

2. Appealing Commission’s Adverse Decision *(approved for public comment 6/3/11)*

Procedure for Appealing a Negative Commission Decision on Accreditation and Post-Hearing Arbitration

Request for Appeal

The institution may appeal a decision by the Accrediting Commission to deny or withdraw accreditation. The request for appeal must be made using the Application for Appeal. (E.3.). The application must be sent with the required fees (see E.1.) to the Executive Director of the Accrediting Commission within 10 days of the receipt of the Commission’s letter advising the institution of the decision to deny or withdraw accreditation. The institution’s failure to submit the application and fees within 10 days will be deemed a waiver of its right to appeal and cause the Accrediting Commission’s action to become final.

The institution shall file a written statement of the grounds for its request for appeal within 30 days of receipt of the notification of the Commission’s action. The institution’s decision to appeal is limited to appealing the factual record that was before the Commission and to the decision which the Commission made in executing its policies and procedures.

If the institution’s appeal request is not successful, where the decision to deny or withdraw accreditation is upheld and becomes final, the institution is not eligible to re-apply for accreditation for a period of one year from the date of the final action.

Appeals Panel

In the appeal process, the institution’s appeal will be heard by an independent appeals panel that is separate from the Commission and serves as an additional level of due process for the institution. The Appeal Panel has no authority concerning the reasonableness of eligibility criteria, policies, procedures, or accreditation standards. It can affirm, amend, remand or reverse the prior decision of the Commission as set forth below. Its role is to determine whether the Commission’s action was not supported by the record or was clearly erroneous. The institution has the burden of proof in demonstrating that the action of the Commission was not supported by the record or was otherwise erroneous.

The Appeals Panel consists of three people appointed by the Accrediting Commission. Its members are selected from a list of former DETC Commissioners and bona fide, active staff from DETC institutions. The Appeal Panel will consist of one public member, an institutional administrator, and an institutional academic. Panel members are subject to the provisions in D.8. Standards of Ethics and Professionalism for Accreditation.

The Appeal Panel members will be drawn from a pool of candidates possessing knowledge of accreditation purposes, standards, and procedures and will be constituted to meet the panel composition requirements set forth above. The candidates cannot include any current member of the Commission and cannot have a conflict of interest. The Executive Director will submit a list of proposed Appeal Panel members to the institution in advance. An institution may ask in writing within 10 calendar days of receipt of the proposed panel that any person or persons be removed from the list on the basis of potential conflict of interests as defined in D.8. If the Commission determines that a conflict exists, the panelist will be replaced. No panel member may serve if he/she participated, in any respect, in the underlying decision by the Accrediting Commission to deny or withdraw accreditation.

Consideration and Decision of the Appeal

The consideration of the appeal will be based upon the Commission’s written findings and reasons related to the action, the institution’s written response detailing grounds for appeal, and relevant supportive documents. The Appeal Panel has no authority regarding the reasonableness of the accreditation standards, policies, or procedures. Its role is to determine whether the Commission’s action was not supported by the record or was clearly erroneous.

The institution must set forth the specific grounds for its appeal in writing in the time specified above and state the reasons the institution believes the adverse decision should be set aside or revised. In making its appeal, the institution has the burden to show that the Commission’s decision resulted from errors or omissions in the execution of Commission policies and procedures, or that the decision was arbitrary or capricious and was not based on substantial evidence on the record. No new materials may be presented for the Appeal Panel’s consideration on appeal.

The Appeal Panel will consider the grounds for the appeal, the institution’s oral presentation, and the record that was before the Commission when it made the decision to deny accreditation or withdraw accreditation.

Decisions Available to the Appeals Panel

The Appeals Panel may elect to affirm, remand, amend or reverse the Commission’s decision.

1. Affirm

If the Appeal Panel determines that the institution has failed to meet its burden of proof in showing that the Commission’s action was not supported by the record or was clearly erroneous, it must affirm the decision of the Commission. In certain instances, the Commission’s decision may be based on multiple violations of DETC Policies or Procedures. A showing by the institution that there is no support in the record only as to some of the violations is not by itself sufficient to meet the institution’s burden of proof. The institution must show that, in light of the entire record, the decision is not supported by the record or is clearly erroneous.

2. Remand

The Appeal Panel may remand a decision to the Commission when it finds that the Commission failed to consider a material fact before it in reaching its decision. A remand is a directive to the Commission that it must reconsider its action in light of all relevant facts that were before the Commission at the time of its decision, including the specific material fact or facts that are the basis for the remand. The Appeal Panel must identify those material facts that it finds the Commission failed to consider.

3. Amend

If the Appeals Panel determines that although there is evidence to support it, the Commission’s decision is nevertheless clearly in error, the Appeals Panel may amend the decision. A decision to amend an adverse action will set forth the specific grounds for the decision and will direct the Commission to modify its decision in accordance with the specific direction of the Appeal Panel. The Appeal Panel may in its discretion amend a decision to deny accreditation by directing the Commission to grant accreditation while directing the Commission to consider the proper length of the grant consistent with the direction of the panel, the practices of the Commission, or in accordance with other guidance from the Appeals Panel.

4. Reverse

The Appeal Panel may reverse a decision of the Commission if it finds that the Commission’s decision, in light of the entire record, was not supported by the record or was clearly erroneous. A decision to reverse an action of the Commission will state the specific bases for the decision to reverse. A decision to reverse a withdrawal of accreditation will direct the Commission to set aside its decision to withdraw and to reinstate the accreditation of the institution as it was before the withdrawal decision. A decision to reverse an action to deny accreditation directs the Commission to award a specific grant of accreditation for a term determined by the Appeals Panel.

Hearing Procedure

The Commission shall have at least one staff person present at the hearing. The Commission Representative and representatives of the institution will have the opportunity to make opening and closing statements to the appeal panel. Such oral statements may not exceed twenty minutes in length. The institution must provide information relevant to the specific grounds for the appeal. If the institution intends to make an oral presentation, the chief executive officer of the institution should make the request in writing to the Executive Director of the Accrediting Commission not less than 30 days prior to the date of the hearing. The names and affiliations of those appearing to make the oral presentation must be included with the request. The institution is entitled to be represented by counsel during the appeal hearing. The DETC does not consider the Appeal hearing to be adversarial in nature. Accordingly, the institution will not have the right to examine the Commission Representative.

The appeal hearing may be recorded by stenographic or electronic means if requested by the institution. Recording and transcripts thereof shall be at the institution’s expense, and a copy will be timely provided to the institution following the appeal hearing.

Commission Receipt and Implementation of Appeals Panel Decisions

The written decision of the Appeal Panel will be provided to the Commission within 30 days. The Commission will implement the decision of the Appeal Panel to affirm, amend, or reverse the prior Commission decision within 30 days of receipt of the written decision by the Appeal Panel. The Commission will notify the institution of the decision within 30 days of implementation.

Notification

The Commission will notify Federal, State, accrediting agencies and the public of its decision according to D.3. Notifying Agencies and the Public of Commission’s Decision.

Arbitrating Post-Hearing Decisions

The *DETC Constitution and Bylaws*, under Section 12.2. provide that:

Section 12.2 - Interpretation and Appeal

An institution challenging a final adverse decision on accreditation must submit to binding arbitration pursuant to the appropriate Commission policy in the DETC Accreditation Handbook. An institution which seeks to overturn an adverse arbitration decision, or filing suit for any other reason, must bring the suit in the Federal Court for the District of Columbia and escrow sufficient funds to guarantee that the Commission

will recover its legal fees in defending the suit if the institution does not prevail. Should the institution prevail over the Commission, the escrow will be returned.

Below are the procedures adopted by the Commission for institutions electing to seek binding arbitration on a final adverse accrediting decision:

1. Upon being notified that its appeal did not change an adverse Accrediting Commission decision, an institution will have five business days to request arbitration, during which no public notification of the Commission action will be made, and no new students may be enrolled. When the institution remits an arbitration fee (using E.13. Application for Arbitration) established by the Commission, an arbitrator will be selected by a recognized national agency. Early resolution of such disputes being in the public good, the parties shall make every effort to expedite the arbitration.
2. The analytic framework used for the arbitration will be that developed by the Federal Courts, particularly the Circuit Courts, and selected excerpts are cited in an appendix to this procedure. Courts have described their role as not one of making a de novo review, but of determining whether the accrediting association’s decision was arbitrary or capricious. In like manner, the arbitration should make this determination, assessing whether the association confined its action to the contours of due process and fundamental principles of fairness, while recognizing the special nature of accreditation and according deference to the rules and processes of accrediting associations.
3. The arbitrator will be provided with all of the information available to the Accrediting Commission when it made the adverse decision, and the procedures used to reach the decision. Along with the presentation by the parties, this will allow for a through consideration of whether the association’s decision was arbitrary or capricious, or reached in an unfair manner. Additional discovery activity and witnesses should not be required. In an exceptional circumstance, where the arbitrator finds that additional information is essential to reaching a fair decision, limited discovery may be authorized.
4. Both parties may appear before the arbitrator with legal counsel to present their position, and each may file a written brief, subject to the fifteen-page limit used by the Department of Education’s appeals division, and up to five exhibits.
5. The arbitrator’s decision will be admissible in any subsequent proceeding where it is relevant.

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