

EMPLOYEE/MANAGEMENT RELATIONS

- 1. REASON FOR ISSUE:** To revise Department of Veterans Affairs (VA) procedures regarding employee/management relations.
- 2. SUMMARY OF CONTENTS/MAJOR CHANGES:** This handbook contains mandatory VA procedures on employee/management relations. The pages in this issuance replace the corresponding page numbers in VA Handbook 5021. Revised text is contained in [brackets]. These changes will be incorporated into the electronic version of VA Handbook 5021 that is maintained on the [Office of Human Resources Management Web site](#). This revision directs readers to the [Office of Human Resources Management, Employee Relations](#) website for sample letters on a variety of topics. It also rescinds the following appendices in their entirety:
 - a. Part I, Appendices I-B through I-N;
 - b. Part II, Appendices II-B through II-I;
 - c. Part III, Appendices III-A through III-D; and
 - d. Part IV, Appendices IV-A through IV-C.
- 3. RESPONSIBLE OFFICE:** The Employee Relations and Performance Management Service (051), Office of the Deputy Assistant Secretary for Human Resources Management.
- 4. RELATED DIRECTIVE:** VA Directive 5021, Employee/Management Relations.
- 5. RESCISSIONS:** The appendices identified in subparagraphs 2a through 2d above.

CERTIFIED BY:

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**BY DIRECTION OF THE SECRETARY
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b. Substance Abuse/Medical Considerations

(1) In relating alcoholism and drug abuse problems to disciplinary policies and practices, it is important to consider non-disciplinary procedures aimed at rehabilitation. However, if the employee refuses to accept assistance offered through the program or to otherwise correct performance, disciplinary measures will be invoked on the basis of the specific misconduct of the employee.

(2) In offering rehabilitative assistance, the employee's supervisor need not confront the employee with the supervisor's belief that the employee has a drinking or drug abuse problem. The supervisor must make the employee aware in general terms that a problem exists affecting his/her conduct, and recommend that the employee participate in a rehabilitation program that is available. Casual suggestions to the employee that the Department would be willing to assist the employee with any problems he/she may have are not a sufficient attempt at counseling to constitute reasonable accommodation. The counseling must be specific with the supervisor recommending that the employee participate in a rehabilitation or counseling program. Should the employee ignore the offer of assistance and the performance or conduct problem continues, it may be necessary to give the employee a "firm choice", between accepting treatment or facing the consequences. A sample firm choice letter is [available on the [Office of Human Resources Management, Employee Relations](#) website]. This letter should be modified to suit your particular circumstances.

(3) Referrals under the Employee Assistance Program (EAP) should be made in writing and as early as possible when the supervisor has a conduct or performance related reason to believe the employee has an alcohol or drug abuse problem which is causing the deficiencies. Written documentation should be maintained of any meetings between the supervisor and the employee to show that an offer of assistance was made. Copies of such documentation should be given to the employee. This documentation can be included at a later date in the evidence file used to support an adverse action. If the employee rejects the offer of assistance, and refuses to acknowledge the problem, action based on misconduct may be taken, including possible removal, even though the employee may later attribute the misconduct to an alcohol or drug problem.

(4) There may be situations where a meaningful offer of assistance is not possible, and appropriate action such as a proposed removal is required. Examples include situations where an employee is incarcerated for an extended period of time, or where the act of misconduct is so egregious (e.g., patient abuse) as to require that the employee be removed immediately from duty status during the period of an investigation and any subsequent proposed adverse action. Normally, an employee will be maintained in a paid duty status during the period between proposal and decision letters. There are circumstances as outlined in law or governing government-wide regulations that allow management to make exception to this provision. In such instances, management must be prepared to demonstrate before a third party that accommodating the employee would have imposed an undue hardship upon the facility where the employee works.

(5) Continuing misconduct while an employee is participating in the program may be dealt with by taking appropriate disciplinary or adverse action. However, the length of time in the program, the type of rehabilitation program provided to the employee, and the employee's demonstrable progress in treatment will be considered as possible mitigating or aggravating factors when deciding on the appropriate action.

suspension or adverse action has been proposed, and offer the employee an opportunity to participate in a rehabilitation program while the proposed action or implementation of the decision is held in abeyance. The final decision on the proposed action is based on whether the employee's participation is successful, and/or whether further misconduct occurs. A primary benefit of last chance or abeyance agreements is that the agency's reasonable accommodation efforts are clearly documented for the record. Since case law in this area is constantly evolving, and there are no set formulas for last chance or abeyance agreements, officials involved in preparing such agreements should contact the Regional Counsel or General Counsel, as appropriate, or the Office of Human Resources Management [] (051) in VA Central Office, when questions arise. Sample abeyance agreements are [[available on the Office of Human Resources Management, Employee Relations website](#)].

(a) There is no set formula for abeyance or last chance agreements:

1. they are tailored to the individual situation;
2. 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);
3. they can be imposed unilaterally by the agency, or
4. negotiated with the employee or his representative, (if they involve a waiver of rights, the employee must agree);
5. they can be imposed at several stages of the adverse action process: after a proposal, after a decision, or even after the action has been effected; and
6. 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).

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

1. a time limit and conditions tailored to the situation;
2. a clear statement of all the agency's requirements of the employee including satisfactory participation in a rehabilitation program, and satisfactory conduct;
3. a description of behaviors that will be considered evidence of compliance or failure to comply with the requirements; and,
4. an explanation of what the agency will do if the employee fails to comply, and what the agency will do if the employee complies.

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

CHAPTER 2. DISCIPLINARY ACTION

1. ADMONISHMENT

a. **Definition.** An admonishment is a written statement of censure given to an employee for a minor act of misconduct.

b. **Procedure.** An admonishment will be in the form of an official letter to the employee describing the reasons for the action. It will advise the employee that a copy of the admonishment and any written explanation or comments regarding the admonishment will be placed on the left-hand side of the employee's personnel folder. The admonishment will contain a statement advising the employee of the right to appeal the action under the grievance procedure in part IV, chapter 2, of this handbook, or the negotiated grievance procedure, as appropriate, and will also contain a statement informing the employee of the withdrawal provisions. Before release to the employee, the admonishment will be forwarded to the Human Resources Management office for review and concurrence. A sample letter of an admonishment [is available on the [Office of Human Resources Management, Employee Relations website](#)].

c. **Withdrawal of Admonishment.** After 2 years (or whatever time frame is specified in any applicable labor-management agreement), admonishments will be removed from the personnel folder and destroyed. However, in cases of patient abuse, an admonishment may be retained in the personnel folder for as long as the individual is employed by VA. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management Officer that the admonishment be withdrawn, if the employee's conduct so warrants. Upon receipt of such a request, the Human Resources Management Officer will return the admonishment to the supervisor for destruction. If the request is initiated by a supervisor below the level of the official who issued the admonishment, it must be approved at or above the level of the official who issued it.

(1) In determining whether an admonishment should be withdrawn early, consideration should be given to the fact that it may not be used after its withdrawal as a past disciplinary record in connection with any future proposed disciplinary or adverse action. This is especially important with respect to admonishments for patient abuse.

(2) When an admonishment has been withdrawn early and destroyed, the supervisory official will inform the employee. In order to assure the employee that no record remains in the personnel folder, the supervisor may wish to destroy it in the employee's presence or give it to the employee for disposition.

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

d. **Right to File a Grievance.** The employee may appeal an admonishment under the VA grievance procedure in part IV, chapter 2 of this handbook, or under the negotiated grievance procedure, as appropriate. Under the VA grievance procedure, the grievance must be submitted through supervisory channels not later than 15 days after receipt of the admonishment. Grievances from bargaining unit

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employees must be filed in accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to that procedure for the appropriate steps and time limits.

2. REPRIMAND

a. **Definition.** A reprimand is a written statement of censure given to an employee for misconduct.

b. **Procedure.** A reprimand will be in the form of an official letter to the employee describing the reasons for the action. It will advise the employee that a copy of the reprimand and any written explanation or comments regarding the reprimand will be placed on the left-hand side of the employee's personnel folder. The reprimand will contain a statement of the right to appeal the action under the VA's grievance procedure in part IV, chapter 2 of this handbook, or the negotiated grievance procedure, as appropriate, and will also contain a statement informing the employee of the withdrawal provisions. Before release to the employee, the reprimand will be forwarded to the Human Resources Management Office for review and concurrence. A sample letter of reprimand [is available on the [Office of Human Resources Management, Employee Relations](#) website].

c. **Withdrawal of Reprimand.** After 3 years (or whatever time frame is specified in any applicable labor-management agreement), a reprimand will be removed from the personnel folder and destroyed. However, in cases of patient abuse, the reprimand may be retained in the personnel folder for as long as the individual is employed by VA. The employee's supervisor may, after 2 years, make a written request to the Human Resources Management Officer that the reprimand be withdrawn, if the employee's conduct so warrants. Upon receipt of such a request, the Human Resources Management Officer will return the reprimand to the supervisor for destruction. If the request is initiated by a supervisor below the level of the official who issued the reprimand, it must be approved at or above the level of the official who issued it.

(1) In determining whether a reprimand should be withdrawn early, consideration should be given the fact that after its withdrawal, it may not be used as a past disciplinary record in connection with any future proposed disciplinary or adverse action. This is especially important with respect to reprimands for patient abuse.

(2) When a reprimand 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 personnel folder, the supervisor may wish to destroy it in the employee's presence or give it to the employee for disposition.

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

d. **Right to File a Grievance.** The employee may appeal the reprimand under the VA grievance procedure in part IV, chapter 2 of this handbook, or under the negotiated grievance procedure, as appropriate. Under the VA grievance procedure, the grievance must be submitted through supervisory channels not later than 15 calendar days after receipt of the reprimand. Grievances from bargaining unit employees must be filed in accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to that procedure for the appropriate steps and time limits.

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evidence to support a conclusion that the reasons for taking action are more likely to be true than not true. This standard of proof is used by the MSPB and arbitrators in deciding appeals and grievances. In proving the charges themselves, it may also be necessary to establish a number of sub-elements. An example would be a case involving charges of absence without leave (AWOL). In such a case, the agency must prove not only that the employee was absent on the date(s) in question, but also that its decision to place the employee in an AWOL status, rather than in an approved leave status, was reasonable.

(2) **Nexus.** Nexus is the element in an adverse action which requires proof of an adequate relationship between the act of misconduct and the efficiency of the service.

(3) **Appropriateness of Penalty.** The agency must establish that the penalty selected is within the tolerable limits of reasonableness (see *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), for a discussion of the Board's authority to review penalties, and appendix A of this part, which lists the "Douglas" factors and contains the Table of Offenses and Penalties). The sample decision letter[, available on the [Office of Human Resources Management, Employee Relations](#) website,] contains suggested language regarding the "Douglas" factors which can be used in the adverse action decision notice.

7. EMPLOYEE ENTITLEMENTS

- a. 30 days advance written notice, stating the specific reasons for the proposed action, except when invoking the crime provision (see paragraph 14 of this chapter), or for furloughs without pay due to unforeseeable circumstances (see VA Handbook 5005, part IV, for further guidance);
- b. A reasonable time, but not less than 7 days (or whatever time frame is specified in any applicable labor-management agreement) to answer orally and/or in writing and to furnish affidavits or other documentary evidence in support of the answer;
- c. Right to be represented by an attorney or other representative;
- d. Right to review the evidence relied upon to support the proposed action (material which cannot be disclosed to the employee or to his or her representative cannot be used to support the reasons in a notice of proposed adverse action and must not be included in the evidence file).
- e. A reasonable amount of official time, if otherwise in a duty status, for reviewing the evidence relied upon to support the proposed action, and for preparing and making a written and oral reply. This also applies to the employee's representative if a VA employee.
- f. A written decision and the specific reasons therefore at the earliest practicable date;
- g. Right to appeal the action to MSPB or under a negotiated grievance procedure (NGP), if the NGP covers appeals of adverse actions and the employee is a member of the bargaining unit, or to file a discrimination complaint under 29 CFR 1614 of the Equal Employment Opportunity Commission's regulations in those instances where the employee has raised an allegation of discrimination during the advance notice period of the adverse action.

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rescinded and a new notice of proposed action issued. The notice will include a new advance notice period and another opportunity to reply orally or in writing, or both orally and in writing. 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 penalty, the employee will be afforded the opportunity to respond to the new evidence before a final decision is made.

f. Officials involved in taking an adverse action against an employee should be aware of the prohibitions against improper "ex parte communications." The MSPB has held that agency 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 an adverse decision. Such communications are improper, and might support reversal of the action on appeal.

13. DECISION NOTICE

a. The decision letter will be dated and signed by the appropriate decision official and will be delivered to the employee prior to the effective date of the action.

b. Before being issued to the employee, the notice will be reviewed by the Human Resources Management Officer, or designee, for compliance with the procedural requirements of existing statutes, OPM regulations, MSPB decisions, applicable labor-management agreements and VA policies. Any comments the Human Resources Management office may have concerning the merits of the case and any mitigating factors will be presented to the decision official.

c. The letter of decision will contain the following information (appendix F of this part):

(1) A statement that consideration has been given to all evidence developed, including the employee's reply. A written reply made by a representative in behalf of the employee is considered to be an employee's reply. If the employee replies both orally and in writing, both must be mentioned. The decision official should also make a statement regarding consideration that was given to the "Douglas" factors (see the sample letter [on the [Office of Human Resources Management, Employee Relations](#) website] for suggested language).

(2) A statement of the decision official's determinations regarding what reasons, if any, in the advance notice were sustained and what reasons, if any, were not sustained.

(3) If a record of prior disciplinary actions was cited in the advance notice, a statement that the action takes the past record, as cited in advance notice, into consideration in determining proper action.

(4) A statement of the effective date, if the penalty imposed is a demotion or removal; or the inclusive dates, if the penalty is a suspension.

(5) A statement concerning the employee's appeal rights, including the right to file a complaint of discrimination (if appropriate), a grievance under the negotiated grievance procedure (if applicable) or an appeal to the appropriate MSPB Regional Office. Only one of the above options may be elected. An employee shall be deemed to have made an election to raise a matter under one of the procedures when the employee timely files an appeal with the MSPB, files a formal complaint of discrimination

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to propose the employee's removal 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. The Regional Counsel should be consulted to assure that there is appropriate coordination with the prosecuting office.

d. Conviction may be cause for removal. However, a subsequent acquittal of the employee on appeal could invalidate the cause for action. Thus, the preferred basis for the adverse action is the misconduct which led to the arrest and conviction. If the cause relied upon is the employee's act(s) of misconduct rather than the arrest and conviction, the administrative action by VA will not be affected by subsequent court action on the criminal case.

e. By invoking the crime provision, the 30-day advance notice period may be shortened to whatever is reasonable under the circumstances, but not less than 7 days, to allow the employee to reply orally and/or in writing to a notice of proposed adverse action. If there is a need for immediate action and it is in the public interest to keep the employee off duty, he or she may be placed in a non-duty status with pay during the advanced notice period of a proposed indefinite suspension or removal, including any period of investigation. To invoke the crime provision and process a removal or indefinite suspension with a curtailed notice period, the following actions should be taken:

- (1) Notify the employee in writing that he or she is being put immediately in a non-duty status with pay.
- (2) Give the employee a notice either of proposed indefinite suspension pending further investigation or disposition of the criminal action, or of proposed removal when there is sufficient evidence to warrant removal. The notice will advise the employee of the reasonable period to respond orally and/or in writing (not less than 7 days).
- (3) 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 has been considered.
- (4) 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 adverse actions.
- (5) Any case involving the crime provision should be discussed with the Regional or General Counsel, 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,
- (6) Sample notices for use in connection with the crime provision [are available on the [Office of Human Resources Management, Employee Relations](#) website].

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PART II. DISCIPLINARY PROCEDURES UNDER TITLE 38

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1. **Records.** All summary review board actions and associated proficiency reports are to be filed in the professional standards board folder whether or not the employee is separated or retained.

4. OTHER APPROPRIATE PENALTY ACTIONS

a. **General.** While the provisions of part II, this handbook, Disciplinary Procedures Under title 38, are not applicable to employees who have not completed the probationary period, in certain cases imposing a penalty action may be appropriate.

(1) These actions may be imposed during the probationary period to correct conduct deficiencies which are not serious enough to justify separation of an employee from the service.

(2) Penalty actions may be imposed as the result of a Professional Standards Board review of an employee's services or by supervisory officials independent of Board action if the employee's action(s) do not warrant peer review. Such actions may include Admonishments and Reprimands (see samples [available on the [Office of Human Resources Management, Employee Relations](#) website]). Such actions may be issued without proposal letters.

b. Approvals

(1) The facility Director may designate supervisory officials at or above the service chief level to approve actions for probationary employees.

(2) The appropriate Network Director approves admonishments and reprimands for network employees, chiefs of staff and facility directors in their probationary periods. Appropriate officials at or above the service director level may approve admonishments and reprimands for VA Central Office employees in their probationary periods.

5. EMPLOYEE STATUS

a. **Status During Review.** In cases involving reviews under the provisions of this chapter, employees will be retained in a pay and active duty status in their current assignment. However, in those instances where it is determined that the employee's continued presence at the work site might pose a threat to employees or others, result in loss of or damage to Government property or otherwise jeopardize legitimate Government interests, the following alternatives may be considered:

(1) Detail the employee to another assignment;

(2) Allow the employee to take leave, or carry the employee as absent without leave if the employee has absented himself or herself from the work site without requesting leave;

(3) As a last resort, the employee may be placed in a paid non-duty status for a brief period pending a decision on whether a summary review is appropriate.

b. **Clinical Privileges.** At the initiation of a Summary Review board, careful consideration should be taken to determine whether a review of the employee's clinical privileges is also appropriate.

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

d. **Mandatory Use of the Informal Procedure.** The employee must complete processing under the informal procedure before a grievance concerning the same matter will be accepted for processing under the formal procedure.

7. FORMAL GRIEVANCE PROCEDURE

a. **Presenting a Grievance Under the Formal Procedure.** If the employee is not satisfied with the informal answer, he/she may present the grievance in writing under the formal procedure. The formal grievance must be filed through supervisory channels within 10 days after receipt of the answer under the informal procedure. The time limit may be extended by management when good cause is shown by the employee. Normally, the formal grievance should be submitted through the employee's immediate supervisor.

b. Contents of a Formal Grievance

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

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

(b) The reasons for which the employee believes that the action was unjustified or that he/she was treated unfairly; and/or the specific policy (agency, facility, etc.), written agreement, or provision violated and how it affected the employee.

(c) The corrective action desired by the employee.

(2) A sample format for an employee's formal grievance is [available on the [Office of Human Resources Management, Employee Relations](#) website].

(3) If the formal grievance does not contain a statement of the grievance giving essentially the information specified above, the decision official will return the grievance to the employee so that the necessary information may be furnished. If the employee fails to provide necessary information after being provided with an opportunity to do so, the decision official should reject the grievance following procedures contained in paragraph 8 of this chapter.

c. **Group Grievances.** When a group of employees has an identical formal grievance, it will be considered in the same manner as an individual complaint and the decision will be binding on all members