

Chapter 7D

Adverse Action Appeals Program

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Glossary

Section 1

Introduction

7D-1. Purpose

This regulation prescribes policies, procedures, and responsibilities governing the adverse action appeals program and the National Guard hearing examiner program for National Guard technicians employed in accordance with the provisions of Title 32 USC Chapter 7. National Guard technicians are either military technicians (dual status) as defined in 10 USC §10216 or non-dual status technicians serving in a technician position as defined in 10 USC §10217.

7D-2. Explanation of terms

Definitions of selected terms used in this regulation are listed in the Glossary.

7D-3. Responsibilities

a. The Chief of the National Guard (CNGB) serves as the strategic focal point in developing, managing, and integrating employment of National Guard capabilities for the Office of the Secretary of Defense, the Joint Staff, and the Departments of the Army and Air Force in support of Combatant Commanders. Administers DoD, Joint, Army and Air Force programs; acquires, distributes, and manages resources. Coordinates departmental policies and programs for the employment and use of National Guard technicians under section 709 of Title 32, United States Code (USC) in accordance with the National Guard Bureau Charter.

b. NGB-J1 serves as the primary advisor to the CNGB on all personnel and manpower issues in the National Guard. Provides oversight and has primary responsibility to the CNGB on human resource technician program development, staffing, and execution of policies, plans and programs concerning technician employment.

c. The Chief, Technician Personnel Division, NGB-J1-TN, is the primary advisor to NGB-J1, commanders, staff and operating officials on all matters pertaining to military technicians assigned to the National Guard. Develops, maintains and revises the technician disciplinary and adverse action and hearing examiner program.

d. The Adjutants General (TAG) supplement and publish military technician management policies relating to technician programs and processes. Monitor the states' compliance with technician guidelines, policies, directives, and report to NGB-J1 and CNGB on program effectiveness. Establish an effective process to provide due process for affected technicians under this regulation.

e. The Human Resources Office (HRO), JFH-MS-HR provides:

- (1) Oversight and management of the adverse action appeals program
- (2) The administration of the adverse action appeals program
- (3) Provides guidance and direction to all managers and supervisors on conduct management responsibilities, rights and obligations
- (4) Assists supervisors and managers with the procedural aspects of an adverse action appeal
- (5) Provides necessary training to managers and supervisors on the subject of this regulation

(6) Represents and/or advises the TAG or TAG representative in adverse action appeals cases

(7) Provides general and procedural guidance and case information to the effected technicians

(8) Consults with the State Judge Advocate Office

(9) Maintains the official adverse action file

f. The Manager and/or Supervisor:

(1) Maintains an office or shop atmosphere which is conducive to good employee-management relations

(2) Practices and maintains discipline to reduce the need for formal adverse actions

(3) Ensures employees understand the duties and work practices, safety and security requirements and administrative procedures

(4) Ensures any disciplinary and adverse action taken is justified by facts and circumstances and is consistent with agency policy, precedent and applicable labor agreement

(5) Ensures any adverse action appeals are coordinated with the HRO for procedural guidance

Section 2

Adverse Action Appeals

7D-4. General

There are two methods for appeal of an adverse action. The first is an appellate review. The appellate review is a review of the adverse action by the state TAG without the involvement of a NGB hearing examiner. The second method of appeal is the administrative hearing. In an administrative hearing, a NGB hearing examiner gathers and assesses the facts using an administrative hearing type process and makes a written recommendation to the TAG. In both methods of appeal, the TAG makes the final decision on the matter and no further appeal is permitted. A collective bargaining agreement may provide a third appeal procedure, such as arbitration; but any such procedure is non-binding, with the TAG making the final decision.

7D-5. Making an appeal

The technician subject to the adverse action, or their representative, may request one method of appeal only. If an administrative hearing appeal is selected, the HRO will advise the technician and their representative that if either of them orally communicates with the TAG concerning the appeal outside the presence of a management representative, and no management representative communicates with the TAG concerning the appeal outside the presence of the technician or their representative, and the TAG determines that as a result of the communication the TAG is unable to impartially consider the recommendations of the hearing examiner, then the hearing will be cancelled and the appeal will be converted into an appellate review. All requests for appeal will be made to the HRO and must be received within 20 calendar days of the delivery of the original decision. If an appeal request cannot be made within the 20 calendar days, a request to extend the time for making an appeal can be made through the HRO to the TAG who may grant any extension warranted as the TAG deems appropriate. Decisions on requests for extensions are not reviewable.

7D-6. Appellate review

If the technician or their representative requests an appellate review, or if a request for an administrative hearing appeal is converted to an appellate review, the following actions will take place: (1) The HRO will provide the TAG and the technician or their representative with the case file, (2) The technician or their representative will provide the TAG and the HRO with any written submissions they may wish to make, (3) The TAG will review all information provided and decide to either make the final decision based on the submissions and/or request that both parties make oral presentations, (4) The TAG will issue a final written decision.

a. Case File. The case file shall at a minimum consist of the proposed action letter, any written replies made by or on behalf of the technician, summaries of any oral replies made by the technician, the original decision, and any other material (reports of investigation or other documents) deemed necessary for an understanding of the appeal. The case file will be provided to the technician or his/her representative as soon as available, but in no event less than 10 calendar days before presentation to the TAG for an appellate review.

b. Oral Presentations. The decision to have oral presentations, or not, is within the sole discretion of the TAG, and is not a matter of right. In those instances where oral presentations are determined to be necessary, both the technician and his/her representative, and the HRO, will be present and allowed to dispute or expand on oral presentations made by the other party. If opportunity to make an oral presentation is requested but denied, the final decision must state the facts and reasons for the denial.

c. Final Decision. The final decision will be made in writing by the TAG and will determine (1) Did the technician do what he/she is charged with (2) Will some discipline, based on the proven infraction, promote the efficiency of the service (3) Is the penalty reasonable. If an adverse action will be imposed on the technician, the TAG may find the penalty determined in the original decision to be appropriate, may impose a lesser penalty with an explanation of why the other penalty was chosen, or may enter into a last chance agreement or stay the imposition of the penalty imposed by the original decision. A sample copy of a final decision is found in Appendix A.

7D-7. Conversion of an administrative hearing to an appellate review

If after selecting an administrative hearing appeal, the technician or technician's representative communicates orally with the TAG concerning the appeal outside the presence of a management representative, and no management representative communicates with the TAG concerning the appeal outside the presence of the technician or the technician's representative, and upon motion by the HRO or at the TAG's initiative, the TAG determines that as a result of the communication the TAG is unable to consider impartially the recommendations of the hearing examiner, then the hearing will be cancelled and the appeal will be converted into an appellate review. If a decision is made to convert an appeal, the decision to do so will be in writing and provided to both parties, and the NGB hearing examiner. A sample copy of a decision to convert an appeal is found in Appendix B.

Section 3 Administrative Hearing

7D-8. Requesting a NGB hearing examiner

When an administrative hearing has been selected, the HRO will request in writing from NGB-TN a list of available NGB hearing examiners, and will provide the technician's name, representative's name, position title, grade, service, nature of offense and penalty. A sample copy of a request for NGB hearing examiners is found in Appendix C. The HRO will select a NGB hearing examiner from the list that is not from the State where the hearing is to be held. Once a selection has been made and the NGB hearing examiner accepts the assignment, the name and contact information of the hearing examiner will be provided to the technician or their representative. The name of the hearing examiner selected and the scheduled date of the hearing will be provided to NGB-TN.

7D-9. Preparation for the hearing

The selected NGB hearing examiner is responsible for ensuring that his/her participation as a hearing examiner is permitted by their command. Once proper authorization to act as a NGB hearing examiner is received the NGB hearing examiner will ensure that the following tasks are accomplished: (1) Written notification is given to the technician or their representative of the NGB hearing examiner's selection, (2) All parties have good contact information for all other parties in the appeal, (3) Establish a mutually acceptable date, time and place for the pre-hearing and hearing, (4) All parties are informed of the date, time and location of the pre-hearing and hearing in writing, or by e-mail, (5) The case file is provided to all parties at least 10 calendar days in advance of the pre-hearing, (6) A court reporter will be available for both the pre-hearing and hearing to provide a verbatim transcript, (7) Both parties exchange proposed witness lists, (8) Issues regarding witnesses (availability, unnecessary duplication or relevancy) are resolved, (9) Management ensures the attendance of all witnesses that are members of the States full time staff that are reasonably available and relevant, (10) Arrangements are provided if a full time staff member is not reasonably available but their testimony is important to the case, such as speaker telephones, video tele-conferences, or affidavit, and (11) Reasonable and relevant requests by the technician or their representative, for documents or tangible evidence in control of the State, are resolved prior to the pre-hearing. Requests for documents or tangible evidence not voluntarily provided by the State to the technician or their representative will be submitted to the NGB hearing examiner for resolution. If the NGB hearing examiner determines that the requested documents are relevant, reasonable as to scope and not readily available from another source, the NGB hearing examiner may require that such documents be produced.

7D-10. Issues that may be decided prior to the pre-hearing conference

A party by written motion or request may ask the hearing examiner to decide issues and to order relief or other action before the pre-hearing conference. Issues that may be raised and decided by motion or request include: if an error is harmful; if an error can be cured, and how; if evidence should be produced; if evidence is lost; if witnesses are available; if a representative should be disqualified; if material facts are undisputed or cannot be proved by the party having the burden of proof; and if settlement should be discussed. The hearing examiner may raise an issue and require the parties to address it in writing or at a conference, which may be held by telephone. The hearing

examiner may determine whether any material facts are undisputed or cannot be proved by the party having the burden of proof. The hearing examiner will issue appropriate orders on procedural matters or recommendations to the TAG on issues decided.

7D-11. Pre-hearing conference

The pre-hearing conference is a meeting of all the parties involved in the hearing conducted prior to the actual hearing. The purpose of the conference is to resolve all pre-hearing issues not fully resolved by previous rulings; to fully explore settlement; to place in the record a statement of undisputed material facts and a statement of the specific issues and material facts on which evidence will be admitted at the hearing; to identify the witnesses will be allowed to provide direct testimony, the issues and material facts to which their testimony is relevant; to identify all exhibits that will be introduced and the issues and material facts to which they are relevant; and to inform the parties of procedures that the hearing examiner will use or require during the hearing. Hearings will normally be closed to the public, but if the technician or their representative requests an open hearing, the hearing examiner will determine and set the procedures to be used for the conduct and attendance at the hearing by the public. The pre-hearing conference and the hearing must be recorded verbatim. In appropriate situations a case may be submitted to mediation with agreement of all parties prior to proceeding to the hearing.

7D-12. Hearing

a. General. The principal function of the hearing is to place in the hearing record witness testimony, documents, and other tangible evidence relevant to the issues and material facts stated at the pre-hearing conference. The hearing is not a court of law and is not subject to the substantive and procedural rules that govern trials but is more in the nature of an administrative hearing.

b. Issues to be decided at the hearing. Three issues are decided at the hearing and form the basis of the hearing examiner's report to the TAG: (1) Did the technician do/or fail to do what they were charged with? This is a factual determination based upon the evidence presented using the preponderance of the evidence standard, (2) Will some discipline, based on the proven conduct, promote the efficiency of the service? This is a judgmental determination based on the record, and (3) Is the penalty appropriate? The penalty determined in the original decision will be sustained or denied in full and will not be modified by the hearing examiner. The original decision penalty will not be denied unless it is arbitrary, capricious, or otherwise unreasonable in light of the conduct as established at the hearing.

c. Conducting the hearing. The hearing examiner will direct the hearing in a manner that best facilitates the accomplishment of determining the issues in paragraph 7D-12(b) above. In usual cases the order of proceedings is as follows, however, the order of proceedings may be modified as required by the circumstances. The usual order of proceeding is: (1) The hearing examiner calls the hearing to order, identifies the nature of the hearing, names the participants and provides other statements as required by the case, (2) Management's representative provides an opening statement, (3) The technician or their representative may make an opening statement after the management representative or at the opening of their case in chief, (4) Management will present witnesses and evidence subject to the right of cross examination by the other party, (5) The technician or his/her representative makes their opening statement if reserved, (6) The technician or their representative presents their witnesses and evidence subject to the right of cross examination by the other party, (7)

Any rebuttal evidence or witnesses are presented subject to the right of cross examination by the other party, (8) A closing statement is made by management, (9) A closing statement is made by the technician or their representative, and (10) The examiner closes and adjourns the hearing. If the technician requests that closing briefs be submitted in lieu of closing statements, the hearing examiner will set the time table, length and method of delivery of the written submissions. If management requests that closing briefs be submitted in lieu of closing arguments and the technician objects, the hearing examiner must consider the request carefully with due regard to the effect that the delay would have on the technician.

d. Hearing Examiner's report of findings and recommendations. The hearing examiner will prepare a report of findings within 45 calendar days of receipt of the transcript or post hearing briefs whichever is later. The transcript will be provided to the hearing examiner and the technician or their representative at the same time. The original report of the hearing examiner and the transcript is sent to the TAG of the State, through the HRO, and a copy of the report is sent to the technician or their representative and to National Guard Bureau (NGB-TN-L) at the same time. Electronic means of transmittal may be used.

e. Final Decision. The TAG of the State will consider the report of findings by the hearing examiner and issue a final decision in the same form as provided in paragraph 7D-6(c) above. If the decision does not support the hearing examiner's recommendations, the final decision must provide rationale for the TAG's position.

Section 4 **NGB Administrative Hearing Examiner Program**

7D-13. General

The NGB administrative hearing examiner program is established to provide the TAGs with a cadre of qualified and certified individuals that can conduct an adverse action appeal hearing and make a report of findings and recommendations to them. The report of findings and recommendations is prepared to assist the TAG in the accomplishment of their statutorily mandated obligation to be the final appeal authority for adverse actions within the National Guard.

7D-14. NGB hearing examiner qualifications

NGB hearing examiners must be of sufficient grade, training and experience to effectively render a report of findings and recommendations to an Adjutant General in a manner that allows the TAG to exercise their authority as the final appeal authority for National Guard adverse actions within their State. Hearing examiners must be: (1) Currently employed as a technician or in another full-time support capacity in the National Guard, and (2) Have been certified or recertified as a National Guard Bureau hearing examiner within the last three (3) years. Hearing examiners should possess the following attributes and/or qualifications, though waivers to any attributes and/or qualifications may be granted on a case by case basis: (1) Possess three (3) years of progressively responsible experience in administrative, managerial, professional, investigative, or technical work, (2) Be of the military grade of E-7 or above or be of a technician grade of GS-9 or above or a WS equivalent, (3) Possess personal attributes essential to perform the duties of a hearing examiner (integrity, discretion, impartiality, reliability, resourcefulness, and emotional stability), and (4) Understand the

relationship between personnel administration and overall management concerns and principles of the organization.

7D-15. Hearing examiner nomination and qualification

NGB-J1-TN will conduct on an as needed basis a NGB Hearing Examiners Certification course. All participants in the Certification course must be nominated by the TAG of their State. Upon successful completion of the NGB Hearing Examiners Certification course, the qualifying individual will be added to the listing of current, qualified hearing examiners and will be qualified to conduct administrative appeal hearings within the National Guard in any State, Territory or the District of Columbia except in their own jurisdiction.

7D-16. Hearing examiner re-certification

At least once every three (3) years each hearing examiner must attend or instruct at a hearing examiner re-certification course sponsored by NGB to remain on the list of certified NGB hearing examiners.

7D-17. Requesting a NGB hearing examiner

The HRO will request from NGB-J1-TN a list of qualified hearing examiners when an administrative appeal is requested. The request will provide the technician's name, position title, grade, service, nature of offense and penalty. The HRO should request such list within 15 workdays of receipt of such an appeal and send a copy of the request to the technician and management. NGB-J1-TN will provide the HRO with a list of qualified hearing examiners and the HRO will provide a copy of the list to the technician and management. The HRO will select and contact the selected hearing examiner directly to determine their availability. If reasonably available, the HRO will request the hearing examiners services from the TAG of the hearing examiner's State. Once approval is obtained for the use of a hearing examiner, the HRO will provide the technician or their representative with the contact information for the hearing examiner and provide a copy of this notification along with the case file to the hearing examiner. The financial costs of the NGB hearing examiner, excluding pay, shall be borne by the requesting State.

7D-18. Use of NGB hearing examiners for other purposes

A State may request a NGB hearing examiner to conduct another type of hearing such as a grievance hearing, performance appeal or similar hearing or to conduct mediation. Such requests will be made directly to the hearing examiner and the TAG of their State. Subject to their availability and the individual qualification of the hearing examiner they may provide such services.

Appendix A Sample Final Decision by TAG

Date

(Technician and representative names and addresses)

RE: Final decision of the appeal of (technician name).

1. In the matter of your appeal (case name and charge) ,after reviewing the file, submissions and (testimony if any) I have decided to (pick one) (sustain the original decision and the penalty imposed) or (sustain the original decision and reduce the penalty) or (sustain the original decision and the penalty imposed, but stay such penalty per the attached last chance agreement or probation agreement) or (grant your appeal and restore you to the position and status you had before the original decision was issued).
2. I have based my decision upon the facts of the case as determined by (the files and written submissions) (the files, written submissions testimony heard) or (based upon the report of findings and recommendations from the NGB hearing examiner).
3. I have concluded that the implementation of the penalty contained in the original decision (or in a reduced or stayed penalty) is based upon the cause stated in the original decision; that the adverse action will promote the efficiency of the service and that the penalty is appropriate.

Or

3. I have decided to grant your appeal and direct the following actions to return you to position and status you had prior to the issuance of the original decision. (Identify all corrective action that must take place.
4. By law my decision is final and no further appeals are authorized in this matter.
5. The facts, evidence, and reasons on which I base my disagreement with (the hearing examiners' report) are as follows (state the facts, evidence, and reasons) [This paragraph is inapplicable if the TAG agrees with the hearing examiner's report]."

The Adjutant General

CF:
NGB-TN
Hearing Examiner
Human Resources Office – JFH-MS-HR

Appendix B
Sample Decision to Convert Type of Appeal

Date

(Technician and representative names and addresses)

(HRO address)

(Hearing examiner name and address, if selected)

RE: In the matter of the appeal of (technician name)

1. Upon a motion by management and/or recommendation of the NGB hearing examiner I have determined that your request for an administrative hearing will be changed to an appellate review.
2. On (date) you (or your representative) stated to me outside the presence of a management representative the following facts or circumstances concerning your appeal: (state facts/circumstances in detail). I have not discussed your case with a management representative. I have determined that as a result of this conversation, I would be unable to consider in an impartial manner a report of findings and recommendations by a NGB hearing examiner.
3. The NGB hearing examiner is excused from service in this appeal and the HRO will provide you with the procedures to be used in the appellate review process.

The Adjutant General

Appendix C
Sample Request for NGB Hearing Examiner

Date

NGB-J1-TNL
1411 Jefferson Davis Highway
Arlington VA, 22202

RE: Request of NGB hearing examiner

1. The State of (State name), requests the services of a NGB hearing examiner for an administrative hearing, for the case of (technician name, grade, position, nature of offense and proposed penalty).
2. Please provide a list of current and certified hearing examiners to the undersigned at the above address.
3. The State of (State name) understands that all expenses of the hearing examiner, excluding pay, are the responsibility of the State requesting such services.
4. The State of (State name) also understands and agrees that it has the responsibility of arranging for and providing a verbatim transcript of the pre-hearing and the hearing.

Human Resources Officer

CF:
Case File

Glossary

Administrative hearing

An administrative process in which a qualified and certified NGB hearing examiner gathers and assesses the facts in an adverse action appeal and provides a written report of findings and recommendations to the TAG for a final decision. The purpose of the process is to fully develop and put on the record the facts surrounding the case, and to assist the TAG in the accomplishment of their statutorily mandated obligation to be the final appeal authority for adverse actions within the National Guard. The hearing is not a court of law and is not subject to the substantive and procedural rules that govern trials but is more in the nature of an administrative hearing.

Adverse action

An official personnel action, usually taken for disciplinary reasons, which adversely affects an employee and is of a severity that a suspension, reduction in grade or status, or removal is warranted.

Appellate review

A review of the adverse action case file, and any additional written submissions, by the state TAG without the involvement of a NGB hearing examiner. The TAG reviews all information provided and decides to either make a final decision based on the submissions, or request that both parties make oral presentations to assist in making a final decision.

Cause

The reason that the adverse action is being proposed. Additional facts must be included in the proposed action letter to allow the technician to know the details (who, what, when and where) of the offense they are charged with.

Case file

Consists of the proposed action letter, any written replies made by or on behalf of the technician, summaries of any oral replies made by the technician, the original decision, and any other material (reports of investigation or other documents) deemed necessary for an understanding of the appeal. The case file will be provided to the technician or their representative as soon as available, but in no event less than 10 calendar days before any hearing, pre-hearing or presentation to the TAG for an appellate review.

Days

Calendar days.

In chief

Denoting that part of the administrative hearing in which the main body of evidence is presented.

Preponderance of evidence

The greater weight of the evidence, sufficient to incline a fair and impartial mind to one side of the issue rather than the other. A supervisor issuing a letter of reprimand must determine by a preponderance of the evidence that the facts supporting the issuance of the letter of reprimand are substantiated. Prior to serving a proposed action letter, a supervisor must develop the facts by a preponderance of the evidence that constitute cause for the adverse action.

Procedural advice

Technical assistance provided by a member of the HRO, usually the Labor Relations Specialist, to assist a technician with procedures regarding the adverse action process.

Supervisor

Under 5 USC§ 7103, an individual employed full-time by an agency having authority to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees; adjust their grievances or to effectively recommend such action. The performance of one or more of these duties qualifies an employee as a “supervisor” for labor relations purposes and excludes the employee from the bargaining unit.

Technician

Dual status and non-dual status technicians defined in 32 USC§ 709(e).