

**THE VA ACCOUNTABILITY AND WHISTLEBLOWER
PROTECTION ACT: ONE YEAR LATER**

JOINT HEARING

BEFORE THE

**COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES**

AND THE

**SUBCOMMITTEE ON ECONOMIC
OPPORTUNITY**

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THE VA ACCOUNTABILITY AND WHISTLE-BLOWER PROTECTION ACT: ONE YEAR LATER

Tuesday, July 17, 2018

COMMITTEE ON VETERANS' AFFAIRS,
U. S. HOUSE OF REPRESENTATIVES,
Washington, D.C.

The Committee met, pursuant to notice, at 10:11 a.m., in Room 334, Cannon House Office Building, Hon. David R. Roe presiding.

Present: Representatives Roe, Bilirakis, Coffman, Bost, Dunn, Arrington, Higgins, Bergman, Banks, Mast, Takano, Brownley, Kuster, Rice, Correa, Lamb, Esty, and Peters.

OPENING STATEMENT OF DAVID P. ROE, CHAIRMAN

The CHAIRMAN. Good morning. The Committee will come to order. Welcome and thank all of you for joining us today at the Full Committee hearing examining the implementation of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017.

Last year's enactment of this bipartisan legislation was a culmination of years of work by Members of this Committee, and I believe is also one of the most consequential reforms to the Federal Civil Service System in decades. This law was put in place to provide the Secretary the tools he or she needs to protect whistleblowers and hold poor-performing employees accountable.

I have said time and time again that the vast majority of VA employees are good, hardworking men and women who take the VA's core mission to heart, but before this law the bad actions of a few tainted the good names of many for far too long.

The drafting of this legislation did not happen in a vacuum. Ideas to improve the legislation were received from all corners, to include Federal employee unions. It was not an ideological or partisan attack on Federal workers. In fact, the final negotiated package passed the U.S. Senate by voice vote; the full House by a vote of 368 to 55, including 23 of the 24 Members of this Committee and 137 Democrats; and was supported by 18 Veterans Service Organizations. While I am proud, they were able to come together and craft this important legislation, our role in overseeing the law's implementation is equally important, and that is why we are here today.

The only way to bring true accountability to VA is to create a culture where employees want to come to work and serve veterans. This will only happen when good work is consistently rewarded

and when it is clear the Department won't tolerate employees who do not live up to the high standards required of public service.

We all remember the stories of poor performance and misconduct this Committee and others uncovered about a select few VA employees who had refused to, or were incapable of, adhering to these high standards. We found time and time again that civil service laws make it extremely difficult and time-consuming to hold an employee accountable who didn't share VA's values, even in instances where the employee in question had broken the law.

I think every one of us on this dais can agree that this is unacceptable and that our veterans deserve better.

So, today we are here to discuss how VA is moving toward this goal of sustainable accountability, and efforts to educate employees and managers about this new authority.

I also want to make it clear that while this law made it easier to discipline poor employees, it did not give VA the license to use this authority to target employees, no matter their position or grade, or to retaliate against whistleblowers. The Department and this Committee continue to rely on whistleblowers to come forward and shed the light on waste, fraud, and abuse throughout VA, and I hope to learn more about how implementation of this law is or is not protecting these courageous employees. We can't measure success of this law's implementation against a number of disciplinary actions, but we can measure failure, and if one single man or woman is afraid to come forward to report wrongdoing because of fear of retaliation, to me that would be a failure.

Before I recognize Ranking Member Takano, I do want to briefly touch on the operations of the Office of Accountability and Whistleblower Protection, or OAWP. When we were negotiating the law that created this office, there were concerns expressed about creating yet another office at the VA that could duplicate efforts of other offices, when what we really needed to do was empower managers to make the right decisions and hold them accountable when they failed to do so. While the employees and management of OAWP should be lauded for their efforts to improve accountability within the VA, I am concerned that OAWP seeks to expand its role beyond what Congress intended. Particularly, I am concerned by some of the recommendations that the VA submitted to Congress as part of its June 30th annual report and about the growth of this office, and I look forward to addressing those concerns today.

The goal of this new authority was to provide the Secretary a tool in their toolbox to discipline poor employees, and I am worried that if we are not careful the OAWP may turn into an entirely new toolbox; we must ensure this doesn't happen. Also, I am certainly no fan of red tape or bureaucracy. I am concerned about the apparent lack of formal written policies or procedures for operations at OAWP. Formal policies and procedures would promote consistent OAWP decisions, and inspire confidence in their worth and work product.

I also remain concerned about the ongoing conflict between Mr. O'Rourke and the Inspector General over the IG's access to OAWP's database of complaints. Mr. O'Rourke, I hope that you and Mr. Missal have found a way to put this unnecessary distraction behind us, and I understand that you have.

Finally, I want to reiterate this Committee will not shy away from our oversight role to investigate improper usage and implementation of this law. However, the only way to do so is to continue this Committee's bipartisan tradition, examine issues with statistics and facts, and not with innuendo, anecdotal accounts, or partisan agendas.

The CHAIRMAN. I now yield to Ranking Member Takano for any opening statements that he might have.

OPENING STATEMENT OF MARK TAKANO, RANKING MEMBER

Mr. TAKANO. Thank you, Mr. Chairman, and I thank you for calling this important hearing.

When the Accountability Act passed last summer, I voted for it with a great deal of caution. I was cautiously optimistic that it would do what it set out to do, which was to improve care by making it easier to remove bad employees.

I understood that the connection between dismissing bad employees and improved care was superficial, but the bill was the best of several legislative attempts to address the VA's significant issues in its management of human resources. I did vote against several of those legislative attempts because I felt that there were just too many bad things in those bills. But I voted for this bill because I hoped that the VA would take the tools we were providing, so that they could not only address bad employees, but also protect good employees by improving the agency's overall human resources functions and morale.

But now that we are more than a year out, I have real concerns about how the VA is using the tools that Congress provided in the Accountability Act. Of the 1,096 removals during the first 5 months of 2018, the majority of those fired were housekeeping aides. This has no doubt contributed to the fact that there are currently over a dozen Medical Centers with housekeeping vacancies. I have seen firsthand the problems caused by vacancies in housekeeping staff at the Loma Linda University Medical Center near my district, and I see how that directly impacts care for veterans.

I also find it hard to believe that there are large numbers of housekeeping aides whose performance is so poor that it cannot be addressed. If that is truly the case, then it stands to reason that there are also management issues behind their poor performance. But of those 1,096 removals, only 15 were supervisors, which is less than 1.4 percent. Firing rank-and-file employees does nothing to resolve persistent management issues; instead, it just leads to worse care from unnecessary vacancies.

This type of implementation is not the intent of the Accountability Act and I hope everyone on this Committee can agree that it is not possible to fire your way to excellence. In fact, this was a view that was shared by the Commission on Care's findings, which also found that the VA's human resources management was under-staffed and under-resourced. This led to problems with poor hiring practices and poor workplace culture. This further exacerbated the VA's difficulties in hiring the best and the brightest, and therefore creating a vicious cycle.

The Accountability Act was supposed to be the VA's tool to break this vicious cycle, but in the past year we have heard indications

that VA's human resources management is in more disarray than ever. A high turnover rate is never a good sign of good management and good management starts at the top.

For months, we have seen a steady stream of reports in the press of a hostile work environment in the VA's human resources division, previously led by Peter Shelby. Then just last week, it was reported that Mr. Shelby himself was fired. Although the VA released a statement saying that he left to pursue other opportunities and whether any of those reports are true, the damage to VA's HR management has already been done. I am not sure how the VA is supposed to improve its human resources management when such stories of its toxic environment at the top are rampant.

And, finally, it is in the midst of this turmoil that this Administration released a new Executive Order that limits the amount of official time for employees to more than 25 percent. As we all know, official time is not spent on union activities. Let me repeat that. Official time is not spent on union activities, because spending time on union activities is illegal. Rather, it is time spent by union officials to perform human resources functions and ensure a well-functioning work environment for all VA employees.

With the current turmoil and vacancies in the VA's HR division, the human resources function that employees on official time perform is more important than ever in ensuring that care for veterans is not impacted. For the VA to sustain cuts to essential human resources functions from both ends like this does not inspire confidence that performance is improving at the agency.

The goal of the Accountability Act was not to further undercut the already strained VA workforce. Firing cannot replace good management. I hope our discussion today will shed more light on what the VA is doing in its implementation of the Accountability Act to ensure better performance among its employees through better management. I thank the witnesses for being here today and I look forward to their testimony.

The CHAIRMAN. I thank the gentleman for yielding.

On our first panel today, we welcome back Mr. Peter O'Rourke, Acting Secretary of the Department of Veterans Affairs. And Mr. O'Rourke and I have spent the weekend in Reno with the Disabled American Veterans, they had a great convention out there. I thought it was—we spent a couple of hours on a panel together and I thought it was time well spent.

Mr. O'Rourke is accompanied by Mr. Kirk Nicholas, the Executive Director of the Office of Accountability and Whistleblower Protection; and Mr. Nathan Maenle, Principal Deputy Assistant Secretary of the Office of Human Resources and Administration.

Mr. O'Rourke, you are now recognized.

STATEMENT OF PETER O'ROURKE

Secretary O'ROURKE. Thank you, Mr. Chairman, Ranking Member Takano, distinguished Members of the Committee. I am pleased to be here with Nathan Maenle, Principal Deputy Assistant Secretary for the Office of Human Resources Administration, and Kirk Nicholas, Executive Director of the Office of Accountability and Whistleblower Protection.

Let me get right to the point. Retaliation against employees who identify a legitimate problem or report that there may be a violation of law, rule, or regulation is absolutely unacceptable; I will not tolerate it. Protecting employees from retaliation is a moral obligation of VA leaders, a statutory obligation, and a priority for this department.

We will take prompt action to hold accountable those individuals engaged in whistleblower retaliation and that includes appropriate disciplinary action.

I am confident that the overwhelming majority of our employees are here to do the right thing. Our best employees' own accountability, because they are here to make a positive difference in the lives of veterans. Congress and VA leadership spent years creating the right formula for addressing accountability and it is why we are talking today.

The problems that surfaced at VA in 2014 uncovered serious shortfalls in the way some leaders dealt with employees who made disclosures. Those problems led to the establishment of the Interdisciplinary Crisis Response Team in July of that year and expanded into the Office of Accountability Review. The purpose was to improve transparency, and elevate the visibility of senior leadership misconduct and their investigations. Those initial efforts shaped a new cultural direction for VA.

This is why Congress passed and the President signed the Accountability and Whistleblower Protection Act. The President and Congress ensured we had the right system and processes in place to protect employees who raised concerns and exposed problems or issues, and to also hold accountable those who engage in misconduct. The President's Executive Order and Congress' legislative work in 2017 established OAWP, creating a new paradigm for accountability and whistleblower protection.

So, how can we promote accountability and improve performance? We must change VA's culture from within. That change must be encouraged and sustained by leaders who embrace accountability and focus on a productive workplace that empowers their employees. I own the responsibility of that change that is needed to move VA forward, but let me be clear: making enduring culture and process changes in an organization the size of VA takes time, persistence, and patience. Getting the processes, communication, and relationships right will not be easy, but my goal is to ensure that we have a better system in place, one that works for all employees.

You have tasked the office with developing a system that better supports employees when they raise issues in the workplace. That task is really threefold; first, protect employees from retaliation, emphasize the need for greater transparency, and promptly investigate and resolve allegations of misconduct. Simply put, our policies must be aligned at every level to reflect the open and transparent way VA strives to operate.

I have seen from the initial results, as evidenced in the report submitted to you last month, that this new office is making a difference, and will continue to build on this foundation in the coming years.

Let me highlight a few of our accomplishments in the past year. The office averages 170 employee whistleblower disclosures to that office a month, and which OAWP staff quickly examine the concerns in an effort to develop the issue raised. From June 23rd, 2017 to June 1st, 2018, the triage staff assessed nearly 2,000 submissions of alleged wrongdoing. The Advisory and Analysis Division completed 182 cases, the same office recommended disciplinary or adverse actions in 54 of those cases involving 58 unique persons of interest. And let me remind you, this is only in the first year.

While our work is just beginning, I am confident those numbers will change as we continue to promote accountability, improve performance, and change the culture of VA.

We are all after the same ultimate objective, to do what is right for our veterans by providing the high-quality care, services, and benefits they have earned, and they deserve. We can achieve that shared objective through cultural change and collective responsibility.

Veterans and the American people expect us to work together on their behalf, we look forward to doing so, and I look forward to your questions.

[THE PREPARED STATEMENT OF PETER O'ROURKE APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you. I will start the questioning. And you mentioned, Mr. O'Rourke, that 58 people had had some disciplinary action, is that correct, out of 360,000-plus employees?

Secretary O'ROURKE. Yes, sir, that is at the senior leader level.

The CHAIRMAN. At the senior level, okay. Do you believe that the implementation of this law has been successful? Do you think this—and when I say that, per your comment this weekend about the impact it has about managing this organization, and what are the three top metrics that you used to define success?

Secretary O'ROURKE. At the initial standup of the office, the first thing that you try to work through is just the recognition of what the new capability is, what we are trying to do in communicating that across. In the case of OAWP, the senior leadership workforce, senior executives, folks in a confidential or policymaking position.

That is difficult in an organization the size and scope of VA. Getting out to visit with VISNs, getting out to visit with Medical Center directors and teaching them, helping them understand what the purpose of that office is in a context of we are here to possibly investigate your misconduct or your performance, is a tightrope to walk, but I believe we did that pretty successfully by going into nonthreatening environments with them, also with meeting with the unions and groups, training everyone that would take our call, to reach out to them to answer any questions they would have.

The CHAIRMAN. Well, how do you answer, because I have read some of the whistleblowers in here who feel like they have been retaliated against. I am not saying that what they have said is true or not true, but I read this last night on several letters that are submitted for the record, how do you adjudicate them when they say they are locked in, you know, put in an office to do nothing for a year, 15 months, 16 months, whatever, how do you make them whole in that case?

Secretary O'ROURKE. First is listening to the whistleblower. What we found very quickly was that a lot of the folks that came to us initially that had things to say, whether they were a legitimate whistleblower complaint was really a matter of defining and making sure they understand what that definition was. But regardless of the definition, it was listening to them and making sure their voice was heard, and then doing the investigation or going on site to actually see what they were claiming, and having either a discussion with their supervisors or with the leadership of that organization to determine what was really going on.

A lot of times what we found was really just two sides not talking to each other. At times we could facilitate that conversation, other times it had been too long, so we needed to take other action, whether that meant a full-blown investigation of the matter or referring that off to OSC or OIG.

The CHAIRMAN. Because I think if you don't protect the whistleblowers, this will fail. I think they have to feel like that you can step forward and say something and not be retaliated against, because that is a huge deterrent to finding out what is going on in an organization as large as the VA.

Secretary O'ROURKE. Absolutely. And getting that word out and changing that cultural piece is going to take some time, because there are places that are more difficult than others. The one thing, though, that you provided in this bill was what is called, what we call anecdotally, the 714 hold. That wasn't something that had existed before. And what that meant is employees GS-15 and below that had an action that they might feel is retaliatory, we were able to step in as the office, as the director and stop that action, put a hold on that action, not allowing it to move forward until whether it was the Office of Accountability or the Office of Special Counsel could then investigate that disclosure for its substance, whether it was real or not, but during that period of time that employee could not be affected, whether it was retaliatory or not.

The CHAIRMAN. How do you respond to the charges that the law unfairly is targeting lower-level employees, many of whom are veterans?

Secretary O'ROURKE. I have got specifics that I am going to let Mr. Maenle address specifically, but it is in the data. The 218 report that was a requirement of the law, as we put through and as we looked at this, when we look back to 2014 and forward, you don't see a significant difference from year to year frankly in any category of unrealistic firings or removals of any category of employee, let alone focusing on lower-level employees. And Mr. Maenle has got a few more details on that too.

Mr. MAENLE. Certainly. So we took a look specifically at custodial workers, laundry workers, and food service workers, and looked across the past three fiscal years, and what we are seeing is not a significant change in the number of actions that were taken. From a percentage perspective, less than a 1 percent increase in the number of terminations of that level of employee.

Now, granted, those three occupations are the highest occupation within the Veterans Health Organization for terminations. And that is the nature of the work, that compares similarly to the private sector.

The CHAIRMAN. My time is expired.

Mr. Takano, you are recognized.

Mr. TAKANO. Thank you, Mr. Chairman.

Mr. O'Rourke, I understand that the VA has provided the Office of the Inspector General access to OAWP information this morning and that they are entitled—information that they are entitled to under the Inspector General Act. Can I get your commitment today that you will provide and continue to provide to the OIG full, complete, and prompt access to OAWP records and all other requests made by the OIG?

Secretary O'ROURKE. Your request, as may, has been complied with even before this morning's recent access to a SharePoint site.

Mr. TAKANO. Yes. And I wanted to know if you were committed to that you will continue to provide the OIG full, complete, and prompt access to OAWP records and all of their requests? I realize that you complied with its previous request and I know that there was a very public spat over that. I want to just get your commitment today that you will comply with future OIG requests.

Secretary O'ROURKE. It is unfortunate that that has been such a public about one issue, because this has been—his access to OAWP has been unfettered since day one.

Mr. TAKANO. That is not what played out. I just want to get your commitment that you will comply with future OIG requests.

Secretary O'ROURKE. My commitment remains the same as it has been since day one, to provide the IG access to what—

Mr. TAKANO. I am not interested in day one what you claim to have said, I want to know from this day forward will you comply with the OIG?

Secretary O'ROURKE. Yes.

Mr. TAKANO. Thank you. I am concerned that of the 1,096 removals during the first 5 months of this year, less than 1.4 percent were supervisors and that the majority of them were housekeeping aides. And let me just put this in perspective. There has always been a preference requirement for this job category, a veterans-preference requirement, and also hiring under noncompetitive set-asides for veterans in this job category.

So in the past the vast majority, close to 100 percent of employees at the VA in this category have been disabled veterans. And that can vary somewhat by facility, but my impression is that in this category, because of these set-asides, the vast majority of these workers tend to be veterans, disabled veterans. Would you agree with that assessment?

Secretary O'ROURKE. No, sir, I wouldn't.

Mr. TAKANO. You wouldn't?

Secretary O'ROURKE. Not disabled veterans. That is a veteran's preference that they have, that is all veterans.

Mr. TAKANO. Okay. So it is all veterans, but whether it is disabled and veterans, this tends to be a very veteran-dominated job category. Okay. And let's be clear that this is who we have—the majority of the 1,096 employees who have been removed, the majority of them have come from the housekeeping category and we are talking veterans here. Not one third, but in this category one third of all veterans—one third of all employees at the VA tend to be veterans, but in this job category nearly 100 percent.

As I mentioned in my opening statement, if there are so many housekeeping aides with incurable poor performance, it is likely that there are some management issues there as well. What are you doing to ensure that personnel decisions such as adverse actions are truly addressing care issues and not just unnecessarily creating vacancies at lower levels, while the real culprits of institutional problems remain on the job?

Secretary O'ROURKE. I think it is helpful to be clear about the turnover rate at that housekeeper level, regardless of whether they are veterans or not, that is—like Mr. Maenle already mentioned, that is our highest turnover area regardless of whether this is in the VA or outside the VA. In fact, our turnover rates in that area are much lower than the private sector, which is closer to 200 percent.

Mr. TAKANO. Yeah, but you are shifting the focus of our conversation here. We are talking about people who have been removed, we are not talking about turnovers. How is that relevant to what my questions are talking about?

Secretary O'ROURKE. The turnover rate includes removals and—

Mr. TAKANO. There again, you are going on to a different talking point about turnovers. We are talking about removals here and that implies to me some management issues.

Secretary O'ROURKE. Even removals, sir, if you go back to 2014, there is not a dramatic difference—

Mr. TAKANO. You are—

Secretary O'ROURKE [continued]. —from the new accountability law than there was beforehand, which indicates year over year the same—

Mr. TAKANO. We are talking about the first five months about all these removals.

Secretary O'ROURKE. Sir, if you go back to 2014, you are going to see the same amount of removals even before the accountability law.

Mr. TAKANO. Well, this still gets to this issue of who we are removing and whether or not we are addressing bad management, unskilled management, what we are doing to improve the personnel function and the fact that the personnel function of the VA is also in turmoil.

Secretary O'ROURKE. I don't connect those two, sir. I am going to stay focused on the removals or the turnover rate both of the lower—

Mr. TAKANO. Well, anyway, let me move on.

Secretary O'ROURKE [continued].—lower-skilled employees—

Mr. TAKANO. What are you doing to ensure that these crucial positions such as those—I guess my time has run out, so I yield back.

The CHAIRMAN. I thank the gentleman for yielding.

Mr. Coffman, you are recognized.

Mr. COFFMAN. Thank you, Mr. Chairman.

To the acting Secretary, I first want to thank you so much for your responding to a concern that was raised by a whistleblower in Denver, Colorado that led to—within the VA OIG and that pulling it to a higher level to make sure that there is no conflict of interest, I want to thank you for being responsive to that.

Let me also, let me raise an issue of accountability, and I guess this is different than what Mr. Takano has raised, in that I am concerned that—and if you could relay this as well to the incoming Secretary—that at this SES, Senior Executive Service management level that we have had individuals in these positions who have had multiple negative reports either by GAO or VA OIG that have never been cleaned up, and yet these people are allowed to remain there.

And so specifically we are going to be opening a VA hospital in Aurora, Colorado this Saturday and the individual that was responsible for the last person there in charge of the project from the VA's standpoint in terms of construction management, that ultimately led to \$1 billion in cost overruns, a project that was 5 years behind schedule, that I led the fight in the Congress to replace the VA construction management team with the Army Corps of Engineers. Without that, I don't think this project ever would have been built. Congress never would have had the confidence to fund those cost overruns to complete this hospital.

And in fact under her leadership, Congress, I mean, stripped the VA of its construction management authority ever to build a hospital again, and yet this person is still there in charge of VA construction facilities management. Not only was she still there, your predecessor, Secretary Shulkin, actually tried to promote her to being in charge of facilities management and contracting, that she at my behest or certainly I raised the issue about her competence, and she was put back down in charge of construction management.

I mean, if we don't clean house, no matter what the new VA Secretary says or does, I mean at this level, at this SES level, nothing will change, and so that is my concern. Do you have a response to that?

Secretary O'ROURKE. Well, sir, I think the response would be to point out the one as you described to me, it is a very difficult challenge when you are looking at changing the culture of an organization the size and as intricately designed, I guess, at this point. As we look at how to restructure and bring things like construction management, other things into better alignment with our priorities, with our goals with serving veterans, that will hopefully lead to some better management structure.

But really what the accountability law does for us in that regard by adding accountability and putting performance as part of that, that that was new, that was innovative at a degree that I don't think we all give ourselves credit enough for. That is going to allow us in the future, once we get over this—you know, get the accountability side correct and start adding carefully the performance side, because that is something, we have to be very cognizant of. Just as the ranking Member mentioned, when we talk about managers and how they manage and what their performance is, we have to do that very carefully so that we are not unfair, but that is something we have to address, and I think that is going to start to address some of those systemic issues you see.

Mr. COFFMAN. I think you have about around 400, I think, in the Department of Veterans Affairs at this SES level who are just below the political appointees, who run the day-to-day operations within the—and programs within the Department of Veterans Af-

fairs, and I think you have got—that I would hope that the new Secretary would take a look across the board and in where we have had consistent failure, those people simply have to be removed. And the Congress of the United States, you know, on a bipartisan basis has given the Department of Veterans Affairs the authority to more expeditiously remove these managers who are the top of this bureaucracy.

And so I just want to commend you to talk to the new Secretary, to move forward with cleaning house.

Secretary O'ROURKE. Yes, sir.

The CHAIRMAN. I thank the gentleman for yielding.

Ms. Esty, you are recognized for 5 minutes.

Ms. ESTY. Thank you, Mr. Chairman. I want to thank the Chairman and ranking Member for holding today's important meeting.

When VA passed the VA Accountability and Whistleblower Protection Act, it was a recognition that more accountability was needed at the VA, and you are hearing that from everyone here today. However, accountability doesn't just mean increasing the number of VA employees who are pushed out the door, accountability means, as Mr. O'Rourke, as you had noted, creating real change in culture and ensuring that bad behavior is not repeated. Management that has enabled bad behavior needs to be held accountable, just as much as low-level employees who in some cases may not have been properly trained.

For acting Secretary O'Rourke, during your tenure our Committee has been made aware of a significant number of career employees who have served under multiple Secretaries. These employees have been removed, demoted, or reassigned, or they have resigned or retired after being made aware of adverse actions coming their way. It is concerning, because there are a large number of personnel changes and that brings about instability in managing such a large agency.

Can you tell us now how many such personnel changes you are aware of for the Office of the Secretary personnel, including Executive Secretary, Protocol Office, the Centers for Women and Minority Veterans, and other included staff in the time between May 30th and July 16th?

And if not, if someone cannot answer that today—

Secretary O'ROURKE. I just wanted to make sure I can address—I know I can address two of those. The Center for Women's Veterans, I believe the director there resigned last week and is now working at CONTRACTS, Center for National Security, I believe she started on Monday. So it appeared she had moved on to better things.

The Executive Secretary, we recognized that we needed to make some changes at the Office of the Secretary level that required us to move some people. They weren't demoted or resigned, they just moved to other—one in particular moved to another SES job, the other moved to another GS-15 job.

So we are not on a path to just, you know, move things randomly. These are all very well planned and designed moves to better make efficiency and effectiveness at our level, but this is something we are encouraging leadership to do across the board. Just as Mr. Coffman pointed out, if you had issues with your perform-

ance or your organization's performance, do not hesitate to take action, whether that is from misconduct or that is from just restructuring to get better performance to serve veterans.

Ms. ESTY. Can you clarify then, were these for cause, for performance issues, or you are saying efficiency? I mean, now—

Secretary O'ROURKE. So this is organization—

Ms. ESTY [continued].—that can cover a multitude of things.

Secretary O'ROURKE. I'm sorry. It is for organizational efficiency. I mean, we are talking about when you have an office that is not performing the way it needs to. That doesn't always mean that a person was committing misconduct of some sort, this means that we are not getting the performance or the efficiency out of that organization that we need and then sometimes it requires a change in leadership.

Ms. ESTY. All right. Well, I am sure we are going to be revisiting this issue to see in 6 months, you know, what are we seeing and to be clear about what is it that is not performance? How are you measuring that performance and what are you doing to ensure that there is better performance, setting out clear metrics, setting out training, being very transparent about what that is, because there is a lot of concern and we are hearing a lot of back-channel about morale impacts of this. And when you lose a lot of senior people, that is a lot of institutional knowledge, that happening all at once during the time of an acting secretary ship is very destabilizing. We have major pieces of legislation, major changes, and to be clear now, that many people is of concern about an ability to actually effectuate change when you have people who no longer can be there who have the institutional knowledge.

You have addressed—so you are saying none were for cause?

Secretary O'ROURKE. Of those two that I just mentioned, neither one of—well, neither of them were any action taken, so we are not talking about something that would be for cause or not.

Ms. ESTY. Are you communicating with nominee Wilkie about any of these changes?

Secretary O'ROURKE. No.

Ms. ESTY. Do you intend to do that? Because it is going to be important for him coming in to understand, if confirmed, about what the reasons are for these changes and what you are attempting to achieve. Our oversight role is to do that—

Secretary O'ROURKE. Sure.

Ms. ESTY [continued].—and we are not being made aware. So I would like you to follow up with us what were the reasons for these changes, why have they been moved where they have moved on these major positions. And, frankly, we are going to have to look with the back channel of what we are hearing with perhaps different reasons than you are suggesting here today about the rationale for these changes. It is of concern—

Secretary O'ROURKE. I understand your concern.

Ms. ESTY [continued].—it is concern about politicizing these high-level positions and that is of deep concern to this—

Secretary O'ROURKE. I'm sorry, I didn't catch, to politicize?

Ms. ESTY. If there is any question about whether these are loyalty concerns or other—

Secretary O'ROURKE. Oh.

Ms. ESTY [continued].—implications about why these people are being replaced, that is of deep concern. There is no place for politics in this agency and people need to be held to performance standards. And, again, when people have served under multiple Secretaries, if it is a performance issue, we should be made aware and so should the incoming nominee be made aware what those issues are—

Secretary O'ROURKE. Absolutely.

Ms. ESTY [continued].—and we should to do our oversight role. Thank you and I yield back.

The CHAIRMAN. I thank the gentlelady for yielding.

Mr. Bost, you are recognized.

Mr. BOST. Thank you, Mr. Chairman.

Mr. O'Rourke, a number of VA employees in my district have reached out to me and they believe issues within the VA would qualify them as whistleblowers. How is the Office of Accountability and Whistleblower Protection training employees about the correct way to handle the whistleblower disclosure in compliance with the law? So what do you actually-how do you train them?

Secretary O'ROURKE. How do we train them? So there has been ongoing training or awareness, provided posting of signs, those things from OIG, the Office of Special Counsel. So there are requirements by statute to post how you—what is a disclosure and what do you do to submit a disclosure to those two agencies. The Office of Accountability and Whistleblower Protection being new, we had to go educate folks of what we needed.

By statute, we were required to produce an identifying and non-identifying form, and a toll-free number that is completely anonymous, those were both done within the first few weeks of the office being developed, and we continue to refine those, but those are available to all employees in multiple different ways. We also have the website that we keep updated that describes very clear what it is a disclosure to help them, but we really understood that what we had to do, as I mentioned earlier, is listen to employees and let them talk about what their issues are. A lot of times when they feel that they can't talk to their management or supervisors, they do need somebody to talk to, and in a lot of the cases we found, from deep diving into some older cases, that was what caused a lot of this to fester and grow and then become much bigger of an issue unless we addressed it at the site.

So we have done a lot in that area, we have more to do. We have trained, I believe, 40,000—I'm sorry, you have those specific numbers.

Mr. MAENLE. So we have trained 2,000 HR professionals and attorneys on the Accountability Act. We have also trained 40,000 supervisors and we have specifically from the Senior Executive Service, 690 members were trained there as well.

Mr. BOST. So then I will ask this. So when somebody does come forward, who is it that actually goes to them? Is it someone that has been trained from your office, is it someone that is at the site where they are at, or how is that handled?

Secretary O'ROURKE. If they reach out to us—so you have to remember, they have multiple channels; they have the Congress, they have the Office of Inspector General, they have the Office of

Special Counsel, they can go down any one of those paths to make their disclosure and they are all equally legitimate. If they come to us either through the form or through the hotline—or toll-free number, I don't want to call it a hotline and confuse it with OIG—then we as part of our triage folks will talk to them. If they just read out to us, and if they just submit the form, then we reach out to them to fully develop what their disclosure is and give them some sort of sense of what it is—you know, is what they are claiming a disclosure, is it retaliation. We hand-hold them through that process, because we found that that is the most effective to addressing that at the lowest level.

Mr. BOST. Okay. I am going to just shift on my other question here a little bit. Prior to the hearing, the Committee requested copies of written policies and handbooks and directives and regulations that have been sent out and putting things in place, and what they received they thought were lacking, to say the least. Is there intent for a larger, more in-depth written policy to be put together, so that when someone from our offices request, okay, what is your checklist, how are you doing it, and how do we know what you are doing is going to be right not only for the whistleblower, but right for the agency?

Secretary O'ROURKE. Sure. I will take the criticism of that. Early on, we had a bias toward action, to actually start reaching out to folks and working with whistleblowers. We had quite a bit of legacy, whether it was senior leader misconduct cases or just a backlog of whistleblowers that wanted to reach out to us. So we did focus a lot more on the operational side. And so we are now trying to see what we have learned from a process standpoint and start to codify that.

So we do have work to do on creating actual regulations around what we do. We do have pretty in-depth process maps, which we are sitting down with the OIG at this time to go over, so that they can see how we handle disclosures, which is interesting because we both have a similar mission. But that is more work that we have to do.

Mr. BOST. You mentioned earlier in your testimony, you were talking about, I think you said it was the 714-hold, is that correct?

Secretary O'ROURKE. Yes, sir.

Mr. BOST. Exactly how does that work and how does that get implemented?

Secretary O'ROURKE. When a whistleblower is served an action, basically they are given a proposed adverse action of some sort, if they have previously disclosed to the Office of Special Counsel, the Office of Inspector General, although that one is a little more complicated based on the transparency there, or to the Office of Accountability and Whistleblower Protection, we then will reach out to that supervisor or that proposing official and say you will hold this action until you hear from us.

Mr. BOST. Okay.

Secretary O'ROURKE. And so they cannot move forward with that action. And we work with human resources, so—

Mr. BOST. And that action could be—my time has expired, but just—

Secretary O'ROURKE. Adverse actions, removals—

Mr. BOST. Any?

Secretary O'ROURKE [continued].—demotion—

Mr. BOST. Demotions?

Secretary O'ROURKE [continued].—suspension, yes.

Mr. BOST. Okay. Thank you so much.

I yield back.

The CHAIRMAN. I thank the gentleman.

Ms. Brownley, you are recognized.

Ms. BROWNLEY. Thank you, Mr. Chairman.

I think I certainly agree with some of your opening comments in terms of a change in culture within the VA and many have already spoken to that, and I certainly concur with your perspective that changing culture takes time and persistence and patience. It is not easy to change a culture in a very large organization. But we also know that the VA is only as good as the employees who work within it.

And I would say too that the preceding Secretaries, you know, changing culture has been one of their top priorities without question, but we continue, and I am concerned that we still get negative reporting around the morale within the agency and that the morale is not very good.

And so my first question would be, since the Accountability Act was instituted within the VA, do you think employee morale has increased or decreased since the Accountability Act has been applied?

Secretary O'ROURKE. Anecdotally, where I visit on trips, I see high morale, but I'm not saying that to counter yours, but I think best what we will know is from our all-employee survey, which I am going to let Mr. Maenle speak to, of when we are going to have those results and how that process of getting those results back, and we will definitely, you know, share them with you all.

Mr. MAENLE. Certainly. So, as you know, we conduct an all-employee survey every year. That survey goes out to every employee across the VA and gives them an opportunity to tell us how the morale is, how things are going in the organization. So this year's all-employee survey closed on June 25th and our commitment is to have those results ready to go 45 days after it is closed, so mid-August we will have those results ready to go. And I am already on the hook to come back and brief this Committee, I believe on those results and what we found as a result of the survey.

Ms. BROWNLEY. And the previous morale survey, what were the results of that?

Mr. MAENLE. So if you use the Federal Employee Viewpoint Survey and the Partnership for Public Service, VA was down the list of places the work. And so we will be comparing this year's results to those previous results to see how we have done.

Ms. BROWNLEY. Thank you.

Mr. O'Rourke, who will be leading the VA's personnel department now that we have the vacancy?

Secretary O'ROURKE. Sure. Right now the—not officially, but the Principal Deputy Assistance Secretary, Nathan Maenle, is leading that office.

Ms. BROWNLEY. And what is your assessment of the current leadership there and what is your plan to ensure that the office re-

mains fully functional and able to meet the needs of the agency despite these recent departures?

Secretary O'ROURKE. Absolutely. I mean, I think a point to that is I don't think any office across the Federal Government is dependent on one person; they are very important, the leadership, but I have full confidence in the leadership team that is at HR&A today. I will be working with them on what our expectations are going forward. But their role is very complex, I mean, as you know. I mean, we have the HR function throughout the Veterans Health Administration and the Veterans Benefit Administration, these are massive organizations across the entire 50 United States, territories, foreign countries, they have a huge challenge, and we will be working with them to make sure that they have everything that they need to continue the progress that they have already made. So we look forward to that.

Ms. BROWNLEY. Well, from my perspective, I think the HR department has been a very weak spot across the VA and if they are not working efficiently and filling vacancies, then other departments are not operating at full capacity and performance. And so it is a constant issue that we have debated and discussed many, many times here in the Committee, and so being able to actually fill these vacancies in a timely manner with high-quality people is really important.

So, I do see it as a very—it is the weakest link in the system and really, we need to be focused on it very much so.

And so that just goes to again my question around, you know, your plan and what your personal involvement will be to make sure that this department is operating as effectively as possible.

Secretary O'ROURKE. Along with my own personal involvement, I have tasked the chief of staff to be personally involved in this as well. So we are taking this leadership involvement at a very serious level.

Ms. BROWNLEY. Well, my time is up, and I yield back.

The CHAIRMAN. I thank the gentlelady for yielding.

Dr. Dunn, you are recognized for 5 minutes.

Mr. DUNN. Thank you very much, Mr. Chairman.

Thank you, Secretary O'Rourke, for coming here to review the VA Accountability and Whistleblower Protection Act one-year in.

So, in recent months there have been some articles around the country regarding a number of VA physicians who were whistleblowers that made legitimate complaints and they experienced, they reported this, allegations of isolation, limiting access to their computers, bullying, intimidation, and actual threats against their medical licenses, so false claims to the medical boards that would impair their license. In fact, there was a case of a VA physician who reported over-prescribing, inappropriate use of opioids, and after reporting those problems, she had her practice privileges suspended and had false allegations made to her medical board. These are chilling things for your physicians to hear, both the ones you employ and the prospective ones you might employ.

How does the VA protect these physician whistleblowers?

Secretary O'ROURKE. First, we take every one of those claims very seriously. When those claims of retaliation of that nature are

made to the office, they are immediately addressed through the triage process to develop those further.

I can tell you, in most of my experience with those cases there is a lot more to the story. So we try to find all the story elements that we can and then make a determination very quickly of whether to refer that to the Office of Medical Inspector or, if there is something more serious, other appropriate investigative agencies.

Mr. DUNN. So I see a number in the data that I was reading of 319 complaints in the last year of retaliation against whistleblowers. Do you think that is a correct number, do you think that is fair?

Secretary O'ROURKE. I think in an organization like the VA that hasn't done what it should about defining what retaliation is, both from an educational standpoint, just, you know, the simple education standpoint, but really digging into that, using examples, and having every level of management hold each other accountable for that type of behavior. I have seen incredibly egregious examples of whistleblower retaliation and I have seen claims of whistleblower retaliation that were absolutely not—

Mr. DUNN. Not true?

Secretary O'ROURKE [continued]. —and it was holding people accountable.

Mr. DUNN. So, if someone does experience legitimate retaliation, what action can the VA take against that employee who was retaliating against the whistleblower?

Secretary O'ROURKE. There are two forms it will take. If we in the Department find that, then we will take adverse action against that supervisor, manager. It has to be in those categories, because employee-to-employee—

Mr. DUNN. Can you give me a for instance? I mean, that sounds like a pretty bad thing to do.

Secretary O'ROURKE. Yeah, we have removed—

Mr. DUNN. Fired?

Secretary O'ROURKE. Yeah, we have removed individuals for that usually after the second type of requirement. The Office of Special Counsel, their mandatory sentence, if you want to call it, is—I believe it is 14 days or more suspension in the first instance of whistleblower retaliation.

Mr. DUNN. Is it important to protect the anonymity of these whistleblowers, so that their identity is not—

Secretary O'ROURKE. Absolutely.

Mr. DUNN. So that is a key concern on the front end. If somebody does come to your office with a legitimate complaint about opioid over-prescription or something, that they don't—you know, this is not then public knowledge that they made that complaint, lest they experience these kind of retaliations.

Secretary O'ROURKE. It is the single highest reason given for retaliation is that they were a whistleblower. There are other claims of retaliation that have to do with other types of activity, but that has been the single highest reason.

Mr. DUNN. So that is protecting the witness, if you will?

Secretary O'ROURKE. Yes.

Mr. DUNN. The witness protection program. Gosh, what are we doing now?

So, let me change with a minute left to me here. The GAO report last year found when it came to official time, this time when employees are working, they are doing actually union duties, but they are on the VA payroll, that is supposed to be reported. You are supposed to know how much that time is, they go through a process, but that data we think is inconsistent and unreliable. So you have a new system, the VATAS, VA Time and Attendance System.

Do you have faith in that? Is that system going to give us some real data, honest data?

Secretary O'ROURKE. Yes, sir. We are going to start fully recording everyone's time, especially when it comes to official time, and that will put about 472 employees back to work, 11 of those being psychologists and 62 being RNs.

Mr. DUNN. Some physicians, I guess, huh?

Secretary O'ROURKE. Yeah. So this will actually be able to help us manage not just that we talked about, you know, giving folks credit for the official time that they need to use, but also putting folks back—

Mr. DUNN. When will that system be rolled out across the VA?

Secretary O'ROURKE. I'm sorry?

Mr. DUNN. When will it be, that system, the VATAS system?

Mr. MAENLE. So we are on the hook this month for deployment.

Mr. DUNN. Excellent, excellent. Let me offer you my apology for the physicians who are goofing off.

Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentleman for yielding.

Ms. KUSTER, you are recognized.

Ms. KUSTER. Thank you, Mr. Chairman.

And thank you, Mr. O'Rourke, for coming to New Hampshire, to Manchester, and I appreciated our meeting and our conversation. I was left hopeful at the time, but unfortunately my staff has yet to receive the final reports from either the Office of Medical Inspector or the Office of Accountability and Whistleblower Protection.

Just this past spring, the VA had informed us that these reports were in their final stages. So can you give me an update on the status of those reports about the Manchester VA and a timeline for their release?

Secretary O'ROURKE. I can't right now, but I will get that to you immediately after this meeting.

Ms. KUSTER. If you could. I know people in New Hampshire are anxious to hear about the investigations of the various personnel and the protections that—the reason I supported this legislation was to give protections to our whistleblowers, but apparently something is holding up the final reports, and it is important for us to get to the bottom of this.

Secretary O'ROURKE. Yes.

Ms. KUSTER. I also want to take into account the situation in Bedford, Massachusetts VA Medical Center next to my home district, which has been the center of at least three high-profile issues involving patient safety, employee safety, and gross fraud by employees.

My colleagues in the Mass. delegation and myself from New Hampshire felt that the Accountability Act that we are discussing today would have expedited effective and appropriate action, but it

is my understanding that at least one of these employees central to the case is still on the job. She was accused of fraud and waste. Why was she not fired for shifting nearly \$200,000 to her brother, and do you know the status of that case and what her current employment situation is?

Secretary O'ROURKE. So, I want to be careful, because I believe that still is an active investigation, but I am familiar with that.

Do you have an update on where we are at?

We have taken multiple disclosures from Bedford and we actually spent two visits to be on the ground, taking interviews, interviewing potential whistleblowers, or just variously other employees. But I know that that was also an OIG investigation as well, so we tried to make sure that we didn't cross into the criminal side, and I believe the facts that you are mentioning are on that criminal side of that. I think there was some resolution, though, with the individual's relative that was involved here.

Ms. KUSTER. If you could get back to my office—

Secretary O'ROURKE. Will do.

Ms. KUSTER [continued].—on that as well.

And the other is that, again in Bedford, a whistleblower recently had their allegations substantiated by the Special Counsel regarding asbestos contamination and subsequent patient and employee concerns about exposure. Can you tell us the status of that investigation?

Secretary O'ROURKE. I will follow up with you, but that sounds like something that would go to the Office of Medical Inspector.

Ms. KUSTER. Okay. So essentially, let me just switch gears here, my time is limited. I have been disappointed by Assistant Secretary Shelby's response. We had a Health Subcommittee hearing in late June, and this is in regard to March 2018 Merit Systems Protection Board study showing that the VA has the highest rate of sexual harassment across all Federal agencies. His response was dismissive of that and I would like to hear directly from you.

Do you accept the findings of this study? What are you doing about this issue? What role is the Office of the—excuse me, the whistleblower protection involved in that, and what is the timeline for actions at the VA to address these allegations.

Secretary O'ROURKE. So you want me to get this all in one minute. So, first, don't accept that kind of response. It is a serious issue and to reiterate that, at the Office of Accountability and Whistleblower Protection, our standing policy was any claims—I don't care where they came from, any claims of any kind of sexual harassment, retaliation regarding that or anything, required a 48-hour response from our office to have investigators on the ground, on site to start those investigations. So we have no tolerance for any kind of delay in any of that.

But I am going to turn it over to Mr. Maenle to provide the statistics on the training and some of the other parts of that program.

Mr. MAENLE. So, we stepped up our harassment prevention program in 2016. Over the past couple months, we have been looking at what do we need to do to make that a more robust program. So is there additional training that we need to do, so that employees are aware of what their avenues are for reporting.

We have a strong policy. We have done recent updates to our handbook, at the prompting of EEOC when they came in to look at our program. Although they liked what they saw, they did give us some suggestions, and so we are implementing those in our handbook.

From a training perspective, we have 95-percent training rate completion.

Ms. KUSTER. Is your training, I'm sorry to interrupt, but is it strictly online or is there an active component by the employees, are they engaged with a trainer in a live interaction?

Mr. MAENLE. So the 95-percent training completion rate is for online training and we have now begun a train-the-trainer program, so we can start doing online—or in-person training completion.

Ms. KUSTER. In person. I think it is much more effective, that is certainly what we have learned here on Capitol Hill and we have also tried to make changes.

And I think the other thing is that knowing—I'm sorry, my time is up, but knowing that this is from the top down and that there is a policy of no tolerance.

So, I apologize to the chair and I yield back.

The CHAIRMAN. I thank the gentlelady for yielding.

General Bergman, you are recognized for 5 minutes.

Mr. BERGMAN. Thank you, Mr. Chairman, and thanks to the panel here for being here today, because, you know, there is always more than one way to skin a cat, but in this case the cat is still the cat, and in this case bad behavior is bad behavior. It can vary from embezzling money to poor patient care, to you name it, the amount of different categories.

But the reporting system in this case needs to be standardized, because if we don't have a standardized way of reporting all the way up the chain, you are going to have variances then and potential for outcomes, because we want to standardize outcomes. If you have done something heinous, it should be a pretty severe outcome. If you have something that could be considered unintentional, but nonetheless was bad behavior, that is met in a different way. It is kind of like in the military with the Uniform Code of Military Justice. We do have that flexibility, but in this case let's talk about standardization.

If we had all the VISN directors here, do you think based upon now, you know, you are into it, that we would hear a standardized answer from them as to how they are implementing the act as we envisioned it?

Secretary O'ROURKE. No.

Mr. BERGMAN. Okay. Is there an effort or a hope that we could get it to an 80-percent commonality?

Secretary O'ROURKE. Yes, sir, and that is why I am short with that first answer. I mean, this organization has part of its culture a lot of independence from VISN to VISN, medical to medical center. Those things we have pointed out at different time. If you have visited one medical center, you have visited one medical center. That is not a great thing to say in all categories, especially not in this.

So it is going to require more engagement. It has required, at times, even working with the senior leadership teams to address that lack of seeing things the same way and kind of getting on the same page.

Mr. BERGMAN. Do we have enough data now or are we getting close to having enough data that has come out of different VISNs to say, wow, here is really a—they have got their act together here. This is an example that for those other VISNs, maybe who are more challenged in this arena to say, okay, if you can't figure it out yourself, try what, you know, VISN X is doing?

Secretary O'ROURKE. It has really been a lead by example. We have several VISNs that have—and we see this mostly on the whistleblower protection side with VISN directors taking the lead with reintegrating their whistleblowers that have been, probably in their words, thorns in their side for a long time for a lot of the right reasons. But they have just kind of held that back or they have opened up and allowed those few people to come in and reintegrate into the organization and provide the value that they can.

So we have had a few that have shown what can be done. It is getting the word out to the others and then showing them, or sometimes strongly encouraging them, that this is the same behaviors, the same attitude, the same way that they should be treating those same type of issues.

Mr. BERGMAN. Do you think that—I mean, the three of you are sitting here at the table being held accountable by us. If we had all of the VISN directors sitting at the table instead of you all, do you think they would feel the temperature in the seat like you potentially do?

Secretary O'ROURKE. I know they will this afternoon. I speak to the National Leadership Council of VHA and I will pass that along.

Mr. BERGMAN. Well, and somehow the—and in several of the oversight hearings that our Subcommittee has had, the lack of the sense of urgency that we have sensed, it is—and now it does fall back onto leadership, whether it is ours as a Committee here of the whole, communicating that with you, or then you, as the leadership communicating it down that—your chain of command because, you know, unfortunately in the end it all boils down to the same outcome and that is a veteran or a group of veterans doesn't get the services that they need, they require for a healthy life, for whatever it happens to be to benefit them. And the reason this was put into place was to hold people accountable, but most importantly, to protect those who saw bad behavior and felt compelled on behalf of the veterans to raise their hand and say, "Hey, this was wrong."

So I see my time is about to expire here, but we are here with you. We just need to—you know, we will give you all the hammers you need, but you need to swing them. Thank you and I yield back.

The CHAIRMAN. I thank the gentleman for yielding. Ms. Rice, you are recognized for five minutes.

Ms. RICE. Thank you, Mr. Chairman. Mr. O'Rourke, the Committee received many statements for the record from former VA employees about their experience after becoming whistleblowers. These experiences included problems with OAWP not keeping their disclosures confidential, which resulted in severe retaliation.

Obviously, this is very concerning since the very purpose of the creation of OAWP was intended to actually centralize the whistleblower protection in one place to prevent such things from happening anymore. I am just going to—I just want to point out two of the statements that happened while you were the head of OAWP.

The first was from a physician by the name of Dale Klein (phonetic) who stated that it was difficult to get the opportunity to talk to his OAWP case manager and that the case manager had not even planned to interview him in reviewing his case. He said his case manager was not even aware of an OIG finding on his whistleblower case and that ultimately OAWP did nothing to protect him from being fired. So that is number one.

Number two, you had an engineer by the name of Daniel Martin who stated that OAWP notified the senior officials, against whom he was doing the whistle blowing, about his disclosure. And as a result of that, he experienced retaliation that has essentially stripped him of his job, except in name only.

So these seem to me to be two examples of whistleblower protection actually doing the exact opposite. So what say you about this since you were in charge of that—

Secretary O'ROURKE. Sure.

Ms. RICE [continued].—department?

Secretary O'ROURKE. We will address Dr. Klein first. That case predated the establishment of OAWP, and his case was much down the road before any of us got involved in that. So his identity, of his own accord, was already proliferated everywhere. His case, in particular, has been reviewed by OSC. We didn't even—we didn't have the chance to investigate it because it wasn't even in our hands. But I believe that case resolved with him being removed and the Office of Special Counsel supporting that decision.

Now, the people that had initially been found with doing some retaliation to him, initially. There is a lot more details in this case that we need to go into, they were disciplined for retaliation because they did, frankly, screw up. They did not handle that the way they should have.

Ms. RICE. So disciplined? Were they removed?

Secretary O'ROURKE. They were—they got the mandatory OSC retaliation penalty of 14-day suspension.

Ms. RICE. So that is the problem. The punishment for people who retaliate against whistleblowers isn't strong enough is basically what you are saying?

Secretary O'ROURKE. That is the mandatory. To be honest, in that case, there were several other mitigating factors—it was almost a technicality to charge them with retaliation.

Ms. RICE. So why does it seem to me—it seems to me that there is always a benefit of the doubt given to the people who retaliate against whistleblowers than is—well, no but that—you can shake your head but—

Secretary O'ROURKE. I don't agree with that.

Ms. RICE. Well, okay, but we have seen example—

Secretary O'ROURKE. Okay.

Ms. RICE [continued].—after example of it. So I have limited time, I just want to get to the hotline. What is the status of the hotline? There is still no oversight mechanism on the hotline?

Secretary O'ROURKE. OIG hotline or—

Ms. RICE. The whistleblower hotline.

Secretary O'ROURKE. So the toll-free number that we maintain?

Ms. RICE. Right. Toll-free, yes.

Secretary O'ROURKE. There is oversight in the sense of OIG looking at the files?

Ms. RICE. No, no, oversight to make sure that it is actually being implemented—

Secretary O'ROURKE. It exists today.

Ms. RICE [continued].—people know that—well, I know it exists, but it doesn't seem—there doesn't seem to be much information out there about how people can access it.

Secretary O'ROURKE. I will take that as a critique. I mean, that has been an effort that—

Ms. RICE. Well, no, it is not a critique, it is a fact.

Secretary O'ROURKE. Well, it is communication throughout the organizations. This is all—this has been a top down communication of getting the word out. We have done all employee e-mails. The word has gone out. It is the consistency of that and having folks realize there is a new outlet for their disclosure.

There is already a hotline at OIG. There is already a hotline at OSC. There are multiple ways for disclosures to be made. Ours is the latest one that got created last June. So it is going to take a time before everyone understands exactly, and really which one to use. Because it is confusing to whistleblowers. We know this. We hear this from them.

Ms. RICE. Okay, then how do we make it less confusing? Why don't you tell us how we can make it less confusing?

Secretary O'ROURKE. Create one.

Ms. RICE. Okay. That is a great idea.

Secretary O'ROURKE. Then you have to take it away from the Office of Inspector General and the Office of Special Counsel, which are governed by other statutes. I don't want to be glib on that.

Ms. RICE. There are oversight—you know, features.

Secretary O'ROURKE. I think whistleblowers should have as many outlets for making disclosure as they need, and we will work out the complexity on the back end of where that disclosure is. That requires more cooperation between the folks that receive them.

Ms. RICE. The problem is that if you flood people with—it is how you get information to people—

Secretary O'ROURKE. Sure.

Ms. RICE [continued].—and how efficiently you do it, and how easy you make it for people to actually dial a number. And I think there needs to be, obviously, some more oversight in that field. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. I thank the gentle lady for yielding. Mr. Mast, you are recognized for five minutes.

Mr. MAST. Thank you, Chairman. Thank you for being here, Mr. O'Rourke. You have got a great Colonel sitting behind you. I have

known the man for a number of years. So I am glad to see him working with you.

I am the end user of the VA to the tee. I get every bit of my health care through the VA. I hold weekly office hours in the VA for any veteran that wants to talk about any issue, VA-related or otherwise. I am walking the halls there frequently. I see them. I see my fellow veterans constantly. I see the smiles on them, and I see their truly heartfelt gratitude when they get the care that they were seeking at the VA. And I also see their frustration when their care was lacking in timeliness or appropriateness. And I hear about it both, as we all do.

And that is, in summation, what we all want to see. We want to see the care for every end user of the VA to be best possible care that it can be. It is summed up very simply like that. I think we all agree on that. It is what we want to see.

Now, you have said in this hearing several times that you want to see a change in the culture of the VA. So I just want to give you a chance to espouse upon that. What would you change in the culture of the VA? If you had a wand, if you could build it up brick by brick from the beginning, what would change in the culture of the VA for you? What would be your tolerance for any negligence whatsoever, big or small, what would you change about that? That is my only question for you.

I give you the next three minutes and 20 seconds to espouse upon how you would change the culture of the VA and what you want to see out of that, sir.

Secretary O'ROURKE. So in the context of—first, starting with the context of the Office of Accountability and whistleblower protection, I want us to all acknowledge that that is where this starts. It starts with accountability, whether it is a frontline employee making a bed, or whether it is a medical center director that has multiple issues going on during the day but needs to find where he or she should put their priorities.

We know that from observation, when you meet veterans that are walking through a hospital that just passed the medical center director and got to speak with him briefly, they know that the leadership there at that local level is engaged.

In the medical centers that I visit, you can feel the difference when that—when leadership is engaged in that way. So the first thing would be is medical center directors, leadership fully engaged with their veterans, fully engaged with their staff, listening to them, raising concerns, raising issues, whether it is funding, whether it is just a—of resources, bringing those up and down the chain of command and having that be seamless and transparent.

One of the things that is frustrating a lot of times is between our administrations, between our staff offices, we have a lot of time where we don't work together on problems. We try to work on them either individually or we just try to not think about them too much. Breaking down those barriers between—whether it is between IT and VHA, whether it is between VHA and VBA, working problems collaboratively with the veteran's outcome in mind.

That has been said before. That is not something new for anybody to hear, but it is truly in the execution of that from the very building—the processes to support that, that is what would

change—I would change immediately if I could. But that involves personalities. That involves people that have been doing things their whole careers. Getting them to move away from those well-established, well-developed opinions and the processes is difficult. It takes time.

But when you have a law like this that links together what I—and I will keep saying it. Chairman Roe and I talked about it over the weekend, why I think this is—why I don't think we give ourselves or Congress gives themselves enough credit on this is they put together accountability, performance with this whistleblower retaliation, whistleblower protection piece which—as we even talked about, it is not well-defined. And we get stories that come in different ways. And I am not discrediting any of them, but really getting to the truth and getting the facts of those is difficult. And it requires people to be—to withhold judgment sometimes, but then look at all of the facts and then make determinations there, not just go off on a track.

So why I think this is so critical is that it gives us the tools as leadership to talk to other leaders and say here is how you need to hold yourself accountable, hold your people accountable, how you should be performing, and it not just be an empty discussion. And then say I am going to come back in six months, if you haven't done these things, I am going to remove you. I am going to end your Federal service, which is a huge thing. It is not anything that any of us in this office ever came to lightly.

When we go to a medical center director and say your service is now over, sometimes when they have had 15, 20 years of service, that is a monumental thing to do, but it is what is going to motivate them to get better. And that is when it is going to motivate them to be more accountable to their employees. So you see it when you see it at a medical center. I would love to take those folks and make an example of them across the rest of the VA and say this is how everybody should operate, but I have gone over my time.

Mr. MAST. Thank you, Mr. O'Rourke. Thank you, Chairman. I yield back.

The CHAIRMAN. I thank the gentleman for yielding. Mr. Peters, you are recognized for five minutes.

Mr. PETERS. Thank you very much, Mr. Chairman. And thanks for being here today with us. At the VA, serving veterans should always come first. And we have to value whistleblowers who call out bad actors and toxic culture. In fact, that is why a lot of us supported the Accountability Act, which was a big stretch for a lot of us to give the VA the tools to make sure that everyone, from the secretary all the way down to anyone who is in the cafeteria, is serving the veteran and not the bureaucracy. And I think we were on board with that.

The Former Secretary Shulkin said he didn't think that this would be a tool that was going to lead to mass firings. Dan Caldwell of Concerned Veterans of America wrote an article entitled, "One accountable government board stands in the way of VA accountability." Because before this bill, senior officials could appeal decisions to the Merit Protection Systems Board, now they can't. In that article, he writes that that board had a history of blocking demotions of—or firings of negligent and bad senior VA

employees. And the current SVAC Chairman, Senate Chairman Isakson said he thought the bill would create a culture of accountability at the VA.

So at its passage, a lot of democrats signaled concern that this would be taken advantage of, ultimately supported the bill. I supported the bill because we thought it was the best compromise to hold the VA accountable to fix its own culture.

And I just want to explore the possibility that, and you have addressed some of the numbers, but that we not create a culture of fear as opposed to accountability. A culture of fear that makes the VA's employees feel like any small mistake could mean losing their job, or prevents whistleblowers from stepping up and having faith in the accountability system.

And my colleague, Ms. Kuster, rightly observed last year that senior executives are at the level at which decisions end up being made, not the lower level folks. So I wonder—I also just refer to one more thing. VA put a press release out on April 25th, 2018. It is very short. It says, “Under VA’s new leadership, which is now firmly aligned with President and his priorities, the Department’s operations have improved in many ways. In a number of cases, employees who are wedded to the status quo and not on board with this administration’s policies or pace of change have now departed VA.”

I wonder when you—under what circumstances you think that disagreeing with the administration is a fireable offense?

Secretary O’ROURKE. I don’t think that has ever factored in any of the processed actions that we have taken at VA.

Mr. PETERS. Well, I guess let me explore it. Obviously, if someone at the senior—I don’t know who these individuals are. I appreciate some maybe, without identifying who they were, what does that mean? People who weren’t on board. Why have they left? Were they asked to leave or what is the context for that?

Secretary O’ROURKE. Any time you start shifting the operation of an organization to start focusing on things like veterans, whether it is electronic health record, Mission Act, those kind of things, folks realize maybe on their own that they don’t want to be there. I think there is a few cases that we could look at of folks in senior positions where they advocated for a different approach and then the organization took another—went in a different direction and they just felt like that wasn’t a place they wanted to be anymore.

That is a personal decision people get to make.

Mr. PETERS. So in these cases, really, it just dawned on them that I don’t match this organization anymore, it is time for me to leave. Is that what you are saying? No one was asked to leave?

Secretary O’ROURKE. No, not in the cases I think you are probably referring to because those really ended up being—in fact, some cases, we were—we found that there really wasn’t an alignment at all with where the VA was going. So I am actually surprised they stayed as long as they did.

Mr. PETERS. And I understand, too, that if someone is not on board with the policies at the high senior level that they might be asked to leave.

Secretary O’ROURKE. Well, I would even go even further than that. I mean, we are not talking about policies. We were talking

about things like the electronic health record, the decisions that were made there both by Dr. Shulkin, by this Committee and by the Congress, and also the Mission Act. I mean, we have some very historic and transformative changes happening at VA that are going to change the status quo.

Mr. PETERS. Right.

Secretary O'ROURKE. And I think when that really became the reality for the organization, folks had to sit back, and take stock of that, and see what they wanted to do.

Mr. PETERS. How are you assuring that people aren't disciplined or fired for their own personal political beliefs. And I just—we just had an example of this in the FBI where a gentleman was by all evidence was doing his job, actually was removed from the case because there was a perception he was biased. How do you parse out when people's personal feelings about the administration might be out of line, but they are doing their job okay? Are you trying to protect those people?

Secretary O'ROURKE. When those people, in that case, make a whistleblower disclosure on something unrelated to politics, absolutely. They get the same protections as whistleblowers across the board. In misconduct cases, misconduct is not—has a very specific definition. It is not political, it—

Mr. PETERS. It has nothing to do with a person's political beliefs, individual beliefs?

Secretary O'ROURKE. No.

Mr. PETERS. Okay. My time as expired, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you, Mr. Peters. Mr. Arrington, you are recognized for five minutes.

Mr. ARRINGTON. Thank you, Mr. Chairman. Mr. O'Rourke let me just dive right in here. How many employees do you have who were hired for specific job, duties probably outlined in the posting, who are now spending 100 percent of their time on union activity or official time?

So almost 500 employees who spend 100 percent of their time on something other than the job they were hired to do. How do you hold those people accountable?

Secretary O'ROURKE. I believe the recent executive orders will require all employees to go back on—at the time I think 25 percent is only required—or the only allowable union time.

Mr. ARRINGTON. Can you hold those employees accountable for doing a job they were hired to do if they are spending 100 percent of their time on union activity? And not the taxpayer funded needed for serving our veterans job that they were hired to do; can you hold them accountable?

Secretary O'ROURKE. With the implementation of the—

Mr. ARRINGTON. Currently, can you hold them accountable under the current construct?

Secretary O'ROURKE. We weren't—

Mr. ARRINGTON. I mean, if the answer is no, I mean, it is no. Let's get to it. It is no. And I hope you change it. I had a law that we passed out of the Committee, one of the most disappointing experiences on the Committee because it was a partisan vote. I didn't get one of my colleagues to vote to reduce that to 25 percent. I

think that is reasonable. Do you know what the legal standard is for administering official time? I am not going to try to stump you.

Secretary O'ROURKE. I am sorry.

Mr. ARRINGTON. Let me just read it.

Secretary O'ROURKE. Sure.

Mr. ARRINGTON. You can have official time, but it has to be administered in a way that is reasonable, necessary, and in the best interest of the public. Do you believe somebody spending 100 percent of their time on union activity or official time, is reasonable, necessary, or in the best interest of the public?

Secretary O'ROURKE. I think I would like to answer that question by saying I am looking forward to getting, especially the 11 psychologists that are on 100 percent union time back to serving veterans. And an area for mental health is very critical for the VA.

Mr. ARRINGTON. Well, let me ask your colleagues, do you think 100 percent of time spent outside of the job they were hired to do is reasonable, necessary, and in the best interest of the public? This is the law of the land. This is what we are supposed to do as a Committee is to hold people accountable to the laws of the land. Is it reasonable?

Mr. MAENLE. And I can tell you, I was hired to serve veterans. And when you are not serving veterans, I think we need to take a hard look at what we are doing to get you back to serving veterans.

Mr. ARRINGTON. It is hard to serve a veteran when you were hired to do a job and then you end up spending 100 percent of your time on a job—I am telling you, anybody listening to this in—across this great country is scratching their head about how in the world we can create a culture of accountability when you have policies in place where somebody can spend 100 percent of their time on something other than what they are hired to do and that that is acceptable. How can that be acceptable?

What about you, Mr. Nichols—Nicholas, do you think it is reasonable?

Mr. NICHOLAS. No.

Mr. ARRINGTON. Okay. Thank you. It is great to get a direct answer. I hope there is no retribution made. You need to file a whistleblower complaint when you get back, so you are protected, but—because I worry for you now, but I appreciate the honesty and the American people appreciate it.

Do people have a constitutional right to a job at the VA?

Secretary O'ROURKE. No, sir, not that I am aware of.

Mr. ARRINGTON. Should the public sector employees be held to a different standard of accountability than those—130 million hard-working, God-fearing, tax paying Americans who work outside of the Federal government, should there be two different standards?

Secretary O'ROURKE. No, sir.

Mr. ARRINGTON. Do VA employees retain their right to sue if they are wrongfully terminated? Do they have that right?

Secretary O'ROURKE. Yes, sir.

Mr. ARRINGTON. So they retain that right. Do they have the right to go choose to leave the VA and work somewhere else if they don't like the way they are treated and they feel like they were performing and etcetera, etcetera?

Secretary O'ROURKE. Yes, sir.

Mr. ARRINGTON. Do the 130 million people who are not part of the Federal government system and the VA, do they have a Merit System Protection Board and what is their standard of evidence when they are fired? Is its substantial evidence or is it preponderance of evidence? Which one?

When a private sector employee, someone outside of the Federal government, is fired what is the standard by which the employee has to present their case in order to fire that employee? Is its substantial evidence or preponderance of evidence?

Secretary O'ROURKE. They don't have MSP—

Mr. ARRINGTON. They don't have evidence, so—okay. But they—okay. Let me go back to the line of questioning of my colleague, Mr. Takano. You said in 2014, were there about the same proportionately low wage and veteran employees that were removed then as there are now, proportionately?

Secretary O'ROURKE. Yes, sir.

Mr. ARRINGTON. So there is no difference, just percentage-wise. There may be more numbers, but as a percentage, that it—the same percentage or trend then exists today?

Secretary O'ROURKE. Yes, sir.

Mr. ARRINGTON. Is there a carve-out for veterans who don't perform well consistently to not be fired?

Secretary O'ROURKE. No, sir.

Mr. ARRINGTON. Is there a carve-out for disabled veterans if they are not performing consistently will not be fired?

Secretary O'ROURKE. No, sir.

Mr. ARRINGTON. Is there a carve-out for low wage people or high wage people or blonde hair people or blue-eyed people that aren't performing well, is there a carve-out for those guys because I would like to know it? That is a loophole, we need to fix it.

Secretary O'ROURKE. No, sir.

Mr. ARRINGTON. Okay. Mr. Chairman, I yield back.

The CHAIRMAN. Time is expired. Mr. Correa, you are recognized for five minutes.

Mr. CORREA. Thank you, Mr. Chairman. Gentlemen, the VA has a very important mission to take care of our veterans who served our country honorably. The job is really one of function of personnel. 99 percent of the services are personnel related. Personnel management, important issue. GAO disabled American veterans have said there is issues of personnel management. Morale, retention.

We have talked about removing employees. My question to you is what have we done to retain employees? In this Committee, we have talked about the fact that salaries aren't competitive in many places. So what are we doing—what do we need to do to make sure that we hold on to those valued employees at the VA?

Secretary O'ROURKE. Absolutely. In the context of the accountability and whistleblower protection law, it is that accountability of peace. When employees don't feel safe, when they want to blow the whistle and can't, or don't feel like they can, if they blow the whistle and don't see anything happen. Maybe they just talk to their supervisor and say there is a problem here and they don't see a response, that is an accountability issue.

And before, when we could have a culture of well, if I don't do something this time, it is not going to make any difference, and an inconsistency of an application of standards, you develop those problems over time. This law at least provided some tools, some more tools, for us to be able to address that. But it is going to be the intent. You are exactly right. It has to be our intent as leadership, and then to make sure that we hold each level of management accountable to then provide those employees at every level with what they need.

Mr. CORREA. Let me ask the question in a different context. We have been talking about removing employees. Flip it around. Retaining employees. What are we doing to make their life at the VA something that people wake up and say, "You know what, I am going to have a great day? I am going to go help veterans."

Secretary O'ROURKE. Well, sir, I think that is where the job I have is actually fairly easy. Serving veterans is the best job you can have. I am sorry, I even told the group of political appointees when we first got here, you will not have a more righteous job than working at the VA because you get to serve veterans.

Mr. CORREA. But yet, we have an issue with turnover.

Secretary O'ROURKE. I would say we have got a complex HR system and a complex system in general, and it is going to require very intentional work on our part, on your part to solve this.

Mr. CORREA. And this is not an issue of got you. And Mr.—Jodey, before you leave, I am going to follow up on some of your comments. But again, just you know, I want to work with you, try to figure out how do we make it a better place for employees to work. And I wanted to make sure he stayed here, Jodey, because I wanted to follow up with some of your lines of questioning in the two minutes I have got.

Are there any other employees that should be at the VA that you have lent to other agencies or other organizations that should really be at the VA as opposed to be working somewhere else?

Secretary O'ROURKE. Not that I am aware of, but let me check back to be completely accurate with that question. But I don't believe we make a habit—I know I detailed lots of people—

Mr. CORREA. Mr. Arrington is—he has got a good point, which is you are supposed to be dedicating 100 percent of your time working, taking care of our vets. I just want to make sure are there any other employees at the VA that are not actually working at the VA, but maybe other departments that you have lent out to or have assigned to.

Secretary O'ROURKE. Like I said, sir, I am not aware of any. And like I have said, we have actually detailed or brought employees from DoD, HHS, other places to VA to help us. So a great example is the lady running our EHRM program is from HHS. Highly qualified, highly skilled in this area. We brought the best we could find to lead that project here at VA.

Mr. CORREA. I would like if you could go back and see, look at your notes and see if there are other folks out there that are actually not working in the VA that should be working in the VA.

Secretary O'ROURKE. Absolutely.

Mr. CORREA. Okay.

Secretary O'ROURKE. I don't—sir, I am not aware of any.

Mr. CORREA. Thank you very much.

The CHAIRMAN. Yield?

Mr. CORREA. Yes. I am going to yield the rest of my— go ahead.

Mr. TAKANO. Mr. O'Rourke, you went along with the characterization that official time is union time. You actually used the term yourself. Is it true that official time can be used to conduct union business? Does not the law prohibit that from happening?

Secretary O'ROURKE. I believe the law does prohibit that.

Mr. TAKANO. Then why did you refer—the law does prohibit it, right, currently?

Secretary O'ROURKE. I believe that is what you—

Mr. TAKANO. So why did you refer—why did you respond to Mr. Arrington's question as going along with the conflation of using union time and official time, saying that they are the same thing. Are they the same thing?

Secretary O'ROURKE. They are commonly referred to as the same thing.

Mr. TAKANO. But are they the same thing?

Secretary O'ROURKE. Well, I am sure there is different legal definitions that we have talked—

Mr. TAKANO. Are they the same thing?

Secretary O'ROURKE. Are they the—

Mr. TAKANO. They are not the same thing. We have gotten lazy in our language. They are not the same thing. And that is the opportunism that is being exploited by Mr. Arrington by going after union time when union—after official time. Official time is not union time. It is not time to conduct union business. Is that correct?

Secretary O'ROURKE. Sir, I want to get—

Mr. TAKANO. Is that correct?

Secretary O'ROURKE [continued].—psychologist back to work.

Mr. TAKANO. Is that correct? It is a simple answer.

Secretary O'ROURKE. That they are the same—

Mr. TAKANO. They are not the same thing.

Secretary O'ROURKE. They are not the same thing, but at the end of the day, they are the same thing.

Mr. TAKANO. No, that is fine. Thank you. I accept your answer, sir.

Secretary O'ROURKE. There are people not working—

Mr. TAKANO. Thank you. It is not the same thing.

The CHAIRMAN. This gentleman's time is expired. Mr. Higgins, you are recognized for five minutes.

Mr. HIGGINS. Mr. Chairman, I would like to yield a minute of my time to Mr. Arrington.

Mr. ARRINGTON. Thank you, Mr. Higgins. I think it is the same thing. I think we are trying to parse words up here. I think if you laid it out and I wish I had it in front of me. I hope somebody can get it and just read through it.

You can have somebody on "official time", which is I believe time spent on union activity actually lobby Congress. That is one of the issues or activities that have been applied and determined acceptable. They go to union conferences. There are all sorts of things that I would say it is union activity.

I am not saying there shouldn't be unions. I am saying you can't spend 100 percent of your time if you are hired to be a physician to take care and provide health services to a veteran and then end up spending 100 percent of your time lobbying Congress for your union, being at conferences for your union. I just don't think that is acceptable. I don't think it is reasonable, necessary, or in the best interest of the public. I am just trying to follow the law.

The CHAIRMAN. Mr. Higgins, you reclaim your time?

Mr. ARRINGTON. So I yield back to my colleague, Mr. Higgins.

Mr. HIGGINS. Thank you, Jodey. Mr. Chairman, in the interest of bipartisanship, we could consider as a Committee a round table to discuss this issue. It is passionate. We all care about the same thing.

Mr. O'Rourke, thank you for being here. Do you generally recognize, sir, that this is an era of reform in the VA? That the VA has been a mess, man, for decades. And it didn't get that way under one administration, or one executive, or one VA Committee. And this Committee, in a very bipartisan manner, has touched my spirit, has embraced the challenge to reform the VA. But does the VA get it that this is an era of reform?

Secretary O'ROURKE. I don't think any organization self-reforms. It is going to be what the leadership of this Congress and the leadership—

Mr. HIGGINS. But is there a clear understanding within the culture that you described if you could change one thing, or if you could identify one thing that reflects this era of the VA is that it is an era of accountability. But I am going to talk about is there a consequence to accountability. So I am just asking you, sir, generally speaking, as a man, as an American, is it recognized within the VA that we have to reform this thing?

Secretary O'ROURKE. I think there is a growing number of people in the VA that recognize that.

Mr. HIGGINS. Okay. For the record, I would like you to answer are MSPB judges providing deference to VA's decisions and not mitigating penalties?

Secretary O'ROURKE. Yes.

Mr. HIGGINS. Are arbitrators following the Act's timelines and are they giving deference to the penalty decision?

Secretary O'ROURKE. Not consistently.

Mr. HIGGINS. And what could be done, or perhaps you could provide in writing for the Committee, what could be done—what could we do as a body to help you enforce within the executive, the arbitrators following the Act's timeline.

Let me ask you, sir, are you familiar with confidential informants that are used across the country in law enforcement?

Secretary O'ROURKE. Yes, sir.

Mr. HIGGINS. And the key word there is confidential. Do you know what happens to a confidential informant if the detectives or the department reveals their identity?

Secretary O'ROURKE. Yes.

Mr. HIGGINS. Yeah, we pretty much find them in a ditch somewhere. So whistleblowers, to me, are the equivalent of confidential informants. And I reflect a concern of my colleagues on both sides of the aisle regarding the protection of whistleblower's identities.

How can there be any complaints of retaliation if we are effectively protecting the identity of whistleblowers?

Secretary O'ROURKE. And that is—what you bring up is a great point because with retaliatory or retaliation cases, the identity of the whistleblowers no longer protect.

Mr. HIGGINS. Exactly.

Secretary O'ROURKE. But you get to the earlier point of how do we—

Mr. HIGGINS. There would be no retaliation if there is no identity exposed. So I think we should have great concern amongst the executive and amongst this body regarding the crucial important of the protection of whistleblower's identities because they are, in effect, confidential informants. And no more will come forward.

We will dampen this reform effort if we don't place a great deal of emphasis on the protection of these identifies. I would just like to say that in cases that have been brought up by my colleagues regarding someone that has been accused of egregious behavior, are they allowed to continue on a job or are they placed on unpaid administrative leave?

Secretary O'ROURKE. Depending on their functional area. Local decision is made on whether to remove them from that.

Mr. HIGGINS. Do you have the power to place them on unpaid administrative leave?

Secretary O'ROURKE. I believe that has been severely restricted and it was abused in the past. So we have had new rules around that.

Mr. HIGGINS. All right. Perhaps you need that—Mr. Chairman, my time is expired. I yield back.

The CHAIRMAN. I thank the gentleman. Mr. Lamb, you are recognized for five minutes.

Mr. LAMB. Thank you, Mr. Chairman. Mr. O'Rourke, just a couple of questions about the union time/official time line of discussion. That time, whatever you want to call it, that is governed by the collective bargaining agreement between AFGE and the VA, correct?

Secretary O'ROURKE. Yes.

Mr. LAMB. Okay. And that collective bargaining agreement is struck between the members of AFGE and the VA, correct?

Secretary O'ROURKE. Yes.

Mr. LAMB. Okay. And that is something that those members were free to contract on their own with the VA, correct?

Secretary O'ROURKE. Yes.

Mr. LAMB. And decide how they want that time to be used as part of the contract?

Secretary O'ROURKE. Yes. One fact in that is that this is a contract we have had rolled over for how many years now? Seven?

Mr. MAENLE. Seven years.

Secretary O'ROURKE. Yes, just to be clear.

Mr. LAMB. No one held a gun to your head, right? It is a freely bargained contract between the VA and the members?

Secretary O'ROURKE. No, no.

Mr. LAMB. Okay.

Secretary O'ROURKE. Although to be very clear, we did negotiate away management rights that we were not supposed to do.

Mr. LAMB. Sure. But the contract stands, and it is transparent and opened to the public?

Secretary O'ROURKE. This—is, yes.

Mr. LAMB. Okay. Now, you were in the military as well, right, Mr. O'Rourke?

Secretary O'ROURKE. Yes.

Mr. LAMB. Okay. And in the military, officers are frequently held accountable for the actions of their subordinates, right?

Secretary O'ROURKE. Yes.

Mr. LAMB. Yeah. And you are familiar with the phrase “Officers eat last.”

Secretary O'ROURKE. Yes.

Mr. LAMB. Part of the military culture is that people at the top are supposed to look out for the people below them and take accountability for their actions, even if it is not the officer's direct fault. They have responsibility for the people underneath them.

Secretary O'ROURKE. Yes.

Mr. LAMB. And that promotes a pretty good culture in the military, right?

Secretary O'ROURKE. For the most part, yes.

Mr. LAMB. Do you draw on your experiences in the military in leading the VA?

Secretary O'ROURKE. I try to be cognizant that I am in a civilian agency, but yes.

Mr. LAMB. Is that—is there overlap between the kind of culture you would like to promote in the VA and what you experienced in the military, as it relates to leadership?

Secretary O'ROURKE. Given our customer-base being veterans, yes. Because that is their expectations from what their shared experiences are.

Mr. LAMB. I mean, one thing I saw in the Marine Corps was that when you create that kind of culture, you have leaders affirmatively go out and take responsibility for the people below them, even when no one tells them to. And the people below them see that and they want to succeed for the person who is leading them because they don't want the person who is leading them to get fired, if they like they, if they think they are doing a good job.

I mean, that is like—when you talk about creation of a culture, that is what ends up happening day to day. Are you familiar with that?

Secretary O'ROURKE. Yes.

Mr. LAMB. Okay. So if we just look at 2018 under the operation of this law, there have been about 15 managers fired overall? Is that an accurate number?

Secretary O'ROURKE. I think that is about right.

Mr. LAMB. And it is fair to say whatever the number is, there have been hundreds of housekeepers, food service workers, and nursing assistants fired in that same time?

Secretary O'ROURKE. I think that is where our military analogy starts to break down a little bit because we are talking about high turnover, hourly waged—

Mr. LAMB. Right. I am just talking, though, about people who have been fired. There have been hundreds of people in those three categories.

Secretary O'ROURKE. Also we need to understand that we are talking about highly desperate numbers of—I mean, we have 400 SES's. We have—

Mr. LAMB. Right. But those—that—

Secretary O'ROURKE [continued].—tens of thousands—

Mr. LAMB [continued].—comparison of absolute numbers is accurate, that there have been 15—

Secretary O'ROURKE. I think we need to look at the percentages.

Mr. LAMB. Yeah.

Secretary O'ROURKE. So if you look at senior leader removals as a percentage and the change, it is—it starts to normalize a little bit.

Mr. LAMB. You are saying they are consistent across time. Exactly. At the same time, we have a lot of vacancies in those lower level positions, right? And in Pittsburgh, for example, near where I am—my district is, we have seen 46 adverse action against low level employees since the law was implemented. And there are 300 vacancies among similar positions.

So I want to ask you, if you are one of the people who are left who has not been fired. Let's say you are a food service worker or a housekeeper. You have seen 46 of your colleagues receive adverse actions in the past year. There are 300 of your potential colleagues who are missing, because there are vacancies. You would agree that increases the workload for you, right? You probably have more of workload than you would have—

Secretary O'ROURKE. I think we need to put this in context, because I believe there is probably the same number fired the year before, and the year before that. So it is not a new—

Mr. LAMB. Right, but the state of affairs today, there are people missing at the lower levels from the VA in places like—

Secretary O'ROURKE. There are not easy places to hire into and with the veteran's preference, which we hold to. It makes it even more difficult to fill those positions sometimes, especially at that level.

Mr. LAMB. So from a housekeeper's vantage point, they have seen 46 of their colleagues punished in the last year. They see 300 of them missing. Their work is additional every single day. And very few, if any, managers have been dismissed in that time. Do you think that they feel like they are part of a culture where officers eat last today?

Secretary O'ROURKE. I don't believe that is going to be the best way to describe that since we are talking about—

Mr. LAMB. I don't think so either. Mr. Chairman, I yield the balance of my time.

The CHAIRMAN. I thank the gentleman for yielding. Mr. Secretary, and thank you all for being here today and I appreciate that. And being no further questions, the first panel is dismissed, and I would like to invite our second panel to the witness table. Thank you for your service.

The CHAIRMAN. Joining us on our second panel this morning is Mr. J. David Cox. Mr. Cox, welcome. The national president of the American Federation of Government Employees. Mr. Cox, you are now recognized for five minutes.

STATEMENT OF J. DAVID COX, SR.

Mr. COX. Thank you for the opportunity to testify today. The Accountability Act has turned out to be the most counterproductive VA law ever enacted. It has demoralized and harmed its dedicated workforce, a third of whom are veterans themselves. Here is what so-called accountability looks like under the new law.

Although the VA has tried to hide the facts by denying information requests from Congress and AFGE, its own published data tell a terrible story of the 1,096 VA employees fired in the first five months of 2018, only 15 were supervisors, and that doesn't mean they are just SES'ers.

Housekeeping aids, virtually all of whom are disabled vets, were the largest number fired, fired by nursing assistants, registered nurses, food service workers, and medical support assistants. These five groups make up 51 percent of all removals.

The VA has refused to provide information on veteran status, gender, or race of those fired. Probably to hide the disproportionate effect of this harsh law on the most vulnerable individuals. Even though we don't have complete data, the disproportionate impact on VA's lowest paid and veteran workforce is undeniable. All of our current openings for housekeeping aids are for preference-eligible veterans and virtually all pay less than \$35,000 annually.

Nursing assistant positions start at around \$30,000. And food service national postings list hourly wages as low as \$11 an hour. These are the jobs of the people being fired under the new accountability law.

This destructive law was enacted despite warnings from experts that miss management, not the union, and not job protections for front line employees was undermining the VA's capability to deliver services to veterans. Healthcare experts repeatedly presented evidence that the VA health care system outperforms the private sector.

Before anyone points to the Phoenix scandal as justification for this law, please recall that statements by Phoenix VA patient schedulers confirm that the wait list gaming was caused by severe shortages of providers and distorted management incentive systems. Not the union contract, and not incompetent are heartless workers who couldn't be fired.

Gaming the scheduling system has been a product ever since post 9/11 veterans started returning home with complex medical needs over 15 years ago. We have been telling Congress that chronic short staffing was causing wait list manipulation and severe access problems at VA medical centers.

We had also been asking for additional staff to reduce the claims backlog at VBA. Yet, thanks to the accountability law, four essential claims processing positions, veteran service representative, rating specialist, claims examiner, and claims assistants were among the largest groups of fired employees in 2018.

Destroying Federal employee due process and union rights continued to be the vehicles of choice for those intent on destroying the civil service and steering the VA into further privatization. In the accountability law, the lower standard of evidence in particular has lent fuel to the firing of employees, along with preventing MSPB

administrative judges from imposing a lesser penalty when the evidence doesn't support removal.

Before the accountability law, VA routinely offered employees a chance to improve their performance before firing them. Now, the agency is using its new authority not to shorten—but to go straight to firing. Finally, the act was supposed to improve protections for whistleblowers. But as we warned, it has had the opposite effect. It is easier than ever to fire a whistleblower. And you can see example of how this has occurred in my written statement.

I want to conclude by pointing out that while the VA has not yet moved to evict all union representatives from their offices as the Social Security Administration did last week, no conversation about Federal labor management relations should occur without addressing this. President Trump is attempting to ruthlessly bust our union with his executive orders.

While many Members of Congress have spoken out against these lawless and severe decrees, I ask that this Committee act to stop the VA from behaving in the same horrendous manner as the SSA. This Committee has an obligation to the democracy for which veterans risked their lives to prevent the executive branch from breaking the law and destroying Federal unions.

Thank you, Mr. Chairman. I will be glad to take any questions from anyone.

[THE PREPARED STATEMENT OF J. DAVID COX SR. APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you, Mr. Cox. And just for the record, when I came to the Congress in 2009, the VA had about 250,000 employees and we were spending about \$97 and a half billion on benefits, cemeteries, and health care. The President's ask in this budget is \$192.5 billion. And there are now—I am not sure what the number is, but 360 or 370,000 members at the VA. It is larger than the United States Navy.

So we have added a hundred and something thousand employees in the last nine years and doubled the budget. That looks to me like if the VA is managing its assets, and I don't disagree with you. I think management is a huge part of this equation. We are not doing something right. We are not getting the bang for our buck if we are doing that.

What evidence do you have that the accountability law is being used improperly when I am looking at GS-01 through 6, where pre-OAWP 61.2 percent of the dismissals were there and now it is 58.6? So the percentage actually in the 1 to 6 have gone down, not up.

Mr. COX. Mr. Chairman, I think if you would look at the fact that 15 management employees, and I heard the acting secretary refer—there is only 400 and some SES'ers, there are tens of thousands of managers throughout the rank and file of the VA from housekeeping aids, supervisors, food service supervisors, and many of those. And 15 is grossly disproportionate. The Phoenix scandal was all caused by top management in that VA by management incentives, in which we all know it was not from the frontline employees who were blowing the whistles, who were arguing and had to represent because that management was trying to fire them, sir.

And also, I would like to add many of these veterans are returning and continue to return and we are not making just a 50 year commitment, we are making a 60, possibly 70 year commitment to hundreds and hundreds of thousands of veterans and how the number of staff is going up, but there are hundreds and hundreds of thousands of veterans whose lives have changed.

I have suffered with a broken leg for a little while and I have learned what veterans are suffering every day of their life and they gave their blood for their country.

The CHAIRMAN. Not to filibuster my time, but basically this Congress, this bipartisan Committee have provided resources to the VA. There is no question about that.

Mr. COX. And we are thankful for what you have done.

The CHAIRMAN. As I said, we have over doubled the amount of money and where the remainder, the other part of the discretionary part of our budget here until we voted for the omnibus budget in March of this year had remained flat. So we took money from other agencies and funded the VA. And I think it is disingenuous to say that we are not providing, or imply that this Committee and this Congress is not providing resources for the VA.

And I don't disagree with you, Mr. Cox, on management. I think that is part of our problem. Let me ask you a second question. Do you think there are fireable offenses at the VA? Do you think there are reasons you should be terminated?

Mr. COX. Yes, sir, and I have said that every time I have come before your Committee or any other Committee. In any government agency, there is wrongdoings that should be fired.

The CHAIRMAN. Thank you. And if the law is being done properly, what would you do to change this law if it is not being done as it was written and it is intended, as I said, on a voice vote from the United States Senate?

Mr. COX. I would change the law to go back for the proper penalties, the ability of MSPB judges to mitigate penalties because due process and having those checks and balances is the way we avoid having a politicized Federal work force. And now when we basically have employees who can be fired at will, we have somewhat of a politicized Federal work force. And there was a reason why we have MSPB and other entities for the Federal employees.

The CHAIRMAN. So you would recommend going back to what we were, what we had, which clearly wasn't working. And I am not saying this I am working perfectly yet, but what we had was not working either. In your written statement, you said that the law has, "Deprived veterans who depend on the VA for health care and benefits of the services of employees with extensive training and experience who have been fired under the acts and the authorities without a fair chance to improve their performance."

Even if I accept this premise—their premise, why is it just great employees with extensive training and experience need time to improve their performance?

Mr. COX. Number one, many of our veteran preference of veterans that are hired, they are hired with service-connected disabilities. One of the is PTSD. And many of us know that have a background, as I am a nurse and you are a doctor, we understand the

illness of PTSD. And working with those employees and also that their behavior, sometimes we have to de-escalate.

And I will commend some other government agencies that has realized that and has tried to put in accommodating situations for people with PTSD. And we understand sometimes if you are in a wheelchair or have a visible disability, but there are many disabilities veterans have that we need to certainly try to work with.

The CHAIRMAN. My time has expired. Mr. Takano?

Mr. TAKANO. Thank you. Mr. Cox, Mr. O'Rourke said that one of the things that they have been doing to ensure a smooth implementation and protection of whistleblowers is listening, including listening to employee unions. Do you feel that you have been included, or your members have been included, in productive conversations with the VA about the implementation of this law?

Mr. COX. No, sir, we haven't. And I would point out that with this Office of Accountability and whistleblower protection, we are not aware of any training or any mechanism that the VA has done to try to train rank and file employees.

I believe I heard Mr. O'Rourke say that they had trained managers. We are not aware of any training. We at one time had requested the telephone number. We publicized for our membership to allow them to at least have it. And after that, I think the VA put out the number.

Mr. TAKANO. How much time does a housekeeping aid, typically the employees for which the veterans' preference and non-competitive set aside was meant to benefit—how much time does a housekeeping aid get to improve their performance as compared to, say, a VISN director who is not implementing the law properly?

Mr. COX. Currently, the VA is saying it would only give maybe 30 days and many times they are not even giving 30 days for a housekeeping aid to improve their performance. And historically, and I worked in the VA many, many years, I saw bad managers be transferred from one VA to another VA with gigantic relocations, bonuses, and various things. And I know this Committee has certainly investigated that and you couldn't deny those facts. They stand for themselves, sir.

Mr. TAKANO. The picture that my colleague from Pennsylvania, Mr. Lamb, presents about these huge number of vacancies at these low-level jobs, these entry level areas in housekeeping, that is—the vacancies. But then the idea that 40, 50 people are dismissed in one year has got to have an impact on morale. Go ahead, sir.

Mr. COX. It does have an impact on morale. In particular, when people believe that folks are fired without a due process. When people have their due process rights, they are offered opportunities to improve. They don't improve and I will agree with what the Chairman said. I mean some people, I believe, fire themselves. The VA or no other entity fires them. But that burden shifts on them. But people need to be given an opportunity and they need to be properly instructed. Many times there is training issues and all.

Mr. TAKANO. Mr. Cox, Mr. O'Rourke also talked about training and whistleblower rights. Has AFGC heard of any non-management employees receiving training on their whistleblower rights?

Mr. COX. No, sir, we haven't.

Mr. TAKANO. I heard Mr. O'Rourke sort of say quietly as he was concluding his testimony, he was kind of complaining about the veterans' preference. That that is the reason why there are these vacancies at places like Mr. Lamb's facility. And I have heard similar complaints made about—inability to hire sufficient housekeeping staff.

And let's be clear, the housekeeping staff is not an unskilled position. They need to be trained in biohazards. It is a very important role in keeping the—

Mr. COX. Yes, sir, it is.

Mr. TAKANO [continued].—facilities clean and keeping the—everything moving. Is that a fair defense that the veterans' preferences get in the way of hiring sufficient staff?

Mr. COX. Sir, I believe that veterans who have served this country loyally and put it all on the line so that I have the freedom of speech and all the rights that everyone in this room has, and that we have, the greatest checks and balances in our government, they deserve those jobs. And I will always say veterans' preference ought to prevail.

Mr. TAKANO. In this executive order, really restricting the use of official time, is official time and being able to—could it be used to help some of these veterans who are employed in these positions? Especially the one with PTS and in the housekeeping roles. Is that an appropriate use of official time?

Mr. COX. Yes, sir, it is.

Mr. TAKANO. And is that often—what official time is used for?

Mr. COX. Yes, sir, it is.

Mr. TAKANO. So, you know, I—I think—and I didn't get time to get into the negotiated collective bargaining agreement which provided for official time, but I will just—I will yield back. Thank you.

The CHAIRMAN. I thank the gentleman for yielding. Dr. Dunn, you are recognized.

Mr. DUNN. Thank you very much, Mr. Chairman. Thank you, Mr. Cox, for joining us here today on this panel. Can—I want to check a few numbers with you. The number of members you have in the VA. I have a number 242,450, is that roughly correct?

Mr. COX. We represent right at a quarter of a million. I can't give you the exact numbers.

Mr. DUNN. Okay, pretty close, right?

Mr. COX. I would say in that neighborhood.

Mr. DUNN. So if we take the union dues, the lowest level of union dues per month, \$18, and multiply that out, that is \$4,356,000 per month that the AFGC makes. That is \$52,272,000 per year.

My question to you is why should the taxpayers be footing the bill for office space, for equipment supplies, or employees for a union that very clearly has the means to support all of those things on its own?

Mr. COX. Well, sir, I am not sure you are computing. Those numbers just out of the VA, and I believe if you check AFGC's national budget, it is about \$80 million. And that is coming from all of our government agencies. And you could check our LM that is online. But I would also say, sir, I believe in—

Mr. DUNN. Do I have the number wrong? It is not \$18 a month? Is that not what the dues—

Mr. COX. Our dues would vary all over the country.

Mr. DUNN. That is the lowest number I could find.

Mr. COX. No, sir. We have over a thousand locals, some of them may be less than \$10 a pay period, but—

Mr. DUNN. So—

Mr. COX [continued].—in—the answer to your question, though, the Congress of the United States passed the Civil Service Reform Act to cover official time.

Mr. DUNN. We are not going to—again, don't want to filibuster our time here, so—

Mr. COX. I wanted to answer your question. I just wanted to answer your question.

Mr. DUNN [continued].—there are 500, almost 500 employees at the VA, who are 100 percent of the time not doing the job that they were hired to do. These are often highly skilled positions, psychologists and physicians, who are literally hired to be psychologists and physicians and are never seeing patients. Does that make sense to you?

Mr. COX. Sir, the law says that we can't discriminate against anyone who chooses to run and want to act as a union official, or be elected, or to be a union representative regardless of professions, race, creed, color.

Mr. DUNN. I am not talking about a union official. Let's talk about using their official time. The taxpayers are paying their salary, you recall this, right, and they are not working for the taxpayers, they are working for the union.

Mr. COX. That is where we will disagree. They are working for the taxpayers because the wisdom of Congress in 1978 gave that right of official time, and it would be up to Congress to pass a different law to change it.

Mr. DUNN. No, let's talk about the official time for a minute. The legal standards for what constitute official time is, and I am sure you are familiar with this: reasonable, necessary, and in the best interest of the public. Is that the best interest of the public to take a psychologist or a physician and put them—difficult to recruit to the VA, and put them—we have shortages in these positions, and put them to work doing union duties?

Mr. COX. Sir, I yield to the wisdom of Congress in 1978 when they passed the law and we can't discriminate against anyone, sir.

Mr. DUNN. You are taking a risk yielding to the wisdom of Congress, I will tell you way. Do you think the Americans at home watching this hearing, how do you think they react to learning that we have literally hundreds of highly paid specialists in the VA who aren't doing a lick of work that they were hired to do?

Mr. COX. And, sir, they are doing work they were hired to do because Congress in its wisdom passed a law that said official time was reasonable and necessary.

Mr. DUNN. Let me tell you how I think the people back in the Second Congressional District of Florida are responding. I think they are shocked. I think they are dismayed. I think they are angry. That is what I think. And I think they demand that we actually fix a problem like this. I don't think I can go home and walk the streets and say this is okay. Don't worry about it. We are pay-

ing them much more than you will ever make to do something that isn't even serving the VA or the veterans.

Chairman Roe offered some statistics concerning the ballooning VA budget and the size of its workforce. I think that those speak for themselves. They are shocking numbers. In nine years, we have doubled the budget and we have added 100,000 employees to the roles. And in the same nine years, I promise you I don't think that the VA care has improved by any significant amount, probably just the opposite. So I am disappointed. I would echo the comments of my colleague about reform. I think the VA is in need of reform, and I think we are here to do that, and I have committed to do that. Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentleman for yielding. Ms. Brownley, you are recognized for five minutes.

Ms. BROWNLEY. Thank you, Mr. Chairman, and thank you, Mr. Cox, for being here today. Certainly your voice is important to this discussion, obviously, but many discussions we have here in the Committee.

I wanted to ask you, you know, in your testimony you also talked about the disproportionate impact on lower level employees and the percentage of adverse actions impacting general-level employees versus supervisors has remained. The VA's testimony saying that those two have remained roughly constant before and after the Accountability Act. Do you agree with that data? Do you agree with that discrepancy?

Mr. COX. I disagree in the fact that 15 supervisors, when there are tens of thousands of management officials throughout the VA, and you are telling me only 15 out of 1,096 our managers that had discipline problems or performance problems, but yet 1,085, or 80-some, rank and file people were the problems. That seems very disproportionate because I go back to Phoenix. I mean, let's talk about that. It was the SCSers, it was those horrible incentives that are in there, and we can talk about VBA, but I think you have all been there many times.

Ms. BROWNLEY. Do you, as an organization, collect any data on employee morale? Do a survey of such?

Mr. COX. More of it is antidotal from our locals but we believe morale is very, very low because there is a real fear of people losing their union rights, losing their rights to representation. There is a great, great fear in all Federal agencies of a politicized civil service work force, and I think that should scare every one of us to death.

Ms. BROWNLEY. Does the VA reach out to you? They testified this morning that they have got a survey out now and expect the results 45 days from now in terms of, you know, trying to measure morale within the VA. Does the VA reach out to you and say can you help us to make sure that the employees are filling this out, this data is important? Do they reach out to you and ask for your assistance to get—to try, in essence, to get really accurate data?

Mr. COX. Since Secretary McDonald and Secretary Shulkin have left, I have not heard a word from the VA.

Ms. BROWNLEY. Thank you. So it is fair to say that in this survey, they talked about the results of the previous survey that is public information not being very good, in this particular survey, they are not reaching out to you in any way for your assistance?

Mr. COX. Haven't heard anything from them, ma'am.

Ms. BROWNLEY. You also in your testimony you talk about the whistleblower hotline, that it is not being made public. And have you heard reports from employees that it is difficult for them to find the hotline information?

Mr. COX. Yes, ma'am, we have. Again, we requested that information, shared it with our membership, and that is how they became aware. And after we did that, the VA came out. And I would say that the union contract is the best thing in the world to protect whistleblowers, and then we have got Office of Special Counsel in the IG. Those have done a very good job. This creating a separate entity becomes somewhat of the fox guarding the hen house, and I think on both sides of this room that there is not a soul that wants more bureaucracy, and AFGE doesn't want more bureaucracy in the protection, or the standing in the way of whistleblower's coming forward.

Ms. BROWNLEY. Have you requested that the VA make this whistleblower number public information?

Mr. COX. Yes, we have.

Ms. BROWNLEY. And the VA's response was?

Mr. COX. I haven't heard a response from them.

Ms. BROWNLEY. You also testified that the VA has essentially stopped using performance improvement plans. Have you seen this across the VA?

Mr. COX. Yes, ma'am, I have.

Ms. BROWNLEY. At every level?

Mr. COX. At every facility, yes, and—

Ms. BROWNLEY. Every facility and in sort of—

Mr. COX. Yes.

Ms. BROWNLEY [continued].—at every level—

Mr. COX. Yes.

Ms. BROWNLEY [continued].—whether it is, you know, mid-level, lower-level?

Mr. COX. I am aware of the rank and file employees, I am not aware of what they do with management employees.

Ms. BROWNLEY. Thanks. I only have a few seconds left, but I know that one of the issues that AFG has struggled with is getting data from the VA as to how the Accountability Act is being implemented. What additional data has AFG requested from VA that is still not available?

Mr. COX. I would have to look to some of my folks because we have requested many things and have gotten very little, almost no, data. We want to know veterans preference; we obviously want to know gender; we want to know grievances that reveal fraud, waste, and abuse; the veterans' preference; gender; ethnicity, if they have it; age; all of those type things that would show patterns of treating one person different than others.

Ms. BROWNLEY. But you are not even sure that that data is being collected?

Mr. COX. No, we know it is being collected.

Ms. BROWNLEY. You do? Okay.

Mr. COX. I am sure it is being collected. The VA collects lots of data.

Ms. BROWNLEY. Thank you, sir. And I yield back.

The CHAIRMAN. Thank you. Mr. Higgins, you are recognized for five minutes.

Mr. HIGGINS. Thank you, Mr. Chairman. Mr. Cox, thank you for appearing before this Committee today. I don't know if I have ever witnessed a more passionate union employee.

Mr. COX. I am a passionate registered nurse that cared for veterans for 23 years and loved every second of it also, sir.

Mr. HIGGINS. And a dedicated union spokesman. There is nothing wrong with that. You see we should all recognize that we are here to service veterans and Americans, we shouldn't be pro-union or anti-union, we should be pro-American and pro-veteran on both sides of the aisle and on that side of your table.

You have made repeated testimony regarding the numbers of VA employees that have been let go. Obviously, there is a process by which a VA employee is fired like anywhere else, but supervisors, according to your testimony, sir, and I ask you respectfully, that number reflects a disparity in your opinion as compared to house-keeping aids, nursing assistants, registered nurses, food service workers, and medical support assistants, which are the largest numbers that have been let go. Would you agree that that has been your testimony, that supervisors being let go, that is a disparate number?

Mr. COX. It seems like a very small number in proportion to the fact that there are thousands, tens of thousands, of managers.

Mr. HIGGINS. Okay. Is it your testimony that it just seems like it or that it is?

Mr. COX. Sir, because I don't have all the VA's information, all the things I have to rely upon the data I have.

Mr. HIGGINS. You certainly are an intelligent gentleman, sir. We are making clear and courageous statements here today. Do you think that not enough supervisors have been fired?

Mr. COX. I would say that would be up to the wisdom of this Committee to request that data, and I have heard—

Mr. HIGGINS. I am asking your opinion.

Mr. COX. In my opinion, I think that the VA needs to make that data available, and maybe they would dispel my personal feelings of what I would view as antidotal information.

Mr. HIGGINS. Are supervisors' members of your union?

Mr. COX. No, sir, they are not represented by our union. No, sir.

Mr. HIGGINS. Okay. It seems to me that your general consensus is that the existing law that was enacted, the goal of the Accountability Law was to bring swifter action to VA employees regardless of seniority, or lack of seniority, or position, and to make sure that the judges didn't circumvent the managers' decisions. So it seems to me that you are stating that the managers that are in place are abusing the existing law, and making it non-functional, and that more managers should be fired, more supervisors should be fired. Is that not your statement? Is that not your opinion?

Mr. COX. I think that is how you are trying to interpret it, sir. But I am saying that the—

Mr. HIGGINS. Reinterpret it then, please.

Mr. COX. Well, I—

Mr. HIGGINS. Do you believe more supervisors should get fired or not?

Mr. COX. I think that any employee who is not doing their due diligence should be held accountable, and it is an accountability law.

Mr. HIGGINS. Thank you. And if they are held accountable, should there be a consequence to that accountability?

Mr. COX. Yes, sir, there should, with a due process to it.

Mr. HIGGINS. And should that sometimes include being fired?

Mr. COX. Yes, sir, with a due process—

Mr. HIGGINS. Okay. Referring to the—

Mr. COX [continued].—so we avoid an apolitical workforce.

Mr. HIGGINS [continued].—those VA employees that have been fired, have they all not, in their hiring process, their training, their certifications been clarified and documented in the hiring process? Whatever their position is within the VA, have they not received extensive training and certification for their particular job?

Mr. COX. We would certainly hope so, but I would go back and look at the—

Mr. HIGGINS. Well, it is a matter of law—

Mr. COX [continued].—director of Phoenix, sir.

Mr. HIGGINS [continued].—that they have that.

Mr. COX. I would go back and look at the director at Phoenix.

Mr. HIGGINS. It is a matter of law that qualifying individuals fill these positions. So the lack of a current performance improvements program, what could possibly be presented to an American man or woman that is highly qualified and certified for a position within the VA—whatever that position is, because veterans and Americans are done with the past performance of the VA. We demand reform, and this Committee is committed to making it happen.

So what possibly could an employee of the VA, having been highly trained and certified, regardless of position, why, if they are found to be negligent in their duties, why would they not be fired? What could they possibly learn from a two- or three-week performance improvement program that they didn't learn in six months or years of certification and training prior to being hired?

Mr. COX. Well, sir, I think part of the issue is the VA constantly changes its performance standards trying to crank the machine up, particularly in VBA, that may not be a realistic machine to do that type of work—

Mr. HIGGINS. May I submit to you—

Mr. COX [continued].—in a proper manager system.

Mr. HIGGINS [continued].—sir, that every American man and woman viewing this hearing today has taken to themselves, we bring our standards to work, man. There is no such thing as menial labor in my life, there is only menial men and women. It is impossible for a man or a woman of standards to perform a menial task because there is no such thing, there is only menial men and women. In your testimony you have repeated the mantra that the current law is not working. May I suggest to you that management of the current law is what we need to address. Mr. Chairman—

The CHAIRMAN. Gentleman's time has expired.

Mr. HIGGINS [continued].—I yield back.

The CHAIRMAN. Mr. Lamb, you are recognized.

Mr. LAMB. Mr. Cox, could you maybe just explain in a little more detail some of the examples of how and why people are being fired

in such large numbers since the implementation of this act? I mean, based on the information in your testimony, and plenty other information we receive, it is not so simple as an employee being found negligent in the care of a particular veteran, right, there are often other reasons that management is using to fire people?

Mr. COX. That is correct, sir. And particularly in VBA, the benefits side, they have changed performance standards continuously. The answer is just speed up processing the claims faster even though they are very complicated to process.

Mr. LAMB. Right. And, in fact, there are several examples detailed in your testimony where people have been fired after making whistleblower complaints, right?

Mr. COX. Yes, sir, that happened in Phoenix and other places that our union had to come to the rescue.

Mr. LAMB. And you yourself were a registered nurse at the VA for much of your career?

Mr. COX. Twenty-three years, sir.

Mr. LAMB. And during that time, did you have experience seeing other nurses or other employees in any job going through a performance improvement program?

Mr. COX. Yes, sir, and many of them successfully completed it. I would say a high number of them successfully completed it because there was additional training. Understanding the VA is a complex system, but it is still the best health care anyone can get in this country, and thank God that veterans are getting it.

Mr. LAMB. Now when you hear about a situation like ours in Pittsburgh where 46 lower-level employees have suffered adverse actions in the last year, and we have 300 vacancies, from your time at the VA do you think that increases the day-to-day burden on the employees who are left, the ones who haven't been fired?

Mr. COX. It certainly does, and it also jeopardizes the veterans, particularly if they are housekeeping aids. While people think of that as a very menial task maybe, they are responsible for the cleaning and sanitizing of a hospital for infection control, it is one of the most important jobs in any medical center.

Mr. LAMB. Are you in touch with some of the lower-level VA members who are left? And it is not the right term lower-level, but people who are filling in the RN, nursing assistant, food workers, cleaners. Are you in touch with them on a regular basis?

Mr. COX. Yes, sir, I am.

The CHAIRMAN. How are they reacting to seeing in the last six months such a large number of people be fired at their level and such a small number of people be fired at the manager level?

Mr. COX. There is fear. There is a lot of fear and there is a feeling that floggings will continue until morale improves and everything is all better. And I think we all know that that is not the way that you get the best performance.

Mr. LAMB. Do you think that helps them do their job to take care of the veterans any better?

Mr. COX. I think, no. I think it creates fear and when you have fear in an organization you never get the best performance, sir.

Mr. LAMB. Yeah. Do you think it helps them do their job any better for there to be fewer employees around on a day—for there to be 46 fewer employees in Pittsburgh on top of the 300 vacancies?

Mr. COX. No, sir, there—and, obviously, there needs to be sufficient employees to get the proper work done, because, at the end of the day, without that being accomplished, the veteran suffers.

Mr. LAMB. Thank you. Mr. Chairman, I yield the remainder of my time.

The CHAIRMAN. I thank the gentleman for yielding, and being here with us until the end, Mr. Lamb, thank you for hanging in there. Thank you, Mr. Cox, once again for being here. And being no further questions—

Mr. COX. Thank you, sir.

The CHAIRMAN [continued].—the second panel is dismissed. I ask unanimous consent that all Members have 5 legislative days in which to revise and extend their remarks and include extraneous material. Without objection, so ordered.

Mr. Takano, any closing comments?

Mr. TAKANO. Just very briefly. I am pleased to see that there are many in the majority who share the concerns of the minority about there being adequate whistleblower protection and how the OAWP is fulfilling, or not fulfilling, its role. I think people on both sides of that all are very gravely concerned about this.

I want to take note, a curious note, of the fact that I did ask Mr. Cox a question about how well the VA is making good on its professed statement that they are listening to employees. I note that they departed quite swiftly before Mr. Cox's testimony, and is that an indication of how they are listening to union officials and union members, I cannot see that their statements are very credible.

I am troubled by the disappearance of performance improvement plans among rank and file employees at the VA, and the general—I can see how there could be very credible claims of a cultural fear within this organization. Fear that is pervasive, fear that issues from seeing large numbers of your fellow employees being fired without due process, without being able to tell your side of the story, does create a condition of fear, and does depress morale. And I am very, very troubled by how I am seeing the implementation of this Accountability Act go forward.

Let me just say that there were claims, that the one place of refuge that the acting secretary took was to say, well, we are firing about the same number of people. That is not really a great claim to stand on because this law was intended to improve our building. We are talking about firings, we are talking about people who were moved and dismissed, we are not talking about just turnover in difficult jobs.

And we are talking about veterans here. We are talking about a workforce that has been the most impacted. These are people who fought for our country, and I think we can do better. And I am, you know, I am just amazed at the implementation of this law, I had hoped it would be better. I am still cautiously optimistic with the right values of the top we can get it right, but I question whether that is occurring now.

Thank you, Mr. Chairman, I yield back.

The CHAIRMAN. I thank the gentleman for yielding. And just to finish up, I think it was a very good hearing today. It is one year of the Accountability and Whistleblower Protection Act. There obviously is a lot of work to be done to make sure the whistleblowers are protected, feel comfortable in coming out, and to Mr. Lamb's.

I have been an employer, I was for over 30 years in a private medical practice. If you are short of personnel, you don't fire adequately performing employees, you reward those people to stay there. So I would say, if I were a manager at Pittsburgh, and I was having to get rid of somebody, and I was already short of personnel, they would have to do something pretty egregious for me to get rid of them. You think about that, if you are already short of people.

I know that the VA is having an issue with hiring people, just like businesses across the country. I think we have a labor shortage in this country right now. And to compete for quality talent, VA's got to be a place that people want to work.

And for the record, if we get all hung up in numbers and all that, but I, while this discussion was going on, had a chance to look at the pre-June 1st, 2016 to June 22nd, 2017, before the Whistleblower Protection Act and then after the Whistleblower Protection Act, and in the GS 1 through 6 the percentage of people terminated—and you have to look at it in percentage because the number of employees the VA has had has gone way up—is actually less.

In the middle, the 7 through 10, the percent, as Mr. Cox had suggested, some of those people needed to be terminated, it did go up. And the GS 11 through 15 the percent went up. And the only percent that went down, and I think this is a reasonable thing to look at, are the SCS and the Title 38s. So here are the facts right here.

I really appreciate everyone being here. I think there is a lot of work to be done. This Committee is committed in a bipartisan basis to keep an eye on the VA, and I appreciate everyone's attendance today, and being here. Hearing no other comments, meeting is adjourned.

[Whereupon, at 12:53 p.m., the Committee was adjourned.]

A P P E N D I X

Prepared Statement of Peter O'Rourke

Chairman Roe, Ranking Member Walz, distinguished Members of the Committee; thank you for the opportunity to testify today in support of the Department of Veterans Affairs (VA) implementation of the Accountability and Whistleblower Protection Act: one year later. Let me also thank the Committee, and other Members of Congress, for your on-going support of holding VA employees accountable for their performance and misconduct. Without that support, VA would not have been able to move forward in providing greater support for our Veterans. I am accompanied today by Mr. Kirk Nicholas, Executive Director for the Office of Accountability and Whistleblower Protection and Nathan Maenle, Principal Deputy Assistant Secretary for the Office of Human Resources and Administration.

The Office of Accountability and Whistleblower Protection (OAWP or the Office) represents the culmination of many years of effort to improve accountability within the Department of Veterans Affairs (VA) and to establish a new capability to centrally receive and address whistleblower disclosures. Congress built on and strengthened the capabilities developed internally by the Department creating OAWP through the VA Accountability and Whistleblower Protection Act (the Act), Public Law 115-41 in 2017.

OAWP absorbed and expanded on the work formerly performed by the Office of Accountability Review and the Central Whistleblower Office to establish an intake, investigation, and accountability vehicle to support the VA Secretary's efforts to better fulfill the Department's mandate to ".care for [those] who have borne the battle."

OAWP serves to improve the performance and accountability of VA Senior Executives and employees through timely, and unbiased investigation of allegations of misconduct involving VA senior executives. OAWP also investigates allegations of whistleblower retaliation committed by supervisory employees. When these allegations are found to be factually true, OAWP provides a recommendation for an accountability action which could be for the removal, demotion, or suspension of the individual based on poor performance and/or misconduct.

OAWP is dedicated and empowered to provide transparency and build public trust and confidence throughout the entire VA system. The Office is committed to preserving the cultural integrity of the Department conducting balanced, fair, and efficient investigations of VA whistleblower disclosures, proposing timely remedial resolutions and providing responsive recommendations. The organization, actions, and statistics of this first year of OAWP are contained in both the June 30, 2018 Report To The Committee on Veterans Affairs of the Senate And The Committee on Veterans Affairs of the House of Representatives On the Activities of the Office of Accountability and Whistleblower Protection (2018 Annual Report) as follows.

Triage Division Statistics

Triage Division is the first point of contact for whistleblower disclosures and allegations of senior executive misconduct. The Triage staff assesses the information submitted and, as needed, conducts initial development of the submission with the disclosing party. Triage maintains oversight of all matters submitted to OAWP and ensures all issues are brought to resolution.

From June 23, 2017 through June 1, 2018, Triage Division has received nearly 2,000 disclosures. The specific types and quantities are displayed on the following charts.

Count of Disclosures by Type, by Month – Details

Disclosure Category	JUN 17	JUL 17	AUG 17	SEP 17	OCT 17	NOV 17	DEC 17	JAN 18	FEB 18	MAR 18	APR 18	MAY 18	Grand Total
WB retaliation	11	50	48	31	25	28	22	24	19	28	20	13	319
Violation of any law, rule or regulation	7	36	33	32	41	27	38	31	48	47	22	31	393
Gross mismanagement	1	6	10	5	7	10	2	6	7	6	5	4	69
Gross waste of funds		1		2		4	2		1	1	1	2	14
Abuse of authority	3	6	20	7	7	15	12	10	17	15	19	6	137
Substantial and specific danger to public health		2	4	3	2			3	4	9	2		29
Substantial and specific danger to safety		1	2	3	6	3	1	1		1	1	1	20
Not a WB disclosure	8	110	107	80	61	66	42	89	102	105	101	147	1018
Grand Total	30	212	224	163	149	153	119	164	198	212	171	204	1999

The above chart displays the type of disclosures received by month from June 2017 through May 2018.

Investigations Division Statistics

Investigations Division is the most visible division in OAWP, and it interacts with witnesses and Persons of Interest (POI) to resolve cases. Investigators conduct inquiries to gather evidence and testimony to resolve allegations of senior executive misconduct or whistleblower retaliation. Depending on the specifics of a case, inquiries may be conducted on-site or virtually.

On June 23, 2017, Investigations Division had a legacy workload from the Office of Accountability Review of 116 investigations involving 216 POIs.

From June 23, 2017 through June 1, 2018, Investigations Division:

- Completed 128 investigations involving 236 POIs;
- Received 261 cases involving 482 Senior Leaders;
- Had 125 pending or ongoing investigations, involving 264 POIs.

Advisory and Analysis Division Statistics

Advisory and Analysis Division is the principal accountability arm of OAWP. The staff analyzes investigative results and makes recommendations to VA leadership regarding appropriate steps to resolve matters. These could include performance management, disciplinary actions, or recommending no action.

From June 23, 2017 through June 1, 2018, Advisory and Analysis Division:

- Received 39 cases directly from Triage as fully developed matters (e.g. MSPB decisions or OSC findings) involving 65 POIs;
- Completed 182 cases, including 130 cases resulting from OAWP investigations;
- Recommended disciplinary or adverse actions in 54 cases involving 58 unique POIs;
- Had 49 potential disciplinary or adverse actions.

The Report itself conveys the first year's achievements and actions of the Office, but this effort did not come easily. The early leadership of OAWP worked diligently to resolve concerns, establish the organization, as well as continuing to triage, investigate and assess ongoing and emerging investigations. The necessity of implementation could not wait for culture change. Instead, the actions of the Office became the fulcrum for change. The Office began to gain credibility by its actions as 2017 closed with outreach programs being instituted for VA Senior Leader engagements and whistleblower intervention. These events began to help dispel the cloud of confusion hovering over the concept "accountability" as well as demystify the response required to address misconduct and retaliation at all levels. With each session, OAWP learned more of what was missing in the implementation, and also made progress in instructing VA Senior Leaders and employees on what accountability means and how to address the issues.

There have been a number of questions related to the implementation of the Act. For instance, there are questions regarding whether the VA is targeting lower level staff versus VA Senior Leaders. As you can see below and in the 2018 Annual Report, the numbers for 2014–2018 are similar in terms of misconduct actions targeting all levels of the organization. Only minor changes in disciplinary actions occurred after the implementation of OAWP.

Summary of Statistics from 2018 Annual Report

The 2018 Annual Report contains a number of statistics regarding the disciplinary and adverse actions taken involving VA employees since 2014. A brief summary of the information contained in that Report demonstrates that lower level employees are not being disproportionately impacted by the Accountability Act. The percentage

of disciplinary and adverse actions issued to general workforce employees both before and after enactment of the Accountability Act remains consistent.

Prior to the Act, positions in the general workforce (Wage Grade and Wage Leader 1–15; and GS 1–10) were disciplined as follows¹:

- From 2015 - 2016, 69% of the disciplinary actions (admonishment, reprimand, suspension less than 15 days) issued by the VA were to employees in the general workforce.
- From 2015 - 2016, 72% of the adverse actions (suspension of 15 days or more, demotion, removal) issued by the VA were to employees in the general workforce.
- From 2016 - 2017, 71% of the disciplinary actions (admonishment, reprimand, suspension less than 15 days) issued by the VA were to employees in the general workforce.
- From 2016 - 2017, 72% of the adverse actions (suspension of 15 days or more, demotion, removal) issued by the VA were to employees in the general workforce.

After enactment of the Act, positions in the general workforce (Wage Grade and Wage Leader 1–15; and GS 1–10) were disciplined as follows:

- From 2017 - 2018, 69% of the disciplinary actions (admonishment, reprimand, suspension less than 15 days) issued by the VA were to employees in the general workforce.
- From 2017 - 2018, 71% of the adverse actions (suspension of 15 days or more, demotion, removal) issued by the VA were to employees in the general workforce.

Completing the Stand Up

Much work has been done to develop the transactional flow from disclosure to disciplinary recommendations. The process continues to be worked until it can predict how much work can be handled by the current number of individuals assigned to the activity, how long the work takes to complete, and how to begin to measure the quality of the work. To adequately predict the outcomes the Office needs good processes that produce reliable data. When these have stabilized OAWP will begin the development of the support policies and procedures for VA wide distribution. Having a full workforce will allow for better measurement, better identification of training needs and designing a quality of work life that can survive long term.

An additional benefit of the process mapping is that it helped identify data capture and management needs. The first benefit of the process mapping allowed the identification of cycle time through the process. The process was also able to identify the amount of work that the process can perform, and a quality metric that can be measured of the outputs. This provides the foundation for the selection of a case management system that will enable the process to work and help with our transparency efforts. Currently, an online update is published each month on disclosures, as well as the disciplinary actions that have been taken agency wide. OAWP has shared those files since mid-2017, and continues to refine the data capture and reporting VA wide and to Congress. The end state is that OAWP is now tracking actions via a “heat map” that permits a view of potential “hot beds” of misconduct to target rather than waiting for a disclosure or allegation. The goal is to prevent misconduct and to improve performance in various programs and organizations that sustain the delivery of work by the VA to the Veteran. The desired end state is to be “proactive” instead of “reactive.”

One lesson learned by OAWP is that it is hard for whistleblowers to reintegrate with their offices. OAWP hired Mr. Brandon Coleman, a former VA whistleblower, to help us understand what happens when an individual does decide to go public. The Office has developed and implemented a “whistleblower reintegration program,” which also links with the VA’s Employee Assistance Program to help individuals work through the emotional crises that can occur following disclosure. The Office has had several successful events to date and is expanding the program to engage the workforce during the first stages of the disclosure to help guide them as events are triaged, investigated and closed. This has been incredibly time consuming so OAWP has added two members to that team. OAWP believes that it can help VA Senior Leaders and employees eventually see that finding defects and fixing them is a cultural issue, one that will help reinvigorate loyalty and trust up and down the rank and file. It is one effort of many, and probably the most critical in helping to change the culture in the VA.

¹The percentages contained here are approximate due to rounding.

A few other areas being strengthened are the re-designation of our investigations capabilities from Human Resources Specialist positions (201) to General Investigator positions (1810). Additional training has been added to the investigators' list: management inquiry training from the Immigration and Customs Enforcement (ICE) at the Department of Homeland Security; Human Audit and Digital Forensics from commercial events; and internal affairs from the Federal Law Enforcement Training Center (FLETC). Finally, OAWP is in the last stages of selecting a case management system that fits within the VA's Business Architecture.

Lastly, I invite you to read the OAWP 2018 Annual Report in its entirety. The product of this nascent organization, it will stimulate questions on how to better adapt this implementation across the Federal sector. Very few of the individuals hired over the last year had any experience with the aftermath of a major implementation, but they are certainly and rightfully proud of their hard work and selfless dedication in bringing OAWP to life while they completed critical activities within the Accountability Process.

Closing

The implementation of this Act honors our Nation's commitment to Veterans by better enabling VA to provide the high-quality care and benefits our Veterans have earned. It supports the Department's efforts to bring value and a source of pride for VA employees who are dedicated in servicing our Veterans. Mr. Chairman and Members of the Committee, this concludes my statement. Thank you for the opportunity to testify before the Committee today to discuss VA's implementation of the Accountability and Whistleblower Protection Act. I would be happy to respond to any questions you may have.

Prepared Statement of J. David Cox, Sr.

Chairman Roe, Ranking Member Walz and Members of the Committee:

Thank you for the opportunity to present the views of the American Federation of Government Employees, AFL-CIO (AFGE) and its National VA Council (NVAC) regarding the implementation of the Department of Veterans Affairs (VA) Accountability and Whistleblower Protection Act of 2017 (Accountability Act). AFGE and NVAC represent over 250,000 front line employees who honor our Nation's veterans every day by providing exemplary services at VA medical centers, benefits offices, vet centers and other VA entities. It should be noted that AFGE and NVAC do not represent any VA management employees, the workforce segment targeted by bills leading up to the Accountability Act.

The Accountability Act has proven to be one of the most misguided and counterproductive VA laws ever enacted. It has demoralized and harmed its dedicated workforce, including a disproportionately large share of the 115,000 veterans who have the honor of taking care of other veterans as proud members of the VA workforce. It has deprived veterans who depend on the VA for health care and benefits of the services of employees with extensive training and experience who have been fired under the Act's new authorities without a fair chance to improve their performance or defend their jobs, as well as others who have left the VA or chose not to apply because of its uniquely harsh firing laws and hostile workplace. The Act has also squandered taxpayer dollars through unnecessary job turnover and litigation by empowering managers to go straight to the nuclear option of removal on the first alleged offense.

Who is getting fired under the Accountability Act?

Here's what "accountability" looks like under the new firing law. The VA has tried to hide the true harm that Act has caused by publishing limited firing data and denying information requests from Members of Congress and AFGE. Notwithstanding the VA's intentional lack of transparency, its own published data still illustrates the Act's severe unintended consequences and its failure to hold management accountable for mismanagement and misconduct.

For example, of the 2,742 VA employees fired in 2018, only 18 were supervisors (less than 1 percent). Housekeeping aides were the largest number fired, followed by nursing assistants, registered nurses, food service workers and medical support assistants. In contrast, supervisors (across the entire Department) ranked in 19th place.

AFGE and NVAC attorneys discovered the perverse impact of this firing law soon after enactment, through individual cases involving positions historically held by veterans, including large numbers of service-connected disabled veterans. These in-

clude housekeeping aides, cemetery caretakers, police officers and Veterans Benefits Administration (VBA) veterans service representatives, claims examiners and claims assistants. Other cases highlighted the Act's greater impact on low wage VA employees generally, such as food service workers, nursing assistants and scheduling clerks.

The first set of VA published data confirmed what we were seeing at the facility level, i.e. that extremely few managers were being held accountable under a law that was justified largely as a management accountability tool.

After we learned that the VA's published data masked the disproportionate effect of this harsh law on the veterans and other vulnerable segments of the VA workforce, we filed a Freedom of Information request for data on veteran status, age, gender and race (Attachment A). The VA has not responded with the data requested for nine months, forcing us to file an appeal. Similarly, Members of Congress have not gotten a response to their data requests (Attachment B).

Despite the limited published data, the Act's disproportionately large impact on VA's low wage workforce and veterans is undeniable. Currently, the Veterans Health Administration (VHA) has a national job posting for housekeeping aides at 13 medical centers. All the openings are restricted to preference eligible veterans and all pay less than \$35,000 annually. The salaries for VHA nursing assistant positions currently posted start at \$30,449. All current food service national postings list hourly wages below \$13 an hour.

The Act's adverse impact on the VA health care system is also evident from the large number of removals of employees in nursing positions. VA Inspector General (IG) Michael J. Missal testified before this Committee last month that the IG has consistently included registered nurses and other nursing occupations in its top five determinations of VHA occupational staffing shortages.

The VA cannot fire its way to success

This destructive law was enacted despite warnings from experts that mismanagement, not job protections for front line employees, was undermining the VA's capacity to deliver services to veterans. Health care experts repeatedly presented evidence that the VA health care system, the primary target of proponents of this firing law, outperforms the private sector.

First hand statements by VA scheduling personnel confirmed that wait list gaming was caused by severe shortages of providers and distorted management incentives, not incompetent or heartless employees who were too easy to fire.

Surveys by veterans' groups and other entities indicated that the VA remains a leader in customer satisfaction and that veterans using the VA health care system overwhelmingly prefer the VA's own providers to private providers and want the VA to increase its own staff.

Wait list gaming and its causes did not first make headlines in 2014. When post-9/11 veterans started returning home with complex medical needs over 15 years ago, AFGE and veterans' groups cautioned Congress that chronic short staffing was causing wait list manipulation and severe access problems at VA medical centers.

Similarly, every year, the Independent Budget recommends additional staff to reduce claims backlogs at the Veterans Benefits Administration (VBA). The VA's 2018 firing data reveals that four essential claims processor positions - veterans service representative, rating specialist, claims examiner and claims assistant - were among the 20 largest groups of fired employees in 2018.

Nonetheless, assaults on Federal employee due process rights and collective bargaining rights have remained the vehicle of choice for those intent on destroying the civil service and starving the VA into further privatization and reduced health care services and benefits. The Accountability Act was the culmination of three years of VA employee bashing and misrepresentation about the quality and access of care provided by the VA as compared to the private sector.

Impact of the new management authorities provided by the Accountability Act

The new authorities caused severe cuts in the due process and existing collective bargaining rights of all VA frontline employees, as well as supervisors. These changes made it easier for managers to fire employees for any reason, good or bad and incentivized them to rush to fire without providing employees with an opportunity to improve.

The Act made changes in three major areas: the standard of evidence that the agency must meet to prove its case; shorter timeframes for employees to respond to the agency's proposal to remove or discipline; and elimination of the right of the Merit System Protection Board to impose a lower penalty when the evidence does not support removal.

Lower evidentiary standard: The Act requires the Merit System Protection Board (MSPB) administrative judges (AJ) and the Board to apply the substantial evidence standard to determine if the agency has proved its case instead of the higher, more widely applied preponderance of the evidence standard. The substantial evidence standard only requires the agency to produce some evidence (or in the words of the U.S. Supreme Court, a “mere scintilla” of the evidence) to win, even if more of the evidence favors the employee. Before this bill became law, the VA had to meet the preponderance standard that requires that the majority of evidence had to weigh against the employee. When managers know that the agency will easily prevail before the Merit System Protection Board, they are encouraged to skip over reprimands, suspensions and demotions and instead, propose removal in response to a single alleged offense. (This change applies only to Title 5 and Hybrid Title 38 employees. It does not apply to physicians, RNs and other Full Title 38 health care personnel as they do not appeal adverse actions to the MSPB).

Elimination of the MSPB’s authority to lower the penalty sought by the agency: Civil service case law has historically required that the MSPB AJs and the Board adjust the penalty to reflect that severity of the underlying misconduct or performance deficiencies. If the Board or AJ concluded that the evidence did not support removal, he or she could apply a demotion, suspension or other lesser penalty instead of being forced to either carry out a removal or dismiss the entire case. The Act has been interpreted to eliminate the ability of the employee to argue that the penalty is too harsh in light of the seriousness of the charge or his or her prior good record. (This change also applies only to Title 5 and Hybrid Title 38 employees.)

Additionally, for all employees including Full Title 38 employees, the Act significantly reduced the amount of time that an employee facing a proposed removal or other major adverse action had to prepare a response to the agency and file an appeal. Previously, employees had 14 calendar days to respond to the agency’s notice of proposed removal. Now, they must respond within 7 business days. The timeframe for appealing a final agency decision to the MSPB (in the case of Title 5 and Hybrid Title 38 employees) has been reduced from 30 calendar days to 10 business days. Similarly, for Full Title 38 health care personnel, the timeframe for appealing a removal or other major adverse action involving professional conduct or competence to the agency Disciplinary Appeals Board has been reduced from 30 calendar days to 7 business days.

Inadequate statutory whistleblower protections: One of the strongest arguments made by proponents of this law to reduce rights was that it would provide stronger protections for “deserving” employees who are agency whistleblowers. However, the Act has a flawed, inequitable and confusing process for protecting whistleblowers from retaliatory firings. It is important to note that none of Full Title 38 health care personnel listed above are protected by the requirement in the new law that the Office of Special Counsel (OSC) approve the removal of whistleblowers proposed by the agency. The VA can fire these clinicians unilaterally even if they have strong whistleblower claims, except in extremely limited cases.

This gap in the law has led to inequities and confusion. Recently, management proposed to remove an RN who had registered as a whistleblower with the Office of Special Counsel (OSC). VA management initially informed her (incorrectly) that OSC approval was required; then management proceeded to remove her because she did not have a right to review by the OSC to save her job.

This gap in the Accountability Act will result in significant inequities. For example, if a Hybrid Title 38 psychologist (with both Title 5 and Title 38 rights) files with OSC as a whistleblower, he or she cannot be fired unless OSC approves the action. In contrast, a psychiatrist (who is covered only by Title 38) providing similar mental health treatment in the same clinic who also reports deficiencies in mental health services who files for whistleblower status will receive no OSC review prior to removal.

Effect of the Accountability Act on Performance Improvement Plans: Prior to enactment of this law, the VA routinely offered employees with time limited opportunities to improve their performance through Performance Improvement Plans (PIPs) prior to removing them for poor performance under Chapter 43 of Title 5. (Misconduct actions are covered by Chapter 75 of Title 5).

Since enactment, the Agency has incorrectly interpreted the Accountability Act as removing the requirement (found in Federal statutes and the AFGE NVAC Master Agreement at Article 27) to give employees an opportunity to improve before they can be subject to a performance-based action under Chapter 43. While the Act does state that the procedures of Chapter 43 do not apply to an action under the Act, the reasonable interpretation of this provision is that the Act shortened the timelines in Chapter 43 performance actions similar to Chapter 75 misconduct ac-

tions but did not eliminate the requirement to provide employees with an opportunity to improve.

We recently grieved the elimination of PIPs in a VBA case. The arbitration hearing was held on April 26, 2018. Briefing was completed on June 18, 2018 and we are currently awaiting a decision from the arbitrator.

CASE EXAMPLES

AFGE and NVAC have handled and/or identified numerous examples of the harsh and counterproductive effects of the Accountability Act.

Whistleblower cases

- An employee out of the Overton Brooks VA Medical Center (Shreveport) reported a management official for improperly accessing her personnel medical records. A few weeks after management learned of the employee's whistleblowing activity, she was given a proposed removal for conduct that occurred four months earlier. The conduct in question involved a dispute between two union officers about union matters. She had received no prior discipline. The employee has filed a whistleblower retaliation complaint with OSC, which is currently pending.
- A local union officer in Pittsburgh was featured in an article about the Accountability Act where he made disclosures about Management's abuse of authority. Management immediately expressed their dissatisfaction with his statements. On June 13, 2018, the VA proposed his removal under the Accountability Act. He has filed a whistleblower retaliation complaint with OSC, which is currently pending.

Disabled veteran seeking accommodation:

- A disabled veteran with a chronic condition requested a reasonable accommodation for telework to accommodate his condition. The accommodation would have obviated the alleged conduct. The Agency never responded to his request, then issued a proposed removal.

VBA Performance Actions:

AFGE and NVAC have serious concerns about the validity of VBA performance standards and whether employees know how these numbers are calculated or understand how to adjust their work flow in response. It is not sufficient to tell an employee that he or she is not "meeting the standards"; the employee also needs to know what is needed to meet them - which is exactly what a PIP would have provided.

Other VBA cases illustrate management's willingness to remove long term employees with valuable claims processing experience on the first offense for failure to meet questionable performance periods during brief evaluation periods.

- An employee with modest performance problems was denied a PIP prior to dismissal to attempt improvement. Instead, the supervisor repeatedly told the employee that he was not meeting the standards. The supervisor did not discuss why the employee was not meeting the standards.
- Another employee who had modest performance issues was proposed for removal after 9 years with the VA. The VA held the employee accountable for performance standards prior to the employee receiving them. The notice stated the employee failed to meet standards over a 6-month period when in fact he only received the standards 4 months in that time. Despite the VA's claims that the employee's problems were severe, it kept the employee on board for an additional 3 months yet refused to offer him a PIP or any other assistance prior to firing him.
- A career VA employee with approximately 28 years worked at the Philadelphia VBA and held various positions in the Insurance Center before being promoted to the Pension Management Center. She was not performing regular VSR work because she was moved around within the PMC by multiple assignments for several years. When she was moved back to her regular VSR position, she was unfamiliar with the new PMC rules and regulations. She asked for retraining but was told by PMC Management that she was "fully trained" and they would not provide her with any additional training. She was proposed for removal under the new law for failing to meet her performance standards.
- After working for more than 12 years for the VA, a Philadelphia VBA employee with two advanced degrees who teaches part time at a local community college was forced into retirement under the new law. When the performance standards underwent drastic changes, he repeatedly asked for help, but management re-

fused to provide them. He was forced into a lower graded position. Instead of risking a termination or further downgrade, he chose to retire early.

VHA Performance Action: (Walls v. VA, 118 LRP 10484):

- This VHA claims assistant was fired for poor performance as a document scanner. The agency used flawed data to make its case. The MSPB overturned the removal but the disruption of the employee's livelihood had already occurred. This case also demonstrates the benefits of a PIP; it informed the employee of exactly what she was doing wrong and ways to improve, but because of its interpretation of the Act, the agency cut her PIP short and failed to give her the complete 90 days to improve.

HOW THE OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION WORKS

The AFGE NVAC legal team has had mixed experiences working with the Office of Accountability and Whistleblower Protection (OAWP). OAWP appears to have met some of its requirements including establishing and staffing its office, creating a form for disclosures and conducting investigations. However, there are some significant items that have not been implemented.

For example, the Accountability Act requires that the OAWP include as a critical element in each supervisor's performance plan how he or she deals with whistleblowers. The VA has yet to do this. When questioned about this, they say they are working on a handbook to accomplish this but over a year has passed with no action.

In addition, the Act requires that OAWP have a toll-free phone number for anonymous whistleblower complaints. The VA does have a toll-free number (855-4AWONOW or 855-429-6669), but it is difficult to find because it is not posted on their site (va.gov/accountability). When asked about this, the VA stated that the number is available internally and that the intent was that they only receive disclosures from employees.

A third concern relates to the VA's policy on reports of wrongdoing. Wouldn't the VA want reports of wrongdoing from other groups with knowledge of the activity, such as the Union, contractors, or veterans service organizations? In fact, nothing in the Act requires that disclosures come exclusively from VA employees. Yet, the OAWP site describes its own disclosure form as follows: "This form is only for use by VA Employees or Applicants for Employment."

In addition, it appears that OAWP has overstepped its bounds by ordering investigations of matters filed with OSC. As previously noted, under Section 714(e) of the Act, if an employee seeks corrective action from OSC for a whistleblower retaliation complaint, the VA cannot exercise its new authorities to remove the employee. What is supposed to happen in order to stop the action is that OSC reaches out to its contact in OAWP, who then reaches out to the facility. Then OSC does its own investigations of whistleblower retaliation. While OAWP has been taking the necessary steps to proactively stop the actions, they have also been taking the information from OSC and doing their own investigations, and in some cases, retaliating again by subjecting the whistleblower to an additional mandatory investigation.

Our legal team is also concerned about the relationship between OAWP and the General Counsel. The Act states that OAWP is not an element of the General Counsel and the Assistant Secretary may not report to the General Counsel. In practice, these two offices work hand-in-hand. If the intention was that there be some semblance of independence, that has clearly not been given effect.

Other concerns about OAWP:

- The Accountability Act requires that OAWP have an internet website to receive anonymous whistleblower disclosures. The VA has yet to do this. They have an email address VAAccountabilityTeam@va.gov which is not anonymous.
- The Accountability Act requires the VA to provide training, in person (to the greatest extent practicable) regarding what whistleblowing is, how to make disclosures, and an explanation that they will not be reprimed against. No such training has occurred.
- The Accountability Act requires the OAWP to take actions against senior leaders under Section 713. Based on their own "CY 2018 VA Accountability Report Details," <https://www.va.gov/accountability/Accountability-Report-062618-1.pdf> in the year since the Act was passed, they have done so in one case. This is out of the 1,044 disclosures and whistleblower retaliation complaints the office received. (It is unclear if this report includes referrals from OSC (<https://www.va.gov/accountability/Whistleblower-Disclosures-Summary-070518-1.pdf>))

- OAWP is required to have an Assistant Secretary; it currently has an Executive Director. VA's reason for this is that Congress has specified the number of Assistant Secretaries they could have. When they passed the Accountability Act, they did not simultaneously increase the VA's allotment. Assistant Secretaries report directly to the Secretary, while Executive Directors must report to a Management official along the chain below the Secretary.

CONCLUSION

AFGE urges lawmakers to take immediate steps to curb the devastating impact of the Accountability Act and restore the essential VA employee rights it stripped away by supporting H.R. 6101, the VA Personnel Equity Act, a bipartisan bill that will restore the higher standard of evidence, longer timeframes and authority to provide appropriate penalties that will ensure fairness and true accountability.

We also urge lawmakers to enact legislation to mandate greater transparency of VA firing data. Similar to the VA Mission Act, which requires greater transparency of VA hiring data, it seems very reasonable to impose a legislative mandate to publish full firing data. The VA's refusal to respond properly to multiple requests for firing data confirms that this additional legislative authority is needed. The Committee should also insist that the VA provide it with the data on veterans and other fired groups that has been requested to date.

Finally, any additional whistleblower protections afforded to VA employees should also apply to the entire workforce and not exclude VA Full Title 38 health care personnel.

Thank you.

Statements For The Record

Daniel Martin

Chairman Roe, Ranking Member Walz, and the distinguished members of the Committee:

I would like to respectfully submit for the Committee's consideration this written statement detailing the whistleblower retaliation I have been subjected to, going on 495 days and counting, for reporting & cooperating with an OIG investigation into improper business practices & personal conflicts of interest by senior management officials within the Department of Veterans Affairs.

As a brief introduction, my name is Daniel Martin. I am a service-connected Navy Veteran and I am currently, in name only, the Chief Engineer for the Northern Indiana VA (NIHCS). I have had the honor of serving my fellow Veterans in VA Medical Centers across Indiana, Illinois, and Iowa as either the Chief Engineer, Project Section Chief, or the facility Electrical Engineer. Prior to joining the VA, I was employed in a similar capacity with the Indiana National Guard. I hold a Bachelor of Science degree in Electrical Engineering & Minor in Mathematics from Purdue University, a Master of Business Administration from Indiana Wesleyan, and certifications as a Senior Level - Federal Acquisition Certification in Program and Project Management (FAC-P/PM), a Master Electrician, and a Contracting Officer's Representative Level III (COR III). My whistleblower retaliation story has recently been reported by USA Today¹, NPR's Here & Now², and SOFREP³News⁴.

My path to reporting suspected wrongdoing in the VA started in December 2015 when I first had concerns regarding an NLP Aqua water filtration system⁵ which was procured prior to my arrival at NIHCS and was scheduled to be installed at VA facilities in Fort Wayne IN and Marion IN. During my review of the contract and the proposed device submittals, I noted several red flags between the alleged capabilities of the NLP Aqua product and industry best practices. Because of this, in coordination with the Contracting Officer, we placed a Stop Work Order on the contract in hopes of cancelling the contract award entirely. Despite my concerns, I was ordered by my chain of command to remove the Stop Work Order and to per-

¹ <https://www.usatoday.com/story/news/politics/2018/01/17/trumps-new-veterans-affairs-office-moves-help-whistleblowers-draw-early-praise/1038915001/>

² <http://www.wbur.org/hereandnow/2018/04/27/va-employee-contract-fraud-whistleblower-retaliation>

³ <https://sofrep.com/103804/va-employee-is-strong-armed-into-silence-after-voicing-concerns/>

⁴ <https://sofrep.com/100559/va-whistleblowers-look-inside/>

⁵ <http://flintwaterstudy.org/2017/05/ruffalos-water-defense-misleads-flint-residents-supports-over-priced-junk-science-water-conditioners/>

sonally oversee the installation of this suspect product. While I complied with what I felt were lawful orders at the time, I continued to investigate how and why this contract was awarded in the first place.

In April 2016, after reviewing and re-reviewing the procurement life-cycle of the NLP Aqua product, I contacted the VA's OIG because I felt there were substantial irregularities in the actions and decisions by my supervisors and NIHCS senior management in the contract award. Specifically, I felt the entire procurement was improper and did not comply with the Federal Acquisition Regulations (FAR), the Veterans Affairs Acquisition Regulation (VAAR), and industry best practices. Shortly after my disclosure to the OIG, I was interviewed by an OIG Special Agent and I agreed to assist them in their investigation into similar contract awards at VA Medical Centers in Michigan.

After assisting OIG for months in their investigation, I noticed changes in the attitude and behavior of my supervisors towards me. In November 2016, after the election of President Trump and believing in the assurances by the President Elect to clean up the VA, I met with Michael Hershman who was just hired as the Medical Center Director for the NIHCS and shared my involvement with the OIG investigation and requested to be detailed or transferred to another facility pending the outcome of the OIG investigation. While Director Hershman indicated at the time he needed to consult with someone and would follow up with me, he never followed up or honored my request. I later found out after a I received a copy of the Office of Accountability and Whistleblower Protection (OAWP) investigation report, that shortly after our meeting Director Hershman told the very same supervisors and VA management officials that I identified to OIG of the details of my conversation with him. Obviously, things went exponentially downhill from there. By March 2017, I was removed as Chief Engineer, by the very same senior VA officials that I identified in my disclosure to OIG & OAWP, pending the outcome of the still ongoing investigation, supervised by the very same senior VA officials I identified in my disclosure to OIG & OAWP, into the same unsubstantiated allegations of misconduct from one (1) year, four (4) months, and eight (8) days ago, which are based on fabricated and manufactured 'evidence' by the very same senior VA officials I identified in my disclosure to OIG & OAWP. With all due respect to the work be conducted by the Special Counsel in the investigation of Russian Interference in the 2016 Presidential Election, the alleged investigation by the same senior VA officials that I identified to OIG into me has gone on sixty-nine (69) days longer than Mr. Mueller's investigation into President Trump. And neither appear to have any end in sight.

Despite the fact that I am one of the original whistleblower cases investigated by OAWP after it was stood up, for the past 495 days and counting, VA leadership and their OGC attorneys have spent hundreds of thousands of taxpayer dollars on numerous repetitive Machiavellian investigations over the same unfounded allegations of me & no one has of yet held the aforementioned senior VA officials accountable in spite of the fact the OAWP's investigative report from last summer stated that they 'lacked candor'. The OAWP was created specifically by Congress and the President to hold bad actors accountable, however for reasons unknown OAWP have sat on the sideline as senior VA officials and OGC attorneys continue to remain unaccountable to anyone and continue to subject me to just about every prohibited personnel practice (PPP) Congress has passed a law to stop.

Below is a partial list of prohibited personnel practices (PPP) committed against me over the past year:

- I have been denied opportunities for Chief Engineer details to several other VA facilities across the Nation;
- For no justifiable reason, my repeated requests & pleas to volunteer as part of the Federal response and help restore the power grid for my fellow Americans down in Puerto Rico were denied and/or ignored;
- Though I was vetting and selected by the VA's National Diversity Internship Program (NDIIP) to mentor a minority engineering student who ironically came from the same low-income neighborhood I did in Chicago, without NDIP approval senior VA officials at the NIHCS assigned another mentor and prohibited me leaving my assigned area.
- Senior VA officials and attorneys with VA's Office of General Counsel Midwest Division have openly referred to me as 'damaged goods' across the VA in order to disparage my reputation inside and outside of the VA.
- Senior VA officials and OGC attorneys have knowingly left me alone & isolated in an out of the way office for a majority of past year, even though the VA's

- own research have found that loneliness in Veterans ‘was tied to the highest levels of depression and suicide ideation, or thoughts of committing suicide’⁶
- I have been restricted & denied by same aforementioned senior VA officials from access to VA facilities were I had received medical care for my service connected injuries.
 - Though I have service connected degenerative arthritis in my back, I have basically been required to sit all day for 16 months in an office with no assigned duties and restricted from entering the medical center by the same aforementioned senior VA officials, a whistleblower retaliation decision which was supported by OGC attorneys.
 - Because I have complied with directions under this detail, I was recently diagnosed with scoliosis by my Choice Act doctors who have directly attributed the cause to my current assigned working conditions.
 - After my Choice Act primary care physician & the sports medicine doctor made this diagnosis, they immediately referred me for pain and physical therapy, shockingly the same aforementioned senior VA officials for no justifiable medical or administrative reason denied the referral for 3 months until Senator Todd Young and Senator Joe Donnelly intervened on my behalf.
 - During the past 495 days, I have experienced temperatures in the office that I have been required to report to as low as 35 degree F in the winter and 95 degree F in the summer.
 - And recently I discovered that senior VA officials and OGC attorneys knew back in April 2018 of the possibility that VA employees and patients may be exposed to silica and asbestos as part of a major renovation project, however even though they were advised by the facility Safety Department to relocate personnel in the affected area, senior VA officials knowingly assigned me to an office immediately adjacent to the project in question from May 29, 2018 to July 3, 2018. This decision was supported by OGC attorneys. I respectfully submit that I reasonable belief the decision to intentionally expose me to harmful environmental conditions was a best recklessly retaliatory. And at worse, criminally premeditated.

Based upon the experiences and evidence that myself and other similarly situated whistleblowers have gathered over the past year; there is substantial proof that senior VA officials, OGC attorneys, and even investigators with OAWP have lacked candor in the justification of their decisions and, most troublingly, have intentionally slow-rolled their cooperation with both the OSC and OIG in order to obstruct and frustrate OSC and OIG investigators. This pattern of obstruction includes inquires from this very Committee and the Senate Veterans Affairs Committee.

Speaking specifically to the VA Accountability and Whistleblower Protection Act, in my opinion the distinguished members of Congress and the President have already given VA leadership all the tools and mechanisms it needs for any dedicated and honest leader to complete the mission to care for our Nation’s Veterans. I equally believe the existing Federal procurement laws are sufficient when they are enforced and both Federal employees and outside contractors comply with them. Unfortunately, until the VA purges the embedded corrupt bureaucracy that are infecting the ranks of Human Resources, Medical Center and VISN leadership, OGC, and even the OAWP, I respectfully submit that this Committee can plan on scheduling this hearing every year and will never see the implementation of VA Accountability and Whistleblower Protection Act as Congress and the President have intended.

In closing, despite all of the malicious actions taken against me by unethical and corrupt VA officials and their VA attorneys, I still believe in the VA. Because it’s not their VA, its mine. It’s yours. It belongs our Nation’s Veterans. It belongs to the incredibly dedicated and hardworking VA employees who represent a majority of the VA’s workforce. Up until recently, I have received fantastic medical care for years from the VAs across country and I credit the incredibly dedicated medical professionals at the VA and the VA’s Vocational Rehabilitation Program⁷ for maturing me into the servant leader I strive to be. I hope the distinguished members of this Committee agree that I have seen the best and, unfortunately, the worst of the VA. I have borne witness to President Lincoln’s promise with every great experience I have enjoyed as patient & an employee of the VA. I strongly believe I have a pretty good idea of the untapped potential of the VA if it is allowed to evolve. And with all due respect to the VA leadership testifying before the Committee today, I believe

⁶Teo, A. R., Marsh, H. E., Forsberg, C. W., Nicolaidis, C., Chen, J. I., Newsom, J., . . . Dobscha, S. K. (2018). Loneliness is closely associated with depression outcomes and suicidal ideation among military veterans in primary care. *Journal of Affective Disorders*, 230, 42–49. doi:10.1016/j.jad.2018.01.003

⁷<https://www.benefits.va.gov/VOCREHAB/martin.asp>

I've earned the right, given my recent experiences, to say with a great degree of confidence that once myself and other likeminded individuals are finally given the chance to be the stewards of the mission and we are allowed to do our jobs without fear of reprisal, this Committee will be happily surprised at how quickly the VA transforms into the model of health care best practices for future generations of Veterans.

Thank you for the opportunity to present this statement for the Committee's consideration. I would also like to acknowledge and thank Senator Todd Young and his staff for their help and assistance in trying to get my medical care back on track and for engaging the Office of Special Counsel and OIG on my behalf.

V/r,

Daniel Martin

Roger G. French (Investigations Unit - Alice Buckley)

VA House Oversight Committee

Subject: VA Issue Paper regarding current state of whistleblower protections as interpreted by VA agency leadership, now expanded to other agencies by Executive Order for presentation at the Whistleblower Hearing.

Prior to the Accountability Act of 2015 and the Accountability and Whistleblower Protection Act of 2017, whistleblowers were protected under a myriad of Federal laws including the Whistleblower Protection Act of 2012 and related laws prior stemming from the Civil Service Reform Act of 1978 and beyond. None of these laws have been effective in protecting the employee-whistleblower from leaders who choose to retaliate because leadership is not held accountable. The act passed by Congress in 2015 was for a noble cause, to allow agency leadership (VACO) to fire incompetent and corrupt Senior Executives (Directors) with limited timeframes. Agency leadership, due to lack of HR knowledge wanted unchecked power to fire SES personnel without due process procedures and to do it quickly and often for non-meritorious reasons. A simple embarrassment by a senior leader could often result in removal if the agency headquarters knew how to frame the charges. They did not know how and often began with a cover-up or knee-jerk reaction. There was also a desire to keep SES personnel from organizing themselves into a protective organization as employees did with collective bargaining. A case in point was the Phoenix VA Scandal. The agencies involved spent millions of taxpayer dollars (IG, VA, FBI) for investigations because they wanted to sweep the corruption under the table and to change the public perception of the damages and deaths inflicted on Veterans by local leaders who had no interest in providing quality care to veterans only in their own career progressions and rewards. Employees who vocalized examples of poor care were systematically fired for pretextual reasons and God help the individual who exercised their first amendment rights to speak with the media in an off duty status as the agency leadership quickly moved to end the employees career and licensure/credentials negating any possibility for future employment or meaningful work.

In the Phoenix example, VACO and watchdog groups made every effort to sweep wrongdoing by local leadership to insulate the government against patient malpractice suits and employee settlement claims. Because of the continuing media and public scrutiny did not subside they removed the Director with a felony charge for non-disclosure of gifts (monies and trips) from a contractor and former VACO leader. To do otherwise would have exposed corruption all the way to the Deputy Secretary who was later terminated for covering up facility and patient care issues. Patient claims were quietly settled as were many employee claims under the watchful eye of than Deputy Under-Secretary, David Shulkin. Also to squelch the anger and disdain of employees, patients, Congress and the public, VACO leadership attempted to fire three other leaders at Phoenix, but failed to do so within established regulations and with proper due process procedures. Dr. Shulkin disavowed any wrongdoing to Congress and the media while attempting to proceed quietly with firing of the officials. He also attempted to replace officials at the facility and the VISN with individuals who had worked and or trained with the former Director. These moves were anticipated and exposed on five occasions resulting in the termination of the interim appointee and in one case, the proposed appointee for a VISN Director position rescinded his application after an article by the Arizona Republic exposed his relationship to the former Phoenix Director. The officials were eventually fired, however, their appeals kept funds needlessly flowing to the officials and

the Director's Appeal is still waiting for review. These actions resulted in millions of dollars more of taxpayer monies being wasted. Congress has been made aware of these actions, both republican and democrats, as was President Trump and President Obama. The only action taken was by Congress and President Trump to appoint David Shulkin as Secretary of the VA and to pass the Act of 2015 and 2017. Shulkin next appointed Peter O'Rourke to head the OAWP office in VACO and Steve Young, as the Deputy Under-Secretary. Young was one of the interim appointees at Phoenix who was exposed for his tutelage under the Phoenix Director and his attempts to ignore the real issues at Phoenix and was subsequently terminated.

Accident, collusion or criminal conspiracy? Be advised it is no accident that the Federal government attempts to cover-up corruption. As whistleblowers, you have seen their calculated and unchecked efforts to do so. Every effort is made to blame the whistleblower, the attorneys or the media, rather than address leadership accountability. If the regulations and merit principles do not allow the agency leadership or the VACO leaders to take unscrupulous actions devoid of merit, leaders can reorganize. As an example Human Resources which used to be centralized to VACO with a strong allegiance to OPM was de-clawed by agency leadership beginning in 1983 with President Reagan's reduction of OPM staff by 33%. HR has since been bounced around like foster care and relegated to an advisory function only. Initial alignment of EEO, IG and General Counsel also subordinates agency watch dogs to perform as leadership wants, whether leadership is righteous or corrupt. A recent example is O'Rourke's retaliatory message to Michael Missal, Inspector General of the VA as reported by the Washington Post. Missal is attempting to review employee complaints and is being threatened for doing so and for reports he did against Shulkin. Shulkin was O'Rourke's friend and Chief of Staff. He was put in the position to protect Shulkin as was Steve Young. Another example is the role of OSC. Examine their budget and caseload. Too little to carry out their mission. This is purposely done to declaw the OSC. Carol Lerner was an accomplished attorney, but was not reappointed because of her honesty about retaliators/senior leadership. She should have been reconfirmed to her position with OSC.

Collusion is common in VA. Leaders collude frequently to thwart employee attempts to report wrongdoing, retaliation and discrimination. We have repeatedly received information from insiders on how Shulkin and O'Rourke, along with local leadership, colluded to get agency info on employees and had their emissaries, Wells Werden and Brandon Coleman, seek out employee info and then collectively conspire with agency leadership to fire the whistleblower. This occurred at the Marion, Indiana VA (Northern Indiana VA Health Systems) and in the VISN 6 Network Office.

In Marion, the whistleblower (an African- American female Veteran and physician) expressed concerns regarding the excessive prescribing of controlled substances (opiates, benzodiazepines), the repeated VA Choice and non-VA Care consult delays, failures in scheduling, and the cover-up by executive leadership of patient care gaps which eventually resulted in a death of one Veteran and the hemiparesis of another was met by Northern Indiana VA leadership with a brutal campaign to discredit and malign the physician. OAR investigator Wells Werden rubber stamped the VA version of events which allowed Northern Indiana to strip the physician of her job, her retirement, her access to COBRA then reported her to the National Practitioner Data Bank, state medical boards. This dedicated employee was removed from Federal service August 30, 2017 and has been unemployed due to Northern Indiana's very long arm of retaliation: providing very negative references, challenging her application for unemployment benefits, refusing to release her VetPro file to any employer and using the VA's financial position in the community as an endless restrictive covenant which has successfully blocked future employment. These actions were not extended to the physicians whose poor care resulted in the spastic hemiparesis of one Veteran (and current Tort case), the death of another and a prolonged ICU stay for another due to aspiration pneumonia. Corrupt VA leadership frequently tags whistleblowers as poor performers or providers of poor care in order to justify the retaliatory actions.

In VISN 6, the Network Director was retaliating against the Deputy Network Director and used O'Rourke to draft the removal when the local Regional Counsel refused based on lack of evidence. The VISN 6 Network Director also conspired with Steve Young, Deputy Under-Secretary to act as a deciding official in the removal based on the fact she had a pre-existing and longstanding personal relationship with him at work and outside of work. They have since put the action on hold since it was reported to OSC. OAWP did not investigate the claims by employees as empowered to do until after The Network Director visited O'Rourke and confessed. Now OAWP is looking to cover-up the collusion. West LA is another example of abuse

by Director, Ann Brown and Scotte Hartronft, Chief of Staff and Peter O'Rourke, Acting VA Secretary. Efforts were made by Brown to retaliate against a former whistleblower and surgeon at West LA, by subjecting him to continued harassment and a sham AIB, staffed with an individual from Phoenix. The board was a bogus sexual Harassment allegation that the agency knew to be bogus. O'Rourke had been hosted at the facility by Brown just prior to the board being convened. In still another matter at West LA, an Associate Director and personal drinking buddy of Ann Brown, blatantly sexually harassed the Chief of Police and Ann Brown failed to act quickly and definitely to stop the harassment. As the facility EEO Officer, she should have advised the employee to contact EEO. She did not. Rather, she contacted OAWP (O'Rourke) and inappropriately asked for an OAWP review of the matter. The OAWP interviewed the victim and harassed the victim to say it was a consensual relationship. After I complained to OAWP, EEO and Ann Brown, the agency removed the Associate Director and then asked the victim to testify for the agency before MSPB.

The newest game put into effect by former Secretary Shulkin and maintained in place by Acting Secretary, Peter O'Rourke, and Deputy Secretary, Steve Young is to limit facilities to \$5000 pay-outs in settlements. Settlements higher than \$5000. Go to VACO to be delayed. Even court ordered settlements are delayed which further prolongs justice under the No Fear Act and violates the Legislative intent of the action. Consolidating power, as has been done under the acts of 2015 and 2017, has only increased VA's ability to further threaten and abuse whistleblowers and is tantamount to providing bank robbers the keys and combinations to banks. Common sense should dictate that you do not provide corrupt leadership in VA, or any other agency, more power to abuse whistleblowers. VA (OAWP) has recently prepared an annual report to Congress (attached). Note that the report does not delineate how many SES personnel were removed for retaliation activities, nor does it signify how many were reassigned to higher level jobs. The report is also silent on how many of the employees removed were whistleblowers. Leaders who are found to have retaliated should be criminally prosecuted, not rewarded with a promotion as was done with Scotte Hartronft, Chief of Staff, West L.A. and considered for promotion as was done with Ann Brown, Director, West L.A. and Kari Blackwell, Associate Director, West L.A. VA's "whack-a-mole" practice of putting corrupt leaders in new, and often, higher positions maintains the status quo of retaliation and corruption in VA. Definitive, decisive and strong action to correct improper actions by leadership is the only way to rid VA of corrupt leadership. That was the original intent of the Accountability Act, as promised by two administrations, but it has been watered down by the 2017 changes and the fact that the administration of the act was left in the hands of the corrupt few.

The VA administrations have promised veterans better care by private sector entities after much foot-dragging and resistance. They next stone-walled the process by alleging IT issues and tried to get funds reprogrammed from Choice accounts to medical care accounts. The next obstacle created by VA to avoid compliance was not to pay veterans private sector bills timely so private sector facilities would refuse to serve veterans. It was also an attempt to realign veterans to VA where untimely service could now be perceived as better than no service and patient billing and credit issues.

The matters I have used as an example exceed collusion and rise to the level of a criminal conspiracy where they intentionally thwart employees' rights as codified in statute such as Weingarten and employees' constitutional rights to due process and access to evidence, as well as, numerous others such as fabricating evidence and depriving individuals of their property interests in Federal employment, levying false and unfounded charges, discrimination and retaliation. These matters should be processed as criminal acts and I have suggested such to U.S. Attorney General Jeffrey Sessions and to VA Inspector General Michael Missal. The result of doing so will insure that leadership is held accountable for criminally conspiring to deprive employees of their legal rights and stop the abuse of the 2015 and 2017 Accountability Acts by VA and the OAWP. Granting authority to leadership to thwart protected union rights, to oversight whistleblowers under EEO, IG, HR and OSC is antithetical to the purpose of oversight functions and allows for greater abuses of authority and will result in greater frequency of occurrences of workplace violence. To further right the above abuses by VA, all investigations, (including AIB'S), settlements and judicial reviews of complaints should be reviewed by the Department of Justice after review by the VA IG. To fund these changes in IG and DOJ, staff funding should be realigned from the Office of General Counsel, VACO Administration and the OAWP. This action will better serve veterans and employees and reduces senior leader's ability to continue to corrupt the VA.

Respectfully,

Original Signature/Roger G. French
 Roger G. French Executive Director of Human Resources, VAPSHCS–Retired Con-
 sultant FCC Consulting/Employee Relations

Dale J. Klein, M.D.

Chairman Roe and Ranking Member Walz,

Thank you for the opportunity to provide a statement of record for this hearing about the implementation of the VA Accountability and Whistleblower Protection Act of 2017. I am submitting a statement in hope that this hearing will give a voice to those who blew the whistle on fraud, waste, abuse, substandard care and criminal activity at the Department of Veterans Affairs (VA), and were retaliated against without the perpetrators being held accountable.

I started work as a physician employee at the John J. Pershing VA Medical Center in Poplar Bluff, Missouri in May 2015. This rural VA facility was built in the 1940's and had never had a pain management clinic. I was hired to start a medical clinic from scratch, that would provide much needed comprehensive and interventional pain management care to the more than 20,000 veterans in the catchment area.

While I initially viewed employment at the VA as an opportunity to create a first-class pain management clinic, I eventually realized there was no actionable path forward toward this goal because of a perpetual lack of support from the agency which was shrouded in corruption.

The VA's history is replete with stories of retaliation against employees who blew the whistle and a pervasive lack of accountability.¹ Because I followed ethical standards and reported misconduct; i.e.: secret wait lists, manipulations of wait times, opioid mis-management, forgery, etc., to the Office of Inspector General (OIG), Office of Special Counsel (OSC) and Joint Commission, I lit an emotional fuse with my chain of command which they viewed as disrespectful. VA administration seemed unable, or unwilling, to separate truth from falsehood. They did not like conflicting views.

After the VA discovered I had made disclosures, I experienced systematic and repetitious bullying, discrimination, harassment, intimidation and retaliation. These toxic tactics made my workplace hostile. Initially, I was marginalized and eventually, I was placed in solitary confinement. The VA threats included reporting me to the State Medical Board and the National Practitioner Data Base.² I also survived the threat of physical harm.

My personal medical records on the VA's electronic medical record system were accessed by agency employees who did not provide medical care to me nor had any legitimate reason to enter and read my restricted files. One employee who inappropriately accessed my confidential medical records, works in Washington DC. While unreported happenings might be considered a coincidence; habitual and premeditated actions are revenge.

On January 25, 2017, Senator Ron Johnson, Chairman, Homeland Security and Governmental Affairs Committee (HSGAC), sent the VA Secretary a letter on my behalf. In that letter, Senator Johnson wrote the VA should, "cease all retaliatory actions" against Dr. Klein.

On May 3, 2017, Senator Johnson sent a second letter, cosigned by HSGAC ranking member Senator Claire McCaskill, to the VA Secretary, which included the following excerpt.

"request that you direct all VA employees to cease any retaliation against Dr. Klein and to cooperate fully and promptly with investigations by the VA OIG and OSC."

The VA tried to prevent me from making additional patient care disclosures and remarkably, closed the entire pain management clinic to silence me. The conclusion is inescapable, the motive of the agency, was to use me as a camouflage to disguise and distract from their own institutional failures. The fury ignited by my disclosures

¹"VA Attorneys Can't Fire or Punish VA Executives Correctly - The Case Of 'Dirty D' And Other Agency Misfits" by Benjamin Krause, J.D., December 6, 2017, DisabledVeterans.org

²The Pennsylvania Supreme Court in *Hayes v. Mercy Health Corp.*, 559 Pa. 21, 739 A.2d 114 (1999) stated that a physician's National Practitioner Data Bank entry may have a deleterious effect on the physician's medical career.

and their prodigious effort to silence me, certainly underscores the significance of the problems and outwardly the direction of administrators' moral compass.

Unfortunately, the VA terminated my employment in August 2017 without even finding a logical replacement to care for the many veterans with chronic and complex pain conditions.

To date, there have been three independent Federal investigations that have each ruled in my favor. OIG substantiated all my disclosures that they investigated.³ OSC declared I am a whistleblower and the VA retaliated against me⁴ and determined I was wrongfully terminated.

The first day the VA's Office of Accountability and Whistleblower Protection (OAWP) officially opened, my whistleblower case was submitted. For many reasons, it was daunting and demoralizing dealing with OAWP.

After much time and effort on my part, I was finally allowed to speak via telephone with the OAWP case manager assigned to my complaint. He informed me the evaluation of my grievance was winding down to conclusion. The case manager said he had not planned to interview me during the fact-finding portion of the process. And during this telephone call, he did not ask questions regarding my situation. The case manager stated he had read some undisclosed documents which explained my circumstances and that was good enough for him to complete the inquiry.

Just as the above telephone conversation was ending, I queried if he was aware of OIG's report regarding my disclosures. Astonishingly, the case manager responded he was oblivious to OIG's findings and recommendations. The OIG investigation, report and associated recommendations are some of the key elements of my case, which provides objective evidence substantiating my claims.

After speaking with the case manager (who doubles as a Human Resources employee), I was left with questions of his qualifications to perform a comprehensive and detailed investigation involving whistleblower retaliation. I questioned if this was even an investigation at all. The case manager made it sound more like a cursory review of the occurrences. Although the VA appears to have the resources available to conduct an in-depth investigation, it appeared he lacked the motivation to uncover the truth.

Obviously, OAWP did not safeguard me because I was eventually fired. OAWP's lack of protection is in contradistinction to OSC's findings of whistleblower retaliation and unfair termination.

During my employment, the VA engaged in a pattern of calculated acts, unbounded by governing laws and practice, and obviously motivated by personal gain and vindictive desires. VA administrators have and continue to put their own personal interests above the veterans' wellbeing, which has left a cloud of undue suspicion above the current leadership regarding accountability and whistleblower protection. The false accusations against me were premised on a mischaracterization of the underlying facts and made use of erroneous analysis to draw inferences that are otherwise inaccurate or taken out of context.

The allegations against me were fabricated and patently false. Vicious insinuations, unsupported by scrutiny, failing to confirm a conclusive result, should not be included in an objective report to justify termination of an employee. Likewise, speculation and unsubstantiated opinions, are inappropriate in an investigative statement. I am disgusted and devastated. And I am the victim. The extent to which the VA has gone to harm me is truly unfathomable. It strains credulity to conclude that VA Central Office was not involved with the termination of my employment.

Moreover, and noteworthy, a recording has been attained which verifies an upper level VA administrator making a statement that negates the one and only reason the agency gave for termination of my employment.

After the VA's bias, retaliation and self-interests were all effectuated, basically, they became irrelevant since all those evils can be covered-up by subjecting the physician to a sham Professional Standards Board.⁵

I was not only unlawfully terminated from my job, but the VA has destroyed my career. Even though I'm a Yale alumnus, Board Certified in Anesthesiology and fellowship trained and Board Certified in Pain Medicine, at 54 years old, I'm unable

³ https://www.va.gov/oig/pubs/VAOIG-16-01077_255.pdf

⁴ "On May 11, 2017, OSC issued a prohibited personnel practice report finding that VA officials violated sections 2302(b)(8) and (b)(9) by terminating Dr. Klein's employment during his probationary period in retaliation for making protected disclosures and engaging in protected activity. OSC requested that the VA respond to its request that the VA take corrective and disciplinary action by May 22, 2017."

⁵ Scandals: Unmasking the Underbelly of the VA, by Dale J. Klein, M.D., Chapter 6: "Professional Standards Board Debacle", Copyright: January 16, 2018, CreateSpace Publishing

to attain gainful employment as a physician secondary to what the VA has done to me.

Accountability of VA management responsible for my retaliation appears to have been minimal. Regrettably, punitive actions fell short of reasonable expectations for violations of Federal statutes. Transferring an administrator to another VA facility is not holding the offender appropriately responsible. And encouraging/allowing another administrator (who possibly committed criminal activity) to retire, (one year earlier than he was planning too), is not a deterrent to prevent other administrators at the VA from retaliating against whistleblowers.

The bottom line to all of this is, if the VA would simply place veterans first and follow established rules and protect the whistleblowers who find these infractions - the VA would and could be an outstanding Federal department. Continuing to hide the truth or pretend otherwise is simply disingenuous.

My experience with the VA was like participating in war. The shrapnel of these traumatic experiences are embedded in my mind. My confidence in the Federal government is shaken, but not broken. I look forward to Congressional oversight of VA wrongdoings, so management at the VA will be held accountable for violations of laws and whistleblowers will be protected. The reason to terminate my employment was baseless and unfounded.

This HVAC hearing is where the airfoil meets the relative wind. The VA is in legal jeopardy. The agency forced me to squander a year of employment in solitary confinement, without assigned duties. The VA has repeatedly exclaimed that forcing me to sit in a small room, staring at the walls, without assigned duties was not retaliation. If that is not reprisal, then what was it? And where is the whistleblower protection? And where is the accountability?

Jacqueline Garrick, LCSW-C

Chairman Roe and Ranking Member Walz:

Whistleblowers of America (WoA) is grateful that this Committee recognized the need to review the Department of Veterans Affairs (VA) ability to appropriately implement the legislation passed last year on Accountability and Whistleblower Protection. WoA has monitored and tracked the Office of Accountability and Whistleblower Protection (OAWP) activities as it has had implications for so many of our peers.

Background and Data:

Incorporated in 2017, WoA has provided peer support to 246 whistleblowers with 157 contacts coming from across VA. They represent a gamut of VA employees nationwide, including healthcare providers, executives, contracting officers, and disability claims adjudicators. Many are veterans themselves, veterans' family members or are veteran/patients. They are employees who came to work every day expecting to do their jobs. They expected policies and procedures to be in place to guide them and their co-workers. They expected fair treatment and a positive work environment. They expected orientation, training, supervision and career development. They expected to be held accountable for their professional ethics and conduct and to follow standards, such as those outlined by The Joint Commission or the FAR.¹ They expected to be able to voice their concerns, especially when they saw harm to veterans. They expected to engage in continuous process improvements. Their expectations were met with disappointment and an adversarial experience that caused irreparable damage to them economically, physically, mentally, and socially.

They have reported contracting waste, fraud and abuse, substandards of care, scheduling irregularities, prescription/formulary mismanagement, medical errors, wrongful deaths/suicides, inaccurate reporting in homeless veteran numbers, privacy violations, lost files or equipment, and the lack of appropriate policies or procedures to ensure patient safety or benefits. In most cases, they saw something unethical or concerning and made a disclosure through their chain of command as they were taught to do. Repeatedly, WoA has listened as VA employees recount that they did not think of themselves as whistleblowers, which also means that they did not know how to protect themselves. They thought they were following ethical standards and identified wrongdoing or simply questioned policies and procedures that were confusing or contradictory to veteran care. They were often unprepared for the retaliation, discrimination, harassment, bullying, and a hostile work environment that en-

¹Federal Acquisition Regulation

sued. They have become all too familiar with the 14 Prohibited Personnel Practices outlined in 5 United States Code, Section 2302. They have been the victims of gaslighting, mobbing, marginalizing, devaluing, shunning, blackballing, double-binding, counter-accusing and violence. They describe being stalked, cyber-bullied, intimidated, threatened and physically assaulted. These toxic tactics are well documented in the mental health literature as related to depression, anxiety, posttraumatic stress disorder (PTSD) and suicide among whistleblowers. The law does not recognize the damages done by this level of emotional distress, nor does it hold perpetrators of harassment or retaliation accountable.

VA alone represents approximately 40% of cases being adjudicated by OSC with a 31% increase in 2017.² VA had amongst the lowest scores on the Federal Employee Viewpoints Survey (FEVS) in 2017. It was 17th of the 18 largest Federal agencies.³ On July 3, 2018, VA announced it would drop its participation in FEVS in favor of its own survey.⁴ It is unlikely that VA will be able to effectively execute an independent viewpoint assessment, without comparator data from other agencies, without Office of Personnel Management (OPM) as a 3rd party evaluator, and without compromising personal information. WoA fears that this is a move to further identify whistleblowers and target them. We urge Congress to further review this plan and discuss it with OPM; the administrators of FEVS. On Glassdoor, VA has a 3.4 rating (out of 5), with pros mostly attributed to Federal benefits and cons related to the difficult work environment.⁵ If VA is not an organization of choice, then the implications in being able to recruit and retain the best staff is impaired. Lack of quality staffing will continue to destabilize VA.

Costs of Whistleblowing:

Whistleblowers on average spend three to five years and thousands of dollars of their family money or retirement savings with cases before the Office of Inspector General (OIG), Office of Special Counsel (OSC), the Equal Employment Opportunity Commission (EEOC) and/or the Merit System Protection Board (MSPB). If an employee is covered by professional insurance and able to fully litigate their claim, their costs are often \$200,000-\$300,000 (limits of the policy) plus out of pocket costs. However, most VA employees end up pro se when they have spent \$10,000 of their life savings and can no longer afford an attorney. Often overlooked are the costs of annual leave for legal and medical consultation and responses to litigation, while the Federal official identified in misconduct is allowed unlimited time and legal support to target the employee or respond to whistleblower activity at the taxpayer expense.

Even when cases are substantiated in favor of the whistleblower, the VA employee may have already been demoted, detailed, discharged of duties, or terminated and bankrupt. Professionally, they are compromised. If they are a credentialed provider, they lose their profession and, in some cases, the ability to work ever again because VA has reported them to their licensing board or to the National Practitioner Data Base (NPDB)⁶ without having to prove proper investigation. For example, in the Memorandum of Understanding (MOU) between VA and NPDB, any report the agency submits to NPDB, must be documented in the physician's file, and becomes a permanent record. The MOU is governed by Chevron Deference; i.e.: NPDB assumes any report they receive from VA is accurate and valid. Congress should address the fact that there is no mechanism in place to question if VA is, or is not, providing accurate and valid information to the NPDB and the elements that constitute that investigation. There should be a mechanism to retract and remove such reports when whistleblower retaliation is substantiated. NPDB does allow a physician to submit a statement to refute the VA's submission. However, it is limited to one-page and does not allow enough latitude to extensively and in detail provide written evidence to disprove the VA's report. The VA is aware of the destructive effect a malevolent statement can have on a physician's, (nurse's, social worker's, etc.) career and the agency frequently uses that leverage to threaten whistleblowers into

² <https://osc.gov/Resources/OSC—Lerner—Testimony—VA—Whistleblowers—04.13.15%20FINAL.pdf>

³ <https://federalnewsradio.com/your-job/2018/06/va-drops-the-fevs-in-favor-of-its-own-employee-engagement-survey/>

⁴ <https://federalnewsradio.com/your-job/2018/06/va-drops-the-fevs-in-favor-of-its-own-employee-engagement-survey/>

⁵ <https://www.glassdoor.com/Reviews/department-of-veterans-affairs-reviews-SRCH—KE0,30.htm>

⁶ A web-based repository of reports containing information on medical malpractice payments and certain adverse actions related to health care practitioners, providers, and suppliers. Established by Congress in 1986, it is a workforce tool that prevents practitioners from moving state to state without disclosure or discovery of previous damaging performance.

submission. WoA has reviewed several of these threatening letters. The loss of their profession also means that providers lose their homes, families, and future. So, the consequences of whistleblowing are very real and life-altering for healthcare providers reporting substandard care.

In the meantime, VA officials responsible for the wrongdoing and the subsequent retaliation move along in their careers unscathed and protected by fellow VA leaders. Millions of taxpayer dollars are footing the bill for employee wrongdoing, poor performance, and the legal and investigative fees of targeting whistleblowers. Promotions and bonuses are corruptly awarded to entice those who aide and assist VA leaders in the removal of a whistleblower. Congress should ask the Government Accountability Office to document the amount of taxpayer dollars VA uses in cases related to retaliation, harassment, and discrimination.

Lack of Government Accountability or Whistleblower Protection:

The first component of the 2017 law was designed to enhance accountability. According to the OAWP, it “Serves to improve the performance and accountability of VA senior executives and employees through thorough, timely, and unbiased investigation of all allegations and concerns.”⁷ However, according to its May 31, 2018 report, of the 1,171 accountability actions taken (demotions, suspensions, removals), 1 was listed as against a senior official.⁸ This list is barely a report. It does nothing to explain why those actions were taken nor does it identify violations of law (i.e.: FAR, Anti-Deficiency Act) or misdemeanor or felonious convictions. It does not give any data on its timeliness or how it ensures an unbiased investigation. In its second report regarding whistleblowers, 2,161 employees⁹ made complaints, but OWAP found that half were not whistleblowers. This data point is concerning because it either means that employees are not being educated in accordance with the NO FEAR Act or whistleblowers are being unjustly denied. There is also a lack of data on how they are being assisted. The OAWP needs to open the aperture on how it is defining its whistleblower terms and capturing retaliation (in its many forms) and be able to account for the assistance provided. It should denote how many of the adverse actions they took involved any whistleblowers and who among them were veterans. (Veterans have reported to WoA retaliation related to asking for reasonable accommodations and use of Family Medical Leave Act time due to their service connected disabilities.)

When a whistleblower contacts the OAWP, they are assigned a case manager who asks them to fill out the VA Form 10177. Whistleblowers wait several months and are then given “boilerplate” answers. They are told that they will hear back, but never do. One whistleblower shared his email exchange with OAWP from April to July 2018. He contacted his case manager over 30 times asking for a case update because he was still on a detail. She repeatedly asks him for case information and responds multiple times with, “Your disclosure has been reviewed. Any applicable findings have been addressed appropriately and your case is now closed,” (he gets that response 9 times) “I am unable to provide more information due to privacy,” (he gets that response 5 times) and finally she tells him, “Your OAWP case will remain on hold pending the OSC investigation. If OSC does not complete its review, OAWP will re-open the case.” If this is in fact true, then OAWP is a complete waste of government resources and Congress should consider abolishing it and transferring those funds to OSC so that they can complete their binding unbiased reviews in a timely fashion.

Complaints that go to the OAWP are redirected back to the same leadership chain that disclosures were made against, so there is no real neutral party involved in the investigation.

Whistleblower confirm that sometimes there is some form of an internal review, usually an Administrative Investigation Board (AIB). VA has a Directive and Handbook (0700) on AIB, it does notate that they are never binding. It describes AIB as an “information gathering process”. It does not specify the level of training for employees delegated the responsibility as collateral duty. These investigators usually do not hold the proper job series or certification to conduct an investigation. Additionally, whistleblowers categorize it as biased because it is often conducted by a person who reports to the same supervisor or up the same chain of command. OAWP staff are allegedly a mix of Human Resource specialists, investigators, mediators/arbitrators and decision makers. Congress should ask VA for its staffing portfolio and qualifications for employees assigned to OAWP and for those asked to “investigate” complaints at all levels or serve on AIBs. Congress should require OAWP

⁷ <https://www.va.gov/accountability/>

⁸ <https://www.va.gov/accountability/Accountability—Report—062618—1.pdf>

⁹ <https://www.va.gov/accountability/Whistleblower-Disclosures-Summary—070518—1.pdf>

to report on how long it takes them to adjudicate a complaint and how it ensures impartiality. It should also require them to document the nature of the complaint and which of the 14 Prohibited Personnel Practices were violated.

Furthermore, even the term “investigation” has legal ramifications that the VA misuses. Whistleblowers report that they were told the “investigation” was merely an “evaluation” or a “fact-finding” which means it was nonbinding but may still result in legal action against the whistleblower. When employees are asked to cooperate with these investigations, they are not necessarily advised about potential charges that could be brought against them, nor are they advised about their due process rights or entitlement to legal representation, which are violations of the NO FEAR Act, and certainly there is no ability to utilize the same resources that the government mobilizes. And since most whistleblowers are not legally savvy about governing statutes, not aware of protocols for collecting evidence, not informed on options for assistance, not always covered by a union, and do not have the same unlimited taxpayer resources as the government for adjudicating these cases, they are immediately at a disadvantage in the process. This imbalance of power should not only be seen as unjust by the Committee, but as inhumane because of the extreme burden it places on employees. At the least, Congress should require any formal or informal investigation, evaluation or fact-finding provide employees with their NO FEAR Act rights prior to any interview. It should ask GAO to review all of VA’s policies, MOUs, and procedures for these formal and informal investigations, the results that they generated, and the level of evidence required prior to reporting a provider to their licensing board and/or the NPDB. And, if the submission is found to be fraudulent, how are providers reinstated and recompensed.

Under the law¹⁰, Federal agencies are required to have a policy on Alternative Dispute Resolutions (ADR). According to the OPM, an ADR should involve a neutral, impartial individual as a mediator/arbitrator, but as noted that is not usually the case at VA facilities. Additionally, the ADR Act calls upon the Federal Mediation and Conciliation Service (FMCS) to help other Federal agencies resolve disputes. The FMCS provides a wide variety of professional services such as mediation, designing and building capacity for effective conflict management systems, and developing tools for interagency/public-private cooperation and collaboration. Although FMCS reports VA as one of its customers, there is no visible data as to how often VA uses its services and no outcomes of that support are reported. Congress should ascertain more information about VAs use of FMCS services and outcomes. This may be a more viable option than allowing VA to investigate or mediate itself. Congress should also obtain information as to how FMCS develops tools for public/private partnerships so that those independent entities could be enlisted more often to evaluate, mediate and facilitate a whistleblower resolution. Furthermore, if this authority is removed from OAWP, those funds should be transferred to FMCS for expansion of public/private partnerships.

Since the 2017 law passed, VA has not engaged in meaningful arbitration or mediation. Several whistleblowers have entered arbitration with VA in good faith (and accruing legal fees) only to have VA delay discussions and abruptly withdraw from arbitration unless the whistleblower agrees to resign. Settlements have also been limited since VA changed the policy (issued by Secretary Shulkin) that amounts above \$5,000 must be approved by an Undersecretary. Congress should ask the GAO to assess the trends and cost expenditures for all parties related to arbitration, mediation, and MSPB judgements.

OIG Recommendation Enhancements:

Overall, WoA has concerns that there is also a lack of accountability for follow up on OIG reports. The fact remains that OIG can only make recommendations to VA senior leaders. Those recommendations are nonbinding. Only the OSC can mandate any corrective action. Congress should require an annual roll up of all VA OIG findings and recommendations. Those recommendations should be tracked, and outcomes documented. Since there are no mandates to implement an OIG recommendation, this would allow Congress to more readily intervene. Otherwise, OIG reports can literally, “sit on the shelf” for decades. Because of this lack of urgency, the recommendations themselves tend to be nebulous and inconsequential.

In one case reviewed by WoA, a whistleblower reported inappropriate conduct, corruption, and fraud by Veterans Benefits Administration (VBA) leadership to over 10 VA officials. The whistleblower was almost immediately put under investigation, but never further interviewed. Not a single VBA leader has been held accountable for any of the waste, fraud and abuse or subsequent retaliation related to the OIG report #16-04555-138, “Alleged Contracting and Appropriation Irregularities at the

¹⁰ Administrative Dispute Resolution Act of 1996 (ADR Act)

Office of Transition, Employment and Economic Impact”¹¹ that was disclosed by the whistleblower. Released on May 2, 2018, it documented that Transition, Employment and Economic Impact Office committed statutory violations of \$11.7 million to CALIBRE for printing, dashboards, and other information technology. This may be an Anti-Deficiency Act violation, so the OIG recommended that the Office remedy this unauthorized commitment (does not say how) and that they should obtain appropriate funding and accounting in the future. So, what happens to almost \$12 million? Does CALIBRE have to reimburse the government? Who at the VBA is accountable for that misspending?

The whistleblower who initially disclosed this wrongdoing went to the OAWP for assistance but got no response. However, after this Committee held a VBA hearing in March, WoA published a press release on April 11, 2018 regarding the VBA testimony and the OIG report that resulted in an email on June 14, 2018, from Nicole Craven, OAWP Administrative Investigator requesting information about the whistleblowers who shared information with us. Ms. Craven stated that she was “directed” by her leadership to reach out to WoA. This behavior further validates for WoA its survey results previously reported to this Committee. In that survey of 23 VA whistleblowers of which 13 said that they contacted the OAWP for assistance and got no real response or felt it resulted in further targeting and retaliation.¹²

Therefore, WoA concludes that VA managers guilty of wrongdoing or the retaliation are not held accountable - rarely are they even identified by the OIG. Most of the time, the OIG recommendation is for “further training.” There should be serious penalties for retaliation (fines, demotions, loss of retired pay, etc) to discourage the tactics related to it. Congress should create a fund that requires those identified as engaging in wrongdoing and retaliation to contribute fines. This fund could be used to offset those costs for a public/private partnership that pays for the independent consultants or attorneys (as described by the FMCS) chosen by the whistleblower and reduce the burden on the taxpayer.

In conclusion, WoA finds that OAWP does not meet the standards outlined by this Committee. It has been an extension of retaliation, harassment, and bias. This Committee would be hard-pressed to find employees that would trust or have faith in VA Central Office to oversee their ability to seek justice. WoA advocates for a real overhaul of the whistleblower protection process and calls upon Congress to create new authorities for VA to transfer funds to OSC and FMCS for more independent, unbiased and neutral parties and public/private partnerships that can truly adjudicate wrongdoing, conduct root cause analyses, and improve care to veterans.



¹¹ <https://www.va.gov/oig/pubs/VAOIG-16-04555-138.pdf>

¹² <https://whistleblowersofamerica.org/f/woa-survey-on-va-in-the-news> (Several more responded after the story was published.)