

ACCOUNTABILITY AT VA:
LEADERSHIP DECISIONS IMPACTING
ITS EMPLOYEES AND VETERANS

HEARING
BEFORE THE
SUBCOMMITTEE ON OVERSIGHT AND
INVESTIGATIONS
OF THE
COMMITTEE ON VETERANS' AFFAIRS
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THURSDAY, MARCH 9, 2023

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS' AFFAIRS
Washington, D.C.

The subcommittee met, pursuant to notice, at 3:03 p.m., in room 390, Cannon House Office Building, Hon. Jen Kiggans [chairwoman of the subcommittee] presiding.

Present: Representatives Kiggans, Radewagen, Rosendale, Mrvan, Pappas, and Cherfilus-McCormick.

OPENING STATEMENT OF JENNIFER A. KIGGANS, CHAIRWOMAN

Mrs. KIGGANS. Good afternoon. Thank you for being here today. Welcome to the Subcommittee on Oversight and Investigations first hearing of the 118th Congress. I am honored to be the chairwoman of the subcommittee. I look forward to working with Ranking Member Mrvan, who is on his way, and my colleagues to accomplish some real work for veterans this year.

As a former Navy helicopter pilot and geriatric nurse practitioner who has worked in the VA system, I can speak to the importance of accountability. As a naval aviator, I was accountable for the success of my mission and the safety and well-being of my crew and passengers. As a nurse practitioner, I was accountable for the success of my mission to provide my patients high quality care. A culture of accountability allowed me and my teams to succeed. When accountability fails, the team falters. In the VA's case, good employees and veterans suffer.

The Department of Veterans Affairs is a truly massive entity. It has over 400,000 employees, thousands of medical centers, and clinics, and serves millions of veterans a year. An organization of that size can only work if there is a high level of accountability from the top to the bottom. Unfortunately, VA has struggled with this. At the Miles City Community Living Center in Montana, physical therapists and nursing staff were found to have abused a patient on two occasions. When the patient refused physical therapy, the physical therapist and nurse forcibly lifted the veteran and made the veteran walk without their walker. The veteran suffered skin tears and bruising as a result. As a nurse practitioner, this is appalling behavior.

What concerns me as much as the abuse is that the nurses involved were also cited in incidents that happened in 2018 and 2020. Why were these employees allowed to continue working at the VA and why did those nurses who witnessed this abuse not raise concerns?

In Detroit, at the John D. Dingell VA Medical Center, a VA Office of Medical Inspector Report found that quality assurance and quality management process was manipulated so that senior leadership colluded with the chief of surgery during investigations. The chief of surgery was the subject of multiple investigations, tort claims, and poor outcomes over 4 years, but remained in the position until September 2021. Fellow employees did not raise concerns for fear of retaliation by the chief of surgery.

At the Loma Linda VA Medical Center, a supervisory employee was found to have created a hostile work environment following dozens of complaints from VA whistleblowers. VA's 50-page investigative report recommended the supervisor be immediately removed. Despite this lengthy report and medical center leadership taking all the right steps, overly burdensome legal standards prevented the medical center from removing the supervisor.

These examples demonstrate how a lack of accountability at the leadership and supervisory level can harm veterans in the VA's ability to recruit and retain top talent. That is why Congress gave VA the authority to expeditiously remove employees for poor performance and misconduct. That authority often called Section 714, has been challenged in the legal system. As a result, the VA has stopped using the authority for most but not all employees.

I am concerned that exempting most of the VA workforce from swift accountability will not produce a better product for veterans. I hope to learn more today about what authorities VA is using in lieu of Section 714 to quickly remove employees like those I referenced.

I also hope to hear about how the VA is holding supervisors and other senior leaders accountable. Too often recommendations for discipline of supervisors are changed or flat out ignored by the Department. VA's mission is too important to get wrong. While the Department has made some improvements, we cannot ignore the accountability of managers. Veterans deserve the very best from every VA across this country and a highly accountable workforce is how the VA will deliver that to veterans.

With that, I now recognize Ranking Member Mrvan for his opening comments.

OPENING STATEMENT OF FRANK J. MRVAN, RANKING MEMBER

Mr. MRVAN. Thank you, Chairwoman Kiggans. With more than 400,000 employees nationwide, and the second largest budget in the Federal Government, VA has a tremendous amount of responsibility. VA's chief responsibility, of course, is to deliver on its sacred mission of caring for and honoring our Nation's veterans, and their families, caregivers, and survivors. More than 90 percent of VA's workforce is employed by Veterans Health Administration (VHA). I have been fortunate to hear from many veterans that they love

the care that they get from the VA, and I fully intend to do all I can to ensure that veterans continue to feel that way.

Like any large organization, especially one that serves millions of patients at more than 1,000 medical facilities nationwide, VHA is not immune from incidences of employee misconduct and sometimes serious lapses in patient safety or quality of care. It is our committee's responsibility to hold VA accountable for such failures. It is bad enough when veterans suffer harm as a result of such failures but incidents like these are also harmful to the VA's workforce.

Headline grabbing incidents tarnish VA's reputation, crush employee morale, and compound VA's long-standing challenges with workforce recruitment and retention. Lapses in patient safety and serious employee misconduct are especially harmful to VA's clinical workforce at a time when our entire healthcare system is under strain from pandemic related employee burnout.

As we discussed at last week's full committee hearing, strong, stable leadership is the foundation upon which accountability is built. We also discussed the highly decentralized nature of the VHA and the governance challenges that have impeded its oversight and accountability. That is why last week I introduced the VHA Leadership Transformation Act, H.R. 1256. My legislation would depoliticize VHA by extending the term of the VA's Undersecretary for Health to 5 years so VHA and its 380,000 employees will not have to endure leadership turnover with every change in Presidential administration. My bill would also remove statutory restrictions on the qualifications of senior executives at the VHA headquarters and give VA greater flexibility to determine the organizational structure of the Veterans Health Administration.

Since coming to Congress just over 2 years ago, I have enjoyed the bipartisan culture of this committee. Healthcare is not partisan and veterans should be shielded from the chaos of the political process when it comes to accessing the healthcare they have earned and deserve. I hope my colleagues will support my bill to bring much-needed leadership, stability, and accountability to the VHA.

Secretary McDonough has made strengthening VA's workforce his top priority. There will be discussions today that will focus a lot of attention on what VA is doing to improve its efficiency in firing employees. I get it. Every Federal agency has its share of bad apples. Veterans need to feel assured that we are handling bad actors appropriately. However, based on the chair's invitation from this hearing, I believe we are also here today to discuss challenges VA faces in recruiting and retaining employees. I would like to give equal attention today to the importance of holding VA accountable for improving its efficiencies in hiring employees and retaining those who have dedicated their careers to serving veterans.

This hearing comes at a time when VA finds itself in a fierce competition with private sector employers desperate for doctors, nurses, and other healthcare professionals. I am hoping today's witness will be able to provide some insight about steps the Department is taking to recruit and retain employees nationwide, especially at the VHA. I will encourage you at the outset to highlight areas where Congress can help VA in this endeavor.

I hope this is the first of many productive subcommittee hearings in this Congress. I look forward to working closely with Chairwoman Kiggans to provide oversight and ensure that the VA is doing its very best to deliver healthcare and benefits to the veterans. With that, I yield back.

Mrs. KIGGANS. Thank you Ranking Member Mrvan. We will now turn to witness testimony. Testifying before us today we have Mrs. Tracey Therit, the Chief Human Capital Officer for the Department of Veterans Affairs. Welcome.

Mrs. Therit, please stand and raise your right hand.

[Witness sworn.]

Thank you. Let the record reflect that Mrs. Therit answered in the affirmative.

Mrs. Therit, you are now recognized for 5 minutes to provide your testimony.

STATEMENT OF TRACEY THERIT

Ms. THERIT. Good afternoon, Chairman Kiggans, Ranking Member Mrvan, and members of the subcommittee. Thank you for inviting me here today to discuss VA's efforts to address accountability within the Department.

The Department of Veterans Affairs Accountability and Whistleblower Protection Act was enacted on June 23, 2017. The Act amended Title 38 of the United States Code by adding several new statutes that among other things, established the Office of Accountability and Whistleblower Protection (OAWP) and added protections for whistleblowers, provided the Department of Veterans Affairs with additional authorities to take disciplinary action against senior executives and other covered employees based on poor performance and misconduct, and provided VA with authority to recoup relocation expenses, bonuses, and awards based on poor performance and misconduct.

The Act provided VA with additional authority to take disciplinary action against senior executives pursuant to 38 U.S.C. Section 713. The authority set forth a streamlined procedure for disciplining senior executives and outlined the process by which senior executives can challenge such an action. Upon enactment, VA quickly developed and implemented policy to carry out actions in Section 713. Section 713 has and continues to be used to address poor performance and misconduct of VA senior executives.

Furthermore, the Act provided VA with additional authority to take adverse actions against certain VA employees under 38 U.S.C. Section 714. This authority sets forth a streamlined procedure for disciplining certain VA employees identified by statute. Upon enactment, VA quickly developed and implemented policy to carry out adverse actions under Section 714.

Since enactment of Section 714 and VA's implementation, Federal Circuit Court decisions and administrative decisions from the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board have limited the scope of that authority. The FLRA ruled that the VA was required to bargain impact and implementation of the law prior to utilizing it against the American Federation of Government Employees (AFGE), bargaining unit employees, which the VA failed to do.

The FLRA also upheld an arbitration award that found that Section 714 did not supersede the collective bargaining agreement requirement to provide performance improvement plans prior to taking a performance action against AFGE bargaining unit members.

VA is complying with the Federal Labor Relations Authority and arbitration decisions. VA and AFGE reached a settlement on the decisions related to performance improvement plans involving approximately 400 employees. Impacted employees have either elected not to be reinstated and received a cash settlement or opted for reinstatement and are going through the performance improvement plan process, if applicable.

Any reinstated employee who does not successfully complete the performance improvement plan period, may be subject to appropriate adverse actions under Title 5 procedures.

Following the FLRA decision cited above, VA engaged in retroactive bargaining with AFGE and is currently in mediation with AFGE concerning approximately 4,000 employees who received an adverse action under Section 714 prior to the FLRA and arbitration decisions.

In some instances, employees against whom the Department took an adverse action under Section 714, filed appeals with the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit resulting in decisions that greatly limit VA's use of Section 714. Specifically, through a number of separate decisions, the Federal Circuit Court ruled that VA could not use Section 714 for performance or misconduct that occurred prior to the enactment of the Act; the MSPB must review VA's selection of penalty in both misconduct and poor performance cases when reviewing an action taken under Section 714; VA must use the preponderance of the evidence standard of proof when taking an adverse action under Section 714; VA must consider all relevant Douglas factors when determining a reasonable penalty; and the MSPB must consider the Douglas factors when reviewing the penalty selected by VA.

Recently, MSPB, in an interlocutory appeal, held that VA was prohibited from using Section 714 to remove, demote, or suspend employees of the Veterans Health Administration who were appointed in a hybrid Title 38 positions.

This decision effectively prevents VA from using Section 714 for actions taken against hybrid Title 38 employees. VA received final decision from MSPB yesterday. VA and/or the Office of Personnel Management has the ability to appeal the decision to the MSPB. Further, Office of Personnel Management and Department of Justice have the discretion to subsequently appeal the MSPB decision to the Federal Circuit. VA is communicating with both agencies regarding appeal options.

These decisions have significantly reduced the differences between 714 and the pre-existing Title 5 disciplinary authorities. Due to these decisions, on April 30 of 2021, VA stopped using Section 714 to take action against AFGE bargaining unit employees. On January 17, 2023, VA stopped using Section 714 to take action against hybrid Title 38 employees. On April 3, 2023, VA will cease using Section 714 to propose new adverse actions against VA employees.

The limitations set forth by the decisions highlighted above will not prevent VA from taking appropriate accountability actions when warranted by poor performance and misconduct. For adverse actions that VA would have issued a Section 714, VA is returning to use of the Title 5 disciplinary authorities that pre-existed Section 714 and which are used throughout the Federal Government.

VA can still demote, suspend, and remove employees when the evidence supports that proposed action. A review of adverse actions indicates that VA has consistently used all available authorities to hold employees accountable. The VA has demonstrated the ability to hold employees accountable without having to use Section 714.

VA intends to use and not suspend the use of any other authorities from the Accountability Act. VA continues to use Section 713 concerning senior executives, 38 U.S.C. 731, and 723, concerning recoupment of relocation expenses, bonuses, and awards, and statutory amendments to the time periods for adverse actions against Title 38 employees will remain applicable.

Under 38 U.S.C. 323(c)(1)(I), OAWP makes recommendations for disciplinary action after substantiating any allegations of misconduct or poor performance by a VA senior leader or whistleblower retaliation by a VA supervisor. These recommendations go directly to the appropriate VA official who will serve as a proposing official if any potential disciplinary action is recommended.

Under 38 U.S.C. 323(f)(2), the VA must provide a detailed justification to the Senate and House Committees of Veterans' Affairs if the recommended disciplinary action is not initiated or taken within 60 days of receipt of the recommendation. VA instituted a process to carry out this requirement which requires the VA official who received the recommendation to provide a detailed justification to OAWP if the recommended action is not taken. VA then develops a report that is sent to the committees that includes a summary and detailed description of the VA official's rationale for not taking the recommended disciplinary action.

Data provided to this subcommittee as part of VA's testimony shows that implementation of OAWP recommendations increased from 2021 to 2022. While each case in which OAWP issued a recommendation and the responsive justification is factually unique, a review of the justifications for calendar year 2022 show that the most common rationales for not initiating or taking a recommended action are that the individual's performance between the investigated incident and the recommendation was exceptional or outstanding, the individual did not have any prior history of discipline, the individual sought guidance from leadership, human resources, or the Office of General Counsel prior to the investigated incident, and the lengthy period of time between the investigated incident and the recommendation. These rationales are consistent with the management official's responsibility to consider relevant factors such as Douglas factors, or other mitigating factors, when proposing and deciding a disciplinary action.

Due to the significant individual privacy interests in these matters, if there are particular cases that the subcommittee wishes to discuss, VA is willing privately to brief members of staff. I am happy to respond to any questions that you may have. Thank you.

[THE PREPARED STATEMENT OF TRACEY THERIT APPEARS IN THE APPENDIX]

Mrs. KIGGANS. Thank you, Mrs. Therit. We will now move to questions, and I yield myself 5 minutes. Thank you for your testimony.

Though I have only been here a short time, I have heard from multiple constituents and VA employees who are having a hard time with supervisors at VA, especially healthcare facilities. These employees are hardworking people who want to serve our veterans. However, they are leaving the VA because their supervisors are not held accountable. You described a kind of a lengthy administrative process just listening to I am sure there is a lot of paperwork involved and probably a lot of online forms, and that, you know, in order to process these complaints. What would you say to these employees who are kind of at the end of their rope? They followed these right steps, but then they feel like their complaints go unanswered. Why should they stay at the VA when they do not feel valued? Then how can we change that?

Ms. THERIT. Chairwoman Kiggans, thank you for that question. We are committed to making sure that we hold senior leaders and supervisors accountable for their performance and their misconduct. If an employee feels that their supervisor is engaging in misconduct, that needs to be reported either to the Office of Whistleblower Protection or to their supervisor's chain of command. Those matters are taken seriously. They are investigated either through fact findings and administrative investigation boards or through the Office of Accountability and Whistleblower Protection. While the process to investigate and gather information on the allegations may be lengthy, as soon as an action is proposed, the individual is given a period of time to respond, the action is decided. We will make sure that that individual knows that their organization and their culture of that environment is protected.

We strive to be a high reliability organization, and employees need to feel safe in bringing those issues forward for attention, and we need to act swiftly, using the authorities that we have, including our Title 5 authorities or our full Title 38 authorities, to address those issues.

Mrs. KIGGANS. What is the average length of time that entire process takes place from the time an employee puts in a complaint until the time it is resolved would you say?

Ms. THERIT. The time to take a disciplinary action is from the proposing action to the final action, 30 days under the Title 5 procedures, and 15 days under the 713 procedures.

Mrs. KIGGANS. Thank you. Then just to change gears. The VA, like most healthcare systems, is having a hard time with recruitment and retention. We talked a little bit about it earlier. A lack of accountability at the leadership and supervisory level drives away some good talent and exacerbates that problem. Does the VA have the tools it needs to make sure the Department and its staff are accountable and succeeding in their mission? How can Congress just assist with recruiting talented staff for you all?

Ms. THERIT. Chairwoman Kiggans, we are grateful for the authorities that we received in the Promise to Address Comprehensive Toxics (PACT) Act. In the first quarter of fiscal Year 2023, we are seeing tremendous growth in the Veterans Health Administration and the Veterans Benefits Administration, largely by use of

those authorities, as well as the onboarding surge events and the hiring events that are happening throughout the country. We also welcome additional authorities, and I know we will be having hearings this month regarding the VA Careers Act and some other legislation that I know Ranking Member Mrvan had mentioned in his opening statement as well.

Mrs. KIGGANS. Then how about retention? I feel like these employees are becoming frustrated sometimes with this process, if they have submitted complaints, and they are either not resolved or they put in multiple complaints. How can we do better to retain the good staff that we do have? Are there any retention, just processes that we are not thinking of that we can do better with?

Ms. THERIT. At the VA, we have reused our retention incentive procedures to retain employees, and we are seeing lower rates of attrition in fiscal year 2023 than we had seen in past years. We also welcome the other authorities that we have had to remain competitive with pay. I know there are lots of competition, especially in the healthcare field, for healthcare workers. We are looking at special salary rates and improvements to salaries that were made under the enactment of the Retention and Income Security Enhancement (RAISE) Act as well.

The other thing that I would mention with respect to retention is being able to develop our whole health, and our engagement programs, the work environment, combating burnout, really, lots of issues around flexibility and our work schedules. There are lots of tools that we need to be applying to ensure that employees feel valued, they feel respected, they can bring forth issues, and those issues are addressed, and they are working in a supportive work environment. I will also add a key factor in all of that is making sure that we are conducting in a lot of our facilities, what are called stay interviews. There are opportunities to get feedback from employees and address that feedback before somebody leaves their department.

We have many tools in place. We welcome conversations with you and other members of the committee on additional things that we can do to make sure that our workforce is supported and that we are able to both recruit and retain talent.

Mrs. KIGGANS. Making sure that we have enough talent to spread the work around so that one staff member is not overburdened with too much, I think is important for healthcare staff. Thank you so much. I yield to Ranking Member Mrvan.

Mr. MRVAN. Thank you, Chairwoman. Ms. Therit, a longstanding issue and source of frustration for this committee, one that predates my time in Congress, is the lack of reliable data about the number of workforce vacancies that exist in the VA. I am told for the last for at least 7 years, maybe longer, VA has been in the process of developing staffing models for each occupation and validating positions that show up as vacancies in the IT systems.

Just yesterday, in accordance with the Mission Act requirement, VA published data indicating that there were more than 76,000 vacancies nationwide as of December 31. Is that a true number of positions VA needs to fill right now? Just briefly, yes, or no?

Ms. THERIT. The 70,000 number of positions are not fully funded positions. There are positions in our HR system that are not en-

cumbered, but they are not a reflection of our Full Time Equivalents (FTEs) and the funding received for those FTEs.

Mr. MRVAN. Okay. What percentage of occupations across VA currently have staffing models? How do you know if those medical facilities and regional offices are staffed appropriately?

Ms. THERIT. Ranking Member Mrvan, I do not have the exact number of staffing models that are in place. I can get that information and provide it to you and your staff.

Mr. MRVAN. Okay. My colleagues and I hear all the time from frontline employees about challenges they face with understaffing which can contribute to lapses in patient safety and drive-up employee burnout. With that, of the 76,000 that you said are unfunded, is there a percentage that has it been determined from the VA which are unfunded and which are positions that need to be filled?

Ms. THERIT. Ranking Member Mrvan, that report that is issued on a quarterly basis does have a distribution of funded versus unfunded full-time equivalent positions. I would be happy to brief you or members of your staff on the report and break it down into some specific areas that you would want to discuss further and the efforts that we are doing to fill those positions.

Mr. MRVAN. Just for my own knowledge base, what is the purpose of keeping the unfunded positions in that data?

Ms. THERIT. The human resources professionals that use the system from which that data comes may at some time in the future want to use one of those positions when they get funding to fill it. Those positions remain in the system, but we have looked at procedures to update that information and validate that data. Again, we would be happy to share with your staff any new procedures that we put in place to address those issues.

Mr. MRVAN. When they transition from funded to unfunded, what is the process in place to fund those unfunded positions? Say that ten times.

Ms. THERIT. At the local level, especially in our Veterans Health Administration, where a lot of that data that is published on a quarterly basis is broken down by facility and by occupation, there are resource management boards. The requests come to those resource management boards to make funding determinations, and then they go into the system, identify that position, and start the recruitment action. That is the steps in the process that is taken specifically within VHA.

Mr. MRVAN. My point in honing in on that is it would appear that that is a tool to be able to identify where those vacancies are and as in oversight investigations when that data is released, you look at that number and you think those are the positions that are needed. When in fact, it is undeterminable what number you release because of the funded and unfunded way that the data is released. That is why I am kind of focusing on that, to make sure that there is a clear path with that knowledge and that data.

Ms. THERIT. Ranking Member Mrvan, I think that is a great observation. I know in the VA Careers Act there is a provision to improve our display and representation of that information. We would welcome an opportunity to work on you to refine that report and

make it easier to understand as well as more meaningful in terms of utilization.

Mr. MRVAN. Thank you. With that, I yield back.

Mrs. KIGGANS. Thank you for your comments. At this time, we are going to take a short recess just to allow for other members to be able to participate. They have conflicts with committees and we are not quite done and I am sure they have other questions. At this time we will take a short recess.

[Recess.]

Mrs. KIGGANS. The hearing is back in order and I would like to recognize Mr. Pappas for 5 minutes.

Mr. PAPPAS. Thank you very much, Madam Chair, and thank you, Ms. Therit, for bearing with us and all the responsibilities that happen here. I want to thank you for your testimony and draw attention to one issue.

The PACT Act obviously was a historic expansion in terms of VA benefits and access for veterans who have been impacted by toxic exposure. One of the provisions in the law, the Workforce Investment and Expansion Act under Title 9, which will help expand the VA's workforce by enhancing hiring practices and incentives, was something that we authored. I think it is going to ensure that VA can better recruit and retain healthcare professionals.

There are provisions that will be particularly helpful, I believe, for veterans in rural areas. Like many of the veterans in my district, it established a national VA rural recruitment and hiring plan to develop and implement best practices for recruiting healthcare professionals to rural facilities. I am wondering if you can provide any update on the implementation of the Title 9 VA workforce provisions in the PACT Act?

Ms. THERIT. Thank you for that question, Congressman Pappas. We are well on our way to completing implementation of about 70 percent of the provisions in Title 9 of the PACT Act. We started with the ones that were easiest to implement by issuing policy quickly on removing the restrictions related to housekeeping aids, increasing the limits on recruitment, relocation, and retention incentives, as well as student loan repayments, and special contribution awards. We are now implementing a lot of the additional pay authorities when it comes to increasing the limits on special salary rates, critical pay positions, as well as waiver of some of the pay limits for work done in response to the toxic exposure claims.

In addition, the plan that you mentioned, the Rural Recruitment Plan, is on track to be delivered to the committee. I believe the timeframe is 18 months from enactment. There are groups within the Veterans Health Administration coming together to develop that plan, and we look forward to briefing you on it when it is completed.

The other piece of information that I will share is in order to do all of this incredible work with recruitment and retention, we need to strengthen our human resources workforce, and there are provisions within Title 9 that have allowed us to do that. We have published the qualification standards. They have been sent to your committee as well as the performance metrics, and we look forward to delivering a plan later this year on what we are doing to recruit and retain our human resources professionals.

There is additional information that you would seek on how we are implementing the Title 9 provisions of the PACT Act. More than happy to brief you on those, but we are greatly appreciative. We are seeing tremendous feedback both from our employees and our labor partners in terms of those authorities and what they mean for improving and strengthening the VA.

Mr. PAPPAS. Thanks for those comments, and I think that is an important flag on what is needed on the human resources side. We look forward to staying in touch on that.

One final question I have. The committee often hears about concerns from frontline employees about locality pay surveys for clinical staff. I actually heard about this from a frontline clinical staff member of VA in my office earlier today. Over the years, the number of these schedules per facility has grown significantly with facilities setting pay that is specific not just to an occupation and locality, but to the occupation facility and specific unit within the facility. These surveys are supposed to be triggered by turnover rates, resignations due to dissatisfaction with pay, and other criteria. There is concern that VA medical facilities are not able to act quickly enough to update these scales. Even if facilities do conduct market studies, they do not always implement pay increases because they sometimes lack the budget to do so. What is VA doing to address this and ensure that salaries for clinical staff are keeping pace with changes in local markets? I know that Congress recently passed the RAISE Act, but we are hearing from rank-and-file nurses that salary increases just have not trickled down to non-supervisory nurses.

Ms. THERIT. Thank you for that question, Congressman Pappas. I am going to start with the RAISE Act. The RAISE Act was targeted at increasing the pay limits for specific occupations, physicians assistants, registered nurses. It did not touch every healthcare position within the Department. For those that it covered, we moved out quickly to make sure that we first started by prioritizing those who were at the top of the pay limit, those then within 10 percent of the cap, and then the remaining positions.

It took policy changes, it took system changes, it took training on the procedures, but we were able to move out quickly on that. We do have additional authorities, which we also think the delegations to the Secretary for some of the authorities as opposed to having to go to the Office of Personnel Management and wait for them to act on our request will expedite our ability to implement some of these pay authorities, especially the special salary rates that can be used in addition to the locality pay tables for specific occupations, as well as in specific geographic areas.

Where we are also seeking partnership with the Department of Defense is on our blue-collar Federal wage system employees, our wage grade employees. They have not been as impacted as our GS and our healthcare workers in some of the legislation that has been passed. The Federal pay system is incredibly complicated. You have the Federal Salary Counsel where we require action on their part to implement locality pay changes and pay changes to the general schedule. Then you have the FPRAC, the Federal Prevailing Rate Advisory Committee, that handles the wage and salary information for the wage grade employees.

We are represented on both of those committees and councils. It is a long and arduous process. If there are more things that we can do with you and others in your areas where these pay impacting situations are occurring, we are happy to work with you because we know a living wage and competitive pay is incredibly important, especially in some of our geographic locations where the cost of living is incredibly expensive. If there is more that we can do to work with you, we are representing and advocating for the VA workforce and trying to take all the steps we can through authority that is delegated to the Secretary, collaborating across government, and then focusing specifically on some of those geographic locations and occupations that are particularly challenging.

Mr. PAPPAS. Thank you for those comments. I yield back.

Mrs. KIGGANS. Thank you, Mr. Pappas. The chair recognizes Mr. Rosendale for 5 minutes.

Mr. ROSENDALE. Thank you, Madam Chair. Ms. Therit, the VA Office of Inspector General's testimony last week before our committee cited many examples of VA staff escaping accountability. One egregious example was the repeated patient abuse in my district committed by a physical therapist and nurse at Miles City Community Living Center. This is deeply disturbing to me. Did the VA hold these employees accountable?

Ms. THERIT. Congressman Rosendale, thank you for that question. The employees at the Miles City VA have been held accountable. All of the recommendations from the Office of the Inspector General have been implemented. The full Title 38 disciplinary procedures were followed. There is pending litigation involving the individuals who were disciplined. There are limitations in what I can share with you. If there is additional information that you are seeking in terms of the response that we took to discipline and hold employees at the Miles City Community Living Center accountable, happy to meet with you and discuss that privately.

Mr. ROSENDALE. Thank you very much. I would like to hear the accounting of the employees and know exactly what actions are being taken to take disciplinary action to hold them accountable so we can get a private meeting set up so that I can get an update on that.

Ms. THERIT. Agree, Congressman Rosendale. I also am aware of conversations that the Secretary and Undersecretary of Health have had with you regarding the Montana VA. There is a team on-site this week addressing those issues, the Office of Accountability and Whistleblower Protection, the Office of the Medical Inspector, and the Workforce Management and Accounting Office. We take those allegations of what has occurred at the Montana VA very seriously. We also used our Title 5 authorities under Chapter 75 to move out quickly in addressing a disciplinary issue at that location as well.

Mr. ROSENDALE. Unfortunately, I have had some more information from the Helena facility as well, Fort Harrison. I will be contacting the Secretary about that as well, that just bounce on to the additional problems that we have already been made aware of.

In reference to the Miles City facility, who was responsible for the oversight of the Community Living Center (CLC) from Fort Harrison?

Ms. THERIT. The director of that facility was responsible.

Mr. ROSENDALE. Okay. Why were not they keeping an eye on the CLC, which had multiple reports and issues in the last few years?

Ms. THERIT. Congressman Rosendale, I do not have those details, and I will get them and provide them to you.

Mr. ROSENDALE. Okay. This hearing is titled Accountability at the VA: Leadership Decisions Impacting its Employees and Veterans. Part of the VA being accountable for veterans is responding to congressional inquiries promptly. I sent a VA letter with five of my key colleagues on January the 26, 2023 and have yet to receive a response. It has been over 40 days.

The letter talks about how the U.S. Department of Veterans Affairs failed to protect employees', medical students', and volunteers' personally identifiable information, including medical history, specifically relating to their COVID-19 vaccination status. Approximately 500,000 employees', medical students', and volunteers' vaccination status and reasons for requested exemptions from the COVID-19 vaccine were sent to the senior leadership of the Veterans Health Administration without following proper protocols.

This negligence allowed employees' vaccination status to be accessed through SharePoint with no password protection by hundreds of individuals who may then have shared the data with other folks. What about those who requested the exemption for medical purposes? What are you going to do to protect people who requested exemptions from being targeted by our adversaries?

Ms. THERIT. Congressman, I apologize that you have not gotten a response to your letter. I know a response has been drafted, and I will make sure that you receive that response in a timely fashion.

With respect to the individuals who have requested exemptions, if they have followed the exemption procedure, no disciplinary action would be taken against those individuals. Their rights to request an exemption for medical or religious reasons would be protected.

Mr. ROSENDALE. I understand that, but what about our adversaries who now possibly could have access to that information that individuals have been requesting an exemption?

Ms. THERIT. Congressman, if an individual's privacy rights have been violated, there are steps that will be taken to discipline individuals who violated those privacy rights.

Mr. ROSENDALE. We have 500,000 people's information that has not been protected, Okay. This is the point that I am getting at, 500,000 individuals' information was not protected. We do not know who has it, but we know that they had requested an exemption, whether it was for religious purposes or for medical purposes, and that information is out now, and it is not protected. You do not know who has access to it, and I do not know who has access to it. What are we going to do about the 500 individuals whose information has been released?

Ms. THERIT. Congressman Rosendale, I will find out what information has been taken, or the steps that have been taken in response to that matter and provide it to you.

Mr. ROSENDALE. Thank you very much. Madam Chair, I yield back.

Mrs. KIGGANS. Thank you, Mr. Rosendale. The chair recognizes Ms. Radewagen for 5 minutes.

Ms. RADEWAGEN. Thank you, Madam Chair. Ms. Therit, is VA adequately educating its employees on their rights as whistleblowers? Is VA doing a good job at protecting whistleblowers from retaliation?

Ms. THERIT. Congressman Radewagen, thank you for that question. Under the Accountability Act, we were required to develop and deliver training to all of our employees, and that training is happening. It is within our talent management system so we have accountability to make sure that employees are receiving that information. They are both being educated and they are being able to use their rights appropriately.

We also have very specific requirements within the Act to protect whistleblowers from retaliation. When those reports are made, they are investigated by the Office of Whistleblower Protection Accountability. We also make sure that in certain instances when corrective action is being proposed that there are opportunities to hold that action until a thorough and proper investigation has taken place.

Ms. RADEWAGEN. Now, Government Accountability Office (GAO) has informed this committee that over the last 5 years, the proportion of VA prohibited personnel practice cases, including whistleblower retaliation allegations, has generally increased. Ms. Therit, what do you make of this trend?

Ms. THERIT. Congresswoman Radewagen, the opportunity to understand what your rights are and exercise those rights is important to our employees. When those issues are being brought forward, we do take them seriously. There are specific provisions within the Accountability Act that prescribe the type of action that should be taken to discipline an individual who is engaged in a prohibited personnel practice. We are following those requirements.

Ms. RADEWAGEN. How can VA give its employees the confidence that they will not be retaliated against if they make the difficult decision to blow the whistle?

Ms. THERIT. Congresswoman Radewagen, we are making sure that every employee who raises an issue is protected both by the investigative authority that exists both at the Office of Special Counsel as well as the Office of Accountability and Whistleblower Protection, and that when individuals bring forward those issues, they are addressed expeditiously.

Ms. RADEWAGEN. Well, as you know, the Office of Accountability and Whistleblower Protection is VA's internal office charged with investigating allegations and making disciplinary recommendations against supervisory employees for wrongdoing or retaliation. In 2022, the most recent data available, OAWP made 32 disciplinary recommendations, only 12 were fully implemented by VA. Why are not more of OAWP's recommendations being fully implemented?

Ms. THERIT. Congresswoman Radewagen, there is a requirement to ensure that we are taking a legally defensible action that can be sustained, that once the action is recommended, the supervisor needs to apply the Douglas factors. We are looking at any mitigating or aggravating factors before we take that final action. That is a requirement to make sure that individuals have due process

before that final action is taken. So, in those cases, there may be a difference between the recommended action and the final action due to the application of those Douglas factors being no prior history of disciplinary action, the individual may have sought guidance from the Office of General Counsel or Human Resources before the action was taken. We are seeing increases in the recommendations being adopted, making sure that we are following our Douglas factors, making sure those legally defensible actions can be taken and can be sustained.

Ms. RADEWAGEN. Compared to the OAWP implementation numbers we saw from 2021, it seems a higher percentage of OAWP recommendations are being fully implemented. Do you see that trend continuing in 2023?

Ms. THERIT. Congresswoman Radewagen, I do see that trend increasing. The Office of Accountability and Whistleblower Protection is taking their investigations and processing them faster. That reduces the time between the incident that has been reported, the completion of the investigation, and the opportunity to take disciplinary action in that matter, which does support the opportunity to be legally defensible in taking that action and making sure that it is sustained.

Ms. RADEWAGEN. Thank you, Madam Chair, I yield back.

Mrs. KIGGANS. Thank you, Ms. Radewagen, and thank you all for being here today. Accountability at the VA is so important because it is fundamental to veterans and their experience with the Department. Accountability is how we improve care outcomes and the delivery of benefits for all veterans day in and day out. It is also how the VA retains its talented staff that provide the high-quality care and veterans benefits to veterans.

The VA must learn from its past failures and implement lessons learned. And I look forward to working with Ranking Member Mrvan and all of our colleagues on the subcommittee to drive toward positive change. Again, thank you all for being here. I ask unanimous consent that all members shall have 5 legislative days in which to revise and extend their remarks and include any extraneous material hearing. Hearing no objections, so ordered. This hearing is now adjourned.

[Whereupon, at 4:21 p.m., the subcommittee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF WITNESSES

Prepared Statement of Tracey Therit

STATEMENT OF MS. TRACEY THERIT, CHIEF HUMAN CAPITAL OFFICER
HUMAN RESOURCES AND ADMINISTRATION/
OPERATIONS, SECURITY AND PREPAREDNESS
DEPARTMENT OF VETERANS AFFAIRS

"ACCOUNTABILITY AT VA: LEADERSHIP DECISIONS IMPACTING ITS
EMPLOYEES AND VETERANS"

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

MARCH 9, 2023

Good afternoon, Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee. Thank you for inviting me here today to discuss VA's efforts to address accountability within the department.

The Department of Veterans Affairs Accountability and Whistleblower Protection Act (the Act) was enacted on June 23, 2017. The Act amended Title 38 of the United States Code by adding several new statutes that, among other things, established the Office of Accountability and Whistleblower Protection (OAWP) and added protections for whistleblowers, provided the Department of Veterans Affairs (VA) with an additional authority to take disciplinary action against senior executives and other covered employees based on poor performance and misconduct, and provided VA with the authority to recoup relocation expenses, bonuses, and awards based on poor performance and misconduct. In accordance with the Act, VA promptly stood up OAWP and implemented new policies and procedures to carry out each of the authorities identified above.

Accountability

The Act provided VA with an additional authority to take disciplinary action against senior executives pursuant to 38 U.S.C. § 713 (Section 713). This authority set forth a streamlined procedure for disciplining senior executives and outlined the process by which senior executives can challenge such an action. Upon enactment, VA quickly developed and implemented policy to carry out actions under Section 713. As reflected in the tables below, Section 713 has and continues to be used to address poor performance and misconduct of VA senior executives. Personnel actions taken against senior executives to date show that Section 713 is being used to hold senior executives accountable.

Furthermore, the Act provided VA with additional authority to take adverse actions against certain VA employees at 38 U.S.C. § 714 (Section 714). This authority sets forth a streamlined procedure for disciplining certain VA employees identified by statute, including Title 5 employees, some of whom are covered by a collective

bargaining agreement. Upon enactment, VA quickly developed and implemented policy to carry out adverse actions under Section 714.

Impact of Court and Administrative Decisions on VA's Use of Section 714

Labor

While VA did not bargain impact and implementation with its labor organizations prior to its implementation of Section 714, it did notify and provide an opportunity to bargain in within weeks of enactment, including to the American Federation of Government Employees (AFGE). While VA met its bargaining obligations with all other labor organizations, AFGE challenged VA's use of Section 714 without first completing impact and implementation bargaining. AFGE argued before an arbitrator and the Federal Labor Relations Authority (FLRA) that the Department did not meet its obligation to bargain the impact and implementation of the law before using it to discipline AFGE bargaining unit employees for acts of misconduct or performance. Additionally, AFGE argued that VA did not follow AFGE's collective bargaining agreement related to the issuance of a performance improvement plan (PIP) prior to taking a performance-based action. The FLRA agreed with AFGE and in accordance with these decisions and an arbitration order, VA is no longer using Section 714 for actions taken against AFGE bargaining unit employees until VA and AFGE complete impact and implementation bargaining of the procedures for use of Section 714.

VA is complying with the FLRA and arbitration decisions. VA and AFGE reached a settlement on the decisions related to PIPs involving approximately 400 employees. Impacted employees have either elected not to be reinstated and received a cash settlement or opted for reinstatement and are going through the PIP process if applicable. Any reinstated employee who does not successfully complete the PIP period may be subject to the appropriate adverse action under Title 5 procedures.

Following the arbitration decision cited above, VA engaged in retroactive bargaining with AFGE, and is currently in mediation with AFGE concerning approximately 4000 employees who received an adverse action under Section 714 prior to the FLRA and arbitration decisions.

Merit Systems Protection Board and U.S Court of Appeals for the Federal Circuit

In some instances, employees, against whom the Department took an adverse action under Section 714, filed appeals with the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) resulting in decisions that greatly limit VA's use of Section 714. Specifically, through a number of separate decisions, the Federal Circuit ruled that VA could not use Section 714 for performance or misconduct that occurred prior to the enactment of the Act; the MSPB must review VA's selection of penalty in both misconduct and poor performance cases when reviewing an action taken under Section 714; VA must use the preponderance of the evidence standard of proof when taking an adverse action under Section 714; VA must consider all relevant *Douglas* Factors when determining a reasonable penalty; and

the MSPB must consider the *Douglas* Factors when reviewing the penalty selected by VA.

Recently, the MSPB, in an interlocutory order, held that VA was prohibited from using Section 714 to remove, demote, or suspend employees of the Veterans Health Administration appointed into a hybrid Title 38 position. While this interlocutory order is not yet final, it effectively prevents VA from using Section 714 for actions taken against hybrid Title 38 employees. When the decision becomes final, VA and/or OPM will have the ability to appeal the decision to the MSPB. Further, OPM/DOJ has the discretion to subsequently appeal the MSPB's decision to the Federal Circuit. VA is communicating with both agencies regarding appeal options.

These decisions have significantly reduced the differences between Section 714 and pre-existing Title 5 disciplinary authorities. If the MSPB's recent decision becomes final, only a small portion of VA's workforce, approximately 75,000 employees or 17%, remain covered by Section 714. On April 30, 2021, VA stopped using Section 714 to take action against AFGE bargaining unit employees and on January 17, 2023, VA stopped using Section 714 to take action against hybrid Title 38 employees. Taking these steps mitigated harm to accountability as the decisions cited above required VA to reinstate and compensate employees affected by the decisions..

Use of Pre-Existing Title 5 Disciplinary Authority

The limitations set forth by the decisions highlighted above will not prevent VA from taking appropriate accountability actions when warranted by poor performance or misconduct. For adverse actions that VA would have issued under Section 714, VA is returning to use of Title 5 disciplinary authorities that pre-existed Section 714 and which are used by all other applicable Federal agencies. VA can still demote, suspend and remove employees when the evidence supports the proposed action. Data comparing actions taken under Section 714 with actions taken under Title 5 reflects no significant change in the number of adverse actions taken. VA will continue to use Title 5 authorities to propose and issue disciplinary and adverse actions for performance and misconduct until such time as an agreement has been reached with AFGE on the future use of Section 714 and the litigation is concluded in the most recent MSPB decision.

A review of adverse action data indicates VA has consistently used all available authorities to hold employees accountable, as such, the VA has demonstrated its ability to hold employees accountable without the use of Section 714. See Table 1 below.

Table 1: Adverse Actions

	FY16*	FY17	FY18	FY19	FY20	FY21	FY22	FY23**	Grand Total
Total Adverse Actions¹	4,530	5,314	5,952	5,653	5,694	4,673	4,068	941	36,825

*FY16 count is incomplete as HR-Smart did not fully deploy until 06/12/2016.

**FY23 includes actions processed on/before 01/19/2023.

VA intends to use and has not suspended use of any other authorities from the Act beyond Section 714. For example, the VA continues to use Section 713 concerning senior executives; 38 U.S.C. § 721 and 723 concerning recoupment of relocation expenses, bonuses, and awards; and the statutory amendments to the time periods for adverse actions against Title 38 employees remain applicable.

Disciplinary Recommendations Made by OAWP

Under 38 U.S.C. § 323(c)(1)(I), OAWP makes recommendations for disciplinary action after substantiating any allegations of misconduct or poor performance by a VA Senior Leader, or whistleblower retaliation by a VA supervisor. These recommendations go directly to the appropriate VA official who would serve as the proposing official in any potential disciplinary action.

Under 38 U.S.C. § 323(f)(2), the VA must provide a detailed justification to the Senate and House Committees on Veterans Affairs if the recommended disciplinary action is not initiated or taken within 60 days of receipt of the recommendation. VA instituted a process to carry out this requirement, which requires the VA official who received the recommended disciplinary action to provide a detailed justification to OAWP if the recommended disciplinary action is not taken. OAWP then develops a report that is sent to the committees that includes a summary and detailed description of the VA official's rationale for not taking the recommended disciplinary action. Prior to calendar year 2022, VA transmitted a number of ad hoc reports with justifications as they were received. In calendar year 2022, VA modified its reporting method by transmitting four quarterly reports which it found to be more efficient.

Tables 2 & 3 below illustrates how OAWP recommendations were treated in calendar years 2021 and 2022:

¹ Adverse actions are personnel actions coded in VA's Human Resources System of Records as a removal, termination, suspension, change to lower grade or resignation/retirement in lieu of involuntary action.

Table 2: Calendar Year 2021

Recommendation Implemented	SLM	SL/WBR	WBR	Total
Fully Implemented	9	2	1	12 (21%)
Mitigated/Modified*	12	2	3	17 (30%)
Not Implemented	11	4	7	22 (39%)
Not Implemented/ Left VA	2	1	2	5 (9%)
Total	34	9	13	56 (99%)*

*Some disciplinary action taken.

**SLM refers to Senior Leader Misconduct/Poor Performance; SL/WBR refers to Senior Leader Whistleblower Retaliation; and WBR refers to Whistleblower Retaliation.

Table 3: Calendar Year 2022

Recommendation Implemented	SLM	SL/WBR	WBR	Total
Fully Implemented	8	0	4	12 (38%)
Mitigated/Modified*	9	1	1	11 (34%)
Not Implemented	4	1	1	6 (19%)
Not Implemented/ Left VA	2	1	0	3 (9%)
Total	23	3	6	32 (100%)

*Some disciplinary action taken.

**SLM refers to Senior Leader Misconduct/Poor Performance; SL/WBR refers to Senior Leader Whistleblower Retaliation; and WBR refers to Whistleblower Retaliation.

Each case in which OAWP issued a recommendation and the responsive justification is factually unique. A review of the detailed justifications from calendar year 2022 show that the most common rationales for not initiating or taking the

recommended disciplinary actions are:

- The individual's performance between the investigated incident and the recommendation was exceptional or outstanding;
- The individual did not have any prior disciplinary history;
- The individual sought guidance from leadership, HR, and/or OGC prior to the investigated incident; and
- Lengthy period of time between the investigated incident and the recommendation.

This is not an exhaustive list of rationales provided, but the most common. Also, each justification consisted of multiple rationales rather than one single rationale. These rationales are consistent with a management official's responsibility to consider the relevant *Douglas* Factors and other mitigating factors when proposing and deciding whether to take a disciplinary action. The *Douglas* Factors consist of the following considerations:

- Nature and seriousness of the offense;
- Employee's job level and type of employment;
- Past disciplinary record;
- Past work record;
- Ability to perform in the future;
- Consistency with other penalties;
- Consistency with the table of penalties;
- Notoriety and impact of the offense;
- Clarity with which the individual was on notice of the offense;
- Potential for rehabilitation;
- Other mitigating circumstances; and
- Availability of alternative sanctions.

Due to the significant individual privacy interests in these matters, if there are any particular cases that the subcommittee wishes to discuss, VA is willing to privately brief members or staff. We are happy to respond to any questions you may have.

