

(B) the emergency is non-recurring and is not caused by or aggravated by the inattention of the Secretary or lack of reasonable contingency planning by the Secretary;

(C) the Secretary has exhausted all good faith, reasonable attempts to obtain voluntary workers;

(D) the nurse staff have critical skills and expertise that are required for the work; and

(E) the work involves work for which the standard of care for a patient assignment requires continuity of care through completion of a case, treatment, or procedure.

(2) Nursing staff may not be required to work hours under this subsection after the requirement for a direct role by the staff in responding to medical needs resulting from the emergency ends.

(d) **NURSING STAFF DEFINED.**—In this section, the term “nursing staff” includes the following:

(1) A registered nurse.

(2) A licensed practical or vocational nurse.

(3) A nurse assistant appointed under this chapter or title 5.

(4) Any other nurse position designated by the Secretary for purposes of this section.

(Added Pub. L. 111-163, title VI, § 602(a)(1), May 5, 2010, 124 Stat. 1172.)

SUBCHAPTER V—DISCIPLINARY AND GRIEVANCE PROCEDURES

§ 7461. Adverse actions: section 7401(1) employees

(a) Whenever the Under Secretary for Health (or an official designated by the Under Secretary for Health) brings charges based on conduct or performance against a section 7401(1) employee and as a result of those charges an adverse personnel action is taken against the employee, the employee shall have the right to appeal the action.

(b)(1) If the case involves or includes a question of professional conduct or competence in which a major adverse action was taken, such an appeal shall be made to a Disciplinary Appeals Board under section 7462 of this title.

(2) In any case other than a case described in paragraph (1) that involves or includes a question of professional conduct or competence in which a major adverse action was not taken, such an appeal shall be made through Department grievance procedures under section 7463 of this title.

(c) For purposes of this subchapter—

(1) Section 7401(1) employees are employees of the Department employed on a full-time basis under a permanent appointment in a position listed in section 7401(1) of this title (other than employees in senior executive positions (as defined in section 713(d) of this title) and interns and residents appointed pursuant to section 7406 of this title).

(2) A major adverse action is an adverse action which includes any of the following:

(A) Suspension.

(B) Transfer.

(C) Reduction in grade.

(D) Reduction in basic pay.

(E) Discharge.

(3) A question of professional conduct or competence is a question involving any of the following:

(A) Direct patient care.

(B) Clinical competence.

(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.

(e) Whenever the Secretary proposes to prescribe regulations under this subchapter, the Secretary shall publish the proposed regulations in the Federal Register for notice-and-comment not less than 30 days before the day on which they take effect.

(Added Pub. L. 102-40, title II, § 203(a), May 7, 1991, 105 Stat. 202; amended Pub. L. 102-405, title III, § 302(c)(1), Oct. 9, 1992, 106 Stat. 1984; Pub. L. 115-41, title II, §§ 201(b), 208(a), June 23, 2017, 131 Stat. 869, 878.)

PRIOR PROVISIONS

Provisions similar to those in this subchapter were contained in section 4110 of this title prior to the repeal of that section as part of the complete revision of chapter 73 of this title by Pub. L. 102-40.

AMENDMENTS

2017—Subsec. (b)(2). Pub. L. 115-41, § 208(a), amended par. (2) generally. Prior to amendment, par. (2) related to the appeals procedure for cases not described in par. (1).

Subsec. (c)(1). Pub. L. 115-41, § 201(b), inserted “employees in senior executive positions (as defined in section 713(d) of this title) and” before “interns”.

1992—Subsec. (a). Pub. L. 102-405 substituted “Under Secretary for Health” for “Chief Medical Director” in two places.

REGULATIONS

Pub. L. 102-40, title II, § 204, May 7, 1991, 105 Stat. 207, provided that: “The Secretary of Veterans Affairs shall prescribe regulations under subchapter V of chapter 74 of title 38, United States Code (as added by section 203), not later than 180 days after the date of the enactment of this Act [May 7, 1991]. Such regulations shall be published in the Federal Register for notice-and-comment not less than 30 days before the day on which they take effect.”

§ 7462. Major adverse actions involving professional conduct or competence

(a)(1) Disciplinary Appeals Boards appointed under section 7464 of this title shall have exclusive jurisdiction to review any case—

(A) which arises out of (or which includes) a question of professional conduct or competence of a section 7401(1) employee; and

(B) in which a major adverse action was taken.

(2) The board shall include in its record of decision in any mixed case a statement of the board’s exclusive jurisdiction under this subsection and the basis for such exclusive jurisdiction.

(3) For purposes of paragraph (2), a mixed case is a case that includes both a major adverse action arising out of a question of professional conduct or competence and an adverse action which is not a major adverse action or which

does not arise out of a question of professional conduct or competence.

(b)(1) In any case in which charges are brought against a section 7401(1) employee which arises out of, or includes, a question of professional conduct or competence which could result in a major adverse action, the employee is entitled, within the aggregate time period specified in paragraph (5)(A), to the following:

(A) Advance written notice from the Under Secretary for Health or other charging official specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge, and a file containing all the evidence in support of each charge, except that the requirement for notification in advance may be waived if there is reasonable cause to believe that the employee has committed a crime for which the employee may be imprisoned.

(B) The opportunity, within the time period provided for in paragraph (4)(A), to present an answer orally and in writing to the Under Secretary for Health or other deciding official, who shall be an official higher in rank than the charging official, and to submit affidavits and other documentary evidence in support of the answer.

(2) In any case described in paragraph (1), the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

(3) After considering the employee's answer, if any, and within the time period provided for in paragraph (5)(B), the deciding official shall render a decision on the charges. The decision shall be in writing and shall include the specific reasons therefor.

(4)(A) The period for the response of an employee under paragraph (1)(B) to advance written notice under paragraph (1)(A) shall be seven business days.

(B) The Secretary shall require that any appeal to a Disciplinary Appeals Board from a decision to impose a major adverse action shall be received within seven business days after the date of service of the written decision on the employee.

(5)(A) The aggregate period for the resolution of charges against an employee under this subsection may not exceed 15 business days.

(B) The deciding official shall render a decision under paragraph (3) on charges under this subsection not later than 15 business days after the Under Secretary provides notice on the charges for purposes of paragraph (1)(A).

(6) The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.

(c)(1) When a Disciplinary Appeals Board convenes to consider an appeal in a case under this section, the board, before proceeding to consider the merits of the appeal, shall determine whether the case is properly before it.

(2) Upon hearing such an appeal, the board shall, with respect to each charge appealed to the board, sustain the charge, dismiss the

charge, or sustain the charge in part and dismiss the charge in part. If the deciding official is sustained (in whole or in part) with respect to any such charge, the board shall—

(A) approve the action as imposed;

(B) approve the action with modification, reduction, or exception; or

(C) reverse the action.

(3) A board shall afford an employee appealing an adverse action under this section an opportunity for an oral hearing. If such a hearing is held, the board shall provide the employee with a transcript of the hearing.

(4) The board shall render a decision in any case within 45 days of completion of the hearing, if there is a hearing, and in any event no later than 120 days after the appeal commenced.

(d)(1) After resolving any question as to whether a matter involves professional conduct or competence, the Secretary shall cause to be executed the decision of the Disciplinary Appeals Board in a timely manner and in any event in not more than 90 days after the decision of the Board is received by the Secretary. Pursuant to the board's decision, the Secretary may order reinstatement, award back pay, and provide such other remedies as the board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

(2) If the Secretary finds a decision of the board to be clearly contrary to the evidence or unlawful, the Secretary 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.

(3) If the Secretary finds the decision of the board (while not clearly contrary to the evidence or unlawful) to be not justified by the nature of the charges, the Secretary may mitigate the adverse action imposed.

(4) The Secretary's execution of a board's decision shall be the final administrative action in the case.

(e) The Secretary may designate an employee of the Department to represent management in any case before a Disciplinary Appeals Board.

(f)(1) A section 7401(1) employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.

(2) In any case in which judicial review is sought under this subsection, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) obtained without procedures required by law, rule, or regulation having been followed; or

(C) unsupported by substantial evidence.

(Added Pub. L. 102-40, title II, §203(a), May 7, 1991, 105 Stat. 203; amended Pub. L. 102-405, title III, §302(c)(1), Oct. 9, 1992, 106 Stat. 1984; Pub. L. 115-41, title II, §208(b), June 23, 2017, 131 Stat. 878; Pub. L. 116-61, §6(7), Sept. 30, 2019, 133 Stat. 1117.)

PRIOR PROVISIONS

Provisions similar to those in this subchapter were contained in section 4110 of this title prior to the repeal of that section as part of the complete revision of chapter 73 of this title by Pub. L. 102-40.

AMENDMENTS

2019—Subsec. (b)(4)(A). Pub. L. 116-61 inserted “notice” after “written”.

2017—Subsec. (b)(1). Pub. L. 115-41, §208(b)(1)(A), in introductory provisions, inserted “, within the aggregate time period specified in paragraph (5)(A),” after “is entitled”.

Subsec. (b)(1)(A). Pub. L. 115-41, §208(b)(1)(B), substituted “Advance written notice” for “At least 30 days advance written notice” and “a statement” for “and a statement” and inserted “and a file containing all the evidence in support of each charge,” after “with respect to each charge.”

Subsec. (b)(1)(B). Pub. L. 115-41, §208(b)(1)(C), substituted “The opportunity, within the time period provided for in paragraph (4)(A)” for “A reasonable time, but not less than seven days”.

Subsec. (b)(3). Pub. L. 115-41, §208(b)(2), added par. (3) and struck out former par. (3) which related to requirement that deciding official render a written decision within 21 days of receipt of the employee’s answer.

Subsec. (b)(4)(A). Pub. L. 115-41, §208(b)(3)(A), added subpar. (A) and struck out former subpar. (A) which read as follows: “The Secretary may require that any answer and submission under paragraph (1)(B) be submitted so as to be received within 30 days of the date of the written notice of the charges, except that the Secretary shall allow the granting of extensions for good cause shown.”

Subsec. (b)(4)(B). Pub. L. 115-41, §208(b)(3)(B), substituted “seven business days” for “30 days”.

Subsec. (b)(5), (6). Pub. L. 115-41, §208(b)(4), added pars. (5) and (6).

1992—Subsec. (b)(1). Pub. L. 102-405 substituted “Under Secretary for Health” for “Chief Medical Director” in subpars. (A) and (B).

§ 7463. Other adverse actions

(a) The Secretary shall prescribe by regulation procedures for the consideration of grievances of section 7401(1) employees arising from adverse personnel actions in which each action taken either—

- (1) is not a major adverse action; or
- (2) does not arise out of a question of professional conduct or competence.

Disciplinary Appeals Boards shall not have jurisdiction to review such matters, other than as part of a mixed case (as defined in section 7462(a)(3) of this title).

(b) In the case of an employee who is a member of a collective bargaining unit under chapter 71 of title 5, the employee may seek review of an adverse action described in subsection (a) either under the grievance procedures provided through regulations prescribed under subsection (a) or through grievance procedures determined through collective bargaining, but not under both. The employee shall elect which grievance procedure to follow. Any such election may not be revoked.

(c)(1) In any case in which charges are brought against a section 7401(1) employee which could result in a major adverse action and which do not involve professional conduct or competence, the employee is entitled to notice and an opportunity to answer with respect to those charges in accordance with subparagraphs (A) and (B) of

section 7462(b)(1) of this title, but within the time periods specified in paragraph (3).

(2) In any other case in which charges are brought against a section 7401(1) employee, the employee is entitled, within the aggregate time period specified in paragraph (3)(A), to—

(A) written notice stating the specific reason for the proposed action, and

(B) time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer.

(3)(A) The aggregate period for the resolution of charges against an employee under paragraph (1) or (2) may not exceed 15 business days.

(B) The period for the response of an employee under paragraph (1) or (2)(B) to written notice of charges under paragraph (1) or (2)(A), as applicable, shall be seven business days.

(C) The deciding official shall render a decision on charges under paragraph (1) or (2) not later than 15 business days after notice is provided on the charges for purposes of paragraph (1) or (2)(A), as applicable.

(d) Grievance procedures prescribed under subsection (a) shall include the following:

(1) A right to formal review by an impartial examiner within the Department of Veterans Affairs, who, in the case of an adverse action arising from a question of professional conduct or competence, shall be selected from the panel designated under section 7464 of this title.

(2) A right to a prompt report of the findings and recommendations by the impartial examiner.

(3) A right to a prompt review of the examiner’s findings and recommendations by an official of a higher level than the official who decided upon the action. That official may accept, modify, or reject the examiner’s recommendations.

(e) In any review of an adverse action under the grievance procedures prescribed under subsection (a), the employee is entitled to be represented by an attorney or other representative of the employee’s choice at all stages of the case.

(Added Pub. L. 102-40, title II, §203(a), May 7, 1991, 105 Stat. 205; amended Pub. L. 115-41, title II, §208(c), June 23, 2017, 131 Stat. 878; Pub. L. 115-407, title VII, §702(a)(2), Dec. 31, 2018, 132 Stat. 5381.)

PRIOR PROVISIONS

Provisions similar to those in this subchapter were contained in section 4110 of this title prior to the repeal of that section as part of the complete revision of chapter 73 of this title by Pub. L. 102-40.

AMENDMENTS

2018—Subsec. (c)(2)(B). Pub. L. 115-407 substituted “to answer” for “to answer to answer”.

2017—Subsec. (c)(1). Pub. L. 115-41, §208(c)(1), substituted “notice and an opportunity to answer with respect to those charges in accordance with subparagraphs (A) and (B) of section 7462(b)(1) of this title, but within the time periods specified in paragraph (3)” for “the same notice and opportunity to answer with respect to those charges as provided in subparagraphs (A) and (B) of section 7462(b)(1) of this title”.

Subsec. (c)(2). Pub. L. 115-41, §208(c)(2)(A), in introductory provisions, inserted “, within the aggregate