VA HANDBOOK 5021/3 Transmittal Sheet June 1, 2005

EMPLOYEE/MANAGEMENT RELATIONS

- **1. REASON FOR ISSUE:** To revise Department of Veterans Affairs (VA) policy regarding employees appointed under 38 U.S.C. 7405.
- **2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This Handbook contains VA policy on employee/management relations. The pages in this transmittal replace the corresponding page number in Part I, III, IV, and VI of VA Handbook 5021, dated April 15, 2002. These changes will be incorporated into the electronic version of the VA Handbook 5021 that is maintained on the Office of Human Resources Management and Labor Relations Web site. Significant changes include:
- a. Adds part-time hybrid employees appointed under 38 U.S.C. 7405(a)(1)(B) under the coverage of applicable title 5 procedures, i.e., disciplinary and adverse action procedures (Part I), probationary employee procedures (Part III) and administrative grievance procedures (Part IV).
- b. Adds reference to VA Handbook 5005 for additional information regarding probationary periods for hybrid employees.
- c. Clarifies coverage of procedures for separating employees appointed under 38 U.S.C. 7405 to exclude employees appointed under 38 U.S.C. 7405(a)(1)(B), i.e., part-time permanent hybrids and temporary hybrids (part-time or full-time) serving on appointments not limited to one year or less.
- **3. RESPONSIBLE OFFICE:** The Human Resources Management Employee Relations & Performance Management Service (051), Office of the Deputy Assistant Secretary for Human Resources Management and Labor Relations.
- **4. RELATED HANDBOOK:** VA Handbook 5021, Employee/Management Relations.

5. RESCISSIONS: None

CERTIFIED BY:

BY DIRECTION OF THE SECRETARY OF VETERANS AFFAIRS:

/s/

Robert N. McFarland Assistant Secretary for Information and Technology $/_{\rm S}/$

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PART I. DISCIPLINARY AND ADVERSE ACTIONS UNDER TITLE 5

CHAPTER 1. GENERAL

- **1. SCOPE.** This chapter contains the policy for taking disciplinary and adverse actions in the Department of Veterans Affairs (VA). Unless otherwise indicated, the chapter applies to all VA employees appointed under title 5 U.S.C., [] 38 U.S.C. 7401(3) [, and 38 U.S.C. 7405(a)(1)(B) (i.e., part-time permanent hybrids and part-time or full-time temporary hybrids serving on appointments not limited to one year or less.)]
- **2. REFERENCES.** Title 5 U.S.C., chapters 73 and 75; VA Handbook 5005, Staffing, part II; 5 CFR, part 752; VA Handbook 5019; [] 38 U.S.C. 7401(3)[; and, 38 U.S.C. 7403(f)(3)].

3. POLICY

- a. The public interest requires the maintenance of high standards of employee integrity, conduct, effectiveness, and service to the public. When such standards are not met, it is essential that prompt and just corrective action be taken. The policy of VA is to maintain standards of conduct and efficiency that will promote the best interests of the service. Disciplinary and adverse actions shall be governed by these basic principles:
- (1) An employee shall be informed in writing honestly and specifically why the action is being brought against him or her.
 - (2) An employee shall be given a reasonable opportunity to present his or her side of the case.
- (3) The employee and representative shall have assurance of freedom from restraint, interference, coercion, discrimination, or reprisal in discussing, preparing, and presenting a defense.
- b. In taking actions covered by this part, like penalties will generally be imposed for like offenses (see appendix A of this part, for further discussion). However, supervisors should give consideration to several factors when determining what action is appropriate, including the nature and gravity of the offense, the existence of either mitigating or aggravating circumstances, the frequency of the offense, and the employee's position. Adverse actions against employees (excluding employees in the Senior Executive Service (SES)) will be taken only for such cause as will promote the efficiency of the service. Adverse actions against SES employees will be based only on misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.
- c. The adverse action procedures described in this part will be used for all actions defined as an adverse action in paragraph 4 [] and covered under 5 CFR, part 752.
- d. An action covered under this part must be in conformance with the merit system principles in 5 U.S.C. 2301 and must not be based on any of the prohibited personnel practices listed in 5 U.S.C. 2302. Accordingly, actions covered under this chapter may not be based on prohibited discrimination because of race, color, religion, sex, national origin, age, or disability. Except when

required by statute, an action covered under this chapter must not be taken against an employee because of marital status or partisan political reasons. Actions covered under this chapter must not be taken as reprisal for the proper exercise of an employee's legal or administrative appeal rights. The Whistleblower Protection Act of 1989 (Public Law No. 101-12) specifically affords protections and entitlements to employees who allege reprisal for having engaged in whistleblowing activities.

- e. Any applicable provisions of a negotiated labor-management agreement should be consulted to determine the possible effect on the processing of disciplinary/adverse actions, notices of such actions, and employee rights.
- f. Any VA employee may review this part and related material by contacting the Human Resources Management office.

4. **DEFINITIONS**

- a. [Active Duty Status. Pay status including authorized overtime, holiday pay, or premium pay].
- b. [Adverse Action. A removal, separation for disability, suspension for more than 14 days, furlough for 30 days (22 non-continuous days) or less, or reduction in grade or pay effected by management for either disciplinary or non-disciplinary reasons, except for those actions which are excluded by law or regulation (see 5 CFR, part 752)].
 - c. Day. Day means calendar day.
- d. [**Deciding Official.** The management official designated to make the final decision on a disciplinary or adverse action].
- e. **Disciplinary Action.** An action taken to correct misconduct or other offenses and to enforce prescribed rules of behavior. It includes admonishments, reprimands, and suspensions of 14 days or less.
- f. [**Furlough.** The placing of an employee in a temporary status without duties and pay due to lack of work or funds, or other non-disciplinary reasons].
- g. [**Grade.** A numerical level assigned to a position under a position classification or job grading system].
- h. [Official Time. Time granted to an employee to review the material relied on to support a proposed action, to prepare an answer, and to secure affidavits, if the employee is otherwise in a duty status].
- i. [Pay. The rate of basic pay fixed by law or administrative action for the position held by an employee].
- j. [**Proposing Official.** The management official who issues a notice of proposed disciplinary or adverse action (i.e., any proposed suspension, removal, reduction in grade or pay, or furlough for 30 days or less)].

3. DISCIPLINARY SUSPENSION OF 14 CALENDAR DAYS OR LESS

- a. **Actions Covered.** The provisions of this paragraph apply to suspensions of 14 calendar days or less.
 - b. **Employees Covered.** This paragraph applies to all VA employees except:
- (1) Employees in the Veterans Health Administration (VHA) appointed under 38 U.S.C., chapter 74 covered by a proficiency rating system. **NOTE:** Employees appointed under 38 U.S.C. 7401(2) and (3) [and 38 U.S.C. 7405(a)(1)(B) (i.e., part-time permanent hybrids and part-time or full-time temporary hybrids serving terms longer than one year)] are covered by the provisions of this chapter.
- (2) Canteen Service employees appointed under 38 U.S.C. 78 (see Veterans Canteen Service Procedures, VCS-1);
 - (3) Schedule C employees;
 - (4) An individual appointed by the President;
 - (5) Re-employed annuitants;
 - (6) Members of the Senior Executive Service.
 - (7) Members of the Board of Veterans and Contract Appeals; and,
- (8) Employees appointed under 38 U.S.C., chapter 3 (e.g. Under Secretary for Health, Under Secretary for Benefits).

c. Employee Entitlements

- (1) An advance notice stating the specific reasons for the proposed suspension;
- (2) A reasonable time to answer, orally or in writing, or both orally and in writing, and to furnish affidavits or other documentary evidence in support of the answer;
 - (3) The right to be represented by an attorney or other representative;
- (4) The right to review the evidence relied upon to support the proposed action (evidence which may not be disclosed to the employee or the employee's designated representative may not be used to support the reasons in a notice of proposed suspension). The evidence will be maintained in the Human Resources Management office;
- (5) A reasonable amount of official time, if otherwise in a duty status, for reviewing the material relied upon to support the proposed action, and for preparing and presenting a written and/or oral reply. This also applies to the employee's representative, if a VA employee;

CHAPTER 3. ADVERSE ACTIONS

1. ACTIONS COVERED. The provisions of this chapter apply to suspensions for more than 14 days, removals, reductions in grade or pay, furloughs of 30 days or less, or other actions which result in an involuntary separation or reduction in grade or pay when such actions are not based solely on unacceptable performance.

2. EMPLOYEES COVERED

- a. Among those employees covered by the provisions of this chapter are:
- (1) Employees in the competitive service who have completed a probationary or trial period for their current appointment;
- (2) Employees in the excepted service who are preference eligibles and who have completed 1 year of current continuous employment in the same or similar positions;
- (3) Employees in the excepted service (other than a preference eligible) who are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; and,
- (4) Employees in the excepted service (other than a preference eligible) who have completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less.
- (5) Employees appointed under 38 U.S.C. 7401(3) (i.e., full-time [] [permanent] hybrids) [or 7405(a)(1)(B) (i.e., part-time permanent hybrids or part-time or full-time temporary hybrids serving terms longer that one year)] who have completed their probationary period.
- b. Most adverse actions will be initiated against employees who meet the criteria described in the previous subparagraph. However, [5 U.S.C. 7511 and] 5 CFR 752.401 (c) provide a comprehensive list of all employees covered by the adverse action provisions of this chapter and should be consulted when questions arise concerning employee coverage.

3. EMPLOYEES EXCLUDED

- a. Physicians, dentists, nurses, nurse anesthetists, expanded function dental auxiliaries, physician assistants, podiatrists, optometrists, and other health care professionals appointed under 38 U.S.C. 74 (see part II of this handbook). **NOTE:** Employees appointed under 38 U.S.C. 7401(2) and (3) [and hybrid employees appointed under 38 U.S.C. 7405(a)(1)(B), who are part-time and have completed their probationary period or who are part-time or full-time temporary and have completed more than one year of service on an appointment not limited to one year or less,] are covered by [] this chapter.
 - b. Schedule C employees;
 - c. An individual appointed by the President; and,
 - d. Members of the Senior Executive Service (except as specifically covered by this chapter).

CHAPTER 2. TITLE 5 PROBATIONARY/TRIAL PERIOD EMPLOYEES

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

2. RESPONSIBILITIES

- a. Managers/Supervisors will continually review the services of employees serving in a probationary status. Supervisors must assure by active measures that the work records of unsatisfactory employees or of those whose services are merely borderline are promptly referred to appropriate officials for action.
 - b. The Chief, Human Resources Management, or designee, is responsible for:
 - (1) Assisting management officials with probationary procedures.
 - (2) Reviewing proposed probationary actions for conformance with [] policies and procedures.
 - (3) Advising employees about probationary procedures and rights.

3. TERMINATION OF PROBATIONERS FOR UNSATISFACTORY PERFORMANCE OR CONDUCT

- a. VA may terminate an employee serving on a probationary or trial period because his/her work performance or conduct fails to demonstrate fitness or qualifications for continued employment. Employment is to be terminated by notifying employees in writing as to why they are being separated and the effective date of the action. The information in the notice as to why an employee is being terminated shall, as a minimum, consist of the conclusions as to the inadequacies of his performance or conduct.
- b. Probation ends when the employee completes his or her scheduled tour of duty on the day before the anniversary date of the employee's appointment. For example, when the last workday is a Friday and the anniversary date is the following Monday, the probationer must be separated before the end of the tour of duty on Friday since Friday would be the last day the employee actually has to demonstrate fitness for further employment.

- **4. APPEAL RIGHTS TO THE MERIT SYSTEMS PROTECTION BOARD.** Probationary employees may appeal to the Merit Systems Protection Board in writing the decision to terminate them for unsatisfactory performance or conduct based upon the following:
- a. **Discrimination.** An employee may appeal to the Board under this chapter a termination not required by statute which the employee alleges was based on partisan political reasons or marital status.
- b. **Improper Procedure.** A probationer may appeal on the grounds that the termination was not effected in accordance with the procedural requirements of 5 CFR 315.805.
- **5. SEPARATION OF PERSONS WHO FAIL TO REGISTER UNDER SELECTIVE SERVICE LAW.** An individual who is serving under a probationary appointment made on or after November 8, 1985, and is not exempt from registration, will be terminated under 5 CFR, part 300, subpart G if he has not registered as required, unless:
 - a. The individuals registers,
 - b. The individual is no longer eligible to register,
- c. OPM determines in response to his explanation that his failure to register was neither knowing nor willful.

EMPLOYEE/MANAGEMENT RELATIONS

PART IV. EMPLOYEE GRIEVANCES AND ADMINISTRATIVE APPEALS

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CHAPTER 2. TITLE 5 AND HYBRID TITLE 38 EMPLOYEES

1. SCOPE

- a. **General.** This chapter establishes policies, principles, and procedures for the presentation and consideration of employee grievances.
- b. **Employee Coverage.** This grievance procedure covers all VA employees, **except** for those listed in subparagraph c [].
 - c. **Exclusions.** The following employees are excluded from coverage:
- (1) A noncitizen appointed under Civil Service Rule VIII, section 8.3 of title 5, Code of Federal Regulations;
 - (2) An alien appointed under section 1471(5) of title 22, United States Code;
- (3) A VA physician, dentist, nurse, or other employee appointed under chapter 73 or 74 of title 38, United States Code. This exclusion does not apply to full-time permanent [employees] appointed under 38 U.S.C. 7401(3) [, permanent part-time employees appointed under 38 U.S.C. 7405(a)(1)(B), or temporary part-time or full-time employees appointed under 7405(a)(1)(B) serving on appointments not limited to one year or less];
- (4) An individual paid from funds as defined in section 2105(c) of title 5 (not applicable to the VA) or section 4202(5) of title 38, United States Code i.e., Excepted Service Veterans Canteen employees.

2. DEFINITIONS

- a. **Grievance.** A request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction relating to employment which is subject to the control of agency management. Matters not covered by the grievance procedure are listed in paragraph 14 of this chapter.
- b. **Employee.** May include a former employee of VA for whom a specific remedy can still be appropriately provided. For example, a former employee charged with 8 hours absence without leave (AWOL) who has requested that the 8 hours of pay be restored. Former employees must have filed a timely grievance in accordance with the provisions of this chapter in order to receive consideration.
- c. **Bargaining Unit Employee.** An employee included in an appropriate unit as determined by the Federal Labor Relations Authority, for which a labor organization has been accorded exclusive recognition.
- d. **Personal Relief.** A specific remedy directly benefiting the grievant, but may not include a request for disciplinary or other action affecting another employee.

PART VI. TITLE 38 SEPARATIONS NOT COVERED BY PARTS II OR III OF THIS HANDBOOK

1. SCOPE. This part contains procedures for the separation of individuals appointed under authority of 38 U.S.C. 7306, 7401(1), 7405[(a)(1)(A),] and 7406. Separations of probationary employees because they are not fully qualified and satisfactory are covered in part III, chapter 1 of this handbook. Discharges for disciplinary reasons of employees with permanent status appointed under section 7401(1) are covered under part II of this handbook, and the term involuntary separations as used in this part does not include such discharges. As used in this part, the term designee refers to a designee in Central Office. The term employee includes all employees covered by this part. This part does not apply in any way to employees appointed under 38 U.S.C. 7401(3) [or 38 U.S.C. 7405(a)(1)(B).] These employees are covered by applicable provisions of title 5, U.S.C.

2. POLICY

- a. Separations and other actions under this part will be effected uniformly and fairly in accordance with management needs, the rights of the affected employees, and the requirements of applicable laws and regulations.
- b. There will be no discrimination because of race, color, religion, national origin, sex or sexual orientation, lawful political affiliation, membership or nonmembership in a labor organization, marital status, nondisqualifying disability, age, or other irrelevant factors in any separation or other action under this part.
- c. Appointments or designations under authority of 38 U.S.C. 7306 terminate on completion of the approved term of service unless sooner terminated for such cause as will promote the efficiency of the service. Normally employees whose appointments will terminate on the completion date should be informed at least 30 calendar days in advance as to whether their appointments will be terminated, extended, renewed, or converted, as appropriate.
- d. The Secretary is the approving authority for involuntary separations under this part of employees in positions centralized to the Secretary.
- **3. REGULATIONS AND PROCEDURES.** The Under Secretary for Health shall promulgate regulations and the Under Secretary for Health and designees shall establish procedures for the following actions under this part: separations because of resignation, retirement, disability, disqualification, abandonment of position, failure to accept reassignment, military service, and preemployment suitability.
- **4. REFERENCES.** 38 U.S.C., chapter 73 and 74.

5. AUTHORITY AND RESPONSIBILITY

a. Secretary. Approves involuntary separations of employees appointed under authority 38 U.S.C. 7306.

- (5) Notification that if separated for abandonment of position, the employee may request in writing a review of the action by the Under Secretary for Health or designee.
- b. If the employee does not return to work or does not, in the judgment of the approving official, make satisfactory arrangement to do so, the separation will be effected at the end of the 10-day notice period. The approving official should take into consideration any presentation by the employee as to illness or disability or emergency circumstances preventing the employee from returning to work.
- c. If, at any time prior to or during the 10-day notice period, the employee returns to duty or makes satisfactory arrangements to do so, the employee will be restored to duty or carried in an appropriate leave status. If appropriate, disciplinary action may be taken by processing the case under the provisions of parts II and III of this handbook. If arrangements are made to return the employee to duty, the individual will normally forfeit pay for the period of unauthorized absence. If warranted, however, substitution of annual or sick leave may be authorized.
- d. An individual separated for abandonment of position by decision of a facility director may request a review of the action by the Under Secretary for Health or designee. If the Under Secretary for Health or designee determines that the employee did not abandon the position, the employee will be restored to duty. The decision of the Under Secretary for Health or designee is final.
- 13. FAILURE TO ACCEPT REASSIGNMENT. If separation for failure to accept reassignment is approved under VA Handbook 5005, part IV, the facility Director will give the employee an advance written notice of at least 30 calendar days. The notice of separation should either be given directly to the employee and the employee requested to acknowledge receipt or mailed to the employee by certified mail. The 30-day notice period begins on the day the employee is given the notification or on the date it is mailed.
- **14. SEPARATION FOR MILITARY SERVICE.** Procedure involving separation for military service prescribed in VA Handbook 5005 will be followed for employees appointed under authority of 38 U.S.C. 7306 and 7401(1) and non-full-time employees appointed without time limit under authority of 38 U.S.C. 7405(a)(1)(A) and (B).

15. INVOLUNTARY SEPARATION OF EMPLOYEES APPOINTED UNDER 38 USC 7405(a)(1)(A)

- a. In effecting involuntary separations of employees serving under 38 U.S.C. 7405[(a)(1)(A)], the procedural requirements prescribed for separations, such as reviews by Professional Standards Boards or Disciplinary Boards, do not apply.
- b. Although not required, employees should, where feasible, be given such advance notice of separation as determined appropriate by the approving official.
 - c. The employee will not be entitled to a review of the involuntary separation.
- d. The provisions of VHA Handbook 1100.18, relating to reporting to State licensing boards and license monitoring entities, must be followed in all instances in which an employee is separated whose standards of clinical practice are in question.