DEPARTMENT OF THE NAVY
UNITED STATES NAVAL ACADEMY
121 BLAKE ROAD
ANNAPOLIS MARYLAND 21402-1300

USNAINST 1610.6
28/SJA
19 JUN 2012

USNA INSTRUCTION 1610.6

From: Superintendent, U.S. Naval Academy

Subj: U.S. NAVAL ACADEMY (USNA) MIDSHIPMEN DISENROLLMENT PROCEDURES FOR CASES INVOLVING UNSATISFACTORY CONDUCT

Ref: (a) SECNAVINST 1531.4, U.S. Naval Academy Midshipmen Disenrollment
(b) Title 10, United States Code
(c) CNO memo, Subj: Policy of Foreign Midshipmen at the U.S. Naval Academy of 18 Nov 09
(d) SECNAV memo, Subj: Retention and Delegation of Authority in U.S. Naval Academy (USNA) Midshipmen Commissioning and Disenrollment Cases of 1 Nov 07
(e) COMDTMIDNINST1610.2D, Administrative Performance and Conduct Manual
(f) SECNAVINST 1920.626C, Administrative Separation of Officers
(g) MILPERSMAN 1531-020
(h) JAGINST 5800.7E, Manual of the Judge Advocate General

Encl: (1) Superintendent Hearing Script
(2) Board of Inquiry Policies and Procedures
(3) Board of Inquiry Notice Template
(4) Board of Inquiry Appointing Letter Template
(5) Board of Inquiry Script
(6) Board of Inquiry Findings/Recommendations Worksheet

1. Purpose. To prescribe procedures for Midshipmen disenrollment from USNA in cases involving unsatisfactory conduct pursuant to references (a) and (b), section 6962.

2. Applicability. This instruction applies to all USNA Midshipmen who are U.S. citizens and all U.S. citizens who sign the agreement to serve per reference (b), section 6959. Disenrollment procedures applicable to foreign Midshipmen attending USNA are controlled by the guidelines set forth in reference (c).

3. Background. This instruction outlines the due process rights afforded Midshipmen being processed or disenrolled from USNA for unsatisfactory conduct, including procedures for characterizing the service of Midshipmen recommended for discharge from the naval service.

4. Policy. Pursuant to references (a), (b), section 6962, and reference (d), when the Superintendent determines that the conduct of a Midshipman is unsatisfactory, the Superintendent must submit a final written report of the facts and circumstances surrounding this determination to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN(M&RA)). The Midshipman shall be provided sufficient notice of, and have an opportunity to examine the final report and submit a written response and accompanying materials to the Superintendent's report for consideration by ASN(M&RA) before a final decision is made. Based on all the materials submitted, ASN(M&RA) may take no action and dismiss the case, disenroll the Midshipman from USNA and order the member to continue to serve as an enlisted sailor, or disenroll the Midshipman from USNA and discharge the Midshipman from the naval service.

5. Commandant Procedures. Before the Superintendent makes a conduct determination under reference (b), section 6962, the Commandant of the Brigade of Midshipman shall conduct a hearing for unsatisfactory conduct consistent with the procedures outlined in reference (e). If the Commandant recommends a Midshipman for disenrollment from USNA, the Commandant will forward the case and supporting materials to the Superintendent as provided in reference (e), paragraph 3.6.

6. Superintendent Procedures. The Superintendent and the Staff Judge Advocate shall review the case and all supporting materials forwarded by the Commandant. If the Superintendent seeks to disenroll the Midshipman from USNA and discharge the Midshipman from the naval service with an Other Than Honorable (OTH) discharge, the procedures outlined in paragraph 8 of this instruction must be followed before the Superintendent forwards his recommendation to ASN(M&RA). In all cases of unsatisfactory conduct not warranting an OTH discharge, the following shall apply:

a. Superintendent Interview. Except as provided below, the Superintendent will interview the Midshipman to determine whether the Midshipman's conduct was unsatisfactory and whether the Midshipman should be disenrolled from USNA. The Midshipman's Battalion Officer, Company Officer, Senior Enlisted Leader, and Midshipman chain of command should be present at the interview, and will be asked to make statements regarding the Midshipman's performance. In addition to the chain of command, the Superintendent may request one representative from an athletic team, club, or extra-curricular activity be present for the hearing to provide insight into the Midshipman's performance.

b. Midshipman Rights at Superintendent Interview. The Midshipman subject to disenrollment shall have the following rights regarding his/her interview with the Superintendent:

(1) The Midshipman shall have at least 48-hours advance notification of his/her interview with the Superintendent;

(2) The Midshipman shall have the right to review all materials the Superintendent will rely on in making a conduct determination. This provision does not apply to attorney work-product or materials containing privileged information as defined by the Military Rules of Evidence;

(3) The Midshipman shall have the right to produce written character statements from any individual prior to the interview. The Midshipman shall also have the right to provide any other documentation in their defense or for extenuation and mitigation purposes. The Superintendent will review all character statements and additional documentation prior to the hearing with the Midshipman. The Midshipman shall not have the right to produce live-witness testimony during the interview; and

(4) The Midshipman shall have the right to remain silent or to make statements during the interview.

c. Post-Interview Action. Pursuant to references (a) and (b), section 6962, after review of all case materials and the Superintendent's interview, the Superintendent may either retain the Midshipman, process the case through the Midshipman Discharge Board (MDB) procedures provided in paragraph 8 of this instruction, or recommend to ASN(M&RA) that the Midshipman be disenrolled from USNA. If the Superintendent recommends disenrollment from USNA, the Superintendent shall prepare a final written report of his recommendation and rationale for such. The Midshipman shall be provided a copy of the Superintendent's final report and have a minimum of five business days to submit any additional matters for consideration by ASN(M&RA) before a final decision is made.

d. Misconduct Cases Not Requiring Superintendent Interview. The Superintendent is not required to conduct an interview with a Midshipman in the following cases:

(1) If, after initial review of the case materials submitted by the Commandant, the Superintendent does not find the Midshipman's conduct to be egregious enough to warrant dismissal;

(2) Cases processed through the MDB procedures provided in paragraph 8 of this instruction that result in a finding that the Midshipman committed misconduct;

(3) Cases in which a Midshipman waives the MDB procedures; or

(4) Cases in which the Midshipman offers a voluntary or qualified resignation under reference (a), paragraph 6e.

7. ASN(M&RA) Procedures. Pursuant to references (a) and (d), ASN(M&RA) holds the authority to take final action on any case involving misconduct. After receipt of all case materials, the Superintendent's recommendation, and additional matters submitted by the Midshipman as outlined in paragraph 6c, reference (a) allows ASN(M&RA) to retain the Midshipman or order disenrollment of the Midshipman from USNA. If ASN(M&RA) orders disenrollment of the Midshipman from USNA, reference (a) provides that ASN(M&RA) will order discharge from the Naval service of Midshipmen in their fourth and third class academic years who have no preexisting active duty-obligations. The Superintendent will determine the characterization of service and execute Department of Defense Form DD214. Discharge from the Naval service may be an Honorable discharge or a General (Under Honorable Conditions) discharge. Midshipmen who have reached their second class academic year may be subject to the recoupment provisions of references (a) and (b), section 2005. If disenrollment of a Midshipman subject to recoupment is ordered, ASN(M&RA) may:

a. Order the Midshipman to fulfill any recoupment obligations through active-duty enlisted service consistent with references (a) and (b), section 2005; or

b. Order discharge of the Midshipman from the Naval service and order monetary recoupment consistent with references (a) and (b), section 2005. If ASN(M&RA) orders a Midshipman be discharged from the Naval service and provide monetary recoupment, the Superintendent will determine the characterization of service and execute Department of Defense Form DD214. Discharge from the Naval service may be an Honorable discharge or a General (Under Honorable Conditions) discharge.

8. Cases Warranting an Other Than Honorable Discharge. If at any time after the Superintendent receives a case from the Commandant, the Superintendent concludes a case may warrant discharge from the Naval service with an OTH discharge as defined in reference (f), the Superintendent may convene an MDB. The MDB shall make a formal finding of fact as to whether the Midshipman committed the alleged misconduct; and if a majority vote determines the Midshipman committed the misconduct alleged, recommend whether the Midshipman should be discharged from the Naval service; and, if a majority recommends discharge, the characterization of service upon discharge. The MDB policies and procedures are outlined in enclosures (2)-(5).

a. Relationship Between Superintendent Interview and MDB . Pursuant to paragraph 6 of this instruction, the Superintendent may forward a case to an MDB after conducting a Superintendent Interview. However, the Superintendent interview is not required before forwarding a case to a MDB.

b. Waiver. A Midshipman may waive his or her right to an MDB with an understanding that he or she may be discharged from the Naval service with an OTH discharge without the rights detailed in enclosure (2).

c. Superintendent Action on MDB. After receipt of the MDB's findings, the Superintendent shall proceed as follows:

(1) Misconduct Finding and Recommendation for Discharge from the Naval Service. When the Superintendent receives an MDB report finding that misconduct occurred and discharge of the Midshipman is recommended, the Superintendent may recommend that ASN(M&RA) disenroll the Midshipman. The Superintendent shall notify the Midshipman of his intent to request disenrollment of the Midshipman from USNA and the characterization of service from a resulting discharge from the Naval service. The Midshipman shall have five business days after notification and receipt of a copy of the Superintendent's final recommendation package to submit additional matters to be considered by ASN(M&RA). The Superintendent's final recommendation package shall include the MDB's recommendations.

(2) Misconduct Finding and Recommendation for Retention in the Naval Service. When the Superintendent receives an MDB report finding that misconduct occurred but recommending retention in the Naval service, the Superintendent may either retain the Midshipman or still recommend that ASN(M&RA) disenroll the Midshipman from USNA. If the Superintendent recommends disenrollment from USNA, the Superintendent shall notify the Midshipman of his intended recommendation. The

Midshipman shall have five business days from receipt of the Superintendent's final disenrollment recommendation package to submit additional matters to be considered by ASN(M&RA). The Superintendent's final recommendation package shall include the MDB's findings and recommendations.

(3) No Misconduct Finding. When the Superintendent receives an MDB report finding no misconduct, the Superintendent must abide by the finding and retain the Midshipman at USNA.

d. ASN(M&RA) Action on MDB. Pursuant to references (a) and (d), ASN(M&RA) holds the authority to take final action on any case involving misconduct. In cases resulting in a MDB finding of misconduct, ASN(M&RA) is not bound by the MDB recommendations pertaining to retention, disenrollment, or discharge.

(1) Misconduct Finding and Recommendation for Discharge from the Naval Service. After receipt of all case materials, the MDB report, the Superintendent's recommendation, and additional matters submitted by the Midshipman as outlined in paragraph 8c(1), reference (a) allows ASN(M&RA) to retain the Midshipman or order disenrollment of the Midshipman from USNA. If ASN(M&RA) orders disenrollment of the Midshipman from USNA, reference (a) provides that ASN(M&RA) will order discharge from the Naval service of Midshipmen in their fourth and third class academic years who have no preexisting active duty-obligations. The Superintendent will determine the characterization of service and execute Department of Defense Form DD214. Discharge from the Naval service may not be less favorable than what the MDB recommends. Midshipmen who have reached their second or first class academic years may be subject to the recoupment provisions of references (a) and (b), section 2005. If ASN(M&RA) orders disenrollment from USNA of a Midshipman subject to recoupment, references (a) and (b), section 2005 provide that ASN(M&RA) may:

(a) Order the Midshipman to fulfill any recoupment obligations through active-duty enlisted service consistent with references (a) and (b), section 2005; or

(b) Order discharge of the Midshipman from the Naval service and order monetary recoupment consistent with references (a) and (b), section 2005. If ASN(M&RA) orders a Midshipman be discharged from the Naval service and provide monetary recoupment, the Superintendent will determine the characterization of service and execute Department of Defense Form DD214. Discharge from the Naval service may not be less favorable than what the MDB recommends.

(2) Misconduct Finding and Recommendation for Retention in the Naval Service. After receipt of all case materials, the MDB report, the Superintendent's recommendation, and additional matters submitted by the Midshipman as outlined in paragraph 8c(2), reference (a) allows ASN(M&RA) to retain the Midshipman or order disenrollment of the Midshipman from USNA. If ASN(M&RA) orders disenrollment of the Midshipman from USNA, reference (a) provides ASN(M&RA) will order discharge from the Naval service of Midshipmen in their fourth and third class academic years who have no preexisting active duty-obligations. The Superintendent will determine the characterization of service and execute Department of Defense Form DD214. Any resulting discharge from the Naval service may be an Honorable discharge or a General (Under Honorable Conditions) discharge. Midshipmen who have reached their second or first class academic years may be subject to the recoupment provisions of references (a) and (b), section 2005. If ASN(M&RA) orders disenrollment from USNA of a Midshipman subject to recoupment, references (a) and (b), section 2005 provide ASN(M&RA) may:

(a) Order the Midshipman to fulfill any recoupment obligations through active-duty enlisted service consistent with references (a) and (b), section 2005; or

(b) Order discharge of the Midshipman from the Naval service and order monetary recoupment consistent with references (a) and (b), section 2005. If ASN(M&RA) orders a Midshipman be discharged from the Naval service and provide monetary recoupment, the Superintendent will determine the characterization of service and execute Department of Defense Form DD214. Any resulting discharge from the Naval service may be characterized as Honorable or General (Under Honorable Conditions) discharge.

9. Notification. In all cases processed pursuant to this instruction, the procedures for notifying Midshipmen regarding the outcome of their case are as follows:

a. Retention by the Superintendent. In all cases in which the Superintendent decides to retain a Midshipman at USNA, notification of the Superintendent's decision shall be made via the Midshipman's chain of command.

b. Retention by ASN(M&RA). In all cases in which ASN(M&RA) decides to retain a Midshipman at USNA, notification of ASN(M&RA)'s decision shall be made via the Midshipman's chain of command. The Superintendent's Staff Judge Advocate shall coordinate communication between ASN(M&RA) and the Midshipman's chain of command regarding ASN(M&RA)'s retention decision.

c. ASN(M&RA) Discharge Decision. In all cases in which ASN(M&RA) orders a Midshipman discharged from the Naval service, the USNA Midshipman Personnel Office (MIDPERS) shall notify the Midshipman of ASN(M&RA)'s decision. USNA MIDPERS shall execute notification by forwarding a copy of ASN(M&RA)'s order, DD Form 214, and any other required discharge documentation to the Midshipman.

d. ASN(M&RA) Active-Duty Enlisted Service Decision. In all cases in which ASN(M&RA) orders a Midshipman to active-duty enlisted service, USNA MIDPERS shall execute notification by forwarding a copy of ASN(M&RA)'s order and any other required documentation to the Midshipman. USNA MIDPERS shall facilitate transfer of the Midshipman to their designated place of duty where they will begin their active-duty enlisted service obligation.

10. Requests for Deferment. In all cases processed pursuant to this instruction in which Midshipmen are ordered to pay monetary recoupment or ordered to active-duty enlisted service, the procedures for deferment are as follows:

a. Requests for Deferment of Monetary Recoupment. Requests for deferment of monetary recoupment shall be made directly to the Defense Finance and Accounting Service (DFAS). Guidance on the procedures for petitioning DFAS for deferment of monetary recoupment is available at http://www.dfas.mil/debtandclaims/militarydebts/educationdebt.html. Requests for deferment of monetary recoupment shall only be made after ASN(M&RA) has ordered discharge and payment of monetary recoupment.

b. Requests for Deferment of Active-Duty Enlisted Service. All requests to defer commencement of active-duty enlisted service shall be made in accordance with reference (g) to ASN(M&RA) via the Superintendent. Requests for deferment of active-duty enlisted service shall be made before the disenrolled Midshipman is to report for active-duty enlisted service. Note that reference (g) states that deferments will not normally be granted beyond July 1st of the year following the year in which the former Midshipman's Naval Academy class graduates.

/S/
M. H. MILLER

SUPERINTENDENT INTERVIEW SCRIPT

Hearing Sequence

- MIDN [Name], I have been informed that you have had a chance to review the materials (blue folder) I will consider in deciding your case. Is that accurate?
- If I determine that you have been found unsatisfactory in conduct, I may recommend to the Secretary of the Navy that you be separated from the Naval Academy. Do you understand this?
- Before I decide your case, I will ask you to make an opening statement and closing statement. I will also ask for input from your chain of command and may ask you questions pertaining to the circumstances of your case.
- Do you understand all your rights as they have been explained to you by LT [Assistant SJA]?
- Would you like to make an opening statement?
- Midshipmen chain of command input (Junior to Senior)
- Senior enlisted Leader input?
- Company Office input?
- Battalion officer input?
- Other representative input?
- MIDN [Name], would you like to make a closing statement?

Render a decision:

Based on all the evidence and testimony before me:

1. I have decided to retain you in the Brigade (under the following conditions):

OR

2. I have decided to recommend to the Secretary of the Navy that you be separated from the Naval Academy. LT [Assistant SJA] will explain your rights in this process.

MIDSHIPMAN DISCHARGE BOARD POLICIES AND PROCEDURES

1. Midshipman Discharge Board (MDB) Composition and Member Roles. The MDB shall consist of not less than three Navy or Marine Corps officers. The senior member shall be the presiding officer, and rule on all matters of procedure and evidence, but may be overruled by a majority of the Board. Board members are subject to challenge for cause only. If the Superintendent appoints a legal advisor, the legal advisor shall rule finally on all matters of procedure, evidence and challenges except challenges to themselves. The Superintendent will rule finally on all challenges for cause to the legal advisor.

2. Nonvoting Recorder. The Superintendent shall appoint a nonvoting Recorder to perform such duties as appropriate. The recorder shall not participate in closed sessions of the Board.

3. Nonvoting Legal Advisor. The Superintendent may also appoint a nonvoting legal advisor to perform those duties contained in paragraph 1 and to address other legal questions or concerns posed by the Board. The legal advisor shall not participate in closed sessions of the Board.

4. Notice to Midshipman Respondent. The Midshipman respondent shall be notified in writing at least 15 days before the hearing of the date, time, and location of their case before a Board; of each of the reasons for which they are being required to show cause for retention at USNA and in the Naval service; the least favorable characterization of service which may be recommended by the Board; and of their rights before, during, and after the Board.

5. Rights of a Respondent. The respondents shall be afforded the following rights, which may be exercised or waived in writing:

a. Request for Continuance. In addition to the 15 days provided in paragraph 4, the respondents may, for good cause, petition in writing and in a timely manner for a continuance not to exceed 15 calendar days from the original date of the Board. Requests for continuance will be decided by the Superintendent if made prior to the convening of the Board. Once the Board is convened, the senior member may rule on such requests or refer them to the Superintendent for decision. Any requests or continuance which would delay the completion of the Board hearing beyond a total of 30 calendar days from the date of notification to the respondent must be approved by the Superintendent.

b. The Right to Counsel. Respondents are entitled to have qualified counsel provided by the Superintendent. Counsel must be a lawyer certified per article 27(b), UCMJ. Respondents may request military counsel of their choice provided the requested counsel is reasonably available. The determination as to whether individual counsel is reasonably available shall be made in accordance with the procedures set forth in reference (h), section 0131 for determining the availability of Individual Military Counsel for courts-martial. Upon receipt of notice of the availability of the individual counsel, the respondents must elect between representation by appointed counsel and representation by individual counsel. Respondents may be represented in these proceedings by both appointed counsel and individual counsel only if the Superintendent, in his or her sole discretion, approves a written request from the respondent for representation by both counsel. Such written requests must set forth in detail why representation by both counsel is essential to insure a fair hearing. Respondents may also engage civilian counsel at no expense to the government, in addition to, or in lieu of, military counsel. Consultation with, or retention of civilian counsel, shall not delay orderly processing per this instruction. Respondents should be advised that retained counsel will be expected to comply with any established board schedule absent extraordinary circumstances.

c. Right against self-incrimination. If suspected of an offense, the respondent Midshipman should be warned against self-incrimination under Article 31, UCMJ, before testifying as a witness. Failure to warn the Midshipman shall not preclude consideration of the testimony of the Midshipman by the MDB, but may impact the government's ability to use such statements in the event of subsequent disciplinary action.

d. Access to Records. The respondent, and his or her qualified counsel, shall have full access to, and copies of, records relevant to the case, except that information or material shall be withheld if it is determined that such information should be withheld in the interest of national security. When information or material is so withheld, a summary of the information or material will be provided to the extent the interests of national security permit.

e. Names of all witnesses in advance of Board proceedings. Failure to provide any information or the name of a witness shall not preclude the Board from considering the information or hearing the witness, provided the respondent has had the opportunity to examine any statement, or talk with any witness presented, prior to consideration by the Board.

f. Right to challenge any member for cause. The respondent may submit any relevant matter which, in their view, indicates that a particular member or members should not consider the case. A member shall be excused if found by the legal advisor, or by the Superintendent if a legal advisor has not been appointed, to be unable to render a fair and impartial decision in the respondent's case. If such an excusal results in Board membership falling below the number required in paragraph 1 of this enclosure, the Superintendent shall appoint a new member who is qualified per that paragraph. Such new member may be challenged in the same manner as the member who was previously appointed and excused.

g. Witness request. Respondents shall have the right to request from the Superintendent or the Board the appearance before the Board of any witness whose testimony is considered to be pertinent to the case, as provided in paragraph 7 of this enclosure.

h. Documentary evidence. Respondents shall have the right to submit, at any time before the Board convenes or during the proceedings, any matter from the respondent's service record, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. This includes, but is not limited to, depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily.

i. Questioning of witnesses. The respondent, counsel for the respondent, counsel for the government, and the Board members may question any witness who appears before the Board or who testifies by other means (e.g., by telephone or VTC, when available). Testimony of witnesses shall be under oath or affirmation.

j. Right to give sworn or unsworn testimony. A respondent may give an unsworn statement to the board. This statement may be oral or in writing. At no time may a respondent be required to answer questions based on his or her unsworn statement. The respondent may only be questioned based on his or her own sworn testimony. In the event a respondent wishes to give a sworn statement or testimony, the respondent should be warned against self-incrimination under article 31, UCMJ. Failure to so warn the respondents shall not preclude consideration of the testimony by the MDB.

k. Oral argument. The respondent and/or counsel for the respondent and counsel for the government may present oral or written argument, or both, on the matter to the Board. Parties may make opening and closing arguments as desired.

l. Copy of Report. Respondents shall be provided with a copy of the Board report. In cases involving classified matter withheld in the interests of national security, any record or information to be provided to the respondent will be edited prior to delivery to them to remove classified material and preserve its integrity.

m. Post-Board Statement. Consistent with paragraph 8 of this instruction, the respondent may submit a statement in rebuttal to the findings and recommendations of the MDB for consideration by the Superintendent and ASN(M&RA).

n. Appearance at Board. The respondents may appear in person, with or without counsel, at all open proceedings of the Board.

o. Failure of the respondents to invoke any of these rights shall not be considered as a bar to the Board proceedings, findings, or recommendations.

6. Waiver. Respondents may waive any of the aforementioned rights before the Board convenes or during the proceedings. Failure to appear, without good cause, at a hearing constitutes waiver of the right to be present at the hearing. Failure to respond to the notice of MDB after five days, during which respondents may consult with counsel, constitutes a waiver of the rights in paragraph 5 of this enclosure.

7. Witnesses. Witnesses whose testimony will add materially to the case shall be invited to appear to offer testimony before the Board if such witnesses are reasonably available. Witnesses not within a 100-mile radius of Annapolis, Maryland are considered not reasonably available. The following additional policies govern the presentation of witness testimony:

a. Sworn statements or depositions shall be admitted and considered by Board from witnesses not reasonably available to testify during a board proceeding;

b. The Superintendent shall make available for personal appearance before a Board active duty or civilian witnesses under his or her jurisdiction whose personal appearance is essential to a fair determination of the facts, unless the witnesses:

(1) are unavailable within the meaning of Military Rule of Evidence (M.R.E.) 804(a); or

(2) decline an invitation to testify before a Board. Civilian employees may be directed to appear by their supervisors. Military personnel can be ordered to appear by their Commanding Officers.

c. Respondents will specify in their response to notice of the MDB the names and contact information for any witnesses they request to the Superintendent or, once the proceedings have commenced, the Board president. Such a request shall contain the following matter:

(1) A synopsis of the testimony that the witness is expected to give;

(2) An explanation of the relevance of such testimony to the issues of misconduct, separation or characterization;

(3) An explanation as to why written, recorded, telephonic, or video teleconferencing testimony would not be sufficient substitute for in-person testimony in order to provide for a fair determination of the facts;

d. Requests for witnesses may be denied if not requested at least five days before commencement of Board proceedings.

e. Witnesses not on active duty must appear voluntarily and at no expense to the government, except as provided for by subparagraph g.

f. The Superintendent shall make all final decisions on the appearance of witnesses before and during the Board.

g. If the Superintendent determines that the personal appearance of a witness is necessary, he or she will authorize expenditure of funds for production of the witness only if the presiding officer (after consultation with a judge advocate) or the legal advisor (if appointed) advises that:

(1) the testimony of a witness is not cumulative;

(2) the personal appearance of the witness is essential to a fair determination on the issues of misconduct, separation, or characterization;

(3) written, recorded, telephonic, or video teleconferencing testimony will not accomplish adequately the same objective; and

(4) the need for live testimony is substantial, material, and necessary for a proper disposition of the case; and the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness, the timing of the request for production of the witness, the potential delay in the proceeding that may be caused by producing the witness, or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

h. If it is determined the personal testimony of a witness is required, the hearing will be postponed or continued, if necessary, to permit the attendance of the witness.

i. The hearing may be postponed or continued to provide the respondent with a reasonable opportunity to obtain a written statement from the witness or arrange for video teleconferencing/telephonic testimony if a witness requested by the respondent is unavailable in the following circumstances:

(1) When the presiding officer determines the personal testimony of the witness is not required;

(2) When the Commanding Officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

(3) When a civilian witness declines to attend the hearing.

8. Hearing. Hearings by a MDB must be conducted in a fair and impartial manner to ensure the respondent has the opportunity to present his or her case. The Board must conduct the hearing consistent with the procedures outlined in this enclosure and enclosure (5) of this instruction. At the discretion of the Superintendent, a Board may be convened to hear the cases of multiple respondents. However, the board will make independent determinations of each respondent's case based on the individual facts and circumstances presented pertaining to each respondent. The following additional procedures shall apply to all Boards:

a. MDBs are not courts-martial and the rules of evidence do not apply.

b. Oral or written matter not admissible in a court of law may be accepted by Boards.

c. Oral or written evidence presented may be subject to reasonable restrictions as to authenticity, relevance, materiality, and competency as determined by the Board.

d. Except for closed sessions during which the board will deliberate on the evidence presented, the proceedings of the board should normally be open to the public at the discretion of the Superintendent. Once convened, the Superintendent may close the proceedings upon motion by either side upon good cause shown.

9. Decision of the Board. The board will make the following determinations, by majority vote, based on the evidence presented at the hearing:

a. A finding based on a preponderance of the evidence on whether misconduct occurred on each of the reasons for separation specified against the respondent for which he or she was notified. Where a reason for separation is based on an approved finding of guilty by a court-martial or a civilian criminal conviction, including by a plea of guilty, such a finding of guilty or criminal conviction shall be binding on the Board on the question of whether misconduct occurred. Signed letters offering a qualified resignation and the reasons contained therein shall also be binding on the Board;

b. Whether, based upon a finding of misconduct for any of the reasons specified against the respondent, the respondent is recommended for discharge from the Naval service; and

c. If discharge from the Naval service is recommended, a recommendation as to characterization of service regarding discharge. This characterization shall be based on the evidence presented, the overall record of the respondent's service, and consistent with the characterization of service descriptions provided in reference (f), enclosure 5 to this instruction.

d. In the event the Board finds that misconduct did not occur, or that misconduct did occur but the respondent should be retained in the Naval service, the Board shall submit their findings to the Superintendent as provided in paragraph 10 of this enclosure.

10. Forwarding Board Report. Consistent with paragraph 8 of this instruction, the Board shall submit its findings and recommendations in a written report to the Superintendent.

MIDSHIPMAN DISCHARGE BOARD NOTICE LETTER TEMPLATE

From: Superintendent, U.S. Naval Academy
To: (Respondent Midshipman)

Subj: NOTICE OF MIDSHIPMAN DISCHARGE BOARD FOR (NAME) WHO IS BEING PROCESSED FOR ADMINISTRATIVE SEPARATION BY REASON OF MISCONDUCT

Ref: (a) USNAINST 1610.6, U.S. NAVAL ACADEMY (USNA) MIDSHIPMEN DISENROLLMENT PROCEDURES FOR CASES INVOLVING UNSATISFACTORY CONDUCT

Encl: (1) Administrative Separation Processing Notice

1. Pursuant reference (a), you are being processed by a Midshipman Discharge Board by reason of misconduct. Specifically, you are being processed for [brief summary of facts, dates, and provisions violated]. The Board will be scheduled on a date no earlier than fifteen (15) days from your receipt of this notice. The Assistant Staff Judge Advocate, U.S. Naval Academy, will notify you of the exact date of the hearing no later than fifteen (15) days before the Board convenes. Should you be discharged from the Naval service, the least favorable characterization of discharge is under Other Than Honorable Conditions. Your rights pursuant to the Board of Inquiry are detailed in enclosure (1).

2. If you have any questions regarding the Midshipman Discharge Board process, please contact my Staff Judge Advocate at (SJA phone number). Pursuant to reference (a), you also have the right to qualified military counsel or civilian counsel at your own expense. You may seek military counsel by contacting the Naval Legal Service Office attorney in Dahlgren Hall, or by contacting them at 410-293-2268.

_____
(Signature of Superintendent)

From: Superintendent, U.S. Naval Academy
To: (Respondent Midshipman)

Subj: ADMINISTRATIVE SEPARATION PROCESSING NOTICE- MIDSHIPMAN DISCHARGE BOARD

Ref: (a) USNAINST 1610.6, U.S. Naval Academy (USNA) Midshipmen Disenrollment Procedures For Cases Involving Unsatisfactory Conduct
(b) JAGINST 5800.7D, Manual of the Judge Advocate General

Reason(s) For Administrative Separation Processing

1)

2)

3)

1. The least favorable characterization of service possible is under Other Than Honorable.

2. You are entitled to the below rights (initial appropriate block)

a. Request for Continuance. In addition to the 15 days provided in reference (a), enclosure (2), paragraph 4, the respondents may, for good cause, petition in writing and in a timely manner for a continuance not to exceed 15 calendar days from the original date of the Board. Requests for continuance will be decided by the Superintendent if made prior to convening the Board. Once the Board is convened, the senior member may rule on such requests or refer them to the Superintendent for decision. Any requests or continuance which would delay the completion of the Board hearing beyond a total of 30 calendar days from the date of notification to the respondent must be approved by the Superintendent. ____ initial

b. Right to Counsel. Respondents are entitled to have qualified counsel provided by the Superintendent. Counsel must be a lawyer certified per article 27(b), UCMJ. Respondents may request military counsel of their choice provided the requested counsel is reasonably available. The determination as to whether individual counsel is reasonably available shall be made in accordance with the procedures set forth in section 0131 of reference (b) for determining the availability of Individual Military Counsel for courts-martial. Upon receipt of notice of the availability of the individual counsel, the respondents must elect between representation by appointed counsel and representation by individual counsel. Respondents may be represented in these proceedings by both appointed counsel and individual counsel only if the Superintendent, in his or her sole discretion, approves a written request from the respondent for representation by both counsel; such written request must set forth in detail why representation by both counsel is essential to insure a fair hearing. Respondents may also engage civilian counsel at no expense to the government, in addition to, or in lieu of, military counsel. Consultation with, or retention of civilian counsel, shall not delay orderly processing per this instruction. Respondents should be advised that retained counsel will be expected to comply with any established board schedule absent extraordinary circumstances. ____ initial

c. Right against self-incrimination. If suspected of an offense, the respondent Midshipman should be warned against self-incrimination under Article 31, UCMJ, before testifying as a witness. Failure to warn the officers shall not preclude consideration of the testimony of the officers by the MDB, but may impact the government's ability to use such statements in the event of subsequent disciplinary action. ____ initial

d. Access to Records. The respondent and his or her qualified counsel shall have full access to, and copies of, records relevant to the case, except that information or material shall be withheld if it is determined that such information should be withheld in the interest of national security.

When information or material is so withheld, a summary of the information or material will be provided to the extent the interests of national security permit. ____initial

e. Names of all witnesses in advance of Board proceedings. Failure to provide any information or the name of a witness shall not preclude the Board from considering the information or hearing the witness, provided the respondent has had the opportunity to examine any statement, or talk with any witness presented, prior to consideration by the Board. ____initial

f. Right to challenge any member for cause. The respondent may submit any relevant matter which, in their view, indicates that a particular member or members should not consider the case. A member shall be excused if found by the legal advisor, or by the Superintendent if a legal advisor has not been appointed, to be unable to render a fair and impartial decision in the respondent's case. If such an excusal results in Board membership falling below the number required in reference (a), enclosure (2), paragraph 1, the Superintendent shall appoint a new member who is qualified per that paragraph. Such new member may be challenged in the same manner as the member who was previously appointed and excused. ____ initial

g. Witness request. Respondents shall have the right to request from the Superintendent or the Board the appearance before the Board of any witness whose testimony is considered to be pertinent to the case, as provided in reference (a), enclosure (2), paragraph 7. ____ initial

h. Documentary evidence. Respondents shall have the right to submit, at any time before the Board convenes or during the proceedings, any matter from the respondent's service record, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. This includes, but is not limited to, depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily. ____ initial

i. Questioning of witnesses. The respondent, counsel for the respondent, counsel for the government, and the Board members may question any witness who appears before the Board or who testifies by other means (e.g., by telephone or VTC, when available). Testimony of witnesses shall be under oath or affirmation. ____ initial

j. Right to give sworn or unsworn testimony. A respondent may give an unsworn statement to the board. This statement may be oral or in writing. At no time may a respondent be required to answer questions based on his or her unsworn statement. The respondent may only be questioned based on his or her on sworn testimony. In the event a respondent wishes to give a sworn statement or testimony, the respondent should be warned against self-incrimination under by article 31, UCMJ. Failure to so warn the respondents shall not preclude consideration of the testimony by the MDB. ____ initial

k. Oral argument. The respondent and/or counsel for the respondent and counsel for the government may present oral or written argument, or both, on the matter to the Board. Parties may make opening and closing arguments as desired. ____ initial

l. Copy of Report. Respondents shall be provided with a copy of the Board report. In cases involving classified matter withheld in the interests of national security, any record or information to be provided to the respondent will be edited prior to delivery to them to remove classified material and preserve its integrity. ____ initial

m. Post-Board Statement. Consistent with paragraph 8 of this instruction, the respondent may submit a statement in rebuttal to the findings and recommendations of the MDB for consideration by the Superintendent and ASN(M&RA). ____ initial

n. Appearance at Board. The respondents may appear in person, with or without counsel, at all open proceedings of the Board. ____ initial

o. Failure of the respondents to invoke any of these rights shall not be considered as a bar to the Board proceedings, findings, or recommendations. ____ initial

p. Respondents may waive any of the aforementioned rights before the Board convenes or during the proceedings. Failure to appear, without good cause, at a hearing constitutes waiver of the right to be present at the hearing. Failure to respond to the notice of MDB after five days, during which respondents may consult with counsel, constitutes a waiver of the rights in reference (a), enclosure (2), paragraph 5.
____ initial

3. If you commence a period of unauthorized absence subsequent to receiving this notice, administrative separation processing may continue in your absence.

STAFF JUDGE ADVOCATE
By direction

I acknowledge receipt of this notice. _____

Witnessed by:

_____

MIDSHIPMAN DISCHARGE BOARD APPOINTMENT LETTER TEMPLATE

From: Superintendent, U.S. Naval Academy
To: (senior member of board)

Subj: APPOINTMENT OF A MIDSHIPMAN DISCHARGE BOARD FOR (NAME) WHO IS BEING PROCESSED FOR ADMINISTRATIVE SEPARATION BY REASON OF MISCONDUCT

Ref: (a) USNAINST 1610.6, U.S. Naval Academy (USNA) Midshipmen Disenrollment Procedures For Cases Involving Unsatisfactory Conduct

1. Pursuant to reference (a), you are assigned as senior member (or member) of a Midshipman Discharge Board to be convened at (time, date, location) or as soon as practicable thereafter. Other individuals assigned to the Board are:

_____ Member
_____ Member
_____ Recorder
_____ Counsel for Respondent
_____ Legal Advisor

2. General procedural instructions are contained in reference (a), enclosure (2). You and other board members should become familiar with reference (a) prior to convening of board.

3. You are admonished not to discuss the pending case with anyone and not to review any documents, including the service record of respondent, prior to convening of board.

_____
(Signature of Superintendent)

Copy to:
Respondent/Counsel
Board members
Recorder
Legal advisor

MIDSHIPMAN DISCHARGE BOARD SCRIPT

Senior Member (SM): The board will come to order. The recorder shall record the time, date, and place of hearing.

NOTE: The recorder should record the time and date of the opening and closing of each session of the board and the presence (or absence) of all parties (board members, recorder, respondent, and counsel for the respondent).

SM: The board is convened by an order of the Superintendent, dated _____, a copy of which has been furnished to each member of the board, the recorder, the respondent, and counsel for the respondent.

The following persons named in the appointing order are present:

Members
Senior Board Member
Member
Member
Recorder
Legal Advisor (if applicable)
Respondent
Reporter (if applicable)

The following person(s) named in the appointing order (is) (are) absent, having been excused by the Superintendent:

_____

NOTE: If a reporter has been made available for the purpose of making a verbatim record of testimony, the reporter's presence is also noted. The reporter need not be sworn.

SM: Will counsel for the respondent state his or her legal qualifications?

Counsel for Respondent (CR): Counsel for the respondent is (not) a lawyer within the meaning of reference (a). (If a civilian, include mailing address and phone number.)

SM: Will the recorder state his or her legal qualifications?

Recorder (REC): The recorder is (not) a lawyer within the meaning of reference (a).

SM: This board has been convened for the purpose of considering the pertinent facts relating to the case of Midshipman (name), who is being processed for discharge by reason(s) of (state alleged misconduct). The board will make findings of fact for each reason and will make a recommendation with respect to final action of retention or discharge from the naval service and to characterization of service or description of discharge. If discharge is recommended, the reason(s) will be stated along with the type and characterization of discharge recommended.

(**RESP'S NAME**), I shall now review with you your rights in connection with this hearing. If you have any questions about any of these rights, do not hesitate to ask me, or if you wish, you may discuss your questions with your counsel.

NOTE: Respondents may waive reading of their rights and procedures.

a. You may appear in person before this board, with or without counsel. In your absence, you may be represented by counsel at all open proceedings of the board. You may have a military counsel of your own choice, provided proper authority determines the counsel requested is reasonably available. You may be represented by civilian counsel at no expense to the government.

b. You may challenge any voting member of the board for cause; that is, by showing that the member cannot render a fair and impartial decision. You or your counsel may question any voting member to determine whether a basis for challenge exists. The Superintendent (or assigned legal advisor) will rule on the challenge. If any member is successfully challenged, this board proceeding will be suspended pending appointment of qualified substitute if – after a successful challenge – the number of board members falls below three.

c. You may submit an oral or written statement in your own behalf; you may testify in your own behalf; or you may remain silent. If you choose to testify and/or make a written statement under oath, you may be cross-examined on your statement and/or testimony. In the alternative, you may make an unsworn statement, personally or through counsel, oral or written. You may not be cross-examined on such an unsworn statement unless you choose to answer questions about it; however, the recorder may introduce evidence to rebut anything contained in such a statement. If you decide not to testify under oath, or if you decide not to make any statement at all, that fact will not be considered against you in any way.

d. You may request the attendance of witnesses at the hearing. The request shall be made no later than five business days in advance of the board and your request must be made in writing, dated, signed by you or your counsel, and submitted to the Superintendent via the senior member of the board. Failure to submit a request for witnesses in a timely fashion shall not automatically result in denial of the request, but it may be considered along with other factors in deciding whether or not the witness can be reasonably produced in person or through other means. Further, the testimony of a witness may be excluded if the legal advisor or, in the absence of a legal advisor, the senior member of the board, determines that its value to determine the truth of the allegations against you is substantially outweighed by considerations such as relevant, undue delay, or needless presentation of cumulative evidence.

(1) Any request for witnesses shall contain the following:

(a) a synopsis of the testimony that the witness is expected to give;
(b) an explanation of the relevance of the testimony; and
(c) an explanation as to why written or recorded testimony would not be sufficient.

(2) The Superintendent may authorize funding for production of witnesses after commencement of Board proceedings, only if the senior member of the board (after consultation with the legal advisor, or another judge advocate if reasonably available) determines that:

(a) the testimony of a witness is not cumulative;

(b) the personal appearance of the witness is essential to a fair determination on the issues;

(c) written or recorded testimony will not adequately accomplish the same objective; and

(d) the significance of the personal appearance of the witness, when balanced against the practical difficulties in producing the witness, favors production of the witness. Factors to be considered in relation to the balancing test include, but are not limited to, the cost of producing the witness; the potential delay in the proceeding that may be caused by producing the witness; or the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(3) If the Superintendent determines that the personal testimony of a witness is required, the hearing shall be postponed, if necessary, to permit the attendance of the witness. Military witnesses required shall be issued temporary additional duty (TEMADD) orders and civilian witnesses shall be issued invitational travel orders.

(4) The hearing shall be postponed to provide you a reasonable opportunity to obtain a written statement from the witness if the witness requested by you is unavailable when:

(a) the senior member of the board or legal advisor determines that personal testimony of the witness is not required;

(b) the commanding officer of a military witness determines that military necessity precludes the witness' attendance at the hearing; or

(c) a civilian witness declines to attend the hearing.

e. You may, at any time before or during the proceedings, submit any answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. This includes, but is not limited to, depositions of witnesses not deemed to be reasonably available or witnesses unwilling to appear voluntarily.

f. You may submit to examination by the board if you desire. If you choose not to submit to examination by the board, the fact will not be considered against you in any way.

g. You and your counsel may question any witness who appears before the board.

h. Your failure to invoke any of these rights cannot be considered as a bar to the board proceedings, findings, or recommendations.

Now, (**respondent**), there are some procedural rules in connection with this board which I shall explain to you. First, these proceedings are administrative in nature and the board is not bound by formal rules of evidence. Thus, the board may consider information which might not be admissible at a court-martial. Also, you should be aware that the board's decision will be based upon a preponderance of the evidence presented.

Second, if you or your counsel has any objection to any matters introduced or to any proceedings of the board, you or your counsel may state your objection and the reasons for it. If no legal advisor appointed: I shall rule finally on all matters of procedure and evidence; however, a majority of the board may overturn any ruling that I make]; or [If legal advisor appointed: The legal advisor shall rule finally on all matters of procedure and evidence.]

(**Respondent**), do you have any questions concerning your rights or procedures before this board?

RESP: (No, Sir/Ma'am.) (_____).

SM: Does the recorder, counsel for the respondent, or respondent wish to question any member of this board in relation to any matter which may constitute a ground for challenge for cause?

REC: (The recorder has no questions.) (_____).

RESP or CR: (The respondent has no questions.) (_____).

SM: Does either side have a challenge for cause against any voting member of this board?

REC: (The recorder does not.) (_____).

RESP or CR: (The respondent does not.) (_____).

NOTE: Grounds for challenge must show that the member cannot render a fair and impartial decision. The Superintendent, upon being informed of the circumstances of the challenge and the recommendation of the other members, may appoint a substitute for the challenged member. At this point in the proceedings the senior member should ensure that all persons scheduled to testify as witnesses are excluded from the proceedings except when actually testifying before the board. NOTE: Ensure that questioning of members for challenge purposes does not cross-contaminate other members with information that would also render them unable to be fair and impartial.

SM: Does either the recorder or respondent desire to make an opening statement?

REC: _____

RESP or CR: _____ (may be made now or before respondent's case)

SM: Is the recorder ready to present the government's case in this matter?

REC: The recorder is ready to proceed. The recorder presents the following documents for the board's consideration in this case.

GOVERNMENT'S CASE

Exhibit 1: Appointment of an Administrative Board

Exhibit 2: Respondent's Notice

Exhibit 3: **NOTE**: Recorders must present, at a minimum, the information which caused the convening authority to convene the board.

SM: Does respondent have any objections to the board's consideration of any of these exhibits?

RESP or CR: (We have no objections.) (We object to Exhibit __ because _____).

SM: (Your objection and my ruling will be noted for the record. Do either of the other members wish to challenge my ruling or discuss it further? (If either member indicates an interest in discussing the ruling, the board will close for deliberations on the issue. All three board members will deliberate out of hearing of other participants. At the conclusion of the deliberations, the board will re-open, and state for the record the ruling.)) Exhibits 1 through ___ are accepted and will be made a part of the record.

REC: The recorder intends to call the following witnesses:

REC: The first witness is (**full name**, **grade**, **and duty station**).

REC: Do you swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth?

WIT: I do.

REC: Would you state your name, rank, unit, and armed force?
(If civilian, state name and mailing address.)

WIT: _____

REC: Do you know the respondent in this case?

WIT: _____

NOTE: The recorder, counsel for the respondent, and the board members will now be afforded a full opportunity to question the witness.

SM: You may be excused.

REC: (After all witnesses have testified.) I have nothing further to present.

SM: (Respondent), you have already indicated an understanding of your rights at these proceedings. Are you and your counsel ready to proceed?

RESP: Yes, Sir/Ma'am.

RESPONDENT'S CASE

CR: Yes, Sir/Ma'am (if he or she has not already done so, counsel for the respondent may now make an opening statement).

NOTE: At this point in the proceedings, counsel for the respondent may present documentary or real evidence, stipulations, affidavits, etc., and may call witnesses to testify. The recorder may object to any documentary evidence. If an objection is registered, the senior member should rule and review with the other members, as was done during the recorder's case above. This is also the time for respondent to testify, either by way of sworn or unsworn testimony, or to make any other statement, either personally or through counsel. If counsel for the respondent calls witnesses to testify, the recorder should administer the required oaths. Counsel for the respondent should have the opportunity to conduct direct examination. Thereafter, the recorder and board members may question the witness. Should the respondent elect to provide information to the board, the board may wish to solicit personal information from the respondent. Before the respondent provides personal information in response to such a request, the respondent must be given a Privacy Act Statement. It is recommended that, if the Privacy Act Statement is provided to the respondent in writing, a copy signed by the respondent be included in the record. The Privacy Act Statement should be signed before the board convenes, if possible.

CR: We have nothing further to present.

NOTE: Rebuttal and surrebuttal witnesses may be called, or recalled, at this point. The recorder and counsel for the respondent will then be given an opportunity to make a closing argument.

REC: The recorder (has a) (waives) closing argument.

CR: Counsel for the respondent (has a) (waives) closing argument.

REC: The recorder (has a) (waives) rebuttal argument.

SM: Has the recorder anything further to offer?

REC: I (do) (do not).

SM: This board will close for deliberations.

NOTE: When the board deliberates, only the voting members will be present. Prior to deliberations, the board members should review the appropriate board findings worksheet. Upon completion of the deliberations, but before the findings are announced, the board must complete the appropriate findings worksheet.

SM: This board will come to order. This administrative board has concluded its deliberations and has completed the board findings sheet with all signatures affixed. (Read boards findings/recommendations for the record.)

_____
_____
_____
_____

SM: The board is adjourned (time and date).

_____
(Signature of senior member)

BOARD FINDINGS/RECOMMENDATIONS SHEET

Findings:

By a vote of ___ to ___ , the preponderance of evidence of Supports Does/Does Not Support Misconduct Occurred for Allegation:
(1)
(2)

Specific evidence relied upon to support findings for Allegation #1:
(1)
(2)
(3)
(4)
(5)

#2: (if necessary)
(1)
(2)
(3)
(4)
(5)

Recommendations (discharge or retention):

By a vote of ___ to___ the Facts and Circumstances Warrant/Do Not Warrant Discharge from the Naval Service for Allegation
(1)

By a vote of ___ to___ the Facts and Circumstances Warrant/Do Not Warrant Discharge from the Naval Service for Allegation

(2) (if necessary)

Recommendations (character of discharge)

By a vote of___to___ the Board recommends (HON/GEN/OTH) Discharge

Signatures:

_____	_____	_____
Senior Member of Board	**Member**	**Member**

Dissenting member comments and signature:
_____
_____
_____