

BOARD OF OFFICERS – NYGD 1325.1

PREFACE

FOR THE COMMANDER



OFFICIAL:

GEORGE J. DE SIMONE
COL NYG
Chief of Staff



STEPHEN A. BUCARIA
Brigadier General, New York Guard
Commander

1. Purpose. This publication sets forth the procedures for conduct of the NYG Board of Officers.

2. Application.

a. Format and procedures established in this publication apply to all members of the New York Guard.

b. This publication is a mandatory directive.

3. Scope. This publication describes the procedure for conducting a Board of Officers for misconduct in the New York Guard.

4. Basis. This directive is in compliance with New York State Military Law Article VII, Sections 130 through 131.12 and Division of Military and Naval Affairs Regulation 27-2. Part of this directive has been tailored from U.S. Army Regulations: AR 135-178 Enlisted Administrative Separations (3 Dec 2001) and AR 135-175 Separation of Officers (28 Feb 1987).

BOARD OF OFFICERS – NYGD 1325.1

TABLE OF CONTENTS

CHAPTER	PAGE
I. INTRODUCTION.....	I-1
II. PARTIES TO THE PROCEEDINGS & RESPONSIBILITIES.....	II-1
1. Unit Commander.....	II-1
2. Convening/Separating Authority.....	II-1
3. Respondent.....	II-1
4. Recorder.....	II-1
5. Respondent’s Counsel.....	II-1
6. Board of Officers.....	II-1
7. Legal Advisor to the Board of Officers.....	II-2
8. Reporter.....	II-2
9. Judge Advocates.....	II-2
10. Commanding General, New York Guard.....	II-2
III. EVIDENCE AND PROCEDURES.....	III-1
1. Rules of Evidence and Proof of Facts.....	III-1
2. Board Procedure.....	III-1
3. Post Hearing Review.....	III-3
4. Appeal of Determination of the Convening Authority.....	III-4
Appendix A - Appointment of Board of Officers	A-1
Appendix B - Referral of Respondent	B-1
Appendix C - Procedure for a Formal Board of Officers.....	C-1
TAB 1 When Respondent is Without Counsel.....	C-9
TAB 2 When Respondent uses an Interpreter	C-10
TAB 3 Documents or Real Evidence	C-11
TAB 4 Written Witness Statement	C-12
TAB 5 Stipulation of Expected Testimony.....	C-13
Appendix D - Board of Officers Findings and Recommendations	D-1

BOARD OF OFFICERS

CHAPTER I

INTRODUCTION

- 1.** A Board of Officers is a civil/administrative proceeding which investigates charges of misconduct against a member of the New York Guard or other matters. While a Board of Officers may appear similar to a courts-martial in procedure, it is not a criminal trial. A Board makes findings of fact and recommendations to the Convening Authority.
- 2.** A Board may only be convened by The Adjutant General of the State of New York (TAG) or the Commanding General of the New York Guard.
- 3.** Upon the presentment of a Notification of Separation Proceeding due to misconduct or a Notice of Investigation, the subject member is suspended from any positive actions, to include promotions, attending drills, serving upon State Active Duty and wearing the uniform, except that Respondents may wear their uniform at a hearing of the Board of Officers.

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CHAPTER II

RESPONSIBILITIES AND PROCEDURES

1. Unit Commander. The Commander of the unit in which the member is assigned initiates the request for separation and forwards the notification to the Respondent and awaits the Respondent's waiver or request for a Board of Officers and to forward them to the Convening or Separating Authority. A Notification Memorandum for Referral of a Respondent to a Board is attached as Appendix B.

2. Convening/Separating Authority. The Commanding Officer of a Major Subordinate Command (O6 level) may convene a Board of Officers and is known as the Convening Authority. While TAG or the Commanding General of the New York Guard may convene a Board of Officers, they generally serve as an appellate authority. The Convening or Separation Authority appoints the members to a Board of Officers. A copy of the Appointment Order is attached as Appendix A.

3. Respondent. Respondent is the person accused of misconduct. The Respondent may choose to waive the formal Board of Officers hearing and agree to a discharge characterized as either Honorable or a General Under Honorable Conditions. If the Respondent is a commissioned officer, warrant officer or an enlisted member with six (6) years of combined service in the active or reserve components of the U.S. Armed Forces, U.S. Coast Guard or the New York Guard, he or she is entitled to a Board hearing. In the event the Respondent is not a commissioned officer, warrant officer or an enlisted member with six (6) years of combined service, the Respondent may submit a written response to the Board outlining his or her defenses and matters in extenuation and mitigation.

4. Recorder. The Recorder is usually an officer of the Judge Advocate General Corps assigned to present the case against the Respondent.

5. Respondent's Counsel. The Respondent's Counsel represents the Respondent at the Board. The Respondent's Counsel is a detailed officer of the Judge Advocate General Corps who is provided at no expense to the Respondent. The Respondent may also privately retain his or her own civilian counsel at no expense to the state.

6. Board of Officers. The Board of Officers consists of at least three officers comprised of a President who is the senior member and shall be in the grade of Major or higher and at least two other Board Members who are officers.

a. Where the Respondent is an enlisted member, the Respondent may request within ten (10) days of the scheduled hearing that at least one-third of the members be enlisted members. In the event enlisted members are requested, such enlisted members shall be non-commissioned officers in the minimum grade of E-7.

b. All members of the Board shall be senior in grade to the Respondent.

c. At least six to ten members should be assigned to a Board to allow for challenges and absences. There is only one peremptory challenge permitted.

d. All Board Members get one vote.

e. A minimum of two-thirds is required for a finding or recommendation.

f. The Board will hear the case and make findings of fact as to whether misconduct has been proved by a preponderance of the credible evidence.

g. After making findings, the Board then makes recommendations whether the member shall be retained, separated from the New York Guard, or placed on the Reserve List.

h. If the Board determines that separation is warranted, then the Board will recommend the characterization of such separation as either an Honorable Discharge, a General Discharge Under Honorable Conditions or an Other Than Honorable Discharge, except that commissioned officers and warrant officers may not be issued an Other Than Honorable Discharge.

7. Legal Advisor to the Board of Officers. The Legal Advisor is a senior field grade officer of the Judge Advocate General Corps who acts in a judicial capacity and as a legal advisor to the Board. The Legal Advisor makes all decisions on legal questions presented to the Board and rules on admissibility of evidence and testimony by sustaining or overruling objections. The following JAG officers may not serve as a Legal Advisor to the Board of Officers: The Recorder, the Respondent's Counsel or the Staff Judge Advocate of the Convening Authority.

8. Reporter. The Reporter acts as a court reporter. A reporter maintains a record of the proceedings. A tape recording of the proceeding may be used to assist the reporter in preparing the summarized record of the Board. A verbatim transcript is not required.

9. Judge Advocates. Officers of the Judge Advocate General Corps will be assigned by the Convening Authority with the consent of the Commander of the Civil Affairs Brigade to perform the following duties:

a. Legal Advisor to the Board of Officers.

b. Recorder who will present the case against the Respondent charged with misconduct.

c. Detailed Respondent's Counsel to represent the Respondent.

d. The Staff Judge Advocate or an Assistant Staff Judge Advocate to the Convening Authority will advise the Convening Authority whether the Board findings and recommendations are legally sufficient after a review of the evidence and proceedings of the Board of Officers.

Note: It is recommended that an Assistant Legal Advisor, an Assistant Recorder and an

Assistant Respondent's Counsel be also appointed to ensure adequate coverage during the proceedings. The Assistant Recorders and Assistant Respondent's Counsel may participate in the proceedings as co-counsel. However, the Assistant Legal Advisor may not participate in the proceedings unless the designated primary Legal Advisor is unavailable.

10. Commanding General, New York Guard. The Commanding General of the New York Guard shall serve as the Appellate Authority who will review any appeals presented of the determinations made by the Convening Authority. The Staff Judge Advocate or the Assistant Staff Judge Advocate to the Commanding General of the New York Guard, will review such appeals and prepare a written report on the legal sufficiency of the determinations of the Convening Authority, the merits of the appeal and shall present same to the Commander of the New York Guard for final determination. The final determination by the Commanding General of the New York Guard shall be made in writing and shall be served upon the Respondent's Counsel and the Convening Authority.

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BOARD OF OFFICERS**CHAPTER III****EVIDENCE AND PROCEEDINGS****1. Rules of Evidence and Proof of Facts**

a. Proceedings under this directive are administrative and not judicial. Therefore, a Board of Officers is not bound by the rules of evidence for trials by courts-martial or for court proceedings generally. Accordingly, anything that in the minds of a reasonable person is relevant to an issue may be accepted as evidence. Copies of medical records, counseling statements, police reports, and other governmental or business records may be considered regardless of whether the preparer of the record or the custodian of the record is available to give a statement or testify in person. All evidence will be given such weight as circumstances warrant.

b. The burden of proof is upon the Recorder who must prove each and every element of the charges against the Respondent by fair preponderance of the credible evidence.

2. Board Procedure – A Procedure Script for a Formal Board of Officers is enclosed as Appendix C.

a. Call to order by the President of Board.

b. Reporter is sworn by the Recorder.

c. President swears in the Recorder.

d. Recorder presents order of appointment and accounts for the members of the Board who are present or absent.

e. The Legal Advisor may be challenged for cause by counsel. If acceptable, then the Legal Advisor is sworn. The Board is *voir dired* by counsel. Only one preemptory challenge permitted. Once the Board is acceptable, the Board is sworn in by the Recorder.

f. Opening Statements by counsel.

(1) Counsel for both sides are allowed to make an opening statement.

(2) The Recorder must make an opening statement.

(3) The Respondent's Counsel may waive an opening statement or reserve it for the opening of the Respondent's case, if any evidence is to be presented.

g. Recorder presents the State’s case:

(1) The Recorder presents evidence and witnesses.

(2) The Respondent’s Counsel is entitled to challenge the evidence and cross examine the witnesses.

h. Respondent’s Counsel presents Respondent’s case.

(1) The Respondent’s Counsel is entitled to present evidence and produce witnesses.

(2) The Recorder can challenge the evidence and cross-examine the witnesses.

(3) The Respondent is not required to testify during the findings phase of the proceedings. However, a Respondent may make an unsworn statement in extenuation and mitigation phase of the proceedings.

i. The Recorder may present rebuttal testimony and evidence.

j. Closing argument.

(1) The Recorder makes a closing argument to the Board.

(2) The Respondent makes a closing argument to the Board.

(3) The Recorder is permitted to make a rebuttal closing argument to the Board.

k. The Board closes to deliberate.

(1) The President closes the Board.

(2) All parties leave the presence of the Board.

(3) The Board deliberates in secret.

l. Decision by Board of Officers.

(1) The Board reaches a decision by a vote of at least a two-thirds majority.

(2) The Board must decide and make findings of fact of whether misconduct has or has not been proven by a preponderance of the credible evidence.

(3) If the Board finds no misconduct then the Respondent shall be recommended to be retained.

(4) If the Board finds that misconduct has been proven by a preponderance of the credible evidence then, in that event, the Board shall make a recommendation to either:

(a) Retain the Respondent (with impact on promotion or grade), or

(b) That the Respondent be separated from the New York Guard with a discharge indicating any one of the following characterizations of service:

1 Honorable Discharge; or

2 General Discharge Under Honorable Conditions; or

3 Other Than Honorable Discharge (except that commissioned officers and warrant officers may not be issued an Other Than Honorable Discharge).

(c) That the Respondent be placed on the Reserve List.

(5) A Board of Officers Findings and Recommendations Worksheet is enclosed as Appendix D.

(6) The Board is reopened and the results are announced by the President of the Board in the presence of the Legal Advisor, Respondent, Respondent's Counsel and the Recorder.

m. Reporter creates a summarized record of the proceedings and submits it to the Recorder who forwards it along with the findings and recommendations and exhibits to the Convening Authority who is the Commander who convened the Board.

3. Post Hearing Review

a. Upon receipt of the findings and recommendations, together with the summarized record of the proceedings and exhibits, the Convening Authority refers them to the Staff Judge Advocate to the Convening Authority who reviews them for legal sufficiency and reports the results of such review in writing to the Convening Authority.

b. The Convening Authority may accept the findings of the Board, but may accept in full, accept in part or reject in part the recommendations of the Board. The Convening Authority may not impose a determination more severe than the recommendation of the Board.

c. The Respondent or his counsel may appeal in writing the findings within ten (10) days of the Board's announcement of their findings and recommendations to the Convening Authority that the findings are against the preponderance of the credible evidence and/or that the recommendation of the Board is too severe.

d. Once the Convening Authority acts on the recommendations of the Board and any appeal, a copy of that determination is presented to the respondent.

4. Appeal of Determination of the Convening Authority

a. The Respondent may appeal the determination of the Convening Authority to the Commander of the New York Guard within ten (10) days of receipt of the determination by the Convening Authority.

b. The Commander of the New York Guard as the Appellate Authority may accept the determination of the Convening Authority or may reject it in whole or in part. The Commander of the New York Guard may render a more favorable determination, but may not impose a more severe determination.

APPENDIX A
Appointment of Board of Officers

(Convening Authority Letterhead)

OFFICE SYMBOL (1325)

DATE

MEMORANDUM FOR: President and Members of Board of Officers, Legal Advisor
and Recorders

SUBJECT: Appointment of Board of Officers

1. A Board of Officers is hereby appointed pursuant to New York Guard Directive 1325 to investigate the circumstances of misconduct by members of the New York Guard.

2. The following members are appointed to the Board:

MAJ Robert A. Jones, HHC, 88th Bde, NYG, New York, NY, NYG ID# Member (President)

CPT Paul R. Wisniewski, HHC, 9th Bn, NYG, New York, NY, NYG ID# Member

CPT David B. Braun, 15th Co, 9th Bn, NYG, New York, NY, NYG ID# Member

CPT John C. Solomon, 8th Co, 9th Bn, NYG, Bronx, NY, NYG ID# Alternate Member

MSG Jason Smith, 47th Co, 104th Bn, NYG, Jamaica, NY, NYG ID# Alternate Member

SFC Daryl Carter, 47th Co, 104th Bn, NYG, Brooklyn, NY, NYG ID# Alternate Member

1LT Sally T. Jefferson, 51st Co, 104th Bn, Staten Is, NY, NYG ID# Alternate Member

3. The following members are appointed as non-voting members of the Board:

COL Joseph Judge, JA, 7th LSD, New York, NY, NYG ID# Legal Advisor

LTC John Jurist, JA, 7th LSD, New York, NY, NYG ID# Assistant Legal Advisor

MAJ John Counsel, JA, 5th LSD, Yonkers, NY, NYG ID# Recorder

CPT Larry Lawyer, JA, 5th LSD, Yonkers, NY, NYG ID# Assistant Recorder

SGT Mary Jones, 7th LSD, New York, NY, NYG ID# Reporter

4. The Board will meet at the call of the President. It will use the procedures set forth in New York Guard Directive 1325.1 applicable to formal Boards with Respondents. Respondents will be referred to the Board by separate correspondence.

5. Reports of the proceedings will be summarized. However, the findings and recommendations will utilize the findings and recommendations form which shall be and submitted to this headquarters; ATTN: S-1. Reports will be submitted within three (3) working days of the conclusion of each case. Personnel officers will furnish necessary administrative support for the Board. Legal advice to the Board will be obtained from the Legal Advisor or Assistant Legal Advisor appointed to this order.

6. The Board will serve until further notice.

(Authority line)

(Signature block)

CF: *(Provide copy to Board personnel)*

Sample memorandum for appointment of a standing Board of Officers using format procedures

APPENDIX B
(Appropriate Letterhead)

OFFICE SYMBOL (1325)

DATE

MEMORANDUM FOR: *(President of standing board)*

SUBJECT: Referral of Respondent

1. Reference memorandum, this headquarters, dated *(day, month, year)*, subject: Appointment of Board of Officers.

2. *(Enter rank, name, NYG ID# and unit)* is hereby designated a respondent before the Board appointed by the referenced memorandum. The Board will make findings whether *(rank, name, NYG ID# and unit)* committed misconduct and recommend whether the Respondent shall be retained in the New York Guard or separated and the characterization of such separation.

3. You shall proceed to a formal Board of Officers hearing on *(date)* and report your findings and recommendations to me immediately upon the close of the Board.

4. *(Enter rank, name, branch and unit)* is designated counsel for *(enter name of respondent)*.

For the Commander, _____

Enc.

(Signature block)

CF: *(Provide copy to all board personnel, counsel and respondent)*

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**APPENDIX C
PROCEDURE FOR A FORMAL BOARD OF OFFICERS**

Legend

PRES: President of The Board of Officers - Senior Member of Board
LA: Legal Advisor - Acts as a Judge
RCDR: Recorder - Acts as Prosecutor
RPTR: Reporter - Keeps records of the proceedings
RESP: Respondent - The Accused
RESP COUNSEL: Respondent's counsel

SCRIPT

Call to Order

PRES: This hearing will come to order. This Board of Officers has been called to determine whether the respondent: _____ has committed misconduct and to recommend whether he/she should be retained or discharged from the service and the characterization of such discharge recommendation, if any.

Reporter Sworn

RCDR: The **REPORTER** will be sworn.

RCDR: Do you swear (or affirm) that you will faithfully perform the duties of reporter to this Board, (so help you God)?

REPORTER: I do.

Recorder Sworn

LA: The **RECORDER** will be sworn.

LA: Do you swear that you will faithfully perform the duties of recorder to this Board (so help you God)?

RCDR: I do.

Recorder Presents Orders

RCDR: The Board is appointed by Memorandum of Appointment, Headquarters, _____, dated _____.

Have all members of the Board read the memorandum of appointment?

(If not, the memorandum of appointment is read aloud by RCDR or silently by any member who has not read it.)

When RESP has been designated by a separate memorandum of appointment, the same procedure applies to that memorandum of appointment.

RCDR: May the memorandum of appointment be attached to these proceedings as Enclosure 1?

LA: The memorandum of appointment will be attached as Enclosure ____.

RCDR: The following members of the Board are present:

The following members of the Board are absent:

RCDR should account for all personnel of the Board, including RESP and COUNSEL, if any, as present or absent at each session. RCDR should state the reason for any absence, if known, and whether the absence was authorized by the appointing authority.

Voir Dire of Legal Advisor

LA: Either of you may challenge me as the Legal Advisor. Do counsel desire to question the Legal Advisor as to my qualifications or impartiality in this case?

RCDR: Yes (No).

RESP COUNSEL: Yes (No).

LA: Is there a challenge to the Legal Advisor?

RCDR: Yes (No).

RESP COUNSEL: Yes (No).

If so, reasons must be placed on the record. The LA rules on any objections. The LA is sworn by the RCDR if there is no objection to the Legal Advisor.

RCDR: Do you swear that you will faithfully perform the duties of Legal Advisor in the case now in hearing?

LA: I do.

Voir Dire of Members

LA: Either of you may challenge any member of the Board for lack of impartiality. The Recorder and Respondent’s Counsel may question the members of the Board if they desire at this time. Do you desire to make a challenge?

RESP COUNSEL: No. (The respondent challenges _____.)

If RESP challenges for lack of impartiality, the LA determines the challenge. If sustaining a challenge results in less than a quorum (at least three members), the Board should recess until additional members are added.

Recorder Swears in the Board

RCDR: The Board will be sworn. All rise.

All persons in the room stand while RCDR administers the oath. Each voting member raises his or her right hand as RCDR calls his or her name in administering the following oath:

RCDR: Do you, Colonel _____, Lieutenant Colonel _____, Major _____, swear (affirm) that you will faithfully perform your duties as a member of this Board; that you will impartially examine and inquire into the matter now before you according to the evidence, your conscience, and the laws and regulations provided; that you will make such findings of fact as are supported by the evidence of record; that, in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such

recommendations as are appropriate and warranted by your findings, according to the best of your understanding of the rules, regulations, policies, and customs of the service, guided by your concept of justice, both to the Government and to individuals concerned, (so help you God)?

MEMBERS: I do.

LA may now give general advice concerning applicable rules for the hearing.

Recorder Presents Memorandum of Notification to Respondent

RCDR: The respondent was notified of this hearing on _____, 20___. I request that the memorandum of notification be attached as Enclosure ____.

RCDR presents a copy of the memorandum of notification with a certification that the original was delivered to RESP and requests that it be attached to the proceedings as Enclosure ____.

LA: The copy of the memorandum of notification will be attached as requested as Enclosure ____.

Presentation of Evidence by the Recorder

RCDR may make an opening statement to point out what the expected presentation of evidence will be.

RESP COUNSEL may make a statement now or may reserve or waive opening statement at this time.

RCDR then calls witnesses and presents other evidence relevant to the subject of the proceedings. RCDR should logically present the facts to help the Board understand what happened. Except as otherwise directed by the PRES, RCDR may determine the order of presentation of facts. The following examples are intended to serve as a guide to the manner of presentation, but not to the sequence. The RPTR maintains a record of each witness testifying and the documents received in evidence.

Direct Examination

RCDR conducts direct examination of each witness called by RCDR or at the request of PRES or members. RESP or COUNSEL may then cross-examine the witness. PRES and members of the BOARD may then question the witness, but PRES may control or limit questions by BOARD members.

RCDR: The BOARD calls _____ as a witness.

A military witness approaches and salutes PRES, then raises his or her right hand while RCDR administers the oath. A civilian witness does the same but without saluting.

RCDR: 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, (so help you God)?

If the witness desires to affirm rather than swear, the words “so help you God” will be omitted.

WITNESS: I do.

The witness then takes the witness chair. RCDR asks every witness the following question no matter who called the witness.

RCDR: What is your full name (grade, branch of service, unit of assignment, organization and station) (and address)?

Whenever it appears appropriate and advisable to do so, the LA should explain the rights of a witness under NY Mil Law §130.15 (compulsory self-incrimination prohibited) or the Fifth Amendment to the Constitution.

If the report of proceedings will be filed in a system of records under the witness’s name, the BOARD must advise that witness in accordance with the Privacy Act. Normally, this requirement applies only to RESP.

RCDR then asks questions to develop the matter under consideration.

RCDR: The recorder has no further questions.

*RESP COUNSEL may **CROSS EXAMINE** the witness.*

*RCDR may then conduct a **RE-DIRECT EXAMINATION**.*

*RESP COUNSEL may **RE-CROSS EXAMINE** the witness.*

Board Questions

LA: Does the Board have any questions?

If RCDR and RESP COUNSEL wish to ask further questions after the Board has examined the witness, they should seek permission from the LA. LA should normally grant such requests unless the questions are repetitive or go beyond the scope of questions asked by the Board.

LA: Does the Recorder or Respondent desire to ask any additional questions in reference to the Board's questions?

Witness Excused

When all questioning has ended, LA announces:

LA: The witness is excused.

LA may advise the witness as follows:

LA: Do not discuss your testimony in this case with anyone other than the recorder, the respondent, or his or her counsel. If anyone else attempts to talk with you about your testimony, you should tell the person who originally called you as a witness.

The proceedings should indicate that the witness (except RESP) withdrew from the room. Unless expressly excused from further attendance during the hearing, all witnesses remain subject to recall until the proceedings have ended. When a witness is recalled, the RCDR reminds such witness, after he or she has taken the witness stand:

RCDR: You are still under oath.

The procedure in the case of a witness called by the Board is the same as outlined above for a witness called by RCDR..

RCDR: I have nothing further to offer relating to the matter under consideration.

Presentation of Respondent's Evidence

RESP COUNSEL: The respondent has (an) (no) opening statement.

An opening statement may be given if it was waived at the beginning of the Government's case. RESP presents his or her stipulations, witnesses, and other evidence in the same manner as did RCDR. RCDR administers oath to all witnesses and asks the first question to identify the witness.

Should the RESP be called to the stand as a witness, the RCDR will administer the oath and ask the following preliminary questions, after which the procedure is the same as for other witnesses:

RCDR: What is your name, (grade, branch of service, organization and station) (address, position and place of employment)?

RESP: _____.

RCDR: Are you the **RESPONDENT** in this case?

RESP: Yes.

The Board may advise RESP of his or her rights under NY Mil Law §130.31 (compulsory self-incrimination prohibited) or the Fifth Amendment of the Constitution.

If the report of proceedings will be filed in a system of records under RESP's name, the Board must advise RESP in accordance with the Privacy Act.

When RESP has concluded his or her case, RESP announces:

RESP COUNSEL: The respondent rests.

Rebuttal

The RCDR may attempt to rebut any testimony or evidence presented by the RESP by recalling previously called witnesses or by calling another witness or by presenting other evidence.

RCDR: The recorder has no further evidence to offer in this hearing.

Board Requests

LA: Does the Board wish to have any witnesses called or recalled?

PRES: It does (not).

Closing Arguments and Deliberations

LA: You may proceed with closing arguments.

RCDR: The recorder (has no) (will make a) closing argument.

LA: Proceed.

RESP COUNSEL: The respondent counsel (has no) (will make a) closing argument.

LA: Proceed.

RCDR may make the original closing argument and, if any argument is made on behalf of RESP, RCDR may make rebuttal closing argument. Arguments are not required. If no argument is made, RESP or RCDR may say:

RESP COUNSEL/RCDR: The (respondent) (recorder) submits the case without argument.

Adjourning the Board to Deliberate

PRES: The hearing is adjourned.

Adjourning the hearing does not end the duties of the Board. It must arrive at findings based on the evidence and make recommendations supported by those findings. See chapter 3, section II. Findings and recommendations need not be announced to RESP, but in certain proceedings, such as elimination actions, they customarily are. RCDR is responsible for compiling the report or proceedings and submitting properly authenticated copies thereof to the appointing authority. See chapter 3, section III.

Re-Opening the Board to Report Findings and Recommendations

The PRES shall ask the RCDR to reassemble the parties. Once assembled:

PRES: The Board is opened to report the Findings and Recommendations.

This Board finds by (unanimous) (majority) vote
 _____ . *(Read the Findings and Recommendations form.)*

This Board is closed.

- TAB 1 When Respondent is Without Counsel.
- TAB 2 When Respondent uses an Interpreter
- TAB 3 Documents or Real Evidence
- TAB 4 Written Witness Statement
- TAB 5 Stipulation of Expected Testimony

TAB1 to APPENDIX C

When Respondent is Without Counsel.

LA: _____, you may, if you desire, obtain civilian counsel at no expense to the Government for this hearing. If you do not obtain civilian counsel, you are entitled to be represented by a military counsel designated by the appointing authority. Do you have counsel?

RESP: No (Yes).

If RESP has counsel, the RCDR should identify that counsel at this point for the record. If RESP does not have counsel, the PRES should ask this question:

PRES: Do you desire to have military counsel?

RESP: Yes (No).

If RESP answers “yes”, the PRES should adjourn the hearing and ask the appointing authority to appoint counsel for RESP. If counsel is supplied, the RCDR should identify that counsel for the record when the Board reconvenes.

A reporter and an interpreter, if used, should be sworn.

TAB2 to APPENDIX C

Interpreter

RCDR: The interpreter will be sworn.

RCDR: Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now in hearing (so help you God)?

INTERPRETER: I do.

TAB 3 to APPENDIX C

Documents or Real Evidence

RCDR: I request that this (documentary or real evidence) be marked as Exhibit _____ and received in evidence.

A foundation for the introduction of such evidence normally is established by a certificate or by testimony of a witness indicating its authenticity. LA (PRES) determines the adequacy of this foundation. If LA (PRES) has a reasonable basis to believe the evidence is what it purports to be, he or she may waive formal proof of authenticity.

TAB4 to APPENDIX C

Written Witness Statement

RCDR: I request that this statement of (witness) be marked Exhibit _____ and received in evidence. This witness will not appear in person because _____.

LA: The statement will (not) be accepted.

RCDR may read the statement to the Board if it is accepted.

TAB5 to APPENDIX C

Stipulation of Expected Testimony

RCDR: The recorder and respondent have agreed to stipulate that: _____.

Before LA (PRES) accepts the stipulation, he or she should verify that RESP joins in the stipulation. If it is written it should be marked as an exhibit.

LA (PRES): The stipulation is accepted. It will be marked as exhibit _____.

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**APPENDIX D
BOARD OF OFFICERS**

FINDINGS AND RECOMMENDATIONS

This Board, after having carefully considered the evidence, finds by [majority, unanimous] vote that:

- 1. The allegation that the Respondent, _____, engaged in misconduct: [specify the charge(s)] _____ [has, has not] been proven by a preponderance of the evidence.
- 2. The facts upon which this determination is based are: (Additional sheets may be appended)
 - a. _____
 - b. _____
 - c. _____
 - d. _____

In view of the findings, the Board recommendation is [select by checking only one]:

- _____ 1. That the Respondent be retained in the New York Guard.
- _____ 2. That the Respondent be retained in the New York Guard, but reduced in grade to ____ because of misconduct, or flagged for promotions for a period of ____ months because of misconduct.
- _____ 3. That he/she be placed on the State Reserve List because of misconduct.
- _____ 4. That he/she be separated because of misconduct. The Board further recommends that he/she be given an Honorable Discharge Certificate.
- _____ 5. That he/she be separated because of misconduct. The Board further recommends that (s)he be given a General Discharge, Under Honorable Conditions.
- _____ 6. That he/she be separated because of misconduct. The Board further recommends that (s)he be given an Other Than Honorable Discharge Certificate.

The findings and recommendations were determined by secret written ballot in closed session.

Date: _____

	President	Member
_____	_____	_____
Member	Member	Member

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