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## ADMINISTRATIVE INVESTIGATIONS

**1. REASON FOR ISSUE:** This Department of Veterans Affairs (VA) Handbook establishes procedures to implement the objectives and requirements of VA Directive 0700, Administrative Investigations. It is intended to promote effectiveness and uniformity in the conduct and reporting of administrative investigations within VA, and to enhance the usefulness of investigative reports.

**2. SUMMARY OF CONTENTS:** This VA Handbook establishes operational requirements and procedures for convening, conducting, reporting, and reviewing administrative investigations. The appendices to this instruction provide definitions, work-aids and advisory materials.

**3. RESPONSIBLE OFFICE:** The General Counsel is responsible for the recertification and contents of this Handbook. Questions may be referred to Regional Counsel or to the Office of the General Counsel (023) as appropriate.

**4. RELATED DIRECTIVE:** VA Directive 0700, Administrative Investigations.

**5. RESCISSIONS:** None.

**CERTIFIED BY:**

**ANTHONY J. PRINCIPI  
SECRETARY OF VETERANS AFFAIRS**

John A. Gauss  
Assistant Secretary for  
Information and Technology

Distribution: RPC 6002

## VA ADMINISTRATIVE INVESTIGATIONS HANDBOOK

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## GENERAL PROVISIONS

### PURPOSE AND SCOPE

The purpose of this Handbook is to establish procedures and guidance to implement the requirements of VA Directive 0700, Administrative Investigations, and to standardize and enhance the efficiency and usefulness of administrative investigations within VA. This Handbook does not duplicate the information in VA Directive 0700.

The provisions of this Handbook are mandatory, except where the text or context indicates otherwise. The Appendices to this Handbook include definitions and a variety of materials such as work-aids, forms, and sample documents, intended to promote effective administrative investigations. The material in these appendices is generally advisory, but includes discussions of important external constraints on the conduct of administrative investigations (such as legal considerations).

*NOTE: This Handbook does not govern: investigations involving quality assurance documents or information protected by 38 USC Section 5705 such as those listed in VHA Directive 2001-049, Quality Management and Patient Safety Activities That Can Generate Confidential Documents; investigations into complaints of discrimination conducted by the Office of Resolution Management pursuant to the regulations of the Equal Employment Opportunity Commission; investigations conducted by personnel of the Office of the Inspector General or the Office of the Medical Inspector; investigations by VA police officers conducted pursuant to VA Directive and Handbook 0730; or tort claims investigations conducted by, or under guidance from, the Office of the General Counsel*

This Handbook is designed to promote useful, effective evidence-gathering and reliable, efficient fact-finding in a wide array of circumstances. It provides VA officials with sufficient flexibility and discretion so that, to the extent practicable, Convening Authorities may tailor a single investigation to effectively meet diverse requirements and informational needs related to a matter. Nevertheless, investigations into many types of matters are governed by specific policies or regulations applicable to that type of matter (see 0 for examples). Such a specific policy or regulation, if issued by a VA Administration or Staff Office Head or higher authority, will take precedence over a contrary provision of this Handbook.

This Handbook is established for the administrative efficiency of VA and does not create rights for any individual. However, individual rights or obligations that must be observed in the course of investigations may arise under other policies, regulations, laws, or governing collective bargaining agreements. See 0 for a summary of these requirements.

## RESPONSIBILITIES OF CONVENING AUTHORITIES

### GENERAL RESPONSIBILITIES

Convening Authorities are responsible for ensuring compliance with VA Directive 0700, this Handbook, and with other governing laws, regulations, or policies in the conduct of administrative investigations. This includes ensuring that personnel who are sufficiently trained to perform duties as members of Administrative Investigation Boards can be made available for these assignments. The Convening Authority may perform the duties of this handbook through appropriate staff. Nevertheless, Convening Authorities (including acting Convening Authorities and principal assistants to whom Convening Authority has been redelegated pursuant to VA Directive 0700) must personally sign Charge Letters, amendments, and certifications.

### DETERMINING THE NEED FOR ADMINISTRATIVE INVESTIGATIONS

Convening Authorities shall determine the need for administrative investigations of matters within their cognizance in accordance with 0 of this Handbook. In determining the need for an investigation, or the

appropriate scope or type of investigation, Convening Authorities may consult with other VA officials and General/Regional Counsel.

#### **NOTICE TO HIGHER AUTHORITY OF CONVENING AUTHORITY INVOLVEMENT**

In accordance with VA Directive 0700 (Administrative Investigations), the decision whether to convene an investigation should not be made by an official whose actions (or failure to act) may be a subject of the investigation, or who appears to have a personal stake or bias in the matter to be investigated. VA Directive 0700 requires the official involved to notify the next higher supervisory authority within the VA organization of the nature of the matter and the need for investigation, and that authority assumes responsibility as Convening Authority for the matter.

#### **SUPERVISION, COORDINATION, AND SUPPORT OF AIBS**

With respect to the AIBs they convene, Convening Authorities shall:

- a. Select members who are impartial and objective with respect to the subject matter of the investigation and who have the ability to conduct the investigation effectively;
- b. Coordinate, as necessary, for participation by members and necessary support staff;
- c. Provide clear guidance to the AIB regarding the subject matter into which the AIB is authorized to inquire (i.e., the “scope” of the investigation), applicable policies, and other aspects of the investigation in a “Charge Letter” and related documents;
- d. Provide any necessary financial, personnel or other support for the investigation;
- e. Ensure that investigation activities are properly coordinated with those of other VA organizations and non-VA entities; and
- f. Oversee the activities of the AIB to ensure an objective and effective investigation, providing supplemental guidance as necessary to meet VA informational needs.

#### **CERTIFICATION OF COMPLETION AND FOLLOW-UP ACTION.**

Upon receipt of the AIBs investigative report and investigative file, the Convening Authority must review the report and certify completion of the investigation in accordance with VA Directive 0700 (Administrative Investigations) and 0 of this Handbook. The Convening Authority shall take any necessary action based on the results of the investigation, including appropriate dissemination of the results of the report to other officials within VA.

#### **DUTIES OF MEMBERS APPOINTED TO ADMINISTRATIVE INVESTIGATION BOARDS**

Participation in AIBs is a high priority assignment. Supervisors of AIB members must ensure that workloads and responsibilities are adjusted to allow timely completion of AIB duties. Duties of AIB members include:

1. Maintaining objectivity, impartiality, and professionalism both in fact and in appearance, and preserving the confidentiality of the information obtained throughout the investigation process;
- Identifying the specific issues for investigation within the scope of investigation established by the Convening Authority, including new issues raised by evidence or information obtained in the course of the investigation;
- Coordinating their investigative activities with any other involved investigative authorities under the direction of the Convening Authority;
- Collecting, preserving, and securing evidence material to the issues;
- Identifying and interviewing subjects of the investigation and other witnesses, according them any rights provided by law, regulation, or governing collective bargaining agreements, and properly documenting such interviews;

Complying with other applicable law, regulations, and policies, including VA Directive 0700 (Administrative Investigations), this Handbook, and any other policies identified in the Charge Letter (See 0 and 0 of this Handbook);

Requesting assistance or determinations by the Convening Authority or legal counsel when necessary to accomplish the purposes of the investigation;

Objectively, carefully, and skillfully analyzing evidence to determine the facts that are not subject to reasonable dispute, and drawing conclusions regarding other issues to the extent justified by the available evidence;

Providing an investigative report to the Convening Authority that clearly communicates the undisputed facts, the conclusions reached regarding other issues, and the evidence upon which they are based; and

Other duties as directed by the Convening Authority.

### **WAIVER OF REQUIREMENTS**

Any Convening Authority designated in VA Directive 0700 above the field facility level may waive the procedures established by this Handbook for the conduct of administrative investigations or the contents of investigative reports by that, or a subordinate, Convening Authority on a case-by-case basis, upon a determination that requiring compliance with such requirements would not be cost-effective, or for other good cause. Any such waiver should be documented in the Charge Letter or completion certificate, with a concise statement of the reasons therefor. This provision does not authorize waiver of matters that are required by law, governing collective bargaining agreements, or by other regulations and policies.

### **COORDINATION OF INVESTIGATIONS**

2. A variety of VA organizations, other federal agencies, and state agencies may have jurisdiction over matters that could also be the subject of an administrative investigation. Such authorities may include federal and state law enforcement authorities or administrative agencies, the VA Office of the Inspector General, the VA Office of Resolution Management, VHA's Office of the Medical Inspector, and Police and Security units at VHA facilities.

3. The Convening Authority is primarily responsible for coordinating the activities of an administrative investigation with such other investigations or inquiries. AIB members must be alert to potential conflicts and coordinate appropriately with the Convening Authority and other investigators. General/Regional Counsel can provide guidance and assistance in this area.

4. To the extent practicable and permitted by applicable law, policy, and agreements, investigative efforts may be combined into a single investigation or otherwise coordinated to reduce duplication of effort and enhance the effectiveness of fact-finding. The following specific requirements must be observed, however:

#### *Investigations Involving Possible Criminal Activity*

(1) During the course of an investigation, an investigator may encounter evidence of larceny, fraud, assault, illegal use or distribution of narcotics, or other possible criminal activity. Investigations to support a criminal prosecution require the expertise of professional law enforcement investigators. Unless properly coordinated, administrative investigation of such matters may jeopardize effective prosecution of criminal conduct. Therefore, when evidence of criminal conduct is discovered, the Convening Authority must coordinate with federal and state law enforcement authorities, including the VA Office of the Inspector General and VA Police and Security Units as appropriate, before an administrative investigation proceeds. See MP-1, Part I, Chapter 16 (Referral of Allegations of Fraud and Notification of Other Criminal Conduct) and 38 Code of Federal Regulations (CFR) Sections 14.560 and 14.563.

(2) Upon discovery of possible criminal activity, AIBs shall suspend any activities that may interfere with law enforcement investigations. They shall not conduct additional interviews or discuss related matters with witnesses until directed to resume the investigation by the Convening Authority. They shall immediately report the information discovered and the action taken to the Convening Authority. In suspending their activities, AIBs shall take special care to avoid alerting witnesses, subjects, or others that information suggesting criminal activity has been discovered.

(3) The Convening Authority should not resume the investigation until the Regional Counsel or General Counsel has concurred in proceeding with the investigation. The requirement for law enforcement notification and review does not preclude investigators or VA officials taking appropriate actions to safeguard and care for persons and property.

*Coordination with Office of the Medical Inspector*

The Medical Inspector monitors the quality of care provide by VHA on behalf of the Under Secretary for Health, and may conduct investigations of matters within its areas of responsibility. Policy regarding cooperation with the Office of the Medical Inspector is in VHA Directive 2001-038, Cooperation with the Medical Inspector.

*Protected Quality Assurance Documents and Information*

Inquiries within the Quality Assurance program, such as focused reviews and root cause analyses, may involve information protected from disclosure within and outside VA pursuant to 38 USC § 5705 and its implementing regulations. See, e.g., 38 CFR § 17.501 –511 and VA Directive 2001-049, Quality Management and Patient Safety Activities That Can Generate Confidential Documents. AIs must be conducted separately and apart from Quality Assurance inquiries and with due regard to preventing unauthorized disclosure of protected quality assurance documents. Individuals with knowledge of confidential quality assurance information specific to the matter under investigation by an AIB may not serve on the AIB or disclose such information to the AIB.

## DETERMINING THE NEED FOR ADMINISTRATIVE INVESTIGATIONS

### INTRODUCTION

Generally, the decision to order an investigation, and the appropriate scope of the investigation, is a matter within the discretion of the Convening Authority. However, Convening Authorities who receive reports, allegations, or evidence of the types of incidents listed below must inquire into the matter sufficiently to determine whether a full administrative investigation is needed, and the appropriate scope of the investigation, consistent with any other governing policies or regulations.

### INCIDENT REPORTS

1. Information indicating a possible need for an administrative investigation can come from a variety of sources, including reports, complaints, or allegations from VA employees, beneficiaries, or the public. Such information may also come from other review procedures, including those involving protected quality assurance information. *Any restrictions on the use of information or the activities of personnel involved in such processes or reports must be carefully observed.* For example, although a Convening Authority who receives protected quality assurance information may use that information in deciding to convene an AIB, protected quality assurance documents may not be disclosed to AIB members or included in AIB files.
2. Reports of the following types of matters commonly require a case-by-case determination as to whether a full AIB is necessary:
  - a. Evidence or allegations of significant misconduct, neglect of duty, prohibited personnel practices, or violation of statutes, regulations, policies, or individual rights by VA employees;
  - b. Criminal or violent acts at VA facilities;
  - c. Reports of serious mismanagement of funds or resources;
  - d. Potential claims in favor of, or against, VA or its employees in their official capacity (see below regarding investigation of tort claims);
  - e. Suspected threats, abuse, or deliberate injury to employees, patients, other beneficiaries, or visitors;
  - f. Reports of unsafe conditions;
  - g. Significant damage to government property, especially where the cause is unknown;
  - h. Any matter that generates or is likely to generate significant and potentially adverse public, media, or governmental interest.
3. A Convening Authority who receives a report of these types of matters should take reasonable steps within his or her authority to preserve evidence, such as prohibiting access to an area, securing documents and computer files, and photographing physical evidence, until investigation decisions can be made.

### INCIDENT-SPECIFIC REQUIREMENTS

Many types of matters are governed by specific policies that establish requirements for incident reporting and investigation. These policies may affect the decision to convene, the scope of the investigation, and the procedures to be followed. These policies include:

**5. Disciplinary Action Involving VA Employees.** VA Handbook 5021, Part I, Chapter 1, Paragraph 7 and Part II Chapter 1, Paragraph 6 provide specific guidance for determining the facts in cases involving potential disciplinary action.

**Senior Management Conduct and Performance Issues.** The Secretary's memorandum of June 8, 2001 entitled "Senior Management Conduct and Performance Issues" requires specific procedures for investigation of allegations of serious misconduct involving senior managers, including appointment of an investigation team by the Assistant Secretary for Human Resources and Administration in

appropriate cases. Senior managers include all Senior Executive Service Employees, Associate and Assistant Directors and Chiefs of Staff at VA facilities, other heads of VA facilities, and all other positions centralized to the Secretary.

**Tort Claims Against VA.** Tort claims investigations conducted under the guidance of the Office of the General Counsel are generally excluded from the requirements of VA Directive 0700 and this Handbook. For investigation and processing of claims of \$2500.00 or less under the Federal Tort Claims Act, see VA's Guidebook for Processing Small Tort Claims. Investigation and processing of other tort claims against VA are initiated by Regional Counsel under 38 C.F.R. §§ 14.600 – 14.605. The results of investigations by the Regional Counsel may be subject to protections as attorney work product and thus may not be accessible to AIBs.

**Possible Misconduct in Scientific Research.** Current VA policy governing investigation and processing of cases involving possible misconduct in scientific research and related activities by VA employees is in M-3, Part I, Chapter 15, "Policies and Procedures for Dealing with Possible Misconduct in Scientific Research" (currently under revision for consistency with Federal Research Misconduct Policy).

**Intentional Unsafe Acts Related to Patient Safety.** See VHA Handbook 1050.1, VHA National Patient Safety Improvement Handbook, which generally provides that such acts are outside the scope of confidential quality assurance investigations and must be referred to top management for appropriate action.

**Reports to State Licensing Boards.** For matters that may affect a health-care professional's eligibility for a state-issued license, requirements for reports to state licensing boards are in VHA Directive 1100 and Handbook 1100.18.

## COLLECTION OF INFORMATION TO DETERMINE NEED AND SCOPE OF INVESTIGATION

In determining the necessity for an administrative investigation, Convening Authorities may, in areas within their authority, direct the collection of readily available information, including taking the statements of key witnesses. Note that the rights of witnesses discussed in 0 may also apply to such inquiries. The results of a preliminary inquiry may be provided to the Convening Authority verbally, or in a short memorandum summarizing the information found, with copies of relevant documents and statements attached. Convening Authorities may use the results of preliminary inquiries to determine whether an administrative investigation is needed, and the appropriate scope of the investigation. An individual conducting a preliminary inquiry may serve as a member of a subsequent AIB if otherwise qualified, and the results of a preliminary inquiry may be provided to an AIB, unless prohibited (as in the case of matters involving protected quality assurance information).

## DECISION FACTORS

The following factors should be considered in determining whether to convene an administrative board of investigation:

6. Impact of the matter on the facility, VA, government, veterans, and public interests generally, including financial impact;

Risk of adverse consequences from recurrence;

Need for objective, expert review and analysis of the matter;

Seriousness of any suspected misconduct, neglect, etc;

Degree to which the cause and essential facts of the matter are known, subject to dispute, or unknown, and the potential for an investigation to determine additional relevant information;

Need for evidence to support corrective or disciplinary action or claims for or against VA (see 0 paragraph 0 above regarding tort claims against VA);

Potential for adverse public, governmental, or media interest; and  
Other investigations being conducted into the same or closely related subject matter, and the availability and adequacy of those investigations to meet VA's informational needs.

## CONVENING ADMINISTRATIVE INVESTIGATIONS

### TIMELINESS OF AI'S

7. Untimely investigations may limit the effectiveness of corrective action and extend or aggravate disruption of VA facilities and missions. In many circumstances, delay in conducting an investigation may reduce the reliability of witness testimony and increase the likelihood that material evidence will be unavailable to the investigation. Thus, a Convening Authority must act promptly to determine whether to convene an investigation, and to issue the Charge Letter.

The Convening Authority should establish strict timelines for completion of the investigation and submission of the investigation report. Generally, resources should be provided and deadlines set to ensure that the completed investigative report is delivered to the Convening Authority within 45 calendar days of the date the AIB is convened. This timeframe may be adjusted as the urgency and complexity of the matter requires. Once established, however, the Convening Authority should extend deadlines only when thoroughly justified (e.g. for unforeseen circumstances). The reasons for extensions shall be summarized in an amendment to the Charge Letter, in the Preliminary Statement of the Investigative Report, or in the Completion Certificate.

### SELECTING AIB MEMBERS AND STAFF

#### NUMBER OF MEMBERS

The AIB will generally be comprised of one to three members, but larger boards are permitted. An odd number of members is preferred to facilitate decision-making by the AIB.

#### QUALIFICATIONS OF MEMBERS

The credibility of an administrative investigation is heavily dependent on both the real and perceived competence and objectivity of the members of the AIB and of the staff assigned to assist. Convening Authorities shall therefore select individuals to conduct and assist in investigations based primarily on their abilities and objectivity, both actual and apparent.

a. *Ability.* The Convening Authority must ensure that the AIB, as a whole, has sufficient expertise and capability to completely address the issues to be investigated (or is otherwise able to obtain the required expertise). The requisite abilities include knowledge of how to conduct and report AIs and expertise in the subject matter of the investigation, potential sources of evidence, and analysis of the evidence obtained. Including at least one member on the AIB with training and experience similar to that of a "subject" of the investigation can significantly enhance the quality and credibility of the investigation. Where particular skills are needed, non-voting staff personnel may be detailed to assist the AIB in any appropriate manner.

b. *Objectivity.* The members must be objective and impartial, both in appearance and in actuality. At least one member appointed to the AIB should be senior or equal in standing to any individual whose conduct is being investigated. Members should not have a personal interest or other bias with respect to the investigation; should not have had direct involvement in matters that are being investigated, and should not supervise or have close personal relationships with any individual whose conduct is a subject of the investigation. Individuals who had access to protected medical quality assurance information, such as in a focused review or root cause analysis, cannot be assigned to participate in an administrative investigation of the same matter.

#### STAFF SUPPORT

When appropriate the Convening Authority may detail staff directly to the AIB. Detailed staff is subject to direct supervision by the Chairman. Such staff may include professional investigators, technical

experts, and administrative support. Alternatively, the Convening Authority should identify the offices that will provide necessary support to the AIB.

### **LEGAL SUPPORT**

The General / Regional Counsel will provide any necessary legal advice to the Convening Authority and the AIB. Legal counsel should not normally be detailed as staff to an administrative investigation. In highly complex or sensitive cases, however, it may be appropriate to request that an attorney be provided for detail as an AIB member or as staff legal counsel to an investigation. Detail of staff legal counsel may be appropriate to provide legal advice on issues, evidence, and analysis, or to assist in questioning witnesses, working with witness counsel, or drafting the report.

### **ARRANGING FOR MEMBERS AND STAFF FROM OTHER SOURCES**

If qualified members and/or staff are not available within the Convening Authority's organization, the Convening Authority must arrange for them to be made available from other sources such as another facility, a VISN or Regional Office, or the VA Central Office.

### **DESIGNATION AND FUNCTIONS OF THE AIB CHAIR**

If more than one member is appointed to an AIB, the Convening Authority must designate one member to serve as Chair (in single-member AIBs, that member assumes the authorities and functions of the Chair). The Chair's functions and authorities include:

- c. Supervision and direction of all investigation activities, including planning, funding, travel, evidence collection, witness interviews and administrative support;
- d. Assignment of workload among members and assigned staff;
- e. Obtaining additional support from the Convening Authority as needed;
- f. Coordinating completion of the investigative report; and
- g. Deciding procedural matters on behalf of the AIB such as those involving witness interviews and consideration of evidence. The chair's decisions with respect to such procedural matters may be overridden by a majority vote of the members.

## **CHARGE LETTERS**

### **PURPOSE OF THE CHARGE LETTER**

The Charge Letter is the means by which a Convening Authority formally appoints members to an Administrative Investigation Board. It defines the scope of the investigation and documents the authority of the investigators to conduct the investigation on behalf of the Convening Authority. Charge letters are also useful for communicating to interested organizations that an investigation is underway. While defects in the Charge Letter do not invalidate an investigation, a properly written Charge Letter will reduce potential for confusion or error in the subsequent investigation and review.

### **FORM OF CHARGE LETTERS**

The Charge Letter should be addressed to the AIB members, with copies to their supervisors and any detailed staff. A Convening Authority may convene an administrative investigation by verbal order, but shall follow it promptly with a written Charge Letter. The subject line of the Charge Letter shall not include the name or personal identifier of any individual. A sample Charge Letter is provided in 0 of this Handbook. The Charge Letter shall:

- a. Identify the chair and members appointed to the AIB and any staff detailed to the investigation; State clearly the scope of the investigation, including the general matter to be investigated and any special requirements or limitations on conduct of the investigation;
- Delegate any necessary authority for the duration of the investigation, including the authority to administer oaths (if not done separately by use of VA Form 4505 or equivalent)

Refer to VA Directive 0700 and this Handbook for policy and guidance, and identify any other regulations or policy known to be governing or particularly relevant and identify any authorized deviations from such policies;

Specify time for completion of the investigative report; and

Include, as appropriate: specific issues to be addressed; identification of any needed sources of support (technical or administrative support, legal advice, interpreter, court reporting services, etc); coordination instructions regarding any other investigations into the matter; whether recommendations or a summary report format are authorized; requirement for an executive summary, or other specific details.

### **SCOPE OF THE INVESTIGATION AND ISSUE IDENTIFICATION**

The scope statement of the Charge Letter provides the outer boundaries of the investigation. A well-written statement of the scope gives both sufficient latitude to the AIB to pursue significant lines of inquiry, and sufficient guidance to deter expansion of the investigation into unnecessary or inappropriate matters. Identification of specific issues or other requirements further helps the AIB to focus its investigation on matters of significant interest to VA. For example, the Convening Authority may focus the AIB on certain alleged misconduct, or may require a more expansive analysis of the various root causes of an incident. While the Convening Authority may provide additional direction to the AIB during the course of the investigation by any means, changes in the scope of the investigation must be documented by an amendment to the Charge Letter.

### **AUTHORITY TO ADMINISTER OATHS**

VA Directive 0700 delegates the Secretary's authority to administer oaths under 38 USC § 5711 to Convening Authorities, and permits redelegation to AIB members for the duration of the investigation to which they are appointed. 0 includes suggested language for accomplishing this redelegation in the Charge Letter.

### **AUTHORIZING REPORT IN SUMMARY FORMAT**

This Handbook authorizes two different formats for the AIB's investigative report: a "summary report" format and a "standard report" format. These formats are fully described and distinguished in 0 of this Handbook. Standard reports are required unless the authority requiring the investigation authorizes a summary report. The standard report format is designed for investigations that require detailed documentation and analysis of conflicting or disputed evidence to determine the facts or resolve issues, particularly where a technical or legal review of the report is likely to be needed. For example, investigations of mismanagement by senior employees and investigations of matters likely to draw substantial media or Congressional scrutiny should normally be reported in "standard" format. The Convening Authority should consider authorizing a summary format report where it is anticipated that the facts and issues will be uncomplicated, extensive evidence is not likely to be needed, and any reviewers of the report will be able to readily determine the evidentiary basis for the findings and conclusions without specific references. If during the course of investigation or upon review of a summary report, the Convening Authority or a senior authority determines that a standard report is needed, that authority may order a standard report to be prepared.

### **REQUIRING AND PERMITTING RECOMMENDATIONS**

b. Investigative Reports may not include recommendations unless they are required or permitted by the Convening Authority. In deciding whether to require or permit recommendations, Convening Authorities should carefully consider whether the AIB's recommendations are likely to be beneficial.

c. AIB recommendations are never binding on the Convening Authority and in all cases must be limited to matters within the scope of the investigation and firmly based on the evidence obtained. AIB recommendations that are well-founded and well-focused may be helpful in some circumstances,

particularly when the AIB includes technical experts and the recommendations relate to their field of expertise.

d. In most cases, however, well-written, well-founded, and complete findings of fact and conclusions should be sufficient for the Convening Authority to determine appropriate action. In contrast, a focus on developing recommendations may tend to distract AIB members from their primary role as objective factfinders. Moreover, dealing with AIB recommendations can sometimes complicate the handling of sensitive issues, particularly where decision factors for the recommended action include matters outside the scope of the investigation or the expertise of the AIB. As an alternative, the Convening Authority may require the AIB to provide conclusions on specified questions, but leave recommendations on corrective action to other appropriate advisors.

#### **AMENDING CHARGE LETTERS**

A Convening Authority may amend the Charge Letter at any time and for any legally permissible reason. For example, a Charge Letter may be amended to change membership, to limit or increase the scope of the investigation, to provide additional instructions, to extend a deadline, or to terminate the investigation. Such amendments may be made by a letter from the Convening Authority specifically referencing the Charge Letter and stating the matter changed. Amendments should be distributed in the same manner as the Charge Letter.

#### **SUSPENDING AND TERMINATING AIBS**

The investigation duties of AIB members normally terminate when the Convening Authority certifies completion of the investigation. If the reasons prompting an investigation no longer exist, the Convening Authority may order the investigation terminated at any time. If it is appropriate to suspend the investigation for a time, but there is reason to believe that it may be necessary to resume the investigation in the future, the Convening Authority may order the investigation suspended until a particular date or until further notice. The order terminating or suspending should be a written amendment to the Charge Letter stating the reasons for the action and disposition of evidence obtained, and should be distributed in the same manner as the Charge Letter.

## GENERAL INVESTIGATION PROCEDURES

### PLANNING

8. Administrative investigations typically involve interdependent processes of issue identification, evidence collection, analysis, and documentation, along with numerous administrative requirements. Planning by the AIB, including frequent reevaluation based on current information, is extremely important to the completion of a thorough, objective and useful investigation. For example, without adequate preparatory analysis and planning, the productivity of evidence collection (and in particular, witness interviews) will be less than optimal, and the investigation may unnecessarily disrupt the functioning of the affected organization.

9. The Chairman has overall responsibility for planning. The Convening Authority may require specific planning documents to be submitted at various stages of the investigation. Appendices D through G of this Handbook provide several work-aids to assist AIBs in planning their investigations.

### COLLECTION OF EVIDENCE

#### GENERALLY

a. AIBs should attempt to review all available documents, records, and other information that are material to the issues of the investigation, or that may reasonably lead to discovery or development of material evidence, except as specifically prohibited. This includes evidence from other available investigations.

b. If items of physical evidence or personal property are taken into custody by an AIB, receipt should be documented and custody accounted for using VA Forms 3524A Evidence or Property Tag / Property Receipt, and VA Form 10-3524, Evidence of Property or Custody Record. Other appropriate VA forms, including those listed below, may be used for the collection of evidence and testimony:

- (1) VA Form 0023, Witness Statement (for unsworn witness statements)
- (2) VA Form 0207, Handwriting Sample

#### COLLECTION OF EVIDENCE FROM THE SUBJECT OF AN INVESTIGATION

In accordance with the Privacy Act, 5 USC § 552a(e)(2), AIBs must “collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual’s rights, benefits, and privileges under Federal Programs.” This provision has been interpreted to require agencies, in some circumstances, to seek information from the subject of an investigation before involving new witnesses or non-agency sources in the investigation. Specific guidance on this requirement is provided in 0 of this Handbook.

#### COLLECTION OF EVIDENCE FROM VA EMPLOYEES

c. VA employees are required to cooperate with AIs by 38 CFR § 0.735-12(b) and by VA Directive 0700 (Administrative Investigations), subject to the constitutional right against compulsory self-incrimination. See 0, paragraphs 2 and 3.

d. VA employees are also required, under VA Directive 0700, to refrain from disclosing information developed in the course of an administrative investigation, when so directed by Convening Authorities or members of AIBs. This is intended primarily to prevent witnesses from influencing the testimony of others, or otherwise jeopardizing the investigative process. It does not prohibit disclosures required for official purposes or disclosures protected from reprisal by law, such as the Whistleblower Protection Act (5 USC 2302).

e. AIB members generally have no authority to directly compel action or cooperation by VA employees or others involved in an investigation unless such authority is specifically delegated to them (for example, in the Charge Letter). AIB members should refrain from taking actions suggesting

otherwise. If the AIB is unable to obtain cooperation by request or persuasion, it should report uncooperative behavior and work through the Convening Authority, or other appropriate authority, to secure the needed cooperation.

### **COLLECTION OF EVIDENCE FROM INDIVIDUALS WHO ARE NOT VA EMPLOYEES**

Individuals who are not VA employees generally have no obligation to cooperate with an AIB (unless they are required to do so by subpoena, a contract, applicable regulation, or other legal authority). While AIBs should seek relevant evidence from such persons and encourage their cooperation, they should avoid suggesting that such an obligation exists.

### **RESTRICTIONS ON DISCLOSURE AND USE OF INFORMATION**

f. All information obtained in the investigation shall be used by the AIB members only for the purposes of the investigation, and shall not be disclosed by the AIB members except for official purposes.

g. Some information relevant to an investigation may not be available to AIB members, or may be subject to specific restrictions on disclosure or use. Generally, an individual with custody or possession of such information is responsible for preventing unauthorized disclosure. Disagreements regarding an AIB's access to and use of such information should be resolved by the Convening Authority or appropriate staff. Assistance may be obtained from the Convening Authority's information policy staff or from General / Regional Counsel. The following are examples of information sources that are subject to specific regulations or directives governing disclosure to, and use by, AIBs:

(1) **Information Protected by the Privacy Act.** Because the duties of AIBs include finding and evaluating evidence material to the issues of the investigation, AIBs often need access to records that are protected by the Privacy Act. The Privacy Act generally prohibits disclosure of information about an individual from a system of records, but authorizes the custodian of a protected record to disclose that record to agency personnel who have a need for that information in the performance of their duties. Thus, the Privacy Act is not an obstacle to disclosure of protected records to AIB members who have a need for that information in the performance of their duties. Disclosure to the AIB may nevertheless be subject to specific administrative requirements. Further, the information does not lose its protection under the Privacy Act by virtue of being included in an investigation. Therefore, AIBs must be particularly careful to avoid unauthorized disclosure to others of information derived from Privacy Act systems of records.

(2) **Confidential Quality Assurance Records.** Documents protected from disclosure by 38 USC § 5705 (certain records generated as part of VA healthcare quality assurance reviews, including focused reviews, root cause analyses, etc.) are generally not available to Administrative Investigations and may not be included in investigative files or reports. AIB members exposed to such information related to the matter under investigation by the AIB shall report the exposure to the Convening Authority for appropriate action. See implementing regulations at 38 CFR § 17.500 – 17.511, VHA Directive 2001-049, and 0 Paragraph 40 of this Handbook.

(3) **Medical Records Generally.** HHS regulations in 45 CFR Part 164, scheduled to become effective April 14, 2003, would establish requirements to request patient consent for access to and disclosure of "individually identifiable health information."

(4) **Employee Health and Employee Assistance Program Records.** See VA Handbook 5019, Occupational Health Services, Part V, Paragraph 1 (Health Records) and Part VI, Paragraph 10, (Employee Assistance Program Records) regarding use and disclosure of these records. See also Public Law 100-71 (restrictions on disclosure of employee drug test results).

(5) **Patient Records Relating to Drug Abuse, Alcoholism or Alcohol Abuse, HIV, or Sickle Cell Anemia.** Such records must be protected in accordance with 38 USC § 7332 and 38 C.F.R. §§ 1.460-1.496.

(6) ***Documents Pertaining to Veterans Claims.*** See 38 USC § 5701 limiting the use and disclosure of this information.

(7) ***National Security (Classified) Information.*** Investigations involving such matters must be handled as provided in governing regulations and directives. See, e.g. 50 USC § 435 and implementing executive orders.

(8) ***Sensitive Law Enforcement Information.*** AIB members may be restricted from access to or disclosure of certain law enforcement information.

#### **USE OF SPECIALIZED INVESTIGATIVE PROCEDURES**

h. Employment of specialized investigative techniques such as covert (undercover) operations, surveillance, polygraphy, identification lineups, and similar procedures as part of an administrative investigation is seldom necessary or appropriate. Such techniques are frequently used in law enforcement investigations, and the results may be considered as evidence if made available to an administrative investigation. However, any such techniques initiated for an AI shall be conducted only by qualified law enforcement personnel, in accordance with applicable law, and with the concurrence of the Convening Authority and General/ Regional Counsel.

i. Polygraph (“lie detector”) examinations require special considerations. VA employees are not required to submit to polygraph examinations by 38 CFR § 0.735-12(b) or other authority generally applicable to administrative investigations. *Statements* made by a witness in the course of polygraph examinations may be considered as evidence. Polygraph *results* (that is, findings of deceptiveness or non-deceptiveness with respect to specific statements) shall not be considered as evidence by an AIB unless the examination was conducted and the results certified or confirmed by a properly authorized U.S. federal or state government official. In addition, polygraph results may not be considered as *conclusive* proof of the truth or falsity of any statement.

#### **PROTECTION OF EVIDENCE AND RECORD KEEPING**

j. The evidence and information gathered by an AIB during the course of the investigation shall be organized in an appropriately indexed investigative file. 0 provides a suggested form for indexing the investigative file.

k. Much of this evidence and information will be used as exhibits and attachments in the report of investigation. In addition, the investigative file should include other significant correspondence about the investigation, audio or video tapes of transcribed interviews, complete copies of items extracted or summarized for the exhibits, and any other relevant evidence obtained by the AIB that is not included in the exhibits. The investigative file shall be stored in a secure location appropriate to the nature of the material included.

l. For clarity and ease of reference, items of evidence that are referred to in testimony should be assigned sequential “exhibit” numbers in the investigative file index, and appropriately labeled, before or during the taking of testimony. Items should retain the same exhibit numbers throughout the investigation and report. The AIB should avoid retaining irrelevant evidence or duplicate documents in the investigative file unless it has a specific reason for doing so, and in any case should avoid assigning different exhibit numbers to duplicate documents.

m. The index and contents remaining in the file after the preparation of exhibits and attachments shall be forwarded to the Convening Authority with the investigative report.

#### **DISCOVERY OF MATTERS OUTSIDE THE SCOPE OF INVESTIGATION**

Investigators often discover significant information about matters that may merit some action or further inquiry, but are outside of the scope of the investigation to which they were assigned. The AIB should provide such information promptly to the Convening Authority for any appropriate action, such as

expanding the scope of the AI, convening a separate investigation, or referring the matter to another authority.

#### **RELEASE OF INFORMATION**

During an investigation, the AIB may receive requests for information about the investigation from other investigative organizations, Congress, unions, the media, or the public. Requests for release of information pertaining to AIs, or from AI files or reports, should be forwarded to the Convening Authority for action by appropriate staff. These issues are generally staffed by the facility office responsible for responding to requests for release or disclosure of records and information, with advice as needed from General/Regional Counsel.

#### **ACTION BY THE AIB ON DISCOVERY OF FRAUD, CORRUPTION, OR CRIMINAL ACTIVITY**

See 0 of this Handbook, Investigations Involving Possible Criminal Activity.

## WITNESS INTERVIEWS

### FORMS OF TESTIMONY AND DOCUMENTATION REQUIREMENTS

#### REQUIREMENT TO SEEK SWORN OR AFFIRMED VERBATIM TESTIMONY

n. AIBs may consider any type of material evidence, including documents, witness statements, transcripts, and summaries of testimony prepared by assistants or other AIB members, in making their findings of fact and conclusions. Generally, however, the more important the testimony is to the issues of the investigation, the more important it is that the testimony be complete and reliably documented.

o. For this reason, if a witness has testimony material to a significant issue that is reasonably subject to dispute, AIBs shall seek to document that testimony in a verbatim form that is sworn, affirmed, or otherwise given under penalty of perjury. Such testimony may be documented by written affidavits, by declarations under 28 USC § 1746, by verbatim transcripts, or by recordings of live testimony. To promote accuracy and completeness of testimony, witnesses providing such testimony should be provided an opportunity to review transcripts or summaries of their own testimony, to submit transcription corrections, and to explain or supplement their testimony by submitting a written statement, all of which shall be included for consideration with their documented testimony.

#### ADMINISTRATION OF OATH OR AFFIRMATION

Oaths and affirmations for witness testimony (including affidavits) may be administered by a notary public, or by any person delegated the Secretary's authority to administer oaths under 38 USC § 5711 and delegated to Convening Authorities in VA Directive 0700. This authority should be delegated to AIB members for the duration of the investigation in the Charge Letter. VA Form 4505 (or equivalent) may also be used for such delegations, particularly if there is a continuing need for this authority. Procedures for administering oaths or affirmations are in 0 and 0 of this Handbook.

## PROCEDURE FOR WITNESS INTERVIEWS

#### WITNESS OBLIGATIONS AND PROTECTIONS.

AIB members are responsible for according witnesses any rights they are entitled to under law, regulation, policy, or collective bargaining agreements during the course of the investigation. These rights are summarized below. 0 provides additional details. Questions regarding witness obligations, protections, and related matters should be referred to the General/Regional Counsel.

p. *Obligations to Cooperate.* Witnesses who are VA employees are required to provide testimony as discussed in 0

q. *Witness Rights and Protections* AIs are not intended to be a substitute for “due process” procedures such as those required for adverse personnel actions. Thus, witnesses do not have the “due process” rights that apply to such proceedings, even if they are subjects of an investigation. For example, they generally have no right to review, challenge, or present evidence before the AIB, to challenge AIB members, or to cross-examine witnesses. Certain rights and protections in favor of witnesses or others established by law, regulations, policies, or collective bargaining agreements nevertheless may affect the manner in which investigations must be conducted. These include:

- (1) Rights established under collective bargaining agreements for bargaining unit members;
- (2) The statutory right under Title 5 USC of a member of a collective bargaining unit who reasonably believes interview responses may result in disciplinary action against him or her to have the assistance of a union representative at the interview (i.e. “Weingarten” rights);
- (3) The requirement under the Privacy Act and VA policies to collect information directly from a “subject” of investigation “to the greatest extent practicable;”

(4) The requirement under the Privacy Act to provide notice of certain matters to individuals who are asked to provide information;

(5) Rights under the Whistleblower Protection Act (codified at 5 USC § 2302) and other federal laws that prohibit reprisal for disclosure of information evidencing violations of law or regulations, hazardous conditions, waste, abuse, gross mismanagement, and other matters; and

(6) The requirement under VA Directive 0700 for Convening Authorities to protect witnesses from reprisal for lawful cooperation with an administrative investigation.

#### **EVIDENCE FROM PATIENTS UNDER TREATMENT AT VA HEALTH CARE FACILITIES**

Prior to interviewing patients at VA health care facilities, the AIB shall request medical clearance for the interview from the patient's primary physician (except in cases where the physician's conduct is at issue in the investigation) and consent from the patient's legal guardian (if any). If the physician's conduct is at issue in the investigation, medical clearance for the interview shall be requested from the appropriate medical authority. In addition, the patient shall be informed prior to the interview that cooperation with the investigation, including photography or recording, is voluntary (unless the testimony is obtained by subpoena). In dealing with patients, AIBs must observe applicable policies and regulations, including the patients' rights listed in 38 CFR § 17.33.

#### **NOTICE AND ADVICE REGARDING WITNESS RIGHTS AND OBLIGATIONS**

The AIB is responsible for ensuring that witnesses receive any required notice concerning their participation in the investigation. A sample notice for this purpose, and for advising witnesses regarding other obligations and protections, is provided in 0. A copy of this or a similar notice should be provided to each witness who provides signed or sworn testimony, and documented by a copy signed by the witness (or a record of any refusal to sign) retained in the investigative file.

#### **MENTAL COMPETENCY ISSUES**

If the AIB has reason to believe that a patient or other witness is not mentally competent or may suffer from a condition that substantially affects his or her ability to accurately observe, recall, and relate observations, or to understand the significance of an oath or affirmation, those matters shall be documented in the investigative file and appropriately noted in the investigative report. If the witness's testimony is likely to be significant, the AIB should request a written opinion from an attending physician or other evidence regarding the competency of the witness. AIBs should consider testimony from such witnesses, but should also take evidence of limited competency into account in assessing the credibility of their testimony.

#### **REQUESTS FOR ASSISTANCE AT INTERVIEWS**

10. Except for members of collective bargaining units as discussed above, witnesses have no right to the assistance of representatives or advisors at witness interviews. The AIB determines who may be present for interviews. AIBs should generally grant requests from witnesses who may be subjects of the investigation for the presence of an attorney or other advisor at the interview, however, unless granting such a request will significantly prolong or disrupt the investigation, impair the factfinding process, result in significantly increased costs, or there is other good cause for denial.

11. Such witnesses should be permitted reasonable opportunities to consult with their advisors to help them to present and review their testimony and statements, but advisors should not be permitted to interrupt answers to questions, to answer for the witness, to obstruct the interview, or to review information other than that provided to the witness.

12. AIBs shall require the witness to designate any such advisor in writing, and any advisors must agree to be bound by the witness's obligations against disclosure. A form for this purpose is provided in 0.

Witnesses and others involved in the investigation or the matter investigated may not serve as advisors.

All costs of providing such an advisor must be borne by the witness, except that a VA employee who serves as a witness's advisor may be authorized reasonable duty time to perform this function.

## INVESTIGATION REPORTS

### GENERAL

13. The investigative report (IR) is the primary end-product of all of the AIB's efforts. The evidence gathered and the analysis done by the AIB can only be used effectively if it is incorporated into a report that objectively addresses the issues for investigation, by presenting the relevant facts and conclusions and showing that they are supported by the available evidence.

14. The investigative report must be provided in the standard format, unless the Convening Authority authorizes the investigation to be reported in summary format. These formats are discussed below. Sample reports of investigation are provided in 0 (Summary Format) and 0 (Standard Format).

### INVESTIGATIVE REPORT – STANDARD FORMAT

#### GENERAL ORGANIZATION

The AIB should organize and prepare the report to most effectively convey the facts and conclusions, and the evidence upon which they are based, to the Convening Authority and other potential users of the report. Material may be arranged chronologically, by topic or issue, or in another logical manner. Regardless of the organization, each finding of fact and conclusion shall be clearly identified as such, and shall be appropriately numbered (or lettered) for cross-referencing.

#### REQUIRED CONTENTS

The IR shall be in the form of a letter or memorandum to the Convening Authority, which shall include, at a minimum, the following:

a. *Subject Line.* The subject line shall succinctly identify the matter investigated, and will usually be the same as that of the Charge Letter. The subject line shall not identify individuals who are subjects of investigation by name, social security number, or other personal identifier.

b. *Preliminary Statement.* The preliminary statement shall identify the authority for conducting the investigation (i.e., the Charge Letter), the scope of the investigation (including a list or summary of the witnesses interviewed), and other matters necessary for the reader to understand the nature and limitations of the investigation and report. It should also alert the reader to significant problems or procedural matters in the investigation and to any important material provided in the attachments.

c. *Findings of Fact.*

(1) Findings of Fact are factual statements, relevant to the issues for investigation, that the AIB has determined to be true and that are not subject to reasonable dispute. For the purposes of this directive, a statement is "factual" if it describes an event or thing in a manner that does not require substantial interpretation or characterization. Examples are objective statements of things that could be seen, heard, touched, smelled, tasted, thought, believed, measured, or determined by established scientific or mathematical processes. A statement is "not subject to reasonable dispute" if it (a) is supported by evidence objectively establishing its truth; (b) is not substantially contradicted by other evidence; and (c) does not require inferences or interpretations that may reasonably be disputed. Determinations by the AIB that do not meet all of these criteria shall be listed as "conclusions" (see below). Examples of Findings of Fact are in 0 and 0.

(2) Findings of fact shall be specific with respect to times, places, persons, and events. Each finding of fact shall specifically identify the exhibits containing the evidence upon which it is based. References to transcripts and large exhibits shall include the page numbers on which the evidence is found.

d. *Conclusions.*

(1) All issues raised in the investigation that are not resolved in the findings of fact shall be resolved in a conclusion supported by a preponderance of the evidence available to the AIB. Matters that are subject to reasonable dispute and determinations involving substantial interpretation of evidence, resolution of conflicting evidence, application of technical standards, or assessments of credibility, must be stated as conclusions.

(2) Each conclusion shall be stated clearly, and shall be accompanied by a concise statement of the basis for that conclusion, including the facts, evidence (including policies, regulations, etc), interpretive legal or technical standards, or other matters upon which the conclusion is based. Any evidence that materially conflicts with the AIB's conclusion must also be specifically identified and the resolution of the conflict shall be discussed.

(3) Conclusions should primarily resolve disputed facts material to the issues. The AIB need not, and in most cases should not, draw ultimate conclusions regarding such matters as litigation risk, whether a particular act constituted "negligence," whether VA or an individual is financially liable or entitled to remedies, and similarly complex legal issues. Including such conclusions in an IR can jeopardize important interests of the United States. If such determinations are needed, the Convening Authority should normally request a separate legal analysis from General/ Regional Counsel. Examples of Conclusions are in 0 and 0.

e. *Signature.* Each member of the AIB shall sign the report unless it is impracticable to do so. A statement shall be included in the IR explaining why any member did not sign. Signature indicates that the report accurately reflects the investigation and that each finding of fact, conclusion, and recommendation (if included) reflects the view of a majority of the AIB members.

f. *Exhibits.* For any material evidence considered or otherwise referred to in the findings of fact or conclusions, the AIB shall attach a separately numbered evidentiary exhibit to the report, consisting of a copy, extract, photograph, or description of the evidence relied upon. Declarations, affidavits and transcripts of testimony should be included as exhibits. Any extract shall be sufficiently complete to provide a thorough understanding of the nature, and limitations, of the evidence. Unless impracticable, all exhibits should be prepared using standard 8 ½ by 11 paper and suitably bound at the top or sides and tabbed for easy reference. An index of all exhibits, identifying each by number, description, and source, shall be included with the exhibits.

## ATTACHMENTS

Information that is not used as evidence of the matters investigated, but is helpful in understanding or interpreting the report, shall be provided in numbered and indexed attachments. Attachments may also include materials adopted by reference into the report, such as diagrams or tables of information adopted as findings of fact. The Charge Letter and any amendments to it shall be the first attachment.

## OPTIONAL CONTENTS

g. *Separate Opinions.* Any member who disagrees with a material part of the report should prepare and attach a signed "separate opinion" identifying those matters with which he or she disagrees, the specific reasons therefor, and any evidence relied upon.

h. *Recommendations* Recommendations may only be included in an IR if specifically authorized by the Convening Authority. (See 0 of this Handbook). If authorized to make recommendations regarding disciplinary action, an AIB may recommend "appropriate disciplinary action," and should specify the acts of misconduct for which disciplinary action is deemed appropriate. The AIB shall not recommend a specific level or type of punishment, however. Any recommendations:

- (1) Shall be firmly based on the evidence, findings of fact, and conclusions in the report,
- (2) Shall state clearly the evidence, findings of fact, or conclusions on which they are based; and
- (3) Shall be stated in terms such that they can be implemented directly by the Convening Authority (e.g. if the AIB feels that actions beyond the authority of the Convening Authority are called

for, it should recommend that the Convening Authority propose the action to the appropriate authority or office within VA).

i. *Executive Summary.* The AIB may summarize the investigation's scope, issues, findings, and conclusions in an "executive summary," which should be formatted as a transmittal letter for the IR. Such a summary is particularly helpful for investigations with complex findings or conclusions. Executive summaries do not constitute the findings or conclusions of the AIB.

j. *Explanatory Material.* The AIB should consider including helpful diagrams and charts, organizational charts, and witness identification lists with the report. These materials should be included as exhibits if they were used as evidence, but should be included as attachments otherwise.

k. *Important correspondence.* Important correspondence about the investigation, such as objections by witnesses or their representatives or coordinating letters regarding investigations should be included as attachments.

**INVESTIGATION REPORT – SUMMARY FORMAT**

The summary report format differs from the standard report format as follows:

<b>STANDARD FORMAT REPORT</b>	<b>SUMMARY FORMAT REPORT</b>
Must be used unless summary format is specifically authorized by Convening Authority	May only be used if specifically authorized by Convening Authority
<p>The preliminary statement must include authority, scope, list of witnesses, and all significant problems and procedural matters</p> <p>AIB must determine and address all issues within the scope of the investigation, even if not specified in the Charge Letter. Each finding of fact must identify the exhibits upon which it is based.</p> <p>Each conclusion must be supported by an analysis showing the evidence, facts, standards, or other matter upon which it is based.</p> <p>Evidence upon which the findings of fact and conclusions are based must be included in evidentiary “exhibits,” and other significant documentation must be provided in attachments.</p>	<p>The preliminary statement must identify the Charge Letter, but need not restate the scope of the investigation, or address procedural matters if they are otherwise documented by attachments.</p> <p>The report is not required to address issues other than those specified in the Charge Letter.</p> <p>Findings of fact do not have to identify the evidence supporting each individual finding (findings of fact must still be clearly distinguished from conclusions, and the evidence proving each finding must be included as attachments).</p> <p>Conclusions do not have to include the supporting analysis if the basis for the conclusion is reasonably apparent from the findings of fact and attachments.</p> <p>Attachments may include both evidence and administrative documents – no separate “exhibits” are required.</p>

## FORWARDING, REVIEW, AND CERTIFICATION OF INVESTIGATIVE REPORTS

**15. Forwarding to the Convening Authority.** The Investigative Report, along with the investigative file, shall be forwarded within the time prescribed by the Convening Authority.

**Review by the Convening Authority.** Upon receipt of the IR, the Convening Authority shall review the report, including exhibits, for compliance with the Charge Letter, this Handbook, and other requirements. The Convening Authority may request legal or other technical reviews of the report, and may return the IR to the AIB for further investigation or clarification as needed.

**Certification by the Convening Authority.** Within 30 days of receiving the IR, or as soon as practicable thereafter, the Convening Authority shall certify completion of the investigation. The Certificate shall state that the report has been reviewed for compliance with VA Directive 0700 and this Handbook, and that the subject of the report has been properly investigated. If more than 30 days have elapsed since receipt of the report, the Convening Authority shall document in the certificate any reasons for the delay (e.g. time required for additional investigation, legal review, etc). In the certificate of completion, the Convening Authority may add, delete, otherwise modify, or comment upon the findings of fact, conclusions, or other matters in the report, and may append additional exhibits or attachments. Any modification of the report shall include a concise statement of the reasons therefor. The Convening Authority may also note in the certificate any corrective action that has been taken regarding the matter investigated as of the date of the certification. Completion of the investigation does not preclude further inquiry or action based on the matter reported. Once the investigation is certified complete, the Convening Authority should provide written notice that the investigation is complete to AIB members, subjects of the investigation, other addressees of the Charge Letter, and other interested persons or organizations as appropriate.

**Subsequent Review.** AIBs are generally considered closed when the IR is certified complete by the Convening Authority. Any authority senior to the Convening Authority in the supervisory chain may nevertheless require the report to be forwarded for further review or action, and may direct the Convening Authority to take further action, including but not limited to reopening or expanding the scope of the investigation, conducting supplemental investigations, or responding to specific questions.

## FILING AND RETENTION

### RETENTION PERIOD

IRs and investigative files shall be filed and retained by the Convening Authority in accordance with applicable records retention schedules. At a minimum, these documents should be retained until all corrective action is completed, including appeals of any disciplinary action or claims for or against VA. General/Regional Counsel can provide information regarding timeframes in which claims or appeals may be made.

### INVESTIGATIVE REPORTS AND THE PRIVACY ACT

a. IRs focus on issues raised by particular events or matters, and collect evidence about individuals only to the extent that such evidence appears to be material to the issues of the investigation. They are not intended to function as agency records of individual conduct or characteristics, and should not routinely be included in systems of records from which information is retrieved by names or personal identifiers (i.e. "systems of records" subject to the Privacy Act).

b. 0, SUMMARY OF OBLIGATIONS AND RIGHTS RELATED TO WITNESSES includes a brief review of some provisions of the Privacy Act that may apply to administrative investigations regardless of whether the report is included in a system of records. If information from an IR is to be maintained in a system of records from which information is retrieved by individuals' names or personal identifiers (e.g. to document the basis for disciplinary or performance-based action), additional

requirements of the Privacy Act may apply to that information. Questions should be referred to the General/Regional Counsel.

## DEFINITIONS

The following definitions and acronyms apply for purposes of this Handbook.

### **1. ADMINISTRATIVE INVESTIGATION (AI)**

A process of gathering evidence and ascertaining facts about particular matters, conducted primarily to enhance administrative effectiveness and efficiency.

### **ADMINISTRATIVE INVESTIGATION BOARD (AIB)**

The standard procedures established under VA Directive 0700 and this Handbook for collecting and analyzing evidence, ascertaining facts, and documenting complete and accurate information regarding matters of interest to VA. “Members” are the person or persons appointed by a Convening Authority to conduct the AIB.

### **AFFIDAVIT, DECLARATION UNDER 28 USC § 1746**

An “affidavit” is a written statement sworn to or affirmed before a person authorized to administer oaths. A “declaration under 28 USC 1746” is an unsworn written statement, which is treated as equivalent to an affidavit under 28 USC § 1746. To have this effect, such a declaration must be dated and signed by the person making the statement, and must include substantially these words “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).”

### **CHARGE LETTER**

The document (including amendments) that appoints members to an AIB and authorizes the AIB to conduct an administrative investigation.

### **CONVENING AUTHORITY**

The authority responsible for convening and supervising administrative investigations under VA Directive 0700. Convening Authorities include the Heads of VA Administrations and Staff Offices, Chief executives of VA facilities, and authorities senior to any of them in the VA organization.

### **GENERAL/REGIONAL COUNSEL**

The attorney responsible under the General Counsel’s organization for providing legal advice to the Convening Authority. For Convening Authorities at the VA Central Office, attorneys from the Office of the General Counsel perform this function; for other offices it is performed by Regional Counsel.

### **INVESTIGATIVE REPORT (IR)**

The standard format for conveying the results of an AIB, designed to enhance clarity and to facilitate review and decision-making. The essential components an investigative report are findings of fact, conclusions, and exhibits. These components are defined and explained in 0 INVESTIGATION REPORTS.

### **ISSUE**

The questions, within the scope of the investigation, that the AIB is responsible for answering. Issues generally include the “who, what, where, when, and why” of the incident prompting the investigation. Specific issues may be identified by the Convening Authority or in applicable policies, and new issues may be raised by information acquired in the course of the investigation.

### **MATERIAL EVIDENCE**

“Evidence” is any information considered by a factfinder that makes a particular matter or asserted fact more, or less, likely to be true (“factfinders” include both the AIB members and those who use investigative reports for decision-making). Evidence is “material” to an investigation if the matter it

tends to prove or disprove is logically connected to an issue of the investigation and it does not unnecessarily duplicate other evidence tending to prove or disprove the same matter.

**PRELIMINARY INQUIRY**

An informal process to obtain and assemble readily available information about an incident, the results which may be used for a variety of purposes, including to determine the need for an AIB.

**SCOPE**

The subject matter into which the AIB is authorized to inquire by the Convening Authority.

**SUBJECT OF AN INVESTIGATION**

An individual whose conduct (1) is at issue in the investigation and (2) may be grounds for adverse action including disciplinary action or criminal prosecution.

**SWORN, AFFIRMED, OATH**

The term “affirm” is used in this manual to refer to testimony provided under an “affirmation” stating that the information is true, to the best of the witness’s knowledge and belief, subject to the penalties for perjury or false swearing, before a person authorized to administer oaths. An “oath” is identical to an affirmation except that it also includes the words “so help me God.” Testimony provided under oath is also called “sworn” testimony. Sworn testimony and affirmed testimony are considered equally reliable and admissible.

**TESTIMONY**

A statement of a witness, prepared for and provided orally or in writing to a factfinder or investigator. Testimonial evidence is distinguished from “documentary” evidence (i.e, written or recorded evidence such as correspondence, business records, photographs, or other records prepared for purposes other than an investigation) and “physical” evidence (i.e., things presented to the fact finder whose existence or condition tends to prove or disprove relevant matters).

## SAMPLE CHARGE LETTER

*Note: Language in italics should be included or adapted as appropriate.*

### (MEMORANDUM FORMAT)

Date:

From: [Convening Authority, Facility Name]

Subj: Administrative Investigation of [e.g. "Alleged Whistleblower Reprisal"]

To: [Names of AIB members]

1. You are hereby appointed to an Administrative Investigation Board (AIB). \_\_\_\_\_ *shall serve as chair of the AIB.* The AIB shall conduct a thorough investigation into the facts and circumstances *regarding an allegation that \_\_\_\_\_ [identify the scope of the matter to be investigated, including the nature of the conduct alleged, the approximate date, location, and individuals involved and any documents describing the matter.]*
2. This memorandum authorizes you to inquire into all aspects of this matter; to require VA employees to cooperate with you; to require all employees having any knowledge of the complaint to furnish testimony under oath or affirmation without a pledge of confidentiality; to obtain voluntary sworn testimony from other individuals; to administer oaths and affirmations; and to gather other evidence that you determine is necessary and relevant. These authorities are delegated for the purposes and duration of this investigation only. Your investigation shall be conducted and reported in accordance with VA Directive 0700 and VA Handbook 0700 (Administrative Investigations), and *[List other specific governing policies and other pertinent laws, policies, regulations, or collective bargaining agreements].*
3. Preparations for the investigation should begin *[immediately]*. On-site investigation should begin within *two weeks* of the date of this memorandum. You shall submit your completed report and investigative file to me within *45 days* of this memorandum's date, unless an extension is granted.
4. *[Include any specific guidance/limitations for investigation or report contents; e.g.*  
*"You shall coordinate your investigation with the concurrent investigation of the Office of the Inspector General into \_\_\_\_\_(related matter),*  
*You need not inquire into \_\_\_\_\_, which is being investigated separately."*  
*Your report [may/shall] be submitted in [standard/summary] format, as described in Chapter 6 of VA Handbook 0700.*  
*Your report shall specifically include findings of fact or conclusions regarding the following issues: \_\_\_\_\_;*  
*you may/ shall make any appropriate recommendations/ you shall make recommendations regarding the following matters only:\_\_\_\_\_]*
5. *The following personnel are detailed as staff to the investigation:*
  - a. NAME CONTACT # FUNCTION
  - b. NAME CONTACT # FUNCTION
6. *Please contact \_\_\_\_\_ at \_\_\_\_\_ to make travel arrangements. Contact \_\_\_\_\_ for any other administrative support required. For any necessary legal support, contact Regional Counsel at \_\_\_\_\_. For matters requiring my personal attention, please contact [Identify point of contact or "me directly"] at \_\_\_\_.*

*[Convening Authority's Signature block]*

Attachments: *[E.g. statements, prior reports, etc]*

CC: *[Detailed staff, contacts identified, other organizations as appropriate]*

## ADMINISTRATIVE INVESTIGATION CHECKLIST

*NOTE: The following checklist provides a generic approach to planning a complex, multi-member administrative investigation, and should be adapted by the investigator or chair as necessary for the needs of a particular case.*

### 2. LEARN ABOUT THE CASE AND YOUR ROLE IN IT.

- ☐ Read the Charge Letter (and any attachments), VA Directive 0700 and this Handbook and be familiar with the appendices.

Review any other policies, regulations, etc. applicable to this investigation, which may detail specific issues or requirements for the investigation.

- ☐ Coordinate with the Convening Authority to obtain any available reports, documents, and other information relevant to your investigation.
- ☐ Familiarize yourself with this information. You may wish to sketch out a tentative timeline, diagram, or summary of events alleged or documented, personnel involved, etc. based on these materials so that you can put any evidence in context.
- ☐ Read 0 TIPS FOR EFFECTIVE INVESTIGATIONS.
- ☐ Make sure you have a clear understanding of the scope of the investigation, your duties, and deliverables.

### MAKE INITIAL ADMINISTRATIVE ARRANGEMENTS.

- ☐ Identify points of contact for:

	<b>Name / Location</b>	<b>Phone/Fax/E-mail</b>
<u>Convening Authority</u>		
<u>Issues:</u>		

Administrative, Logistics  
and Financial Support:  
Legal Support:

HR/Labor Issues:

Members and Staff:

- ☐ Establish target dates for investigation:

_____	Date of Charge Letter
_____	Complete Initial Planning
_____	Commence On-Site Investigation
_____	Conclude On-Site Investigation/ Begin Final Write-up
_____	Deliver Complete Report and Agency File

- ☐ Confer with members and staff to discuss schedules and functions:

Introductions of members and staff

Discuss scope, general approach and goals of investigation

Discuss division of workload among members and staff

Assign responsibilities for administrative tasks, such as maintaining and securing the investigative file, arranging interviews, etc

Schedule on-site investigation to allow for timely completion of the report.

- ☐ Make any travel arrangements for members or staff.

- ☐ Arrange for office and interview space.

- ☐ Determine any local procedures for interviews and transcription; arrange for court reporter and/or recording equipment (if needed).

- ☐ Set up Investigation File.

#### **IDENTIFY ISSUES AND EVIDENCE.**

- ☐ Prepare detailed list of issues (consult technical experts as necessary), using 0.

- ☐ Identify information sources and potential witnesses for each issue.

NOTE: Update this list when you develop new leads, and cross items off as you obtain them or find that they are not needed. Be aware that new evidence or information may open up new issues at any point in the investigation.

#### **COLLECT AVAILABLE DOCUMENTS AND OTHER EVIDENCE**

- ☐ Begin by collecting evidence already available within VA.

Some documents may have been provided with the Charge Letter.

If the IG or another investigative body has looked into the matter, they may be able to provide the evidence they collected for your use, even if they cannot provide their full report.

Request files and records (e.g. personnel and correspondence records) to determine whether they include relevant evidence. But see 0 (Restrictions on Disclosure and Use of Information).

**WARNING: If evidence is subject to special protections (such as Privacy Act, classified information, or confidential quality assurance information), you must ensure compliance with the requirements for that material.**

Review investigative procedures and witness information in Chapters 4 and 5 and 0.

- ☐ Collect available documentary and physical evidence in the investigative file. Record its source, date received, and description as you receive it. Assign exhibit numbers as the item is used in testimony (See Chapter 4 and 0 SAMPLE INVESTIGATIVE FILE INDEX).

For evidence that cannot be obtained for the file (e.g. physical evidence or original documents needed elsewhere) substitute copies, photographs, or descriptions of the actual item.

Maintain security for the evidence collected (e.g. keep it in a locked room or container when not in use).

#### **CONDUCT WITNESS INTERVIEWS.**

- ☐ Develop witness plans for identified witnesses using 0.

If witnesses are members of a collective bargaining unit, review the applicable collective bargaining agreement and consult with labor / management relations staff to ensure compliance.

Coordinate potential union / labor issues, including requests for representation, with the Convening

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Authority's staff.

Identify the form and process by which the testimony should be obtained (i.e. sworn verbatim testimony or declaration, who will attend the interview, how questioning should be conducted, etc.).

- ☐ Determine sequence of interviews and schedule them.

Note the Privacy Act requirement regarding collecting evidence from subjects of investigations. See 0.

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Coordinate with Convening Authority, supervisors of VA employees, and witnesses themselves for attendance at interviews.

Schedule the interviews to allow ample time for each session.

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Leave time to re-interview key witnesses if evidence raises new questions.

If any witnesses are VA patients, review and comply with Section 0-(Evidence From Patients Under Treatment At VA Health Care Facilities) as well as the requirements of 38 CFR § 17.33 (Patients Rights).

- ☐ Use 0 PROCEDURE / CHECKLIST

FOR OBTAINING WITNESS TESTIMONY to prepare for and conduct interviews of witnesses.

## WRITE THE REPORT.

- ☐ Review VA Directive 0700 and the Charge Letter to determine what is required in the report.

Make sure you understand the important distinctions between findings of fact and conclusions.

Make sure the report clearly states the evidentiary basis for your findings and conclusions.

- ☐ Determine the overall structure for the report.

Meet with the other members to discuss the matters to be included, and how the report should be structured to best communicate the results of the investigation. For example, you could provide all findings of fact in chronological order, followed by conclusions. Alternatively, you could group together findings of fact and conclusions regarding particular issues, as long as you clearly distinguish them within each section.

Plan to include additional explanatory background material as attachments where appropriate, and note them in the preliminary statement.

- ☐ Assign the tasks of writing initial drafts of the various sections of the report. For example, members can draft findings of fact and conclusions related to specific issues in which they have special expertise, with one member assigned to consolidate the drafts into a single report for review.

- ☐ Compile and circulate the draft report to members for comment.

Each member should review all of the evidence to ensure that it provides adequate support for findings and conclusions.

Communicate/ meet to resolve any disagreements over findings, conclusions, or other matters.

- ☐ Review the report to eliminate these common problems areas:

- ⊗ Use of language indicating a lack of objectivity.
- ⊗ Failing to obtain, review, and address material evidence on significant issues, including evidence tending to contradict the AIB's findings and conclusions. This includes failure to ask direct and pertinent questions to subjects of the investigation, and failure to follow up or gather evidence on explanations that may be pretexts for improper actions.
- ⊗ Failing to resolve all issues in findings of fact or conclusions.
- ⊗ Findings or conclusions that focus on the investigation process, rather than the matter investigated.
- ⊗ Failing to distinguish findings of fact from conclusions.
- ⊗ Failing to document the evidentiary basis for facts or conclusions by citation to exhibits.
- ⊗ Failing to explain basis for conclusions, or to address and resolve significant conflicts in evidence.

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- ⊗ Resolving disputed matters by relying on the AIBs' subjective opinions (including opinions of witness character), rather than obtaining and thoroughly analyzing material evidence.
- ⊗ Failing to review evidence to verify that the report correctly reflects its content and effect.
- ⊗ Failure to include exhibits or to index exhibits properly.
- ⊗ Including exhibits that contain a large volume of irrelevant material.
- ⊗ Providing recommendations that are not authorized, or that are not based on findings or conclusions.
- ☐ Sign the report and deliver to the Convening Authority with the investigative file.

## TIPS FOR EFFECTIVE INVESTIGATIONS

### 3. THE ROLE OF THE INVESTIGATOR

- Realize that you are an investigator, not a judge or a jury. Your main job is to collect and assemble relevant evidence, to use that evidence to determine what actually happened and why, and to report what you find, all in an impartial, objective manner.
- Realize that the procedures used by an AIB can have important beneficial or adverse effects on the morale and efficiency of everyone involved, particularly on alleged victims, those accused of deficient performance or misconduct, and other witnesses.
- Remember that your authority as an investigator is only to conduct the investigation. If it is necessary to compel cooperation with the investigation (e.g. to get a witness to appear at an interview), any order must come from someone with authority over the individual or matter involved (unless you have been specifically authorized to take such action).
- Avoid preconceptions and keep an open mind. Until you actually sign the report, consider any findings, conclusions, or assumptions to be tentative and subject to change.

### DETERMINING ISSUES FOR INVESTIGATION

- “Issues” are the questions to be answered by the investigation, either by findings of fact or conclusions. When issues are resolved by evidence establishing facts that are not reasonably disputable, they are addressed as findings of fact – otherwise they must be addressed by conclusions.
- Although some issues may be specified in the Charge Letter or in governing policies, determining which issues are within the scope of the investigation is an ongoing process that requires considerable interpretation and judgment by the investigator. New evidence may resolve some issues and raise new ones.
- Review the Charge Letter to determine the scope (i.e., the boundaries) of the investigation and any issues specified by the Convening Authority. Review any applicable instructions, particularly those identified in the Charge Letter, for specific issues to be addressed.
- Identify other issues based on the known evidence and allegations. Certain issues are common to most investigations (depending on the circumstances):

The nature and sequence of significant events and the individuals involved;

The nature and amount of any harm or adverse consequences;

The reasons challenged actions were taken (or not taken), and whether any exercise of judgment or discretion was reasonable;

Whether applicable standards (including laws, regulations, professional standards, established practices and procedures, and other standards) were met or violated, the reasons standards were not met, and the adequacy of those standards (if within the scope of the investigation). Consult with technical advisors, including subject matter experts and legal advisors (General / Regional Counsel), as necessary to help identify and explain relevant standards. Obtain copies of written standards. Break standards down into elements to identify reasonably specific issues for investigation.

The causes of events or harm. Establish whether there were causal connections, between related incidents and actions. Depending on the scope and purpose of the investigation, consider root cause analysis of the significant chains of causation;

Aggravating or mitigating factors – that is, factors that help to explain why error, misconduct or misjudgment occurred, such as whether a person knew pertinent facts or was aware of applicable

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standards and potential adverse consequences.

## EVIDENCE AND ANALYSIS OF ISSUES, FACTS AND CONCLUSIONS

### *Sources of Evidence*

- Evidence is anything that makes a particular matter more or less likely to be true. Investigators look for *material* evidence of *facts relevant* to the *issues* for investigation – that is, evidence that is reliable and effectively shows what happened, resolving the issues for investigation. You don't need to collect everything you see, but you should make a copy or at least a note of anything you think is, or may become, material evidence.
- Consider all types of evidence, particularly about matters subject to dispute. Look for physical evidence (i.e., anything that may have affected, or have been affected by, the matter investigated) and all kinds of documents (including photographs, videotapes, records, correspondence, etc.) as well as testimony. In some cases, technical or forensic analysis of physical evidence can help prove critical facts (e.g. to show the cause of damage).
- Visit the scene of significant incidents early if possible– to collect evidence, to help you understand how the evidence fits together, and to identify potential leads.
- If another investigation has been conducted into a related matter (for example, by the IG, ORM, or local law enforcement), seek to obtain any relevant evidence from that investigation that can be made available to the AIB. Do not ask for information that cannot be disclosed to the AIB, such as confidential quality assurance information, however.
- If crucial evidence cannot be obtained by other means (including requests for voluntary cooperation with the investigation), the AIB may ask the Convening Authority to seek a subpoena for its production. Subpoenas are legal documents that can be used to compel witnesses to testify or produce specific evidence for VA, even if they are not VA employees. The Secretary has authority to subpoena witnesses for "the purposes of laws administered by the Secretary" under 38 USC 5711, and has delegated this authority to certain VA officials in 38 CFR § 2.2. Note that most Convening Authorities do not have subpoena authority, and that the use of this authority in the context of an administrative investigation may be subject to legal challenge. The VA Inspector General has separate subpoena authority for matters within the IG's responsibility. Any efforts to obtain or enforce a subpoena for an administrative investigation must be done in close consultation with the General/Regional Counsel's Office.
- Be alert for *new leads*, and follow them up. In addition to the names of potential witnesses provided by individual(s) making allegations, other potential leads can be identified in the course of formal or informal witness interviews or other case-related discussions.

### *Assessing Credibility and Resolving Conflicts in Evidence*

- The formal rules of evidence do not apply to administrative investigations (or in administrative proceedings that may use evidence gathered in an AI). The principles underlying those rules, many of which are touched on below, nevertheless provide a useful guide to analyzing the probative weight (or "proving power") of particular evidence, and for resolving apparent conflicts in evidence.
- Be alert for significant inconsistencies in the evidence and other matters affecting the credibility of evidence (i.e., the reliability of the evidence for establishing true, relevant facts). The following are some well-recognized factors used to assess credibility (see, e.g. *Hillen v. Dept. of Army*, 35 MSPR 453 (1987):

*Witness's Capacity and Opportunity to Observe and Recall the Event Accurately.* Every witness

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statement should clearly establish the basis for the witness's knowledge of the matters testified to: what did the witness see, hear, smell, touch, taste, or (if material) think. Any difficulty in perceiving, recalling, or describing the matter testified to may affect credibility. Similarly, while "hearsay" testimony (testimony relaying the observations of someone other than the witness) may be considered by an AIB, it is often accorded substantially less weight than that of a direct observer.

*Inherent Probability.* Some testimony requires or implies circumstances or coincidences that are simply unlikely to occur in the real world because of their inherent improbability or inconsistency with human nature. Less probable testimony is generally less credible, so look to see if other evidence can corroborate improbable testimony.

*Consistency with Other Statements by the Same Witness.* Inconsistencies among a witness's own statements, both official and unofficial, may raise doubts about credibility. The witness should be asked to explain any apparent inconsistency in statements. In some circumstances, a prior consistent statement (e.g. made before the witness had a motive or an opportunity to make up a false statement) may increase the credibility of testimony.

*Consistency with Other Evidence.* Other evidence may contradict a witness's statement if it is inconsistent with the statement. On the other hand, consistency of testimony with other evidence tends to support its credibility, particularly when the other evidence is from an independent source.

*Bias.* Certain interests or attitudes on the part of a witness may cause a witness, consciously or unconsciously, to shade his or her recollections or testimony. The nature and intensity of the witness's interest is a critical factor in assessing bias. The fact that a witness's testimony may be self-serving is not sufficient grounds for disbelieving that testimony, but it is a factor for consideration in assessing the probative weight of the evidence. Similarly, a statement that is clearly contrary to the witness's interests may be a factor enhancing its credibility.

*Character Traits Related to Truthfulness.* A witness's character for truthfulness or untruthfulness may render that person's testimony less reliable. Such character traits could be established, for example, by documentation of recent misconduct involving false statements or deceit. Untruthfulness may also be established by a person's reputation or other specific acts, but it is seldom effective to pursue vague or isolated allegations of untruthfulness or bad character unless they are closely related to the issues for investigation.

*Demeanor.* Demeanor is the behavior and appearance of a witness during testimony, where the factfinder essentially functions as a "human polygraph." Demeanor may include emotional behavior, evasion of particular questions, body language, etc. Trained investigators use a witness's demeanor to guide their questioning and investigative efforts, but demeanor is seldom if ever reliable as evidence. Thus, while the demeanor of a witness is often a factor in assessing credibility in court, it should not be considered a significant factor in assessing credibility in administrative investigations. If demeanor is used as a credibility factor, the behavior must be detailed in the investigative report (e.g. by an interviewer's declaration describing the conduct in detail).

➤ Look closely at apparent conflicts *before leaping* into credibility analysis.

In most cases, an official, sworn statement of the observations of a responsible federal employee is sufficient to prove the facts testified to, unless there is specific reason to doubt such statements (such as conflicting evidence, inherent improbability, or a significant motive to lie or "misremember"). Often, close inspection of evidence will show that an apparent inconsistency arises from diverse interpretations or opinions regarding the same objective facts. Investigators should therefore look closely at any evidence, and ask appropriate follow-up questions, to determine whether contrasting statements actually constitute conflicting evidence of material facts.

➤ Don't confuse *credibility* with *honesty*.

Credibility is a characteristic of the evidence; honesty is a character trait of the witness. Evidence of a

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character trait for honesty or dishonesty is only one of many factors used to assess credibility. Honest people can sometimes be incredible (for example, if they did not observe or do not remember events accurately) and even the most dishonest people can be credible under some circumstances (for example, if they have no motive to lie, if their statements can be independently corroborated, and if they are motivated to tell the truth by fear of the consequences of perjury or false statements).

A particular witness may be very credible on some points and incredible on others. An investigator should rarely, if ever, dismiss a witness's statement as "incredible" unless a careful objective analysis shows that no reasonable person could believe the testimony.

- *Don't rely on "gut feelings" for credibility analysis.*

In administrative investigations credibility must be assessed by objective evidence, not by "gut feelings" of the investigator or the witnesses. Even though the investigator is the factfinder for purposes of the investigation, the investigator's feelings as to whether a particular witness is credible are seldom very useful to users of the report. Resolving evidentiary conflicts on the basis of credibility requires consideration of the objective evidence, the witnesses who provided statements, and the circumstances under which the statements were made.

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### ***Authenticity of Evidence***

- *Be alert for authenticity issues.*

Authenticity issues are issues dealing with whether a particular piece of evidence is what it appears to be. For example, information that an evidentiary document was forged or altered in some way would raise an issue of its authenticity.

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Generally, evidence from a records custodian or other reliable source (as shown in the index of exhibits), such as evidence taken from official records or other agency files, can be presumed to be what it appears to be unless there is a specific reason to doubt it.

Key pieces of evidence (i.e., important evidence on disputed issues) should be authenticated by a witness's testimony if feasible (e.g. "Mr. Overmeister, please examine this copy of Exhibit 12, an e-mail with the Subject line "Stop the Leaks!" that shows you as originator – did you send this e-mail?").

If the authenticity of material evidence is disputed (e.g. by a witness during an interview who testifies that a document appears to have been altered in a significant way) you must resolve the authenticity issue.

### **WITNESS INTERVIEWS**

- Procedures for witness interviews are in 0.
- Conduct testimonial interviews so that the transcript "tells the story" in a logical way.

Establish the relationship of the witness to the case – including the witness's position or role in the matter being investigated.

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Establish the basis for the witness's knowledge - i.e., the "opportunity to observe": how does she know what she knows. For example, establish presence at the scene of significant events.

Have the witness explain, in his/her own words, what happened, starting from the beginning. Once the employee has completely related his/her narrative, ask specific questions.

- During questioning, focus testimony on **material evidence**:

Make sure that the witness testifies to the material facts. This may sound obvious, but investigators often simply fail to ask -- or insist on direct answers to -- critical questions, such as whether the subject did the act complained of, how, and why.

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Treat all witnesses with respect -- whether they are subjects, complainants, eyewitnesses, experts, employees, VA beneficiaries, or others -- but don't be reluctant to ask any witness probing questions about material facts.

Focus on what the witness did or observed -- saw, heard, felt, smelled, or tasted -- rather than what they thought about it (unless their thoughts are themselves material facts). Ask not only what a witness knows, but also how they know it.

Do not presume that minor inconsistencies between a witness's testimony and other evidence indicate a deliberate falsehood. Such inconsistencies can often be explained by, for example, a lack of time to review notes and records or to prepare for the testimony. Your approach should be analytical and critical -- not cynical.

Once you have firm testimony on the relevant facts, ask the witness about the inconsistent matter, and give them an opportunity to explain any apparent prior inconsistency.

Although witnesses' opinions, characterizations, and conclusions are rarely helpful as evidence unless they are directly at issue, questions about these matters may be useful as leads to more helpful questions. Delve into the basis for opinions or conclusions: what did the witness see, hear, smell, feel, taste that led them to that opinion or conclusion?

Remember, however, that a person's beliefs, knowledge, or thought processes may sometimes be material facts. If the witness's intentions, purposes, or reasons for doing something are themselves at issue (e.g. when a person is suspected of discrimination or reprisal), their account of such matters is extremely important. Question them thoroughly on such matters. Ask them what they knew or believed about the situation and details about why they decided as they did. Have them identify (and produce, if possible) any documents or other information they relied on, any person they consulted or discussed the issue with.

Look for and follow up on leads (but do this during preliminary interviews if possible rather than in testimony that will be transcribed). Ask questions that may lead to new or corroborating evidence (e.g., identification of date, time, and other witnesses to a significant act or conversation) and then check leads out.

Ask witnesses whether they have discussed the matters testified to with others, and why.

➤ **Use effective questioning techniques.**

Have a list of questions or points to address, starting with less controversial, embarrassing, or confrontational matters.

Phrase questions in a manner that will elicit full explanations, and then ask narrower follow-up questions as needed for clarity. Constructing questions too narrowly might impede your efforts to learn all of the facts.

Listen to the answer. Don't presume that the witness answered the same as they did in the preliminary meeting or in their previous statement.

Cover all of the bases regarding the event (i.e., who, what, when, where, how, and why). Ask the witness to be specific in describing the incident, even if it entails repeating profanity, or describing/demonstrating inappropriate physical contact.

Think about how your question and the answer will appear in written form. Avoid ambiguous questions (e.g., bad question: Did you not see Ms. Jones punch Mr. Smith in the nose?" A: Yes).

If the witness rambles into irrelevant matters or becomes evasive, bring the witness back on to track with more specific questions.

Use *open* questions (questions that require a narrative response) to determine the extent of a witness's knowledge or to obtain general recollections from the witness's point of view (Open question: "Please describe what you did when Mr. Smith called you a buffoon.") Use *closed* questions (questions that call for a "yes" "no," or "short answer" response) to "nail down" the specifics of the

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testimony. (Closed Question: What part of Mr. Smith's face did Ms. Jones strike?)

Generally, avoid using *leading* questions (questions that suggest or encourage a particular "preferred" answer) except where necessary to elicit specific admissions or answers from an evasive or uncooperative witness (e.g. "You punched Mr. Smith in the nose, didn't you?"), or if you have no other reasonable alternative to get the information. These types of questions often make it look like the interviewer is testifying or pressuring the witness.

If a witness does not appear to remember incidents or seems to have difficulty recollecting specifics, it is permissible to refresh their recollection with documents or other items, but use only items that they previously had access to (notes, correspondence, etc.)

Ask questions about apparent exaggerations, inconsistencies, gaps, etc.; whether internal to the interview, or between the interview account and a previous statement. Give the witness an opportunity to explain any inconsistency.

Do not be reluctant to clarify statements if it is necessary to fully develop the testimony, even if it might make the person uncomfortable (e.g. repeating obscenities).

You may ask the same question repeatedly, particularly if answers seem evasive.

- Review your witness plan again before concluding the interview to ensure that all necessary points have been covered.

## WRITING THE REPORT

- Remember that your audience may include people unfamiliar with the day-to-day functions of your organization. The report should not contain references, terminology or acronyms that are not readily understood outside of your organization.
- You must specifically identify the evidence you are relying on for each finding of fact and conclusion. Review the evidence carefully to make sure it says what you think it says.
- Prepare exhibits from the investigative file for all evidence discussed in the report. Generally, if only a small part of a large document is referred to in the report, an extract of the document should be prepared as an exhibit. Make sure that any extract gives a full picture of its evidentiary value ("warts and all").
- Where appropriate and consistent with clarity, consider using official titles, rather than personal names, to help "depersonalize" the tone of the report and to simplify removal of personal information if the report must be released.

- For conclusions:

Clearly identify the conclusion, and then state in an "ANALYSIS" section the reasons you believe it to be true. You may also state the issue if it helps for clarity.

Identify any facts, evidence, and interpretive rules you use, such as definitions, legal or technical standards or terms, etc.

Identify and show how you resolved significant inconsistencies or conflicts in the evidence by objective analysis.

Base any assessment of credibility (e.g. when resolving conflicting evidence) firmly on objective analysis of the evidence – not on your feelings or speculations.

Consider organizing your analysis as follows:

1. Identify the issue, including any standards that apply;
2. Identify any relevant undisputed facts;
3. Analyze any disputed matters by identifying the conflicting evidence, discussing how you analyzed the conflict, and stating what you concluded about the facts from the analysis;

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4. Analyze how the standard applies to the facts determined; and
  5. State your conclusion.
- Recommendations may be provided only if specifically required or permitted by the Charge Letter or governing directives. Make sure any recommendations are well-supported by your findings and conclusions, and are phrased so that they can be acted on directly by the Convening Authority (e.g. recommend that the Convening Authority forward a proposal to change a directive promulgated by higher authority).
  - Circulate the draft findings at least once to other members for comment and try to resolve any disagreements about the findings or conclusions by consensus. Have members specifically identify any disagreements and try again to achieve consensus on as many points as possible. Make sure all members have access to the evidence so they can perform a thorough review.
  - Remember that signature affirms that a majority of the AIB agrees with each separate finding, conclusion, and recommendation – not that you personally agree with each one.
  - Members who disagree with significant matters in the report should provide a separate opinion so that decision-makers have the benefit of your views.

## SAMPLE INVESTIGATIVE FILE INDEX EXHIBITS

[illegible]

## INVESTIGATIVE FILE INDEX

ISSUE ANALYSIS WORKSHEET

ISSUES & ELEMENTS	INFORMATION SOURCES (Documents, Technical Experts, etc)	POTENTIAL WITNESSES

## WITNESS PLANNING WORKSHEET

Witness Name: \_\_\_\_\_  
Title/ Position: \_\_\_\_\_  
Witness's role in matter investigated: \_\_\_\_\_  
Phone: \_\_\_\_\_ E-mail: \_\_\_\_\_  
Address/: \_\_\_\_\_  
Office \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Status: (Circle Yes/No)

VA Employee? Y N

Member of VA Collective Bargaining Unit? Y N

VA Patient/Beneficiary? Y N

Subject of investigation? Y N

### NEED FOR TESTIMONY:

- ☐ List investigative issues related to this witness:
  
  
  
  
  
- ☐ List prior statements / documents prepared by this witness:
  
  
  
  
  
- ☐ List other evidence related to this witness:
  
  
  
  
  
- ☐ Nature of any suspected misconduct / neglect by this witness and relevant standards:

### QUESTIONS/ AREAS OF INQUIRY FOR INTERVIEW:

- ☐ Relation of Witness to Case:
  
  
  
- ☐ Opportunity to Observe:
  
  
  
- ☐ Material Facts:

☐ Admissions/ Corroboration of other evidence:

☐ Authentication of Evidence:

☐ Credibility Matters (if relevant):

☐ Other Matters:

**Documentation:**

Verbatim Testimony Required? Y N

Should be documented by: Declaration Transcript Tape

## PROCEDURE / CHECKLIST FOR OBTAINING WITNESS TESTIMONY

### 4. PLANNING THE INTERVIEW

- ☐ Review / amend witness plan for this witness. Formulate key questions for the witness and flag potential problem areas.
- ☐ Review in advance the ground rules and duties regarding the interview process with team members to help ensure that the process is orderly and effective.
- ☐ Review 0, Paragraph 0 (Witness Interviews)
- ☐ Be familiar with, and prepared to explain, witness rights and responsibilities. See 0 (SUMMARY OF OBLIGATIONS AND RIGHTS RELATED TO WITNESSES).
- ☐ Know your options if the employee or representative refuses to cooperate.

### 5. HOLDING A PRELIMINARY INTERVIEW

- ☐ Decide whether to hold a preliminary interview.

It is often useful to meet with a witness in a less formal setting than a recorded testimonial interview, to determine the extent of a witness's knowledge of material facts, to provide notices, to determine whether the witness will exercise any applicable rights, to schedule subsequent interviews, or to provide a basis for a declaration (or other written testimony) that can be used in lieu of a recorded interview. Such informal interviews also help build rapport, save time and costs, and reduce digressions in a subsequent testimonial interview

Preliminary interviews may not be appropriate if you are concerned about a witness improperly influencing testimony of other witnesses, changing testimony, or for other reasons.

- ☐ Hold the preliminary interview.

Be sure to accord any applicable witness rights in a preliminary interview

- ☐ Decide whether to document the witness's testimony by a declaration under 28 USC 1746 (or other means), to proceed to a recorded testimonial interview, or both.

See Paragraph 0 Forms of Testimony and Documentation Requirements.

A recorded testimonial interview is often appropriate if extensive testimony is needed (e.g. from the subject of an investigation), if the credibility of the witness's testimony is subject to question, or for other reasons.

### PROCEDURE FOR PREPARING DECLARATIONS UNDER 28 USC 1746

- ☐ Review the definitions of Affidavit and Declaration Under 28 USC 1746 in 0.
- ☐ Draft the Declaration (or affidavit).

While it is permissible to have the witness prepare the declaration, investigators often find it most effective to draft the declaration for the witness, because this ensures that all material points of testimony are covered in a clear and definite manner. If you use this approach, make it clear that you are trying to accurately record the witness's recollections, and not trying to influence their testimony or "put words in their mouth."

A declaration under 28 USC 1746 and witnessed by an AIB member is equivalent in evidentiary value to a sworn affidavit.

0 provides a suggested format for a declaration (or affidavit).

- ☐ Present the declaration to the witness. Impress upon the witness that he or she alone is responsible and accountable for every word in the declaration.
- ☐ Encourage the witness to correct and supplement the draft so that it accurately reflects the witness's recollections or other testimony and becomes the witness's own statement. Legible pen and ink corrections by the witness are permitted and in fact help to show that the witness carefully considered the statement before signing.
- ☐ Review the declaration to ensure that it is completed correctly. If it differs materially from any recorded testimony, ask the witness to clarify or explain the discrepancy and amend the declaration accordingly. Then ask the witness to initial each page, date and sign the declaration.
- ☐ Sign the declaration in the "Witnessed by" block.
- ☐ If the witness is reluctant or refuses to sign, determine the problem. Remember VA employees must cooperate in the investigation. Usually the only valid reasons for an employee's refusal to sign are: (1) that the declaration does not accurately or sufficiently reflect the personal knowledge of the witness, in which case, the witness should correct the declaration and sign it, or (2) the witness has invoked the right against self-incrimination.
- ☐ If the witness still refuses to sign, prepare an investigator's declaration summarizing the interview, or transcribe the tape (if any) and use the transcript as an exhibit. Safeguard the tape in the investigative file. Include the reasons given by the witness for refusing to sign in the Preliminary Statement of the Investigative Report.

## 6. PROCEDURE FOR HOLDING A RECORDED TESTIMONIAL INTERVIEW

- ☐ Ensure presence at the interview of someone authorized to administer oaths (e.g. court reporter or someone designated under VA regulations).
- ☐ Plan to record the interview.

Generally, all of the AIB members should attend each testimonial interview if feasible – this helps ensure that all necessary questions are asked and answered to the satisfaction of each member.

However, there may be situations that warrant interviews by fewer than all members, such as when there are numerous interviews and/or evidence gathering requirements that can't otherwise be accomplished within acceptable time frames.

For testimonial interviews, investigators often find it most convenient to tape record testimony and then to either have the tape transcribed (typed out verbatim) or summarize it into a declaration or affidavit.

Alternatively, the investigator may arrange to have a court reporter document the interview using "deposition" procedures similar to those used in civil litigation. This may make for less work for the interviewer, but may increase the overall cost and complexity of the interview process.

General/Regional Counsel can help provide information on local resources and procedures.

- ☐ Bring the following to the Interview
  - VA Directive 0700 (Administrative Investigations) and Handbook
  - Charge Letter (and documentation of authority to administer oaths)
  - Witness plan / questions
  - The interview script (below) – (with blanks filled in)
  - Investigative File
  - Copies of any exhibits to be used during the testimony, labeled with exhibit numbers
  - Tape recorder and plenty of tape (test it ahead of time and cue it up) or court reporter
  - Witness rights forms and designation of counsel forms (Appendices J and K)

## SCRIPT / FOR RECORDED TESTIMONIAL INTERVIEW

Introductions (usually off tape)

Thank the interviewee for coming

Introduce the members of the AIB

Try to put the person at ease

Explain the purpose of the interview

☐ If not already completed:

Obtain the person's signature on 0, SAMPLE NOTICE OF WITNESS OBLIGATIONS,  
PROTECTIONS, AND PRIVACY ACT MATTERS

Resolve any questions or exercise of rights by the witness.

If applicable, obtain witness's "Designation of Representative"

Also, ensure any applicable requirements of the collective bargaining agreement have been met (e.g. obtaining the member's permission before tape recording the interview or specific notice requirements).

☐ Start the tape and ensure that it is recording.

☐ State the following:

This is \_\_\_\_\_ (day of week), \_\_\_\_\_ (date). The time is \_\_\_\_\_.

Speaking is \_\_\_\_\_, Chair of the Administrative Investigation convened for the purpose of hearing testimony of \_\_\_\_\_ (witness) concerning \_\_\_\_\_

We are meeting in Room \_\_\_\_\_.

Present are: \_\_\_\_\_ (state the names of all the persons in the room and their role in the investigation, team members, witness and representative). This interview is being [tape recorded / videotaped / etc.].

☐ Note for the record whether the witness is testifying pursuant to a guarantee that the information will not be used for criminal prosecution, (or other restrictions).

☐ Administer the Oath after asking the witness whether they prefer to "swear" or "affirm" their testimony.

### Oath/Affirmation:

☐ "Please state your full name and your current position and employer."

☐ "Do you solemnly swear (affirm) that the testimony you will give in the case under investigation will be the truth, the whole truth, and nothing but the truth [if sworn, add: "So help you God"]?"

☐ WITNESS: \_\_\_\_ (I do).

☐ State that you have obtained the person's signature on the "Statement of Employee Rights and Responsibilities" (or reasons for declining to sign) and "Designation of Representative" (if applicable).

☐ Begin your questions (see Witness Plan).

### CONCLUDE THE INTERVIEW

☐ Ask witness whether they know anyone else with information about the matters discussed.

☐ Ask the team members if there are further questions.

- ☐ Ask witness if they have a statement or anything further to offer to help the team with the investigation.
- ☐ Ask witness if there is anything they would like to clarify about the testimony they have just given.
- ☐ Advise the witness “Your testimony will be typed or summarized. You may be asked to review this document, make clerical corrections and attach a supplementary statement, and then asked to sign and date the document.”
- ☐ Remind the witness: “You may be called back to answer some additional questions. You will remain under oath. Do not discuss this interview with anyone who might be involved in this case, other than a member of this AIB [or your representative]. If you have questions, or if anyone else tries to discuss your testimony with you, or if someone tries to take action against you for cooperating with this investigation, please tell me immediately.”
- ☐ Thank the witness for meeting with the AIB.
- ☐ Turn off the recorder.
- ☐ Determine whether to document the interview by a transcript or summary declaration.
- ☐ Fix the cassette so it cannot be erased, and label, date and initial the tape. Then (1) prepare the declaration or (2) deliver the tape for transcription (Note: the tapes must be stored in the investigative file after they are transcribed).

#### **PREPARING VERBATIM TRANSCRIPTS**

- ☐ If verbatim transcripts are desired, they can be prepared by court reporting services or by support staff.

Transcripts may be prepared in any standard “deposition” format. Regional Counsel can provide samples.

If practicable, ask the court reporter to index the transcript. For a minimal additional cost, an index will greatly simplify finding specific testimony for AIB members and users of the report.

- ☐ Upon receipt of the transcript, have the witness  
Review the transcript;  
List any necessary corrections of transcription errors on an attached sheet (not on the transcript);  
Provide a separate signed and dated statement, if needed to correct any misstatements or to provide important clarifying information if necessary;  
Attach any statement or corrections page to the transcript;  
Sign the transcript and return it to you for inclusion in the investigative file.
- ☐ If the witness refuses to sign, ascertain the witness’s reasons, and summarize the reasons for refusal in the report of investigation.

## SUMMARY OF OBLIGATIONS AND RIGHTS RELATED TO WITNESSES

*Although VA Directive 0700 and Handbook do not establish rights for individuals with respect to administrative investigations, such rights may be established by external sources such as statutes, regulations, collective bargaining agreements or governing directives. The following summary of witness obligations and rights is provided to assist AIB members in observing the rights of witnesses, and in dealing with legal issues that may arise during the course of the investigation. AIBs must consult with Regional Counsel if significant questions arise regarding the rights or obligations of witnesses.*

### 7. “DUE PROCESS” RIGHTS NOT APPLICABLE TO ADMINISTRATIVE INVESTIGATIONS

Federal law provides certain “due process” rights to persons in proceedings where important personal interests such as property or liberty are at stake. Because administrative investigation boards are investigative bodies and do not determine such interests, such rights are inapplicable to administrative investigations. The employee, therefore, has no “due process” right to advance notice, *Womer v. Hampton et. al.* 496 F.2d 99 (1974); or to a notice of charges, *Ashford v. DOJ*, 6 M.S.P.R. 458 (1981), nor does the employee have a right to review or to challenge adverse evidence. If adjudication proceedings, such as disciplinary proceedings and appeals, are initiated as a result of an administrative investigation, any applicable due process rights would attach to those proceedings.

### VA EMPLOYEES’ OBLIGATION TO COOPERATE

VA Regulation 38 CFR 0.735-12(b), entitled “Furnishing Testimony,” states “Employees will furnish information and testify freely and honestly in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be ground for disciplinary action. An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that he or she may be or is involved in a violation of law wherein there is a possibility of self-incrimination.” Note that the obligation to furnish information extends to VA records and other records for which the witness is accountable as a VA employee, but might not extend to the employee’s private documents or information. Obtaining such documents may require a subpoena or other legal procedures. Questions regarding the reach of this authority should be referred to Regional /General Counsel.

### RIGHTS AND OBLIGATIONS REGARDING SELF-INCRIMINATION

If a witness is compelled to give self-incriminating testimony or risk losing his or her job, such testimony (or evidence derived in some way from the testimony) may not be used in any criminal proceeding, because such use would violate the constitutional privilege against compelled self-incrimination. “Self-incriminating” testimony is testimony that could be used to prove criminal charges. It does *not* include testimony that could only be used to prove non-criminal charges, such as those used in employee disciplinary proceedings. The lead case on this point is *Garrity v. State of New Jersey*, 385 U.S. 493 (1967). However, an employee who is assured the government will not make use of the employee’s testimony for criminal prosecution of the employee may be disciplined for subsequently refusing to answer questions. *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973), and *Weston v. HUD*, 14 M.S.P.R. 321 (1983). Thus, if employees refuse to respond to questions on the basis of their right against self-incrimination, the AIB may accept the refusal and continue with other matters; or may consult with Regional Counsel to obtain the necessary assurance from the Department of Justice that the statement will not be used for criminal prosecution.

## PRIVACY ACT REQUIREMENTS

Two requirements of the Privacy Act, and of case law interpreting the Privacy Act, are particularly important to administrative investigations:

### *Collection of Information from Subjects of Investigation.*

(1) 5 USC § 552a(e)(2) requires agencies to “collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual’s rights, benefits, and privileges under Federal Programs.” Some courts have construed this provision to require the agency to seek information from the subject individual *first*, if practicable (at least before seeking information from outside the agency). See, e.g. *Cardamone v. Cohen*, 2001 U.S. App. LEXIS 2814 (6<sup>th</sup> Cir. 2001); *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989).

(2) Consistent with this requirement, VA policy in VA Handbook 5021 , part I, chapter 1, Paragraph 7a(1), and Part II, Chapter 1, paragraph 6a(3) require the fact finder to obtain information from the employee who is the subject of the inquiry (although these do not specify the order of interviews).

(3) Thus, if an AIB obtains evidence or allegations of conduct that may justify disciplinary or other adverse action against an individual (i.e., a “subject”), it

(a) Must interview the subject about that conduct and request any material evidence that the individual can provide, and

(b) Should do so before seeking other evidence on that matter from third parties, *to the extent practicable* consistent with the effectiveness and efficiency of the investigation.

(4) Here are some factors to consider in assessing “practicability” of seeking evidence from a “subject”:

(a) Existing agency records and documents may be obtained and reviewed prior to seeking information from the subject.

(b) A need to clarify allegations or the basis of allegations often justifies collecting evidence from a reporting source and eyewitnesses before seeking information from the subject.

(c) Interviewing the subject early may effectively narrow the issues for investigation and reduce the need for discussing the case with third parties, thus reducing the potential for rumor, disruption of agency processes, unjustified harm to individual and organizational reputations, and overall costs of investigation. For example, the subject may admit to certain of the alleged facts, identify essential witnesses and evidence, and provide explanations for actions that can then be effectively either corroborated or refuted.

(d) A real, fact-based concern that the subject may intentionally or unintentionally influence or intimidate witnesses, or may otherwise limit their complete and truthful testimony, may justify questioning those witnesses or taking other investigative action before interviewing the subject or before informing the subject that the investigation is in progress.

### *Privacy Act Warnings*

5 USC 552a(e)(3) requires an agency to inform, in writing, each individual whom it asks to supply information of (1) the authority to request the information, and whether disclosure of the information is mandatory or voluntary; (2) the principal purpose for which the information is intended to be used; (3) the routine uses of the information, and (4) the effect on the individual of failing to provide that information. Because the law is not clear as to whether this requirement applies only to the subject of a record, or to everyone from whom information is requested during an investigation, AIBs should provide such notice to all witnesses. 0, SAMPLE NOTICE OF WITNESS OBLIGATIONS, PROTECTIONS, AND PRIVACY ACT MATTERS, includes a Privacy Act notice for witnesses.

## PROTECTION AGAINST RETALIATION FOR TRUTHFUL TESTIMONY

VA Directive 0700 requires Convening Authorities to protect witnesses from reprisal for their lawful cooperation with an administrative investigation. Retaliation by any VA employee against any person for cooperating with an investigation or providing truthful testimony is prohibited by a number of statutes and regulations, depending in part on the persons involved, the information provided, and the nature of the retaliatory act. In some cases, employees may be entitled to specific protections against retaliation, such as those established under the Whistleblower Protection Act (see, e.g., 5 USC 1213) and agency policies regarding the protection of whistleblowers. Witnesses who believe they are being reprisal against should be advised that the AIB will report the matter to the Convening Authority, and that they may also report the matter to the Office of Special Counsel or the Office of the VA Inspector General. An AIB member who receives such a report should obtain specific details from the reporting employee and immediately forward the matter to the Convening Authority, or other appropriate authority, for any necessary action.

## RIGHTS OF BARGAINING UNIT EMPLOYEES

Interviews of bargaining unit employees must be conducted in accordance with rights established under statute or any applicable collective bargaining agreement. AIBs must consult the applicable collective bargaining unit agreements to determine the requirements of those agreements.

### *“Weingarten” Rights*

(5) “Weingarten rights” refers to the right of bargaining unit employees to have a union representative present during “investigative interviews” that could lead to disciplinary action. The specific right of federal employees who are employed pursuant to Title 5, U.S. Code to union assistance during investigative interviews is provided for in 5 USC 7114(a)(2)(B). This statute provides that the union that represents a collective bargaining unit “shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if - (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.”

(6) Under case law interpreting this provision, the union representative in attendance at an investigative interview is entitled to take an “active role,” which generally includes asking questions of the unit employee, assisting the employee in producing relevant information, and consulting with the employee. See, e.g., 52 FLRA 421 (1996); 50 FLRA 601 (1995). A union representative is not entitled by this authority, for example, to disrupt an investigation, to provide answers for the employee being questioned, or to attend meetings or interviews where the employee is not present. See, e.g. *Norfolk Naval Shipyard*, 9 FLRA 458 (1982); *FAA, St. Louis*, 6 FLRA 678, (1981); *IRS, Fresno*, 7 FLRA 371, (1981).

(7) If a member of a collective bargaining unit requests union representation, the AIB should suspend the interview pending resolution of the request; review any applicable collective bargaining agreements, and contact appropriate staff of the Convening Authority for any necessary advice or liaison with the Union. Regional Counsel may also be consulted regarding options.

(8) Under title 38 USC 7422 (b), the collective bargaining rights of Title 38 employees are not applicable to matters involving (1) professional conduct or competence (i.e, direct patient care or clinical competency), (2) peer review, or (3) certain pay matters. VA’s position is that Title 38 employees have no statutory right to assistance of union representatives at investigative interviews involving these types of matters. In most cases, however, representation will be permitted as a matter of discretion as described in 0 of this handbook. Questions should be referred to Regional Counsel. See, e.g. *NFFE v. FLRA*; 73 F.3d 390 (D.C. Cir. 1996); *but see VA Medical Center Hampton and AFGE*, 51 FLRA 84 (1995).

*Rights and Obligations under Collective Bargaining Agreements*

Collective bargaining agreements may establish rights, obligations or procedures in addition to, or more extensive than, those listed in this appendix. Such provisions might, for example, require advance notice to employees or to the union of certain matters, and may also govern the conduct of union representatives with respect to an investigation (e.g. prohibiting disclosure of information).

*Union Rights to Participate in Formal Discussions.*

Under 5 U.S.C. 7114, unions representing collective bargaining units must be given an opportunity to be represented at “formal discussions” between management and unit employees that concern a grievance or the conditions of employment of the unit. Witness interviews conducted as part of an administrative investigation do not normally constitute “formal discussions,” primarily because they seek the personal recollections and testimony of the witness, rather than a discussion of the conditions of employment of the bargaining unit or the resolution of a grievance. VA labor relations officials and General/Regional Counsel should be consulted if the AIB believes that a given interview with a bargaining unit member may involve a “formal discussion” or if the issue is raised by the Union.

**PRIVILEGES**

The law affords protection against compulsory disclosure of the content of certain communications, including certain discussions with clergy, health care professionals, one’s spouse, or one’s attorney. Depending on the source of the privilege, the protection may apply only in specific federal or state legal proceedings, or may apply directly to administrative investigations. If a witness declines to answer a question based on an assertion of privilege, the investigator may often resolve the issue by asking a question that does not call for disclosure of privileged information. If a witness continues to refuse to answer questions on the basis of privilege, the AIB should contact the Regional Counsel for guidance.

**PROVIDING ADVICE OF RIGHTS AND OBLIGATIONS**

0 provides a form for advising witnesses of their rights and obligations. This form may be adapted to meet local requirements, including any requirements of collective bargaining agreements. Witnesses may also be provided copies of applicable policies and allowed to consult with private legal counsel. If the investigator obtains written advice regarding witness rights from the Regional Counsel, the Regional Counsel should be consulted as to whether such advice may be shared with a witness.

## SAMPLE NOTICE OF WITNESS OBLIGATIONS, PROTECTIONS, AND PRIVACY ACT MATTERS

1. VA Regulation 38 CFR 0.735-12(b) states, “**Employees will furnish information and testify freely and honestly** in cases respecting employment and disciplinary matters. Refusal to testify, concealment of material facts, or willfully inaccurate testimony in connection with an investigation or hearing may be ground for disciplinary action. An employee, however, will not be required to give testimony against himself or herself in any matter in which there is indication that he or she may be or is involved in a violation of law wherein there is a possibility of self-incrimination” (emphasis added). In addition, VA Directive 0700 requires all employees to cooperate with administrative investigations to the extent permitted by governing laws, regulations, policies, and collective bargaining agreements.
2. For individuals who are not VA employees, participation and testimony in this investigation is generally voluntary unless it is obtained by subpoena.
3. You may refuse to answer a question if you believe the answer could be used to convict you of a crime. If you refuse to answer on this basis, you must inform the investigator that you are asserting this right. No adverse action may be taken against you for such a refusal unless you have been assured that your answer will not be used against you in a criminal prosecution. You do not have the right to refuse to answer a question based on a belief that your response may incriminate a person other than yourself, or that it may result in adverse administrative action against you.
4. VA Directive 0700 requires you to refrain from disclosing any information developed in the course of the investigation, including the substance of your testimony, with others, if so directed by the Convening Authority or by a member of the administrative investigative board. This is to protect the integrity and fairness of the investigative process. You may, however, discuss such matters with federal investigators, with the Office of the Inspector General, the Office of Special Counsel, or with your designated personal advisors or representatives (if any). In addition, you will not be reprised against for any disclosures protected by the Whistleblower Protection Act or other law.
5. You will be protected from reprisal for providing truthful testimony or otherwise cooperating lawfully with this investigation. If you feel that you are being treated adversely for such actions, please advise a Board member immediately so that we can ensure that effective corrective and remedial action is taken. You may also contact other appropriate officials, including the U.S. Office of Special Counsel or the VA Inspector General, if you feel you are being retaliated against for your cooperation with this investigation.

1. **Other Information:**

AUTHORITY TO COLLECT INFORMATION: 38 USC § 5711.

PRINCIPAL PURPOSES FOR WHICH INFORMATION IS REQUESTED: To determine the facts of the matters investigated and any corrective action needed.

ROUTINE USES: The information obtained from you may be included in systems of records, including, but not limited to, “Veteran, Employee, and Citizen Health Care Facility Investigation Records,” 32VAOO, and is subject to the routine uses of such systems. These uses may include internal administration of the Department of Veterans Affairs, correction of systemic problems, determination of liability for claims and benefits, administrative or disciplinary action, actions affecting professional licenses and employment, and provision of information about the matter investigated to other federal and state agencies, Congress, and the public.

FAILURE TO PROVIDE THE REQUESTED INFORMATION could lead to actions and decisions based on incomplete or erroneous information. Failure to provide requested information by

employees of the Department of Veterans Affairs could result in disciplinary action against such employees for violations of the requirements discussed above. In addition, the Department may seek to obtain information from employees or members of the public by subpoena, in which case a refusal to provide information requested at that time could be punishable in federal court by fines and imprisonment.

2. **Members of Collective Bargaining Units (CBUs)** who reasonably believe their responses may result in disciplinary action against them may have a union representative assist them during the interview if they so request. If you are a CBU member and choose to have a representative, notify an AIB member immediately so that we can provide an appropriate form for your designation.

3. **Additional Notice (as required by governing policy, collective bargaining agreement, etc):**

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4. **If you have any questions** or requests regarding the matters discussed above, please notify an AIB member immediately.

**I HAVE READ THE ABOVE NOTICES, OR HAVE HAD THEM READ TO ME, AND HAVE HAD ANY QUESTIONS ANSWERED TO MY SATISFACTION.**

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(Print or type Name of Interviewee)

---

(Signature of Interviewee)

---

(Date)

---

(Print or Type Name of Interviewer)

---

(Signature of Interviewer)

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(Date)

**SAMPLE DESIGNATION OF ADVISOR /  
UNION REPRESENTATIVE**

This is to certify that I, \_\_\_\_\_ have designated  
\_\_\_\_\_ to assist me during the  
present investigation.

This designation will remain in effect until such time as a new designation is made or I cancel this  
designation in writing.

My advisor and I will not discuss my testimony or any information gained as a result of this  
investigation with others, except for disclosures specifically protected by law.

**SIGNED:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

\_\_\_\_\_  
(Print name here)

**ADVISOR'S SIGNATURE:**

**SIGNED:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

\_\_\_\_\_  
(Print name here)

**ADVISOR IS** (Check and complete all applicable)

\_\_\_\_ Union (CBU) Representative, Union/Local \_\_\_\_\_

\_\_\_\_ Attorney, Member of \_\_\_\_\_ (State) Bar.

\_\_\_\_ Other, Specify relation to witness: \_\_\_\_\_

**SAMPLE WITNESS DECLARATION / AFFIDAVIT**

*Note: Drafting advice is in italics*

**DECLARATION OF [NAME, POSITION]**

I [FULL NAME] [declare/ swear/ affirm] that the following is true and based on my personal knowledge and belief.

*[Current Identifying Information - e.g.]. I am currently employed at \_\_\_\_\_ or I live at \_\_\_\_\_*

*[Relation to case; e.g.]: During the period \_\_\_\_\_ I worked for \_\_\_\_\_ within the office of \_\_\_\_\_.* Among my duties at this time was \_\_\_\_\_. In addition, on \_\_\_\_\_ I was present for a meeting with \_\_\_\_\_ in my capacity as \_\_\_\_\_

*Substance of Testimony – include all material evidence including the source of the information for the witness, opportunity to observe, e.g.*

*“At I was at \_\_\_\_\_. I saw \_\_\_\_\_. I heard \_\_\_\_\_. She told me that \_\_\_\_\_. I did \_\_\_\_\_. I thought \_\_\_\_\_. I thought / did this because \_\_\_\_\_ “etc.]*

**The foregoing is a complete statement of my personal knowledge regarding the matters discussed. I have thoroughly read and reviewed this statement and have made any appropriate corrections or additions to it. I understand that I may be subject to severe administrative sanctions or criminal penalties if any part of this statement is false.**

**I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on \_\_\_\_\_**

\_\_\_\_\_  
Signature

**For Declarations**

Witnessed by: \_\_\_\_\_

**For Affidavits:**

SUBSCRIBED AND SWORN OR AFFIRMED BEFORE:

\_\_\_\_\_  
Witness/Notary on \_\_\_\_\_  
(Date)

AUTHORITY TO ADMINISTER OATHS: \_\_\_\_\_  
(e.g. Charge Letter of (Convening Authority) dated \_\_)

## **SAMPLE INVESTIGATIVE REPORT – SUMMARY FORMAT**

(VA Standard Memorandum Format)

From: Administrative Investigation Board

Subj: Report of Investigation into Allegations of Patient Abuse, VAMC Anytown

To: Director, VAMC Anytown

### **PRELIMINARY STATEMENT**

I have completed the administrative investigation into allegations of verbal patient abuse by VA employee Mr. John Orderly on May 24, 2001, as required by your memorandum dated May 30, 2001 (Attachment 1). The initial statement of Mr. Paul Patient, the alleged victim of the abuse, is provided in Attachment 2. In conducting this investigation, I obtained sworn testimony from Mr. Orderly, whose conduct was the subject of this investigation; his supervisor Ms. Janet Nitingale, who was also an eyewitness; and Dr. Elizabeth Proctor, the treating physician (Attachments 3, 4, and 5). I obtained further information from Mr. Patient over the telephone, but he refused to sign another statement (See Attachment 6, Record of Contact). I also reviewed Mr. Orderly's OPF.

I questioned the four other employees on duty in Ward 3 at the time of this incident, but determined that none of them had information material to this investigation

### **FINDINGS OF FACT**

4. Mr. Orderly has been employed by VAMC Anytown as an orderly since October 1994. Ms. Nitingale, RN, has been Mr. Orderly's supervisor since February 1999.
5. According to Ms. Nitingale, Mr. Orderly has been an average to above average worker. He has not previously received disciplinary action for patient abuse or other misconduct.
6. During his off-hours in May of 2001, Mr. Orderly was pursuing a nursing degree at the University of Anytown. Ms. Nitingale permitted him to work on school homework during work hours as long as it was related to his medical duties and did not interfere with his VA work assignments.
7. On May 20, 2001, Mr. Orderly was on duty in Ward 3, VAMC Anytown. Mr. Orderly's tour of duty was scheduled to end at 7:00 AM. He had a class in Medical Ethics scheduled for 8:00 AM. Mr. Orderly had an essay due that day for that class, which he was working on when not assisting patients. As Mr. Orderly acknowledges, he was under pressure to do well on this essay because he was in danger of failing the class and his grade on the essay was worth 1/5 of his grade for the course.
8. Ms. Nitingale, was also on duty at that time, as Duty Nurse for Ward 3. Mr. Patient was in room 327B recovering from surgery.
9. Ms. Nitingale, Mr. Orderly, and others on the ward considered Mr. Patient to be a "difficult" patient. Ms. Nitingale and Mr. Orderly were aware of several specific incidents in which Mr. Patient had, unnecessarily made work more difficult for the staff. Mr. Orderly had at least once referred to Mr. Patient as a "lazy S.O.B" in a conversation with Ms. Nitingale.
10. At about 2:30 AM, Mr. Patient rang for bedpan removal, and Mr. Orderly arrived shortly thereafter. Mr. Patient was reading a magazine and still sitting on the bedpan when he arrived. Mr. Orderly asked Mr. Patient to lift up slightly so he could remove the bedpan. Mr. Patient replied that he would do so as soon as he finished the article that he had almost finished reading.
11. Approximately fifteen seconds later, Mr. Orderly asked Mr. Patient to lift up again, after which Mr. Patient replied that he would be finished "in a minute." Mr. Orderly then made the statement that is the subject of Mr. Patient's complaint. The words Mr. Orderly used, which are disputed by the witnesses, are discussed in conclusion 1.

12. Mr. Patient then said in a loud and accusing voice, “Who are you calling a lazy [or crazy] slob?” or similar language, which was overheard by Ms. Nitingale. Without challenging the implication of Mr. Patient’s question, Mr. Orderly then said “just lift up so I can get the bedpan,” retrieved the bedpan, and left the room quickly.

13. Ms. Nitingale went in to check on Mr. Patient, and took his statement, which is included as Attachment 3 to this report. Mr. Patient stated at that time that Mr. Orderly had just “disrespected him” by saying “Move your can you lazy slob.” She describes Mr. Patient’s manner at that time as angry, embarrassed, and annoyed, but rational.

14. Mr. Patient was released from VAMC Anytown on May 25<sup>th</sup>, 2001. Dr. Proctor, his treating physician, stated that Mr. Patient told her at his pre-release review that one of the orderlies had called him a disrespectful name, that he had already reported it to the Medical Center Director, that he was sure the Director would “have his job,” and as far as he was concerned it was a “closed subject.”

### CONCLUSIONS

**CONCLUSION 1: When Mr. Patient continued to read after Mr. Orderly had asked him to “lift up”, Mr. Orderly reacted by saying “Move your can, you lazy slob” or similar words, to Mr. Patient.**

**Analysis:** Mr. Patient’s sworn account of the Mr. Orderly’s conduct, written within minutes of the incident, is strongly supported by independent evidence and the facts above. Particularly persuasive are the following facts: (1) Mr. Orderly had used similar language in discussing Mr. Patient with a coworker, (2) Mr. Patient accused Mr. Orderly of making the statement by saying “who you calling a lazy [or crazy] slob,” and Mr. Orderly did not deny or even address the accusation; (3) Mr. Orderly was under pressure to get back to an important school assignment, which explains why he may have been short-tempered; and (4) there is no evidence of a credible reason for Mr. Patient to make up such an accusation. Mr. Orderly states that he never would use this kind of language to a patient, but he does not remember the words he did use to Mr. Patient, nor can he otherwise account for the facts discussed above.

**CONCLUSION 2: Mr. Orderly’s disrespectful conduct was in part due to the pressure from his schoolwork, and in part due to Mr. Patient’s own rudeness to staff – neither of which excuses his behavior.**

\_\_\_\_\_Date\_\_\_\_\_  
Ima.Sleuth, Investigator

ATTACHMENTS  
Index

Number	Description	Source
1	Charge letter dated May 24, 2001	Charge Letter for AIB
2	Report of Contact signed by Paul B. Patient, dated May 20, 2001.	Charge Letter
3	Transcript of Testimony of John Orderly, May 27, 2001	AIB Interview
4	Transcript of Testimony of Janet Nitingale, RN, May 27, 2001	AIB Interview
5	Declaration of Elizabeth Proctor, MD Treating Physician, dated May 29, 2001 with Supplementary Statement.	AIB Interview
6	Report of Contact with Mr. Paul B. Patient (Patient) dated May 29, 2001.	AIB Report of Contact
7	Extracts from OPF of John Orderly prepared May 30, 2001	VAMC Anytown (HRM Office)

## SAMPLE INVESTIGATIVE REPORT –STANDARD FORMAT

*The following example is based on an imaginary, relatively complex scenario involving a senior manager and matters that cannot be proved directly (in this case, the reasons for decisions and actions by the subject of the investigation). Footnotes are provided in this sample to explain significant points about the report drafting process. Footnotes are seldom necessary in investigative reports. Deleted material is indicated by bracketed ellipses [. . .].*

(VA Standard Memorandum Format)

From: Administrative Investigation Board

Subj: Report of Investigation into Allegations of Vehicle Misuse at VACO-ORA

To: Chief of Staff

### PRELIMINARY STATEMENT

The Administrative Investigation Board (AIB) has completed its investigation as directed by your memorandum dated August 1, 2000, as amended (Attachment A).

#### 16. Scope.

This investigation was convened to inquire into the facts and circumstances surrounding an allegation that the Director, VACO Residual Affairs Staff, used a government vehicle for other than official purposes during the period November 1999 through June 2000.

Allegations that the Director committed whistleblower reprisal against the VA employee who reported the alleged misuse of the government vehicle have been made to the U.S. Office of Special Counsel, (OSC). The OSC asked the Convening Authority to provide a copy of this report of investigation when completed. The OSC has also requested that VA refrain from investigating the reprisal allegations because it intends to conduct its own investigation; thus the alleged reprisal is not within the scope of the present investigation.<sup>1</sup> (Attachments A and G).

In addition to the witnesses named in the list of exhibits, the AIB questioned the following persons but determined that they did not possess information material to this investigation:

[ ...]

#### 2. Significant procedural issues.

a. On August 14, 2000, Mr. Millburn Drysdale, Administrative Coordinator (AC), Residual Affairs staff, <sup>2</sup> informed the AIB that he refused to answer questions regarding the subject of this investigation based on his constitutional right against compulsory self-incrimination. General Counsel (023) and the Convening Authority consulted with the local U.S. Attorney's Office and received authority to assure the AC that his testimony would not be used against him for criminal prosecution. (Attachment F). The AC testified subject to this assurance (Exhibit 8). On September 16, 2000 the Convening Authority authorized a 14-day extension of this investigation due to the delay occasioned by this matter. (Attachment A, p. 2).

b. On August 12, 2000, a representative of the AEIOU Local 1234 requested that the union be allowed to attend certain witness interviews on behalf of the employee who reported the vehicle misuse, so that the union could assist her in her whistleblower reprisal claim. This request was denied after consultation with Labor-Management relations staff (Attachment E). A grievance with respect to this decision is being processed separately.

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<sup>1</sup> This clarifies the scope of the investigation and identifies a related investigation.

<sup>2</sup> Refer to individuals by position, rather than name, unless necessary for clarity – this enhances the tone of objectivity and also simplifies redaction of personal identifiers from the report.

### FINDINGS OF FACT

17. The following relevant laws and regulations apply to use of government vehicles. (Exhibit 12).<sup>3</sup>

a. Government vehicles may be used only for official purposes and, (except for situations not applicable here such as official overnight TDY travel) transportation of an employee from his or her residence to his or her place of employment is not official. 31 U.S.C. § 1344.

b. An employee who knowingly misuses a Government vehicle, or who uses a Government vehicle in reckless disregard for whether his use violates the law, shall be suspended by the head of the agency for one month. 31 U.S.C. § 1349.

c. VA Directive XXXX, effective October 21, 1999, provides that \_\_\_\_\_ (Exhibit 3).

d. [ . . . ]

18. Mr. Jedidiah Clampett has served as Director (“Director”), Residual Affairs Staff, a Senior Executive Service position at the VA Central Office from March 1998 through the present. (Exhibit \_\_\_\_). His immediate supervisor is been Ms. Jayne Hathaway, Deputy Assistant Secretary for Residual Affairs, (“DAS”) since September 1999. (Exhibit \_\_\_\_). The Director supervises a total of 25 employees organized into three teams. The three team leaders and the Administrative Coordinator (AC), Millburn Drysdale, each grade GS-14, are his immediate subordinates. (Exhibit 10, page 9; Exhibit 7, pp. 3-4).

19. Throughout the period investigated, the Director’s scheduled tour of duty was 8:00 AM to 4:30 PM each week day and his official duty station was VA Central Office, 810 Vermont Ave. N.W., Washington D.C. (Exhibit 13).

20. The Director was advised in a September 1997 Advisory Opinion from the Office of General Counsel (023), in response to his request for advice, that using the Government car for local transportation between home and work was prohibited unless specifically authorized by the Secretary. (Exhibit 14). The Director did not again seek advice from General Counsel regarding use of this vehicle or related matters. (Exhibits \_\_\_\_ and \_\_\_\_).

21. The Secretary did not authorize home-to-work use of a government car for the Director at any time through July 31, 2000. (Exhibits \_\_\_\_ and \_\_\_\_).

22. In about November of 1999, the AC advised the Director that home-to-work use of his government vehicle was authorized by VA Directive XXXX, which had been published the previous month. (Exhibits \_\_\_\_).

23. Between November 1999 and January 17th, 2000, the Director used his Government car 13 times for local transportation directly from home to duty station, a distance of 45 miles. (Exhibit \_\_\_\_\_, Exhibit \_\_\_\_ page \_\_\_\_).

24. On about January 5th, 2000 after receiving an advisory notice clarifying the intent of VA Directive XXXX, the AC advised the Director that he had been mistaken in his previous advice, and that VA regulations and other laws prohibited the Director from using the car for home to work transportation. (Exhibits \_\_\_\_). When the Director asked whether he could station his government vehicle at another VA facility and drive it between that facility and the office, the AC told him he could do so only if he had official business at the facility. (Exhibits \_\_\_\_ and \_\_\_\_).

25. On about January 17th, 2000, the Director ordered that his Government car be parked at VA outpatient clinic Bugtussel, Virginia, which was 6 miles (driving distance) from his home and 42 miles from his office. (Exhibits \_\_\_\_ and \_\_\_\_).

26. On about the same date, the Director started a routine morning telephone conference with his office staff from the clinic. Each work day, the Director would drive his own car, a 1985 Ford Escort, from

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<sup>3</sup> This paragraph illustrates one way relevant standards could be used and presented in an investigative report. If appropriate, they could also be listed within the analysis of a conclusion, or in a separate section. Copies or extracts of applicable regulations, directives, etc. should be included as exhibits.

<sup>4</sup> For exhibits of more than a few pages, provide the specific page numbers on which the supporting evidence appears.

home to the clinic, and would begin the work day at the clinic at 8:00 AM by holding the telephone conference from a vacant office at the clinic. The Director had no other official reason to visit the clinic on these days (Exhibit \_\_\_\_). After completing the conference, the Director would drive the Government vehicle about 42 miles to his office during the work day. Depending on traffic, this trip averaged between 45 minutes and 90 minutes in length. At the close of his regularly scheduled workday, the Director would depart his office and return the car to the clinic in the evening. (Exhibits \_\_\_\_).

27. The telephone conferences were seldom more than 10 minutes long. The business portion of these conferences consisted of the four team leaders describing their work for the day, and the Director providing any comments he felt necessary about the days' work. If a team leader was absent, he or she was required to provide an alternate for the meeting. (Exhibits \_\_\_\_).

28. This routine was repeated approximately 90 times between approximately January 17th through June 21st 2000; that is on most days except those on which the Director was on authorized leave or travel. (Exhibits \_\_\_\_).

29. The Director did not request leave or other authorized absence for the time spent driving from the clinic to the office. The Director did not request overtime or other compensation for the time spent returning the car to the clinic each evening (Exhibits \_\_\_\_).

30. On June 20th, 2000, a Budget Clerk of the Residual Affairs Staff notified the DAS that the Director was using the government vehicle for commuting. (Exhibits \_\_\_\_). The DAS then called the Director and discussed the matter with him. The Director explained the arrangement, and agreed that if the DAS Staff thought the arrangement "might create an appearance problem," he would "make other arrangements for managing his workforce." (Exhibits \_\_\_\_).

31. The Director then began commuting to his worksite in his personal vehicle. He continued holding planning meetings through July of 2000. The meetings were scheduled each day for 10:00 AM and were held most days when the Director was present. (Exhibits \_\_\_\_).

32. The locations of the Director's home, official duty station (office), and VA Clinic, Bugtussel are as shown in Exhibit 6.5 The driving distances and commuting times among these locations are as shown in exhibit \_\_\_\_).

33. Throughout the period \_\_\_\_ through \_\_\_\_, the Director's personal vehicle for commuting was a 1985 Ford Escort Hatchback. The Director's assigned government vehicle was 1996 Ford Taurus, which, as the Director states, was considerably more comfortable and reliable for commuting than his personal vehicle. (Exhibits \_\_\_\_).

## CONCLUSIONS

**CONCLUSION 1: The director's use of the vehicle prior to January 17<sup>th</sup>, 2000 for transportation between home and work was in accordance with staff advice and a reasonable interpretation of VA policy, but was actually in violation of 31 USC § 1344.**

**ANALYSIS: [...]**

**CONCLUSION 2: Under the circumstances, the Director's failure to request legal advice on the matter of using the Vehicle prior to January 17<sup>th</sup>, 2000 and the Administrative Assistant's failure**

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<sup>5</sup> Findings of Fact that can be more clearly shown in graphic form can be incorporated by reference to an attachment.

to recommend such a request both reflected extremely poor professional judgment, but was not a “reckless disregard for whether the use violated the law.”

ANALYSIS: [....]

**CONCLUSION 3: The Director’s use of his government vehicle from the clinic to work was not for official purposes. The morning telephone conferences from the clinic were a pretext to justify transferring much of his personal commuting burden to the government.**

**ANALYSIS:**

The Director claimed that he started holding the telephone conferences from the clinic because he needed to make work assignments early in the morning to effectively coordinate the work of his office, and traffic would often jam on the freeway to his office, causing back up delays of up to one hour and preventing him from attending the meetings. (Exhibit \_ page \_\_\_\_). When asked why the meetings could not have been conducted when he arrived at work or at close of business, the Director responded that he believes “until you have your morning work meeting, employees tend to just spin their wheels.”

(Exhibit \_\_\_\_ and \_\_\_\_). He stated that he was a career military man, and a veteran, and this is how they schedule daily work in all of the units he was in. (Exhibits \_\_\_\_ and \_\_\_\_).<sup>6</sup>

Regardless of whether the Director believes that regularly scheduled morning meetings are important, his personal interests, rather than official needs, motivated his decision to hold these conferences by telephone from the clinic.<sup>7</sup>

The arrangement clearly benefited the Director personally. By beginning the work day at the clinic with the conference, the Director reduced his commute by roughly 45 minutes per day , effectively converting this commuting time to duty time. (Findings of Fact (FOFs) \_\_\_\_ and \_\_\_\_).<sup>8</sup> In addition, because he claimed to be “on duty” during the trip from the clinic to the office, the Director conserved any leave that he may have properly been charged for delayed arrival due to traffic, and helped avoid possible disciplinary action for unauthorized absence. (FOFs \_\_\_\_ and \_\_\_\_). Finally, by using the government vehicle for a large portion of his commute, the Director was able to use a considerably more comfortable and reliable vehicle and shift to the Federal Government roughly 80% of his vehicle expenses for commuting (FOFs \_\_\_\_, Exhibit \_\_, and Conclusion \_\_\_\_).<sup>9</sup>

The telephone conferences accomplished some coordination of office workload, (FOF \_\_\_\_); but there was no significant business need for holding the meetings by telephone conference from the clinic. The Director and his subordinates, all agree that the conferences averaged from 5 to 10 minutes long, and seldom exceeded 10 minutes (Exhibits \_\_\_\_). The four subordinates each testified that the conferences frequently started from 10 to 30 minutes after the appointed 8 AM start time, that approximately eighty percent of the conversation was not related to their work for the day, and that much of the conversation seemed unrelated to work at all (Exhibits \_\_\_\_). The Director acknowledges that “maybe 20 percent of the time was spent in “team-building” discussions about matters that were “not otherwise directly related to the work of the office,” and that “sometimes they may have started a little late.” (Exhibit \_\_\_\_, pages\_\_\_\_) While the Director claims that productivity increased after the meetings started, he could identify no objective evidence of an increase in productivity. (Exhibit \_\_\_\_). The Director had no other official need to be at the clinic. (FOF \_\_\_\_).

The sequence and timing of events also indicates that the daily 8AM telephone conferences were not motivated by official purposes. Prior to January 2000, the Director held similar planning meetings with

<sup>6</sup> Note that, the Director’s explanation for his action must be discussed in the conclusions because it is evidence that tends to contradict the conclusion that his official purpose was a pretext.

<sup>7</sup>Unless otherwise specified, an AIB’s conclusion represents its determination based on at least the preponderance of the evidence available to the AIB.

<sup>8</sup> Findings of Fact may be abbreviated “findings” or “FOF.”

<sup>9</sup> Note that conclusions can draw support from evidence, Findings of Fact, and other conclusions.

his staff, in person, averaging about twice per week at various times per week. (Exhibit \_\_\_\_). But shortly after he was told he could park the government vehicle at the clinic if had official business at the clinic, the Director began holding the regular daily planning meetings via telephone from the clinic (FOFs \_\_\_\_). In addition, after he was questioned by the DAS about the matter, he moved the meetings to 10:00, well after the 8AM commencement of his regular tour of duty (FOFs \_\_\_\_). Thus the Director did not deem the 8 AM meetings officially necessary before or after the period in which he used the government vehicle for transportation between clinic and office.

Finally, if the Director had felt that the telephone conferences were necessary even if he were delayed in traffic, he could have pursued less expensive alternatives such as initiating the call from home or obtaining a cellular phone. The Director acknowledges that these alternatives would have been less expensive to the government, and would have been substantially less advantageous to him personally than stationing the government car at the clinic. (Exhibit \_\_\_\_).

**CONCLUSION 4: The director's use of the vehicle for transportation from the clinic to his official duty station was, at least, "in reckless disregard for whether his use violated the law."<sup>10</sup>**

**ANALYSIS:**

According to guidance from General Counsel (023), for the Director's use of the vehicle to constitute willful use for nonofficial purposes under 31 USC § 1349, the Director must have had actually known that the use would be characterized as nonofficial, or must have acted in reckless disregard as to whether use was for nonofficial purposes. (Exhibit \_\_\_\_).

The Director asserts that he relied on his staff and was not personally knowledgeable about the rules. (Exhibit \_\_\_\_). When asked whether he had talked to anyone about whether use of the government vehicle between the clinic and the office was for official purposes; he responded: "I count on my staff to provide advice, but I'm the one who gets paid for making the decisions around here, based on what I think is best for veterans, and I thought this was best for veterans." (Exhibit \_\_\_\_ at \_\_\_\_).

This answer might be persuasive if his attention to staff advice showed concern, rather than disregard, for whether his contemplated use was "official." The Director acknowledges that he knew his use of the government vehicle was limited to official purposes, as he had been informed by the AC. (Exhibit \_\_\_\_, p. 7 and \_\_\_\_). He also knew that the Office of General Counsel was the office responsible for providing legal advice on using a Government car, and that it had previously advised him that he could not use the government vehicle for home-to work use. (Facts \_\_\_\_). He did not consult his staff regarding whether his contemplated use was official, much less ask his staff to consult General Counsel. (Exhibit \_\_, p. 12). The Director's knowledge of the significance of the "official purpose" issue coupled with his failure to consult with available staff or legal counsel, show a reckless disregard for whether his use of the vehicle was official, particularly in light of the clear personal benefits accruing to him by using the vehicle and beginning his workday at the clinic.

**CONCLUSION 4: THE MISUSE RESULTED IN SIGNIFICANT COSTS TO VA INCLUDING FINANCIAL COSTS TOTALING APPROXIMATELY \_\_\_\_.**

**ANALYSIS [ ]**

**RECOMMENDATIONS<sup>11</sup>**

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<sup>10</sup> This is an example of a conclusion regarding application of a legal standard ("reckless disregard") to the facts. Note the emphasis on presenting facts and evidence, rather than the opinions or beliefs of the AIB, in providing the basis for conclusions.

<sup>11</sup> Note that recommendations are only included if authorized by the Charge Letter (or in policies cited in the Charge Letter). The recommendations must be firmly grounded in the facts and evidence, and appropriately phrased for action by the Convening Authority.

**VA HANDBOOK 0700**  
**APPENDIX N**

34. Appropriate disciplinary or other administrative action should be taken with respect to the Director for use of the government vehicle for other than official purposes, in reckless disregard of whether the use was official. ( Facts \_\_\_\_ through \_\_\_\_ and conclusion \_\_\_\_). Note that if the misuse is determined to be willful or in reckless disregard for the rules, VA must initiate action to suspend the Director for one month. (Facts \_\_\_\_ and Conclusion \_\_\_\_).
35. The AC should be counseled concerning his exercise of poor judgment with respect to the matters discussed in \_\_\_\_\_. These matters should be appropriately reflected in performance appraisals.
36. The Convening Authority should submit a proposal to [VACO office] for reevaluation of the policy in VA Directive XXXX, which \_\_\_\_\_. The Convening Authority should suggest that this policy be clarified to \_\_\_\_\_. (Conclusion \_\_\_\_).
37. The Convening Authority should seek any restitution to VA recoverable for the Director's misuse of his duty time and of the government vehicle for personal benefit (Conclusions \_\_\_\_ and \_\_\_\_).

\_\_\_\_Date\_\_\_\_  
Imam. Sleuth, Member  
\_\_\_\_Date\_\_\_\_  
Francis N. Tara, Chair

\_\_\_\_Date\_\_\_\_  
Al Finish, Member

**INVESTIGATION OF ALLEGED VEHICLE MISUSE  
EXHIBITS  
Index**

<b>Number</b>	<b>Description</b>	<b>Source</b>
1	Statement of Ms. Elverna Bradshaw of June 21, 2000: Misuse of Government Vehicle	Charge Letter for AIB
2	Photograph of Government Vehicle VIN XXXXXX and Director's personal vehicle (1985 Ford Escort)	AIB Photographs
3	VA DIRECTIVE XXXX, of October 21, 1999, Subj: XXXX XX XXX XXXX	VA Directives System
4	Declaration of Jedidiah Clampett, July 27 <sup>th</sup> , 2000	AIB Interview
5	Letter from Ms. Jethrene Bodene: Subj: Commute Times and Distances	Metro Commuter Connection Services, Inc, Washington D.C
6	Road Map of Washington D.C. Area (annotated by AIB to show locations and commuting routes).	Mappy Days Map Co.
7	Declaration of Jane Hathaway, Deputy Assistant Secretary for Residual Affairs, August 6, 2000	AIB Interview
8	Transcript of Testimony given September 14, 2000 by Millburn Drysdale, Administrative Coordinator, Residual Affairs Staff (with supplemental statement attached)	AIB Interview
9	VA Notice XXXX of January 3, 2000, Subj: Clarification of VA Directive XXXX.	AC Millburn Drysdale
10	Transcript of Testimony given September 14, 2000 by Jedidiah Clampett, Director Residual Affairs Staff.	AIB Interview
11	Letter to AIB from Elle Clampett-Noodleman (daughter of Mr. Clampett) dated August 20, 2000.	Director Clampett
12	E-mail of August 12, 2000 Subject: Legal Standards for Use of Government Vehicles	OGC (023)
13	Assignment Documents	Jedidiah Clampett, Official Personnel File
14	Advisory Opinion: Use of Government Vehicle for Commuting, OGC (023), September 14, 1997	OGC (023)

## EXHIBITS

[illegible]

**EXHIBITS**  
**INVESTIGATION OF \_\_\_\_\_**

## ATTACHMENTS

### Index

[illegible]

# INVESTIGATION OF \_\_\_\_\_ ATTACHMENTS Index

[illegible]

### SAMPLE COMPLETION CERTIFICATE

*Note: Language similar to that in italics should be included as appropriate.*

#### COMPLETION OF INVESTIGATION

I have conducted a review of the attached report of investigation dated [Report date] into [insert subject from Charge Letter] in accordance with VA Handbook 0700. This investigation was convened by my Charge Letter of [insert date].

*Review of the report was extended to 20 days to perform a thorough legal and financial review with respect to conclusions 4, 5, and 7, as documented by Appendices \_\_\_\_ and \_\_\_\_.*

#### MODIFICATIONS:

*The findings of fact and conclusions are modified as follows:*

- a. Change Finding of Fact 1 to read "...." As discussed below, the matter deleted from this finding is a conclusion rather than an undisputed fact.*
- b. Change Finding of Fact 4 by deleting the following language. "....." The deleted portion is not supported by the evidence cited and is contradicted by evidence in Exhibit 5, page 7).*
- c. Add as an additional Finding of Fact, number 27, the following: "..... (Exhibits \_\_\_\_, \_\_\_\_, and \_\_\_\_)."*
- d. Delete Conclusion 13, which expresses an unnecessary and inappropriate legal opinion.*
- e. With respect to conclusion 14, I note that ..... ]*

*The following corrective action has been taken regarding the subject matter of this report::*

- a. I have requested \_\_\_\_\_ to conduct a thorough financial audit of the operations of \_\_\_\_\_ to ensure that its current procedures comply with applicable requirements, and that adequate control mechanisms are in place to preclude recurrence of the matters documented in Conclusions 5 and 7.*
- b. The Chief Operating Officer has initiated disciplinary action with respect to the matters in Findings 12 and 13 and Conclusion 5.*
- c. I have directed that a copy of this report be forwarded to the Deputy Under Secretary for \_\_\_\_\_ for consideration of VA-wide policy changes in view of conclusions 9 and 10, and for distribution of lessons learned from this investigation to field activities.*

I certify that this report has been reviewed for compliance with VA Directive and Handbook 0700, and the subject of the report has been properly investigated.

\_\_\_\_\_  
Convening Authority

DATE