



Section A. Purpose and Scope

1. This INSTRUCTION states the policies and procedures under which the commissions of officers on active duty in the regular corps of the Public Health Service (PHS) who are not retirement-eligible, may be terminated without their consent because of marginal or substandard performance.
2. This INSTRUCTION is not applicable to the involuntary separation of regular corps officers pursuant to the 3-year file review. (See Section E.1. of the regulation, Subchapter 43.7, Commissioned Corps Personnel Manual (CCPM), INSTRUCTION 1, "Separation of Officers in the Regular and Reserve Corps Without Consent of the Officers Involved.")

Section B. Authority

1. Section 215 of the PHS Act (42 U.S.C. 216) authorizes the President to prescribe regulations with respect to termination of commissions in the PHS Commissioned Corps. This authority has been delegated to the Secretary of Health and Human Services (HHS) under Executive Order 11140, dated January 30, 1964. Pursuant to Section 215 of the PHS Act (42 U.S.C. 216), the authority for daily administration of the PHS Commissioned Corps has been delegated to the Director, Division of Commissioned Personnel, Human Resources Service, Program Support Center.
2. Regulations which provide for the involuntary separation of regular corps officers with less than 20 years of retirement eligibility credit are set forth in Subchapter CC43.7, CCPM INSTRUCTION 1, "Separation of Officers in the Regular and Reserve Corps Without Consent of the Officers Involved," of this manual.

Section C. Policy

1. General. All commissioned officers assume a continuing responsibility for effective performance of their assigned duty. An officer who fails to meet and maintain the standards of performance expected of his/her grade and experience may be separated under the procedures set forth in this INSTRUCTION.
2. Opportunity to Demonstrate Capabilities. While the maintenance of high performance standards is essential, insistence on these standards will be combined with consideration of the officer's capabilities. Continuing efforts may be made to assign officers where they can best demonstrate and optimize their capabilities. Ineffective performance in one assignment may be a basis for termination.

Section D. Identification of Ineffective Officers

1. Ineffective officers must be identified promptly and positive action must be taken to assist them in improving their performance prior to the initiation of action against them under this INSTRUCTION. When an officer's performance is less than satisfactory, the immediate supervisor will be responsible for:
  - a. discussing the performance with the officer in person;
  - b. determining the reasons for the unsatisfactory performance;
  - c. taking reasonable and timely action to assist the officer to improve his/her performance; and
  - d. documenting the actions taken to assist the officer.
  
2. Discussion with the officer should be prompt and not be delayed until an annual Commissioned Officers' Effectiveness Report (COER) is due. It should be held at any time appropriate and sufficiently in advance to give the officer an opportunity to improve his/her performance before the report is due. Counseling sessions shall be documented in a clear and concise manner, and a copy of the counseling report should be provided to the officer, so that the officer understands what to expect in his/her performance evaluation. The supervisor will then discuss his/her evaluation of the officer when rating him/her at the time the regular annual COER is due. Interim COERs may be used as a management tool in providing guidance and counseling to the officer. For further discussion on the COER, see CCPM INSTRUCTION 1, Subchapter CC25.1, "Commissioned Officers' Effectiveness Report," of this manual.
  
3. An accurate appraisal and reporting of an officer's performance are basic requirements. It is imperative both to the officer and to the Service that reports be candid and objective since they are the basis for personnel actions involving assignment, promotion, and possibly separation. While underrating the officer may affect his/her career, overrating is of dubious benefit to him/her since it may lead to assignment and promotion with responsibilities for which he/she is not, in fact, qualified, thus resulting in adverse action.

Section E. Initiation of Action

1. Who May Recommend Action

- a. A supervisor may initiate the recommendation for action under the provisions of this INSTRUCTION by submitting the recommendation through component administrative channels to the HHS Operating Division (OPDIV) or Program head or designee, for endorsement as required by Section E.3., below.
- b. An official in the officer's administrative chain may recommend termination of an officer within his/her jurisdiction;
- c. The Director, DCP, may also initiate action for the involuntary termination of any officer when such action is warranted. In such a case, DCP will seek input from the OPDIV or Program before convening a board.

2. When Action is Appropriate. A recommendation for action under this INSTRUCTION is appropriate when the officer's performance is marginal or substandard as evidenced by the existence of one or more of the following or similar circumstances:

- a. Failure to demonstrate acceptable qualities of leadership required of an officer in his/her position and grade;
- b. Failure to achieve and maintain acceptable standards of professional competency required of an officer of his/her grade and category;
- c. Failure (including lack of ability) to properly discharge assignments commensurate with grade and experience;
- d. A progressive downward trend in overall performance resulting in an unacceptable record or a consistent record of substandard service;
- e. A record of marginal performance over an extended period of time as indicated by COERs or other documentation; or
- f. Apathy or other attitudinal or behavioral characteristic(s) indicating that the officer is unable or unwilling to expend the effort required to maintain expected levels of performance or competence.
- g. Restriction or revocation of professional licensure when such is required for appointment.

3. Submittal of Recommendation. A recommendation for termination under this INSTRUCTION must be logically arranged and indexed and shall include a statement of all pertinent facts as listed below:
  - a. Statement of allegation(s) lodged against the officer, specifically including dates, places, events, and persons involved, to the extent known or readily ascertainable, for each separate allegation;
  - b. Description of standard of performance requirements;
  - c. Summary of all past and current discussions with the officer and his/her superiors concerning the officer's performance;
  - d. Statement regarding action taken to place the officer in a suitable assignment; and
  - e. Current evaluation by superiors of the officer's performance in his/her present assignment including whether the duties and responsibilities are in line with the grade held and experience of the officer.

The recommendation should be submitted through component administrative channels to the OPDIV or Program head or designee for endorsement and transmittal to the Director, DCP.
4. Suspension from Duty. The subject officer may be placed in nonduty with pay status pending the outcome of proceedings conducted under this INSTRUCTION. This may be particularly advisable when retention of the officer on duty status could result in damage to Government property or could be detrimental to the interests of the Government or be injurious to the officer, other officers and employees, patients, or the general public. See CCPM INSTRUCTION 4, Subchapter CC23.6, "Nonduty With Pay Status," of this manual.
5. Referral to Board. If the Director, DCP, determines that such action is warranted, the case will be referred to an Involuntary Termination Board (ITB) appointed as provided in Section F., below. The Director, DCP, will notify the officer, with copies to the officer's OPDIV or Program, giving the specific reason(s) for the referral.

#### Section F. Involuntary Termination Board

ITB will consist of at least three PHS commissioned officers in the Senior grade or above. At least one of the board members will be of the same professional category as the officer whose record is being reviewed by the board. The members, insofar as practicable, will be senior in grade to the officer being

considered by the board. Three members present will constitute a quorum of the board. The Director, DCP, will appoint the board members and designate one member as chairperson. The Director, DCP, will convene the board as necessary and may appoint an officer or any DCP staff member as special advisor to the board on procedural matters and to assist in the interpretation of commissioned corps personnel policies and regulations.

The Director, DCP, will make every effort to assure that the board does not consist entirely of men or women or entirely of individuals of one race, but no board member will be selected on the basis of gender or race.

#### Section G. PHS Representative

The Director, DCP, will appoint an individual to prepare a statement of the charges and specifications against the officer and to act in the interest of the Government as the PHS representative to present the case to the board. The PHS representative will not be a board member and will be independent of the control of the board. He/she will investigate all the circumstances of the case. All PHS personnel and/or personnel of other OPDIVs or major programs outside of HHS to which PHS commissioned officers are assigned, are expected to cooperate fully with the PHS representative by promptly providing any and all information within their knowledge to the PHS representative upon his/her request. Such personnel will have the right to be furnished instructions and papers or copies thereof necessary for guidance in furnishing information to the PHS representative.

#### Section H. Officer's Rights

##### 1. Notice to the Officer

The Director, DCP, will notify the officer in advance that proceedings are being initiated against him/her.

- a. Such notice will normally be provided at least 30 calendar days in advance of the date on which the board is scheduled.
- b. The notice will be sufficiently detailed, factual, and specific concerning the alleged act(s), omission(s), or circumstances which form the basis for the proposed action.
- c. The notice will summarize the officer's rights by including a copy of this INSTRUCTION as an attachment and referring to it in the text of the notice.
- d. The notice will indicate the date, time, and place that the board is scheduled to convene.

- e. The notice will include the names, grades, and categories of the appointed board members, and the name, grade, duty telephone number, and address of the PHS representative.
2. Right to Representation. Officers have a right to representation at any point during the process. Representatives may include an attorney, another commissioned officer or employee (as specified in Item 5 a., below).
3. Right to Review Service Records. Pursuant to CCPM INSTRUCTION 7, Subchapter CC26.1, "Rights and Responsibilities of PHS Commissioned Officers Under the Privacy Act of 1974," of this manual, the officer has a right to review his/her service records including materials submitted to the board by the OPDIV or Program.
4. Right to Submit Written Statements. An officer may at any time before the board convenes or during the proceedings, submit to the board on his/her behalf or as directed by the board, any answer, deposition, sworn or unsworn statement, affidavit, or certificate of proposed stipulation.
5. Right to Request a Hearing. The officer may request a hearing on the matter. Such requests should be made within 10 working days following receipt of the notice of the board. Timely requests for a hearing shall be granted as a matter of right.
  - a. The officer may appear in person, with or without counsel. The term "counsel" includes members in good standing of any bar of any State, United States Territory or the Commonwealth of Puerto Rico, or other persons who in the opinion of the Director, DCP, are considered to be competent to represent the officer in the board proceedings. Commissioned officers or other Federal employees may represent the officer if reasonably available.
  - b. The officer may present witnesses on his/her behalf at hearings before the board. The officer will be responsible for notifying the witnesses and arranging for their appearance at the time and place set for the board proceeding. The officer shall provide the PHS representative with a list of witnesses and a concise statement of their testimony at the same time that a hearing is requested.
  - c. Withing five working days of receipt of officer's witness list, the PHS representative will provide the officer with the list of witnesses the PHS representative intends to call.
  - d. The officer or his/her representative has a right to cross-examine witnesses presented by the PHS representative.

6. Failure to Invoke Rights. An officer's failure to invoke any of his/her rights will not be considered as a bar to the board proceedings, findings, opinions, or recommendations.

Section I. Limitations on Officer's Rights

1. Postponements and Continuances. The officer is not entitled as a matter of right to any postponement of the board proceedings. The officer may, however, submit a timely request for postponement for good cause shown to the Director, DCP. It shall lie entirely within the discretion of the Director, DCP, whether to grant such a request for postponement. A failure to respond to a request for postponement shall be deemed a denial of the request.

Once the board is in session, requests for postponement will not be entertained but requests for continuances may be directed to the Board chairperson who shall have the sole authority to rule upon them.

2. Discovery. An officer may request copies of personnel records pursuant to the Privacy Act (see Subchapter CC26.1, CCPM INSTRUCTION 7, "Rights and Responsibilities of PHS Commissioned Officers Under the Privacy Act of 1974"). The officer may also request documents pursuant to the Freedom of Information Act. The officer will have no right to discovery (such as the taking of depositions, the serving of interrogatories, etc.) beyond what may be informally arranged and mutually agreed to by the PHS representative and the subject officer or his/her counsel.
3. Challenges. The officer may not challenge a member of the ITB without stating the reason for the challenge. The officer, however, may submit, in writing, to the Director, DCP, for appropriate action, any relevant matter which, in the officer's opinion, indicate that a particular member or members should not sit on his/her case. Such documentation must be received by the Director, DCP, no later than 10 working days prior to the date upon which the board is scheduled to convene.

Section J. Conduct of Hearing

1. By Chairperson. The hearing will be conducted by the chairperson and will be subject to his/her rulings. The hearing will provide the officer, insofar as practicable, an opportunity to make a full and fair presentation of his/her case. The board will not be limited by formal rules of evidence but will maintain reasonable bounds of competency, relevancy, and materiality. Oral and written matter which would be inadmissible in a court of law will not necessarily be rejected. The chairperson shall rule upon all questions pertaining to such matters as

continuances, adjournments, recesses, acceptability of offered evidence, and the propriety of any argument, statement, or question of the PHS representative, the subject officer, or his/her counsel.

2. Officer's Presence or Representation

- a. If the officer, after being notified, does not provide to the Director, DCP, with timely written notice, that he/she desires to be present or to be represented by a counsel during the proceedings, the board will consider the case on the basis of all the material before it, including, but not limited to, any evidence or any brief submitted by or on behalf of the officer and all available pertinent records.
- b. If the officer, after being notified, has indicated to the Director, DCP, that he/she will be present or be represented by a counsel during the proceedings, and without good cause and timely notice to the Director, DCP, the officer or his/her counsel fails to appear at the time and place set for the proceedings, the board may consider the case in accordance with this INSTRUCTION.
- c. If the officer is present, with or without a counsel, the written record will be considered in conjunction with any additional evidence offered by either the subject officer or his/her counsel or the PHS representative. The board shall first meet in a closed session to review the entire written record. The board shall then convene in an open session during which the order of presentation of additional evidence shall be as follows:
  - (1) Opening statement by PHS representative;
  - (2) Opening statement by subject officer or his/her counsel;
  - (3) Presentation of any PHS witnesses or additional evidence;
  - (4) Presentation of any witnesses or other evidence offered by the subject officer or his/her counsel;
  - (5) A summation by the PHS representative; and
  - (6) A summation by the subject officer or his/her counsel.
- d. Each witness shall be subject to cross-examination and to redirect examination unless the right to conduct either is waived. Further examination will ordinarily be allowed only upon a showing of extraordinary circumstances which, in the opinion of the board, warrant such examination in the interests of justice. The board may

itself conduct such examination of any witness as it deems appropriate. In the event that any party seeks to impeach the credibility of a witness other than through cross-examination, that witness may be recalled for the purpose of rehabilitating his/her prior testimony.

3. Testimony. All testimony before the board will be given under oath or affirmation, and shall be recorded verbatim.
4. Examination by Board. An officer may submit to examination by the board but is not required to do so. However, if an officer makes an oral statement to the board, he/she will be subject to such examination.
5. Transcript. A verbatim recording of any oral testimony shall be obtained. The board may make or maintain a verbatim or detailed transcript of other aspects of its proceedings. However, a transcript of sufficient detail to show the basis for the findings of fact will be maintained. The Director, DCP, may require that a record of a specified type (e.g., a tape recording), be made, but in the absence of any express requirement for more extensive material, a report as outlined in Section K., below, accompanied by all correspondence, exhibits, and material considered by the board will be considered adequate.
6. Burden of Persuasion. In all board proceedings conducted pursuant to this INSTRUCTION, the PHS representative shall bear the burden of establishing by a preponderance of credible evidence that the subject officer's performance has been marginal or substandard.

#### Section K. Action by the Board

1. Deliberations. Board deliberations and voting will be conducted in closed sessions at which only board members and designated support personnel will be permitted to be present.
2. Report of the Board. The report of the board will include the following:
  - a. A summary of the officer's service and background;
  - b. A summary of the alleged act(s), omission(s), or circumstances which formed the basis for the convocation of the board;
  - c. A summary of the position taken by the subject officer with respect to the alleged act(s), omission(s), or other circumstances which formed the basis for the convocation of the board; and

- d. Findings and recommendations of the board. The board may recommend involuntary termination, retention with or without demotions, retention with or without reassignment, or reprimand.

The report will be signed by all board members concurring and the statements which are concurred in by a majority of the members will constitute the report of the board. The board report will be forwarded to the appropriate official as specified in Section L., below.

3. Minority Report. Any member or members not concurring with the majority will sign and submit a separate minority report, or separate minority reports, setting forth the extent of his/her, or their concurrence and nonconcurrence and the reasons therefore, and the variant findings, opinions, or recommendations, as appropriate. Each minority report submitted will be attached to the report of the board and will be considered by all authorities reviewing the report.
4. Record of Proceedings. When the board has completed its deliberations, a record of proceedings will be prepared. The record will indicate whether a quorum was present and the name and vote of each member present. The record will include the report of the board, any minority report(s), any transcript, recording, or summary of the proceedings, and all other papers, documents, and materials necessary to reflect a true and complete history of the proceedings. The record so prepared will be certified by the chairperson for being true and complete.

#### Section L. Action on Board Recommendations

1. Recommendation of Retention. Where the board recommends retention of the officer, with or without reassignment and/or demotion, the officer shall be retained and the record of proceedings shall be transmitted to the Director, DCP, who shall render the final decision whether the officer shall be reassigned and/or demoted. The decision of the Director, DCP, on these matters shall be final.
2. Recommendation of Termination. Where the final recommendation of the board is termination of the officer, the record of proceedings shall be transmitted forthwith to the Surgeon General (SG) for his/her action on the board's recommendation. The SG may then order further investigation by the board, may approve and adopt the board's findings and recommendations in whole or in part; or may disapprove the board's recommendations. If the SG does not concur in such a recommendation to terminate the officer's commission, the officer shall be retained and the record of proceedings returned to the Director, DCP, together with instructions regarding whether or not the officer should be demoted and/or reassigned. If the board's recommendation to terminate the officer's

commission is concurred in and approved by the SG, the officer's commission will be terminated on the last day of any month thereafter as the SG may direct. The decision of the SG shall be final.

#### Section M. Travel Entitlements

The Director, DCP, shall authorize necessary travel entitlements for any PHS commissioned officer who requested to participate in any hearing or proceeding under this INSTRUCTION.

#### Section N. Cross References

1. For information on involuntary separation of reserve corps officers during their probationary period, refer to Subchapter CC23.7, CCPM INSTRUCTION 1, "Involuntary Separation during the Probationary Period Served by Officers on Active duty in the Reserve Corps," of this manual.
2. For information on involuntary retirement of regular and reserve corps officers, refer to Subchapter CC23.8, CCPM INSTRUCTIONS 3 and 4, "Retirement of an Officer with 30 Years of Active Service," and "Involuntary Retirement After 20 Years of Service," of this manual, respectively.
3. For information on performance evaluations and ratings of regular and reserve corps officers, see CCPM INSTRUCTION 1, Subchapter CC25.1, "Commissioned Officers' Effectiveness Report," of this manual.
4. For information on placing PHS Commissioned Corps officers into nonduty with pay status because of pending disciplinary, separation or retirement actions against them, refer to CCPM INSTRUCTION 4, Subchapter CC23.6, "Nonduty With Pay Status," of this manual.

#### Section O. Privacy Act Provisions

Personnel records are subject to the provisions of the Privacy Act of 1974. The applicable systems of records are 09-37-0002, "PHS Commissioned Corps Personnel Records," HHS/OASH/OSG; and 09-37-0005, "PHS Commissioned Corps Board Proceedings," HHS/OASH/OSG.