

NENGI 430

**Nebraska
National Guard
Instruction**

**Performance Appraisal
Review and Appeals**

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Office of the Adjutant General

NEBRASKA NATIONAL GUARD PERFORMANCE APPRAISAL REVIEW AND APPEALS

Contained herein are the regulatory requirements of the Nebraska National Guard Performance Appraisal Review and Appeals Instruction. This instruction is consistent with Chief National Guard Bureau Instruction (CNGBI) 1400.25, Vol 431 and Department of Defense (DoD) Instruction 1400.25, Vol 431.

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CHAPTER 1

GENERAL GUIDANCE

1-1. PURPOSE. This instruction establishes the procedures and provides information on the Performance Appraisal Review and Appeals processes for performance appraisal disputes. Since the procedures contained in this instruction are applicable to both the Army and Air National Guard, the term Nebraska National Guard (NENG) will be used throughout this instruction. For the purpose of this instruction, the term employee or employees will refer to a Title 32 (T32) Excepted Service Dual Status Technician (DS), Title 5 (T5) Competitive Service employee, and Title 5 Excepted Service employee of the NENG. For the purpose of this instruction, the term appellant will refer to an employee who has filed an appeal of their performance appraisal.

1-2. POLICY. It is the policy of the NENG that employees, including management officials, may seek reconsideration of a performance appraisal or issues related to the performance appraisal process through the procedures contained herein. In instances where the appellant is a member of a Collective Bargaining Unit (CBU), the negotiated grievance procedures shall be followed, except where grievances are expressly excluded from its coverage. Employees may not challenge contents (for example, performance elements or standards) of a performance plan and decisions to grant or not grant a performance award or quality step increase (QSI) through the procedures contained herein.

1-3. SCOPE.

- a. This instruction applies to Nebraska Air and Army National Guard T32 DS Technicians, T5 Competitive Service and T5 Excepted Service employees. It will be used in filing performance appraisal appeals, establishing the board, and guiding board procedures.
- b. Where provisions of this instruction differ from the Collective Bargaining Agreement (CBA), the provisions of the CBA will apply. When provisions of this instruction differ from changes in law or regulation, the changes in law or regulation will apply.
- c. Where this instruction is silent, the flexibilities provided by regulation or guidance from higher authority is preserved.

1-4. RESPONSIBILITIES.

- a. The Adjutant General (TAG) of Nebraska is responsible for establishing an appeals process for employees to appeal a performance appraisal. TAG has established that the appeals board will meet on an ad hoc basis and that the Human Resources Officer (HRO) may act as TAG's designated representative. TAG or his/her designated representative may choose to provide for a supervisory chain of command review process in lieu of a board appeal. The TAG will:
 - (1) Issue a final decision as the final appellate authority regarding performance appraisal appeals, except where the employee is a member of a CBU whose grievance procedures do not expressly exclude performance ratings from its coverage. If the

negotiated grievance procedure does not expressly exclude from its coverage grievances challenging appraisal accuracy, the grievance process is the final appellate authority.

- b. The Human Resources Officer (HRO) is responsible to TAG for ensuring that the requirements of this instruction are accomplished. The HRO will:
 - (1) Develop, maintain, evaluate and revise this instruction as necessary;
 - (2) Upon receipt of appeal request, review the appeal with the performance appraisal;
 - (3) Provide notification of receipt of appeal to the appellant and the rating official;
 - (4) Appoint a State Review and Appeals Board on an ad hoc basis; and
 - (5) Provide guidance and assistance to appellants, supervisors, commanders, and board members concerning their responsibilities under this instruction.
- c. Managers and Supervisors will:
 - (1) Know and comply with the provisions of this instruction and keep employees informed of its provisions; and
 - (2) Recommend changes to this instruction, to the HRO.
- d. Employees are responsible for:
 - (1) Becoming familiar with the Performance Appraisal Review and Appeals procedures contained in this instruction and CNGBI 1400.25, Vol 431;
 - (2) Preparing memorandums and documentation when requesting an appeal;
 - (3) Ensuring that the established timeframes are followed, and that requests are timely submitted; and
 - (4) Presenting their case to the board either personally, or through their designated representative.

1-5 RECORDS STORAGE. Documentation will be maintained in the Human Resources Office for a period of 3 years and then transferred to the records staging area.

CHAPTER 2

CATEGORIES OF REVIEW

2-1. GENERAL INFORMATION. There are two methods of performance appraisal review; Supervisory Chain of Command Review, and a State Review and Appeals Board. The method of review will be determined by the lowest rating of record on the appraisal that is being appealed, and the decision of TAG or his/her designated representative. In either method of review, TAG will issue the final decision regarding the appeal.

2-2. SUPERVISORY CHAIN OF COMMAND REVIEW. For appeals of performance ratings other than for unacceptable performance, TAG or his/her designated representative may choose to provide for a supervisory chain of command review in lieu of a board review. For this category of review, a higher-level official in the supervisory chain (not previously involved in the appraisal being appealed) performs an impartial review and provides a recommendation to TAG.

2-3. STATE REVIEW AND APPEALS BOARD. The State Review and Appeals Board is an ad hoc board whose members are appointed by TAG or his/her designated representative to conduct fact finding and review each case objectively. The board process is similar to a hearing where both parties will have the opportunity to present written and oral evidence for the board to consider in reaching a recommendation. The Board's recommendation will be provided to TAG who will issue a final decision. Board procedures are addressed in Chapter 4.

CHAPTER 3

REQUESTING A PERFORMANCE APPRAISAL APPEAL

3-1. FILING AN APPEAL. An employee desiring to file an appeal of a performance appraisal will follow the procedures contained in CNGBI 1400.25, Vol 431 and this instruction.

- a. The timeframes for requesting an appeal are as follows;
 - (1) An appeal for other than “Unacceptable” (rating of 1) or below “Fully Successful” (rating of 3) performance, must be received by the HRO no later than thirty (30) calendar days after the employees receipt of the appraisal.
 - (2) An appeal based on “Unacceptable” or below “Fully Successful” performance, must be received by the HRO within the fifteen (15) calendar day period described in CNGBI 1400.25, Vol 431, Enclosure C, or within fifteen (15) calendar days of receipt of the appraisal.
- b. For the purpose of this instruction, receipt of the performance appraisal is considered to be the date that a rating official communicates it to the employee.
- c. If the employee is a member of a CBU with a negotiated grievance procedure covering the challenge of performance ratings, the employee must use the negotiated grievance procedures to challenge the rating of record.

3-2. APPEAL REQUEST. Requests for appeal should be submitted to the HRO-Employee Relations Specialist (ERS) or Labor Relations Specialist (LRS) in writing and addressed to the HRO.

- a. A request for appeal should contain the following information:
 - (1) Employee’s name;
 - (2) Organization;
 - (3) Appraisal being appealed;
 - (4) Why the appraisal should be changed;
 - (5) Performance level requested; and
 - (6) Date appraisal was received from rater
- b. When any of the necessary information is not available, the employee should submit what is available and state why the other information is not available.

- c. The appellant and the rating official may submit substantiating documentation for the board to consider either with the request for appeal or within fourteen (14) days after the appeal request is received by the HRO. If the documentation is not submitted electronically, sufficient copies must be provided to accommodate the board members, rating official, appellant, and the HRO. Documentation will be submitted to the HRO-ERS or LRS and addressed to the Board.
- d. The rating official will receive a copy of all documentation submitted by the appellant. The rating official will have a minimum of seven (7) days after receipt to submit a response and to provide substantiating documentation for the Board to consider. Documentation will be submitted to the HRO-ERS or LRS and addressed to the Board.
- e. A list of witnesses will be provided to the HRO-ERS or LRS as soon as they are known or within seven (7) days of the pre-board conference. The HRO-ERS or LRS will notify witnesses of the board date to ensure they are available.

3-3 REPRESENTATIVE OR ADVISOR NOTIFICATION. The HRO-ERS or LRS will be notified, in writing, of the appointed representative of the appellant and the representative or advisor for the rating official. This notification will be received prior to the pre-board conference. The representatives will be the HRO point of contact for notification letters, decision letters, etc., and will be responsible for providing copies of correspondence to the HRO for further distribution to the appellant, rating official, or union, as necessary.

CHAPTER 4

BOARD PROCEDURES

4-1. BOARD COMPOSITION. Board members will be appointed in writing by TAG or his/her designated representative on an ad hoc basis. The board will consist of three (3) members who will provide an impartial review on performance appraisal appeals.

- a. The following will be considered when appointing members to the board;
 - (1) Board members will not be in the direct chain of command of the appellant;
 - (2) Board members will not be in a lower graded (T32 or T5) position than the appellant, except as described in 4-1 a. (4). below;
 - (3) The Chairman of the Board will be the highest graded member of the board and will ensure the board maintains the highest professionalism and carries out the responsibilities as outlined in sections 4-4, 4-5, and 4-6.
 - (4) Where the appellant is a member of a CBU, the board will consist of one (1) union representative nominated by the Union President and two (2) representatives of the agency. The union representative may serve as an exception to the rank and grade rules. If the Union President chooses not to appoint a member to the board, the board will consist of three (3) agency representatives.
- b. Upon appointment of the board, board members will become familiar with CNGBI 1400.25, Vol 431 and this instruction. Prior to the pre-board conference, copies of the request for appeal, performance standards, progress review, and appraisal will be provided to each board member along with any additional documentation submitted by the appellant or the rating official or their representatives.
- c. Board Members must be present at all times during the proceedings and must participate in proposing a recommendation.

4-2. BOARD DATE. The HRO-ERS or LRS will coordinate the date, time and location of the appeals board, as directed by TAG or his/her designated representative. Once established, notification of the board date will be provided to the board members, witnesses, appellant and their representative (if any), and rating official and/or advisor by the HRO.

4-3. PRE-BOARD CONFERENCE. Prior to the board, a representative of the HRO will coordinate the pre-board conference. The pre-board conference will review the conduct, responsibilities and procedures of the board. At the conference, the representatives of the agency and of the appellant will exchange witness lists (if applicable), exhibit list and documents, if not previously available and submitted. Once the pre-board conference has been conducted, the record will be closed and no further evidence will be allowed except by mutual consent of the Board Members. The pre-board conference may be held immediately prior to the board or up to seven (7) days in advance of the board.

- a. The lists will be in letter format. Sufficient copies of lists and documents will be provided to the HRO-ERS or LRS to accommodate the following:
 - (1) Chairman of the Board;
 - (2) Board Members;
 - (3) The appellant and their representative (if applicable);
 - (4) The rating official and advisor (if applicable); and
 - (5) The HRO.

4-4. CONDUCTING THE BOARD. During the proceedings, the board may admit oral/or written evidence from the appellant and the appellant's rating official. The appellant and the appellant's representative (if desired by the appellant), rating official, and the representative of TAG will submit any additional information they deem pertinent. Such information may be presented orally, by presentation of witnesses, and/or in writing. The conduct of the board will follow the process outlined below;

- a. The Chairman of the Board will give introductory remarks. (EXAMPLE: This board is hereby convened to review the performance appraisal appeal of (Name, Duty Title, and Organization)).
- b. Notes may be taken by board members for further review.
- c. The HRO-ERS or LRS will document the procedures and provide board minutes to the appellant or board members if requested. A verbatim transcript will not be provided.
- d. Witnesses will be notified by HRO of the time and place they should be available. No other witnesses shall be present for another witness testimony.
- e. The appellant presents their opening remarks first with the rating official following.
- f. After opening remarks, the appellant may begin their oral presentation followed by the rating official. Each party will be given an opportunity to provide an oral response to the presentation of the other party. The Board Chairman may limit oral presentations that do not add context to the written record. For example, the Chairman may limit oral presentations that read verbatim from the written record or evidence that has been previously provided to the board members.
- g. After oral presentations by the appellant and the agency, the appellant will begin with questioning of their witness, followed with questioning of the witness by the agency, if appropriate or desired. The appellant may again question the witness, if appropriate or desired, followed with questions by the agency, if appropriate or desired.

- h. Both oral and written information may be submitted to reach a decision as long as the appellant, the appellant's representative (if any) and the representative of TAG are given the opportunity to hear, and reply to the information submitted by the other parties. If any of these individuals are absent during the oral presentation, the absentee(s) must be furnished in writing, any evidence admitted in their absence.
- i. During the proceedings, board members may seek information which will assist in reaching a conclusion and recommendation by asking questions or requesting documentation from either party.
- j. Upon completion of the presentations, closing remarks will be given by the appellant and the agency, in that order.
- k. The Chairman will then adjourn the board and explain to the appellant that the Boards' recommendations will be forwarded to TAG, with TAG making the final decision. The appellant will receive a copy of the final decision.

4-5. BOARD CONCLUSION. The burden of proof in a Chapter 43 case (Performance Based Action) rests with the appellant. In discharging the duties of the Board, the following factors will be considered in arriving at the conclusions and recommendations:

- a. The board members must serve as impartial fact finders and review each case objectively.
- b. The board must give consideration to the merits of each case and secure all information.
- c. The board may not consider information not directly related to the matter being considered.
- d. When reviewing performance appraisals, the board will ONLY be concerned with the performance appeal; it will not review the personnel action(s) taken as a result of the appraisal.
- e. The board may not use any written information to render a recommendation until the appellant, the appellant's representative (if any), and the management representative and/or advisor have had an opportunity to examine and reply to the evidence.
- f. The board should consider the following when determining the conclusions and recommendations;
 - (1) What is the basis of the appeal?
 - (2) Did the rating official establish performance standards for the appellant?
 - (3) Has the appellant been given sufficient time to perform at a fully acceptable level in the position for which the rating was received?

- (4) As a result, was the performance appraisal reasonable and appropriate under the circumstances?
- (5) Did the rating official provide the appellant the necessary feedback for the appellant to have sufficient information to improve their performance?
- g. It is appropriate for the board to recommend to the appellant or the appraising party, as appropriate, any recommendations that may prove beneficial to both parties.

4-6. BOARD RECOMMENDATION. The board will, by majority, vote, or recommend to TAG to either change the appraisal as requested by the appellant or sustain the appraisal without change. The recommendation will be submitted in memorandum format to TAG within fifteen (15) calendar days from adjournment date. A copy of the recommendation by the board will be furnished to the HRO.

4-7. FINAL DECISION. Notification of the final decision of TAG will be made by the HRO, in writing, to the appellant and their representative (if any), and the rating official. TAG is the final appellate authority on the accuracy of performance appraisals unless the appellant is a member of a CBU with a negotiated grievance procedure that does not exclude performance ratings or ratings of record from its coverage.

USERS OF THIS PUBLICATION ARE INVITED TO SEND COMMENTS AND SUGGESTED IMPROVEMENTS ON DA FORM 2028 (RECOMMENDED CHANGES TO PUBLICATIONS AND BLANK FORMS) TO TAG-HRO, 2433 NW 24th Street, LINCOLN, NE 68524.



DARYL L. BOHAC
Major General
The Adjutant General

NICOLE D. NUSS, Colonel, NEANG
Human Resources Officer

DISTRIBUTION: "Special"
(1 ea. Employee Supv)
(1 ea. Mil Dept. Activity/Organization)

APPENDIX A
PART I. ACRONYMS

CBA	Collective Bargaining Agreement
CBU	Collective Bargaining Unit
CNGBI	Chief National Guard Bureau Instruction
DoD	Department of Defense
HRO	Human Resources Officer/Human Resources Office
HRO ERS	Human Resources Office Employee Relations Specialist
HRO LRS	Human Resources Office Labor Relations Specialist
TAG	The Adjutant General
T5	Title 5 United States Code (Competitive or Excepted Service)
T32	Title 32 United States Code Dual Status Technicians

Appendix A
PART II. DEFINITIONS

AD HOC: Defined as “created or done for a particular purpose as necessary” or “when necessary or needed”.

APPRAISAL: The process by which employees are informed of how their performance compares against established performance standards, resulting in final performance appraisals at the end of the appraisal period.

COLLECTIVE BARGAINING AGREEMENT: An agreement entered into as a result of collective bargaining. Typically an agreement between the exclusive representative of the bargaining unit and the head of the agency.

COLLECTIVE BARGAINING UNIT: A group of employees whose community of interest are represented by an exclusive representative (union) and who are not excluded under the certificate of representation for such representative.

RATING OFFICIAL: A representative of management, usually the immediate supervisor, who is approved by the agency to evaluate and assess employee performance.

UNACCEPTABLE PERFORMANCE: Failure to meet established performance standards in one or more critical elements.

For more definitions please refer to CNGBI 1400.25, Vol 431 and the CBA.