

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

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

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

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

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

b. *Establishing Timeliness of an Appeal.* For purposes of computing the 30-day period for filing an appeal, the date of service of the written decision on the employee will be determined by the date of receipt by the employee of the personal delivery, the signed receipt of certified mail, or presumed to be 5 days after depositing the decision in the U.S. mail if no acknowledged receipt is available. The Deputy Under Secretary for Health for Operations and Management will make a final decision regarding the determination that an appeal is filed untimely. The employee will be notified in writing, by letter, of this final determination. There are no further administrative appeal rights regarding the issue of timeliness.

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8. Formal Hearing.

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b. *Exclusion of Individuals During Proceeding.* Prior to testifying or, if subject to recall, no witness will be permitted to hear

the testimony being given by another witness unless the witness is the appellant, or is assisting in the representation of either party. In any event, the Chairman of the Board will make the final determination on exclusion of individuals during any phase of the proceeding.

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

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

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

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

g. *Record of Hearing.* (1) A verbatim record of the hearing proceedings will be prepared.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VA Handbook 5021/Part V, Chapter 1

Part V. Title 38 Appeals to the Disciplinary Appeals Board, Chapter 1. General

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

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