Subject: Board for Correction of PHS Commissioned Corps Records

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PHS:
16-00-00 PURPOSE AND SCOPE

This clarifies the policies concerning the Board for Correction of Public Health Service (PHS) Commissioned Corps Records (hereinafter referred to as the Board), contained in Part 4, Regulations, Commissioned Corps Personnel Manual (CCPM), Subchapter CC49.9, Personnel INSTRUCTION 1, September 8, 1981. This clarification describes more fully the procedures for establishing and administering the Board, for making applications to correct PHS Commissioned Corps records, for considering applications by the Board, and for settling claims or determining monetary benefits resulting from Board decisions. The Board may amend or waive any of the provisions of this manual chapter, however, as they apply to a particular case.

PHS:
16-00-10 AUTHORITY

The regulation amplified herein is issued under Section 221a(a)(12) of the PHS Act (Public Law 96-76, 1979, as amended) and 42 U.S.C. 213a(a)(12). This Section extends to the Commissioned Corps the provisions of 10 U.S.C. 1552 allowing the Secretary of the Department of Health and Human Services (DHHS), under procedures approved by him/her, and acting through a Board of civilian (non-uniformed, non-reserve) employees, to correct any record pertaining to the service of any current or former Commissioned Corps officer maintained by DHHS, when the Secretary considers such action necessary to correct an error or remove an

injustice. These authorities also authorize the Department to pay any amount due as a result of correcting a record.

PHS:
16-00-20 ESTABLISHMENT OF THE BOARD

A. Establishment. The Board is established in the Office of the Assistant Secretary for Health, PHS in DHHS. The Secretary has delegated to the Assistant Secretary for Health (ASH) the authority to administer the Board. This authority has, in turn, been redelegated to the Director, Office of Management, hereinafter referred to as the "Approving Official". The Approving Official has designated the Director, Office of Organization and Management Systems, to be the Executive Director of the Board.

B. Function. The function of the Board is to consider all applications properly before it for the purpose of determining the existence of an error or injustice and to make recommendations to the Approving Official.

C. Jurisdiction. The Board has jurisdiction to review and determine all matters pertaining to the Commissioned Corps records of any current or former Commissioned Corps officer properly brought before it, consistent with existing law and regulation. The Board also has jurisdiction to correct other records if necessary to implement a Board decision.

D. Board Members. The Approving Official appoints a panel of representative, qualified PHS civilian employees, GS-14 or higher, to serve as potential Board members. Members of this panel are designated to constitute a Board for each case requiring consideration and one such member is chosen to serve as the Chairperson. A Board quorum consists of at least three members.

E. Executive Director. The Executive Director oversees the administrative operations of the Board and serves as a member of the Board in emergency situations. He/she serves under the supervision of the Approving Official. The Executive Director may appoint an Executive Secretary or other staff to assist with the operations of the Board. The responsibilities of the Executive Director include:

1. Providing staff support to the Approving Official regarding the development and maintenance of a panel of senior Civil Service employees to serve as Board members on an as-needed basis;

2. Reviewing applications to determine whether to grant Board review;

3. Designating from the panel, established by the Approving Official, Board members, including a Chairperson, to consider applications and make recommendations to the Approving Official;

4. Assembling materials to be presented as documentation for Board review, obtaining additional information as the Board may require, preparing for Board hearings, and preparing case summaries, case digests, Records of Proceedings, as provided for in Section 16-00-50 and elsewhere in these procedures; and,

5. Maintaining historical records and preparing an annual report as provided in Section 16-00-90.

F. Chairperson. The Chairperson presides over Board meetings to review cases and over hearings. He/she:

1. Sets the agenda;

2. Determines whether or not to grant a hearing requested by an applicant;

3. Calls, chairs, recesses or adjourns, and calls additional meetings or sessions, as needed;

4. Directs consideration of documentation sent to the Board;

5. Formalizes requests of Board members for additional documentation;

6. Conducts voting on proposed Board recommendations; and,

7. Reviews and certifies to the Executive Director that the Board Findings, Conclusions and Recommendations are true and complete and ready to be sent to the Approving Official.

G. Executive Secretary. The Executive Secretary carries out functions prescribed for him/her by these procedures and such other duties as may be assigned to him/her by the Executive Director. He/she serves under the supervision of the Executive Director.

H. Changes to this Issuance. The Approving Official or Board members, may request the Executive Director to initiate recommendations for changes in the procedures established herein that may be necessary for the proper functioning of the Board. All such changes shall be reviewed by the Office of the General Counsel (OGC), and must be approved by ASH.

PHS:
16-00-30 APPLICATION FOR CORRECTION

A. Submission. An application to the Board must be submitted on Form PHS-6190, Application to the Board for Correction of Public Health Service Commissioned Corps Records, or on an exact facsimile thereof and sent to the address indicated on the form. The applicant has the responsibility to procure such evidence as he/she desires to present in support of his/her application. The application should be accompanied by copies of all briefs, official records, memoranda or other documents the applicant or his/her counsel desires to submit in support of the request. The applicant may provide or authorize submission of the results of any relevant grievance, EEO complaint or other administrative action or investigation, including medical reports, which support the application. Forms and explanatory matter for making application may be obtained from the:

Executive Secretary
Board for Correction of PHS Commissioned
Corps Records
5600 Fishers Lane, Room 17-51
Rockville, Maryland 20857
Phone number: (301) 443-6268

B. Applicant's Signature. The application must be signed by the person requesting removal of an alleged error or injustice. The application may, however, be submitted by a spouse, parent, heir, counsel or legal representative when the record in question or the alleged error or injustice involves a person who is incapable of making application for himself/herself or whose whereabouts is unknown or who is deceased. When the application is not signed by the person requesting corrective action, it must be accompanied by satisfactory evidence of: (1) the death, incapacity or unavailability of such person; and, (2) the relationship of the person making the application (whether a spouse, parent, heir, counsel or legal representative).

C. Time Limits. The application must be filed within three years after discovery of the alleged error or injustice. An

application filed after that time may not be accepted by the Board unless the Board finds that it would be in the interest of justice to do so. Reasons why its acceptance would be in the interest of justice must be stated in the application.

D. Other Remedies. Before the Board can consider an application, an applicant must have exhausted all pertinent administrative or other remedies afforded him/her by existing law or regulation as the Board may determine are practical and appropriately available to the applicant. Where applicable, these may include exhausting grievance remedies as provided in CCPM Subchapter CC26.1, INSTRUCTION 5 and EEO remedies in CCPM Subchapter CC26.1, INSTRUCTION 6 of the CCPM, and waiver of claims for overpayment of pay and allowances in CCPM, Subchapter CC22.7, INSTRUCTION 7. The applicant shall include information in this regard on his/her application.

E. Access to Official Records. The applicant may have access to his/her official records or to any information pertaining to him/her in the custody of the Department, as provided for in 45 CFR Part 5b regarding the Privacy Act. The applicant may have access to other Department records as provided for in 45 CFR Part 5 implementing the Freedom of Information Act.

PHS:
16-00-40 CONSIDERATION OF APPLICATION

A. Review of Application. The application and all documentation submitted are reviewed by the Executive Director to determine whether to grant or deny a Board review of the application or recommend to the Board disposition on its merits without a Board meeting. In making this determination, the Executive Director will ask the Division of Commissioned Personnel (DCP) whether the applicant has exhausted other administrative remedies and whether the corrective action sought will be taken by DCP. The Executive Director also may request that DCP furnish the Board with PHS records pertinent to the request of the applicant.

A Board review is granted if the documentation provided by the applicant and that by DCP demonstrate the existence of a probable error or injustice justifying action by the Board.

B. Denial of Application. The Executive Director shall deny an application when:

1. All effective administrative remedies have not been exhausted, as determined from information provided by DCP;

2. Insufficient relevant evidence has been presented to demonstrate the existence of a probable error or injustice;

3. Effective relief cannot be granted by the Board;

4. The Board does not have jurisdiction to determine the matter presented; or

5. The application has not been filed within three years as prescribed in Section 16-00-30C and the interest of justice does not require its acceptance.

Denial of an application under this paragraph is without prejudice to further consideration if new, relevant evidence is submitted by the applicant or otherwise comes to the attention of the Board. When relief is denied under this Section, the applicant is advised of the reasons for the denial and of any right he/she may have to further proceedings.

C. Appeal. The applicant may appeal the Executive Director's denial of an application to the Approving Official.

D. Withdrawal. The Board may permit an applicant to withdraw his/her application without prejudice at any time before the Findings, Conclusions and Recommendations are acted on by the Approving Official.

E. Other Proceedings Not Stayed. The application to the Board does not operate as a stay of any proceedings or administrative action being taken with respect to or affecting the person involved or of any matters the applicant may have requested the Board to consider.

PHS:
16-00-50 CASE RECORD DEVELOPMENT

A. The Case Record is developed by the Board staff in preparation for a Board review.

B. The Executive Director provides DCP with a copy of each application submitted under Section 16-00-30 that has not been denied under Section 16-00-40B, together with any briefs, memoranda, copies of official records and other documentary evidence submitted or obtained by the Board concerning the application.

C. DCP reviews the application and documentation and promptly informs the Executive Director whether: (1) all pertinent administrative remedies have been exhausted; and, (2) the problem cited can be resolved administratively.

D. DCP shall, in general, serve as the focal point for collecting evidence from other PHS agencies related to an application.

E. DCP forwards to the Executive Director an Advisory Opinion in writing on the application including evidence from any pertinent PHS agency file, procedure, etc. that tends to rebut or support the applicant's evidence and/or to clarify the actions and decisions of program administrators regarding issues presented by the applicant. The information and views furnished by DCP, which are not binding on the Board, are submitted to the Board along with all other written information and documentation submitted by the applicant.

F. The Executive Director prepares a draft Case Summary that delineates the facts and issues in the case and the positions of both the applicant and DCP. In so doing, the Executive Director may request from the applicant or DCP additional information deemed necessary for consideration of the application by the Board. Where pertinent, the Case Summary includes a listing of prior cases decided on by the Board and any relevant precedents, as well as any relevant legal precedents, especially those resulting from decisions of the Comptroller General, which have been brought to the attention of the Board.

G. A copy of the draft Case Summary and Advisory Opinion are sent to the applicant who may rebut, if he/she desires, any information, statements or views contained therein. Such rebuttal should be accompanied by clear and convincing evidence. In turn, a copy of the Case Summary also is sent to DCP for similar review and comment. Each party receives copies of the comments provided for further rebuttal until the Executive Director is satisfied that a full Case Record has been developed or after being advised by the applicant and by DCP that no additional documentary materials will be

submitted. All comments received are incorporated into the final Case Summary for submission to the Board.

H. The Case Record contains the application, transcripts of any testimony, affidavits, papers, documents, briefs, advisory opinions, written arguments and any other documentation and evidence submitted by the applicant, the rebuttal or comments and documentation submitted by DCP in support of its position, and the Case Summary. At a later stage, the Record will also contain a transcript of the hearing, if one has been held, and the Findings, Conclusions and Recommendations of the Board and the determination of the Approving Official.

I. The Executive Director or the Chairperson may request an advisory legal opinion or advice from OGC on any aspect of the case to clarify any legal or administrative precedents or issues. Additionally, DCP may advise the Board that it should seek a legal opinion on legal issues which should be resolved prior to, or as part of, the Board's review.

J. The Case Record is sent to the Board for review.

PHS:
16-00-60 HEARING

A. General. The applicant may request permission to appear before the Board in person or by counsel or in person with counsel after the application and supporting documentation have been accepted under Section 16-00-40B.

After the Case Record has been developed, the Chairperson will determine whether or not to grant a hearing. A hearing will be granted if the Chairperson finds that the documentation indicates that a hearing would be likely to provide additional information material to the case not otherwise obtainable from the written record. In addition, a hearing may be granted or requested by the Board during its deliberations. In either case, the Chairperson will decide whether DCP should also be requested to provide evidence at a hearing.

B. Denial of Hearing. If the Chairperson determines that a hearing that has been requested by an applicant is not warranted, the applicant or his counsel is notified in writing that a hearing has been denied and is advised of the reasons therefor.

C. Appeal of Denial. The applicant may request the full Board to reconsider the denial by submitting within 30 days, after the date of notice, further documentary evidence to justify a hearing. If the Board denies a request for reconsideration, the applicant or his/her counsel is notified in writing of the denial and the reasons for that determination. The Board also sets forth its reasons for the denial in its final disposition of the application.

D. Notice of Hearing. In each case in which a hearing is granted, the applicant or his/her counsel, and DCP, if requested to present evidence, are notified by the Executive Director in writing that a hearing has been granted and that a time and place for the hearing will be set. The date of the hearing may not be less than 30 days from the date that the written notice is mailed, except that an earlier date may be set when the applicant waives his/her right, in writing, to the 30-day notice and has actual notice of the time and place of the hearing.

Upon receipt of notice of the hearing, the applicant notifies the Executive Director in writing at least 15 days prior to the date set for the hearing whether he/she will appear and furnishes to the Board the name of counsel, if represented by counsel, and the name of each witness he/she intends to call.

E. Counsel. The term "counsel" includes members in good standing of any bar or any state, accredited representatives of veterans' organizations recognized by the Administrator of Veterans' Affairs under 38 U.S.C. 3402, and other persons, including PHS Commissioned Corps officers, who, in the opinion of the Chairperson, are considered to be competent and appropriate to represent the applicant. No staff assigned to the Office of the Surgeon General (OSG) may represent the applicant.

F. Witnesses. The applicant is entitled to present witnesses in his/her behalf at a hearing before the Board. The applicant is responsible for notifying such witnesses and for ensuring their appearances at the time and place set for the hearing.

G. Postponement of Hearing. New issues may not be raised by legal briefs, memoranda or other documentary evidence filed or submitted after the hearing date has been set or at the hearing, except for good cause shown. If new issues are raised after the hearing date has been set, upon good cause shown, the Chairperson may postpone the hearing for such

time as is necessary to allow sufficient time for review of additional materials. If a hearing is postponed, the Executive Director notifies the applicant or his/her counsel in writing of the postponement and of a place and time set for a new hearing.

H. Nonappearance. An applicant who notifies the Board in writing that he/she does not desire to appear or to be represented by counsel at the appointed place and time set for the hearing, or who fails without good cause to appear in person or to be represented by counsel, is deemed to have waived his/her right to a hearing. Under such circumstances, the Board considers the application on the basis of the written material in the Case Record at that time.

I. Conduct of Hearing. The Chairperson conducts the hearing so as to insure a full and fair presentation of all the evidence. The hearing is not an adversarial or a legal proceeding. It is not limited by legal rules of evidence; reasonable bounds of competency, relevancy and materiality are observed in receiving and considering evidence. All testimony is given under oath or affirmation; witnesses are subject to questioning by the Board. It is the applicant's responsibility to procure evidence in support of his/her case.

J. Continuance. The hearing may be continued by the Board on its own motion. A request for continuance by or in behalf of the applicant may be granted by the Board if considered necessary to insure a full and fair presentation of the evidence.

K. Report of Proceedings. The proceedings in the hearing are reported verbatim and are transcribed.

L. Review of Proceedings. A copy of the proceedings, including the transcript of the hearing and all other documents incident to the hearing, is given to the applicant or his/her counsel, to the Board members and to DCP for review and comment prior to any deliberations by the Board in executive session.

M. Expenses. No expenses of any nature whatsoever voluntarily incurred by the applicant or his/her counsel or his/her witnesses or by any other person in behalf of the applicant is paid by the Federal Government.

PHS:
16-00-70 DELIBERATIONS AND DISPOSITION

A. Deliberations. Only the Chairperson, Board members and the Board Staff are present during deliberations on an application. The deliberations are conducted in executive session and any records thereof are not subject to requests under the Freedom of Information or Privacy Acts.

B. Further Information. When it appears to the Board that the facts and issues have not been fully and fairly disclosed by the Case Record, testimony or other information before it, it may request that the Board Staff obtain further information essential to insuring a full and fair review of the application. The Board may, at its discretion, accept any documentary evidence relevant to a matter under consideration if received prior to the final determination on the application by the Approving Official. The applicant and DCP will be given an opportunity to comment on any further information submitted to or obtained by the Board.

C. Findings, Conclusions and Recommendations. After the Board has deliberated, it votes on the disposition of the case. A majority vote of the members present constitutes the action of the Board and is so recorded. In case of a disagreement among the Board members, a minority recommendation may be submitted by the dissenting member. The Chairperson authorizes Board staff to prepare Findings, Conclusions and Recommendations containing the reasons for the recommendations, together with all essential facts on which they were based. The minority report, as well as transcripts from any hearing and any advisory opinions considered by the Board, are incorporated into the Case Record.

The Recommendations will specify with particularity any change, correction or modification to the records deemed necessary by the Board to carry out its Recommendations. Ordinarily, the Executive Director will have consulted with the Chairperson and DCP regarding the alternative approaches available to the Board to effect the changes desired and will have so advised the Board.

An application that requests a change in a COER rating; deletion of comments made by a supervisor, reviewing officer or others; or removal of a COER from a record will be carefully considered by the Board. The Board shall presume that COER ratings are appropriate and that COER procedures have been properly followed. The applicant shall bear the

burden of providing evidence to the contrary. Ordinarily, any substantial deficiency in a COER will result in the entire document being removed from the applicant's Official Personnel File.

D. Finalization of the Case Record. After the Board has completed its deliberations, and the Findings, Conclusions and Recommendations have been developed, the Case Record is finalized by the Board Staff. The final Record includes the names of each member present and certifies that a quorum was present. The Chairperson signs the Recommendations and the certification that they are true and complete statements of the actions taken by the Board and that they were concurred in by the Board members. The Chairperson also signs the certification that all documentation received and applicable statutes, regulations and policies were considered by the Board in arriving at the Recommendations. This documentation is sent to the Executive Director for transmission to the Approving Official.

E. Action by the Approving Official. The Executive Director sends the Case Record to the Approving Official for approval or disapproval of the Recommendations. Approval by the Approving Official constitutes the final determination by the Board on the request of the applicant. If disapproved or returned for further consideration, the Approving Official prepares a statement stipulating the reasons for the determination and any specific instructions. Upon final action by the Approving Official, the Case Record is returned to the Board staff for disposition.

F. Review by OGC. If, in the opinion of the Board or the Approving Official, the case requires review for conformity with established legal and administrative precedents, OGC will review the case and will submit the results of its review to the Chairperson for further consideration by the Board or for transmittal to the Approving Official.

G. Notification. The Executive Director sends the applicant and DCP a copy of the final Case Summary considered by the Board; the Findings, Conclusions, Recommendations; and the final action of the Approving Official. DCP is responsible for: (1) providing notification about the Board's decision to PHS agencies required to correct records, and (2) complying or ensuring compliance with the Board's decision.

H. Separate Communication. When the Board considers it necessary to submit comments or recommendations to the Approving Official on matters arising from but not directly

related to the issues in any particular case, such comments and recommendations are not submitted as part of the Case Record.

I. Official Personnel File. A copy of the final action on the application is not filed in the Official Personnel File maintained by DCP if doing so could nullify the relief granted. The Executive Director makes the determination on whether or not the action should be filed.

J. Reconsideration. A request for reconsideration must be filed within three years after receipt of the decision of the Approving Official. However, this limitation may be waived by the Board if the applicant provides clear and convincing evidence that it would be in the interest of justice to do so. Reasons why the request for reconsideration should be granted should be stated in the request itself.

A request for reconsideration may granted only if (1) newly discovered evidence or information not previously considered by the Board is presented by the applicant or by OSG or otherwise comes to the attention of the Board, and (2) the newly discovered evidence or information would, if true, probably result in a determination other than that originally made. The Board may refuse to consider evidence or information claimed to be newly discovered if it finds that such documentation could have been presented to the Board prior to its original determination if the applicant or OSG had exercised reasonable diligence. A denial of reconsideration must be approved by the Approving Official.

K. Release of Case Record. The applicant may inspect and copy the complete Case Record compiled on his/her request except any documents exempted under the provisions of the Freedom of Information Act or the Privacy Act. Inquiries concerning the Case Record should be addressed to the Board for Correction of PHS Commissioned Corps Records at the address shown on in Section 16-00-30A. Release of records to third parties is subject to Department regulations implementing the Privacy and Freedom of Information Acts. Release of medical records to the subject individual is subject to Department regulations implementing the Privacy Act.

PHS:
16-00-80 PAYMENT OF CLAIMS

A. Authority to Pay. The Department is authorized to pay claims in accordance with 42 U.S.C. 213a(a)(12).

B. Payments not Authorized. The Department is not authorized to pay any claim heretofore compensated by Congress through enactment of a private law or to pay any amount as compensation for any benefit to which the claimant might subsequently become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

C. Procedures. The Executive Director sends the final decision of the Approving Official to DCP for implementation and payment of monetary benefits due. DCP is responsible for contacting the agency with the responsibility and authority to make the payment. Payment is subject to the following:

1. Upon request, the claimant is required to furnish any information necessary to determine the proper parties to the claim;

2. Appropriate records are examined by DCP in light of the final decision by the Approving Official to determine all amounts due. Amounts due the applicant may be reduced by the amount of any existing indebtedness to the Federal Government or by the amount earned in the private sector applicable to circumstances and the time period covered by the decision;

3. All settlements shall be implemented in such a way as to minimize the cost to the Federal Government.

4. At the time of payment, the claimant is advised by DCP as to the nature and amount of the various benefits represented by the total settlement and that acceptance of the settlement constitutes a complete release by the claimant of any claim against the Federal Government from correcting a record ordered by the Board; and

5. If the intent or import of the decision of the Approving Official is not clear with respect to payment, the decision is returned to the Executive Director for clarification by the Board.

D. Report of Settlement. When payment is made, the amount of such payment, name of the payee or payees and date of payment is reported by DCP to the Executive Director.

PHS:
16-00-90 RECORDS AND REPORTS

A. Historical Records. The Executive Director prepares and maintains historical abstracts on cases considered by the Board. The purpose of the abstracts is to provide a record of Board precedents and examples that can assist potential applicants in preparing applications. The abstracts are made available to third parties and to potential applicants upon request. The abstracts are not to include any identifying facts or information that could be associated with any specific applicant or case considered by the Board.

B. Annual Board Report. The Executive Director prepares and submits an annual report to ASH, summarizing the activities of the Board. A copy of the report is provided to OSG. A copy also is available for reading in the office of the Executive Director.

PHS:
16-00-100 PRIVACY ACT PROVISIONS STATEMENT

Board for Correction case records are subject to the provisions of the Privacy Act of 1974. These records are maintained in system 09-37-0017, "Proceedings of the Board for Correction of Public Health Service Commissioned Corps Records, HHS/OASH/OM." The provisions of the Privacy Act have been fully integrated into the Board's proceedings.

Material Transmitted

None

Material Cancelled

Manual Guide PHS 76-1, Supply Support Systems - User Satisfaction (PHS TN 76-1, 8/18/76, pages 1-4)

Background

PHS policies and procedures on user satisfaction are currently contained in two different PHS manual systems, the General Administration Manual and the Materiel Management Manual. This transmittal cancels the PHS General Administration Guide listed above. All pertinent policies and procedures regarding the communication of user satisfaction with items and/or services provided by supply support systems will be published in the PHS Materiel Management Manual, Subpart 103-31.53.

Filing Instructions

Remove and discard superseded material. Post receipt of this transmittal to the Checklist of Transmittal Notices and file this transmittal behind the Checklist.

Ellen Wormser
Director
Office of Organization and
Management Systems, OM/OASH