

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

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

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#### 6. *Powers of the Chairperson of the Disciplinary Appeals Board.*

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a. Taking proper steps to expedite the hearing of evidence, and speaking and acting for the Board;

b. Ruling on all questions arising during the proceedings, such as admissibility of evidence offered during the hearing, calling of witnesses, order of introduction of witnesses, etc.;

c. Obtaining further evidence concerning any issue under consideration by the Board at any stage of the proceedings;

d. Acting as the presiding officer, directing the regular and proper conduct of the proceedings, and authenticating, by his or her signature, instructions and proceedings of the Board;

e. Ruling on questions of disqualification of any member of the Board. In cases where the Chairperson is the challenged member,

the question shall be resolved in accordance with paragraph 7e of this chapter;

f. Scheduling the specific hour and dates of hearings;

g. Closing the record;

h. Administering oaths or affirmations made by individuals giving testimony;

i. Ruling on motions from the parties; and

j. Calling witnesses on behalf of the Board.

#### 7. *Procedure.* a. *Determining Jurisdiction.*

When a Board is convened to consider an appeal, the Board shall first determine whether the case is properly before it prior to considering the merits of the appeal. The Board shall determine whether the matter appealed is a major adverse action as defined in part II of this handbook, and whether it arises out of or includes a question of professional conduct or competence. The determination of jurisdiction will be made as soon as practicable. The Board will make a record of its determination.

(1) The record of decision in any mixed case shall include a statement by the Board of its exclusive jurisdiction, citing 38 U.S.C. 7462(a) as the authority and the basis for such exclusive jurisdiction. A mixed case is one that includes both (a) a major adverse action arising out of, or including, a question of professional conduct or competence, and (b) a major adverse action which does not arise out of a question of professional conduct or competence or a disciplinary action.

(2) If necessary, the Board may develop the record to establish jurisdiction.

(3) If the Board determines that the appeal is not properly before it, *e.g.*, that it lacks jurisdiction, the Board shall fully set forth its reasons, including a statement of the appropriate appeal procedure. The Deputy Under Secretary for Health will take appropriate action on the decision of the Board as described in paragraph 9e of this chapter.

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#### 8. *Formal Hearings.*

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

#### 9. *Disciplinary Appeals Board Decisions.*

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

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

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

#### d. *Preparation of VA Form 10-2543.*

Following deliberation and voting on the findings and any penalty, VA Form 10-2543 will be prepared by the Disciplinary Appeals Board considering the case. The Chairperson of the Board will forward the complete

record, including its findings and decision, signed and dated by all members of the Board and the technical advisor, through the Office of Human Resources Management (051) to the [Deputy] Under Secretary for Health for appropriate action. VA Form 10-2543 will contain supporting rationale for each of the findings.

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

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

(a) Reverse the decision of the Board; or

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

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

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

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

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

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

g. *Case Record.* (1) The case record will consist of the notice of proposed adverse action, appellant's reply, if any, all evidence (documents or testimony) relied upon by the Board in reaching its decision, notice of decision to appellant, appellant's request for a hearing, Deputy Under Secretary for Health's or designee's appointment of Board, Board communications and notices related to the hearing, any Board rulings or submissions of the parties, verbatim record of any formal hearing, Board Action (VA Form 10-2543), Deputy Under Secretary for Health's execution of the Board's recommendation, and any Notification of Personnel Action (SF-50B).