: *If an action is being held in abeyance, use the following:*

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

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

Signature of Appropriate Official

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

2. LAST CHANCE AND ABEYANCE AGREEMENTS

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

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

c. **SAMPLE INSTRUMENTS**

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

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

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

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

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

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

4. "Failure to comply with the preceding will constitute just cause for proceeding with the proposed action."

NOTE: The abeyance letter was signed by the decision official, and did not require the employee's agreement.

LAST CHANCE AND ABEYANCE AGREEMENTS - - Continued

(c) **Outcome:** The employee stopped going to the follow-up rehabilitation meetings, and the counselors so informed the agency. When the employee also had two subsequent unscheduled, unsupported absences, the agency invoked the agreement. Since the action had been held in abeyance before a decision was made, the agency had to issue a final decision on the charges in the original proposed action. In its decision letter, the agency first cited failure to participate in rehabilitation and the two instances of unsupported, unscheduled absence as violations of the abeyance agreement. Based on these violations, the agency explained that it was proceeding with the proposed action. The agency then assessed the evidence on the original charges, sustained them, decided to remove, and notified the employee that he would be removed in 1 week.

(2) **Approach 2:** Agency issues decision to remove, but holds implementation of decision in abeyance.

(a) **Situation:** Although the agency had referred the employee to alcohol treatment twice before, it wasn't until the employee received a notice of proposed removal for over 80 hours of AWOL that he admitted that he was an alcoholic, and requested reasonable accommodation. The agency's decision letter sustained the charges, found removal warranted, and decided to remove. However, it also said that the agency had decided to hold the removal action in abeyance under specific conditions.

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

"It is my decision that you should be removed from your position, but that this removal be held in abeyance for 1 year from the date you receive this letter, subject to the following: you have no further absences charged to AWOL; you submit documentation of successful completion of the (agency) Employee Assistance Program and the Kaiser Alcohol Abuse Program; your sick leave usage remains under the installation goal; and your performance is at least fully successful. If all the foregoing criteria are met, the action will be cancelled at the end of the 1-year period. Failure to meet any one of these criteria during the 1-year period will result in your immediate removal."

NOTE: *The letter was signed by the decision official and did not require the agreement of the employee.*

(c) **Outcome:** Later, the agency decided that the employee had violated the terms of the agreement and reinstated the action. The decision letter described the specific violations: "On (date) your reported for work at 9:25. You claimed to have forgotten to set your alarm clock. You were charged with 1.5 hours of AWOL. On (date) you did not call in until 12:44. You claimed you could not call earlier because you had no change. You were charged with 4.25 hours of AWOL." (The agency also knew, but did not state in the letter, that the employee had stopped regular participation in the alcohol rehabilitation program.) "it is my decision that you have violated the terms of our agreement and, as such, you will be removed, effective (date)."

(3) **Approach 3:** Employee's removal has been effected, and the action is being appealed. The agency and the appellant reached an agreement to give him one last chance.

(a) **Situation:** The employee was removed for being AWOL and being intoxicated on duty. While preparing for the hearing before MSPB, the appellant informed the agency that he was successfully participating in a rehabilitation program and requested one last chance. While clearly not required to do so, the agency agreed under certain conditions which the agency believed gave it a quid pro quo.

(b) Agreement Provisions: The last chance agreement read in relevant part: "in consideration for reinstatement to the position of (specify position) for a 1 year period, (employee) agrees to the following:

-to participate in (specific) alcohol rehabilitation program, and to maintain satisfactory punctuality, attendance, and good work habits."

"Should (employee) fail to participate in the rehabilitation program, or should the employee's attendance and work habits become unsatisfactory during the 1-year period, the removal will be reinstated. One incident of AWOL or of being intoxicated on duty will be cause for reinstating the removal."

"Appeal rights to the MSPB, and grievance-arbitration procedures are waived during this 1-year period on any disciplinary action against (employee)."

"I clearly understand the last chance opportunity agreement, and fully agree with the terms of the settlement. I know and understand that I have appeal rights to the MSPB. With this agreement, I waive all appeal rights regarding my removal, which was effective (date), to the MSPB, grievance -arbitration, and the EEOC."

NOTE: *The agreement was signed by the employee, employee representative, supervisor, and two witnesses.*

(c) Outcome: Two months later appellant was AWOL for 2 days. The employee's supervisors went to the employee's home and found the employee intoxicated. The agency removed the employee the next day. MSPB ruled that the agreement had been properly invoked, that the appellant had waived the appeal rights to the MSPB and thus dismissed the case.

d. DISCUSSION

(1) As the three examples show, there is no set formula for abeyance or last chance agreements:

(a) They are tailored to the individual situation;

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

(c) They can be imposed unilaterally by the agency, or negotiated with the employee or representative, (if they involve a waiver of rights, the employee must agree);

(d) They can be imposed at several stages of the adverse action process:

1. After a proposal,

2. After a decision, or

3. Even after the action has been effected.

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

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

(a) A time limit and conditions tailored to the situation;

(b) A clear statement of all the agency's requirements of the employee including satisfactory participation in a rehabilitation program and satisfactory conduct;

(c) A description of behaviors that will be considered evidence of compliance or failure to comply with the requirements; and,

(d) An explanation of what the agency will do if the employee fails to comply, and what the agency will do if the employee complies.

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

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

(b) The letter to the employee should clearly describe how the employee violated the provisions of the agreement; and,

(c) The agency should proceed on the basis of the original charges only.

SAMPLE GRIEVANCE FORMAT

TO: (Name, title, and mailing address)

SUBJ: Grievance

1. This is a (formal or informal) grievance under the VA grievance procedure.
2. The matter on which this grievance is based occurred on (give date) and is described in detail as follows: (Furnish sufficient detail to clearly identify the matter being grieved. Appropriate documents related to your grievance should be attached.)
3. The personal relief (i.e., corrective action) I seek is: (Specify clearly.)

(NOTE: "Personal relief" means a specific remedy directly benefiting the grievant and may not include a request for disciplinary or other action affecting another employee. Failure on the part of the grievant to provide sufficient information relating to the grievance or to clearly specify the personal relief requested will result in rejection of the grievance. It is preferable that the grievant personally deliver the grievance when practicable. When mailing is used, the postmark usually determines the filing date of the grievance.)

Signature

Date

Attachments: (All attachments should be identified)

GRIEVANCE EXAMINER'S REPORT

Grievance examiners should consider the following factors in preparing a Report of Findings and Recommendations to respond to the decision official:

1. After completion of the inquiry, the examiner must prepare, and provide to the decision official a Report of Findings and Recommendations. The report must show a determination of the factual issues in the grievance, based on analysis of evidence secured through the inquiry, and review of the grievance file. For each relevant and timely issue, the examiner must analyze and weigh the evidence.

2. If the examiner finds that the employee has a reasonable basis for the grievance, the examiner must then consider whether the adjustment the employee has requested is reasonable and should be recommended.

3. The examiner's findings for each relevant and timely issue may be organized along the following lines:

(a) Identification of the issue,

(b) Analysis and weighing of evidence pertinent to the issue,

(c) Statement of whether the employee's grievance is valid, and

(d) Whether the requested adjustment is appropriate.

(e) Reasons should be provided in regard to determinations made by the grievance examiner pertaining to any adjustments.

4. If the examiner excludes any matter raised in the grievance because the matter is not covered under the grievance system, the report should contain an explanation as to why it is not covered.

5. For grievance examiners appointed locally, the grievance file and the recommendations must be submitted to the decision official within 30 days of receipt of written notification of appointment as grievance examiner. For grievance examiners from outside the facility, the due date for submission is 45 days from receipt of the written notification of appointment.

6. The examiner must limit the findings and recommendations to those issues raised in the grievance.

7. The examiner will indicate in the report that the decision official must notify the grievant of the final decision within 15 calendar days after receipt of the report.

ADMINISTRATION OF OATHS

The Chairman and Secretary of the Disciplinary Appeals Board, as well as Grievance Examiners, are authorized to administer oaths during a hearing. The form of oath generally used is as follows:

"Do you solemnly swear that the testimony you are about to give in the case will be the truth, the whole truth, and nothing but the truth, so help you God?"

If the witness elects to affirm rather than to swear, the following may be used in lieu of the oath:

"Do you solemnly affirm, under the pains and penalties of perjury, that the testimony you are about to give in the case will be the truth, the whole truth, and nothing but the truth?"