

**VA ACCOUNTABILITY AND TRANSPARENCY:
A CORNERSTONE OF QUALITY CARE AND
BENEFITS FOR VETERANS**

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BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
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VA ACCOUNTABILITY AND TRANSPARENCY: A CORNERSTONE OF QUALITY CARE AND BENEFITS FOR VETERANS

WEDNESDAY, OCTOBER 25, 2023

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 3:27 p.m., in Room SR-418, Russell Senate Office Building, Hon. Jon Tester, Chairman of the Committee, presiding.

Present: Senators Tester, Brown, Blumenthal, Manchin, Sinema, Hassan, King, Boozman, Cassidy, Tillis, and Tuberville.

OPENING STATEMENT OF CHAIRMAN JON TESTER

Chairman TESTER. Good morning. I am going to call this Senate Veterans' Affairs Committee hearing to order. I want to thank the witnesses for being here today.

Senator Cassidy will be sitting in the Ranking Member's chair until Senator Moran comes, and he will be showing up soon.

Look, accountability and transparency must be cornerstones of fulfilling VA's mission to provide high-quality care and benefits to our veterans, and we all agree that bad actors at the VA cannot and will not be tolerated. And that is why I worked with then-Chairman Isakson and bipartisan members of both chambers to pass the VA Accountability and Whistleblower Protection Act of 2017. That law sought to increase whistleblower protections at the VA, including an Office of Accountability and Whistleblower Protection. It also provided the VA with additional authorities it requested to remove employees for misconduct or poor performance.

More than 5 years later, we know that parts of the law have worked while others have faced significant challenges. The fact is even one case of fraud, malicious patient harm, or abuse of power at the VA is one too many. And the biggest threat to bad actors is an informed and empowered workforce that knows its rights and the consequences of misconduct.

According to VA's 2023 All-Employee Survey, 1 in 4 employees do not feel comfortable disclosing a suspected violation of law or rule or regulation without a fear of reprisal. The VA needs to encourage reporting of wrongdoings by providing clear information about where to voice concerns while also strengthening protections for whistleblowers, and it needs timely, thorough disciplinary procedures that follow due process that hold up in court.

That is why I introduced the LEAD Act, and I want to thank Senators Moran and Rounds for joining me in that effort. The LEAD Act builds on our work of 2017, by providing solutions to the evolving challenges at VA to sustain individual and department-wide accountability and transparency. These challenges have been identified and confirmed by years of Committee oversight and reports of independent oversight bodies like the VA OIG and the GAO.

This bill recognizes that proactive VA oversight of its programs and having more engagement from leadership prevents harm from happening in the first place. This bill will help the VA hold bad actors accountable by giving employees the knowledge and the processes to take disciplinary action against bad actors that will stick.

When it comes down to it, VA cannot repeat past mistakes when providing veterans with the care and the benefits they have earned or cut corners when trying to discipline employees. We must move forward with straightforward, bipartisan reforms that will ensure past mistakes simply do not happen again.

And with that it is a pleasure for me to turn to my substitute Ranking Member, Senator Cassidy.

**STATEMENT OF SENATOR BILL CASSIDY
(ON BEHALF OF RANKING MEMBER JERRY MORAN)**

Senator CASSIDY. And for the record, I walked in at 3:28 and you had already started the meeting.

Chairman TESTER. Well, they say if you are not early, you are late.

Senator CASSIDY. The Vince Lombardi school. Thank you, Mr. Chairman.

Today's hearing is about prioritizing the best interests of veterans over a disorganized and cumbersome bureaucracy where all too often the interests of those that it was created to serve appear to be an afterthought. I have served on Committee since I first arrived in the Senate. It is clear to all serving here, Democrats, Republicans, and I will say to the people here to testify from the VA, that supporting veterans is our highest priority.

But we cannot sit on our hands and not acknowledge that at times the VA has refused to take appropriate action to correct things that have gone wrong, and despite the many good things the VA does every day for veterans, things still go wrong regularly. Now some of these are just, you have got a big organization and it is going to happen. But some, like barriers to health care, lengthy delays for disability compensation, missing student housing checks, laws and regulations not being followed, and even outright fraud and wrongdoing. That is why we cannot take our eyes off the ball when it comes to changing the VA for the better, kind of like total quality management—one policy, one medical center, one regional office, one cemetery at a time.

And real change requires real accountability. In 2017, Congress passed the VA Accountability and Whistleblower Protection Act, giving VA the ability to hold bad employees more accountable. This included a new Section 714 authority, allowing for expedited removal, demotion, suspension of employees for poor performance or misconduct. This bipartisan bill, sponsored by Senator Rubio and

Chairman Tester, helped improve both employee satisfaction and trust of veterans in the VA. By the way, important to note that VA employees like accountability. They like that they know that they are working hard and there is an occasional bad apple or bad actor, and that bad actor/apple reflects upon them all. So it improved employee satisfaction to have bad employees held accountable.

Unfortunately, in recent years, actions by the courts, the FLRA, and the MSPB, as well as internal decisions by the VA have cut back the law's most important provisions. In particular, arbitration actions between the VA and employee unions have caused the VA to cease use of Section 714 authority entirely. Because of this, a large number of fired employees have been reinstated with back pay, including some fired for, quote, "grievous misconduct." I look forward to hearing more from our esteemed witnesses today on this issue.

A few weeks ago, at a hearing on veterans' mental health and suicide prevention, we were informed of a recent VA OIG report describing serious problems with the Veterans Crisis Line. According to the OIG, Veterans Crisis Line staff failed to take appropriate action with a veteran who died by suicide on the same night he contacted the VCL, VCL leadership interfered with the OIG investigation, and in the end, the staffer in question is still employed by the VA while his superiors were moved to a different facility and promoted—promoted—into a senior advisor role to the VHA Under Secretary.

I asked tough questions that day to the witnesses and received no real answers, like, for example, why were they not fired. Maybe today we will have an opportunity to learn why appropriate action was not taken and how we can ensure that VA staff are held accountable as they care for our Nation's most important resource, our veterans. When VA employees cannot or will not do the jobs assigned they should not continue working at the VA. Yet at least in some areas that is exactly what seems to be going on, as well as for veterans, their families, for the hundreds of thousands of hard-working VA employees who do it right and for taxpayers.

When Congress first provided VA with an expedited authority to hold employees accountable, President Obama said, "If you engage in an unethical practice, if you cover up a serious problem, you should be fired, period. It should not be that difficult," close quote. That was true then and it is true today.

I yield.

Chairman TESTER. Thank you, Senator Cassidy, for that statement.

I want to welcome Tracey Therit, VA's Chief Human Capital Officer, back to the Committee. Ms. Therit is joined by folks covering other offices related to the conversation on accountability and transparency. Those folks include David Perry from VHA's Workforce Management Office—good to have you here, David; Aaron Robison from the Office of General Counsel—Aaron, thank you; and Ted Radway from the Office of Accountability and Whistleblower Protection—thank you for being here, Ted.

It is my understanding that Ms. Therit will give the testimony and will be supported by these three gentlemen. Please know that

your full written testimony will be a part of the record, and you have the floor for the next 5 minutes, Tracey.

**STATEMENT OF TRACEY THERIT ACCOMPANIED BY
DAVID PERRY, AARON ROBISON, AND TED RADWAY**

Ms. THERIT. Good afternoon Chairman Tester, Senator Cassidy, Members of the Committee. I appreciate the opportunity to discuss VA's ongoing efforts to provide world-class care and benefits to every veteran who entrusts us with those needs, be that health care, benefits, or end-of-life arrangements.

I am accompanied today by David Perry, Chief Office, Workforce Management and Consulting, Veterans Health Administration; Ted Radway, Executive Director, Investigations, and Acting Executive Director, Compliance and Oversight, Office of Accountability and Whistleblower Protection; and Aaron Robison, Senior Attorney-Advisor, Accountability, Office of General Counsel. We look forward to discussing what VA is doing to enhance employee and organizational accountability across the Department, maintain strong labor-management partnerships, and ensure appropriate oversight of our resources.

We, at the VA, are laser-focused on hiring and retaining a workforce that provides timely access to care and benefits. To that end, we thank Congress for providing the critical authorities and appropriations in bills such as the Reforming American Immigration for Strong Employment Act, the PACT Act, and the 2023 Consolidated Appropriations Act. We appreciate the intent of the VA Clinician Appreciation Recruitment, Education, Expansion, and Retention Support, CAREERS Act of 2023, and support many of the provisions in this bill as it aligns with several legislative proposals offered as part of VA's fiscal year 2024 budget submission.

My written statement provides more detailed information on the two bills central to this hearing, but I would like to take a few moments to offer a general overview of the Department's position on each bill.

First, VA agrees with the underlying premise of S. 2795, the Leadership, Engagement, Accountability, and Development Act of 2023, LEAD Act, though we propose amendments to various provisions in the bill. The LEAD Act nests well with VA's existing policies and procedures for responding to potential acts of misconduct and poor performance, to include training and standards of accountability. VA supports the establishment of an Office of Transparency, Engagement, Accountability, and Management, referred to as the TEAM Office, in the Veterans Health Administration, a provision that aligns with VA's optimization plan on which we recently briefed this Committee.

VA also supports aligning the Office of the Medical Inspector under the TEAM's Office with minor technical amendments to ensure role clarity due to the critical oversight function this office provides. VA does not support Section 301, which would establish an Office of General Counsel within OAWP. OAWP's independence is crucial to avoiding a conflict of interest or the appearance of one in VA investigations.

To facilitate independence, OAWP created the Investigative Attorney Division, IAD, in 2022, a division of skilled attorneys who

specialize in whistleblower and Federal personnel law. IAD reports to the OAWP's Assistant Secretary through the Executive Director for Investigations, and its attorneys are independent of VA's Office of General Counsel.

Second, VA does not support S. 2158, the Restore Accountability Act of 2023. Even without using 714 against American Federation of Government Employees bargaining unit employees since 2021, VA has taken over 4,000 adverse actions in each of the last two fiscal years using existing authorities. VA is concerned that as written the Restore Accountability Act will continue to be the subject of extensive litigation and constitutional challenges, and we strongly caution against enacting requirements that could create unintended outcomes in the future.

VA appreciates the Committee's willingness to engage on these bills, and we welcome the opportunity to collaborate on how we can deliver care and services to our Nation's veterans and their families. We thank the Committee for this opportunity. This concludes my statement, and we welcome your questions.

[The prepared statement of Ms. Therit appears on page 27 of the Appendix.]

Chairman TESTER [Inaudible]. The 2017 accountability law, which included new authorities it requested to better hold its employees accountable. Tracey, can you tell me what has changed and why the VA now concludes it does not need additional authorities to discipline mid- and lower-level employees from those outlined in Title 5?

Ms. THERIT. Senator, within the last 6 years we have seen the challenges that implementing 714 faces. The entire bill, we are using the provisions that deal with 713, which allows us to take actions against senior executives, and we are also implementing the provisions of the bill that allow us to recoup bonuses and awards as well as relocation expenses and reduce annuities. So there are many provisions of the 2017 Accountability Act that we are using, and the fact that we have the OAWP established as a venue for employees to air their concerns and grievances and have those investigated.

I think what we have seen with the legal challenges in the courts as well as with the labor partners is an opportunity to strengthen our processes and procedures not just on the back end, when it comes to proposing and deciding an action, but then need for that increased consistency and improvement in our policies and procedures as well as our reporting and collecting of data on the front end, and that is why the LEAD Act fits so much better into what we need to do to make the Department more accountable in the future.

So I think what we have seen is where we need to strengthen our employee relations procedures so that we can hold employees accountable, and that is on the execution of our authorities as opposed to additional authorities.

Chairman TESTER. Mr. Robison, can you talk about the Department's position and what would happen if Congress gave you broader disciplinarian authorities with lower evidence standards and fewer due process protections?

Mr. ROBISON. Yes. Thank you for the question, Senator. You know, obviously the details of what types of due process protections are being lowered and what other changes are being proposed matter in that type of conversation. But generally what we will see if additional authorities that do those things are provided, we will, as Ms. Therit mentioned, we will see legal challenges, and we will go through that litigation process with really no guarantee that the VA will prevail in those legal challenges.

We have spent the last 6 years in administrative and judicial courts talking about these burden of proof and due process issues. And if we are talking more specifically about provisions such as those in the Restore Accountability Act, the Department has legal concerns, significant legal concerns, about how those would play out in court.

And I would also like to emphasize what Tracey had mentioned, which is accountability starts long before we get to the point where we are proposing actions. So what we like about the LEAD Act is being able to focus our attention on that front-end process, where we are focusing on trying to make investigations more efficient, more thorough, and devoting our resources to that.

Chairman TESTER. After the 2017 law was passed, VA took several steps during implementation, and those steps landed them in court. Mr. Robison, why did the VA end up winning most of those cases, or did the VA end up winning most of those cases?

Mr. ROBISON. So with respect to implementation there are kind of two lines of cases that we talk about, and the first line of cases is in the labor arena, where the decision was made in 2017 to implement and start using the authority without bargaining prior to implementation with the union. A grievance was filed at that time, and from there it culminated in the AFGE settlement agreement that we have discussed. And in between them there was a lot of litigation between those two points and a lot of events that occurred during that time.

And in the second line of cases really had to do not so much with implementation but had to do with interpretation of the statute. So really when we are talking about just implementation that occurred in 2017, we are talking about those labor cases.

Chairman TESTER. And those court decisions ended up in a situation where a number of employees had to be reinstated. Is that correct?

Mr. ROBISON. Well, when we are talking about the labor cases there was one case related to performance-based actions in which performance-based actions were overturned and folks were reinstated. As far as the other labor case that resulted in the AFGE settlement agreement, a smaller number than the pool of individuals impacted by that decision will be reinstated. There is a whole process that is going to have to play out in facilitating that settlement agreement.

Chairman TESTER. Senator Cassidy.

Senator CASSIDY. I will yield to Senator Tuberville.

SENATOR TOMMY TUBERVILLE

Senator TUBERVILLE. Thank you. Thank you, Chairman Tester and Ranking Member.

You know, I am from Alabama. We are very proud of the VAs that we have in our State. And we have recently had a new one put in. It is a clinic and we are very proud of that. I have got some friends that have some relatives in there and they are doing a great job.

And I think it is our sacred duty to take care of our veterans. I believe most people at the VA try to do that every day. I know since I have been on this Committee for 3 years we have worked awfully hard to make our VA better. But the fact is that we have had some abuses going on for a long time, and we all know that. I mean, it happens in every hospital.

But we have had some happen in the VA, and we are responsible for that. And we knew that during the Obama years. We had veterans dying on waiting lists. VA's employees lied to cover it up. It was horrible. I mean, I have read some of the statements. I mean, you cannot fathom that. It is an insult to everybody that wears a uniform to have to go in some of these places.

So these people needed to be held accountable. Frankly, a lot of them should have gone to jail for what I saw. When President Trump took office he addressed this problem head on. A bipartisan Congress passed the VA Accountability Act. It passed by voice vote in the Senate, overwhelming in the House. It allowed the VA to fire 4,000 employees. Now I was not here when that happened, but that is just amazing to me. Four thousand people were fired basically for not doing their job, at the end of the day. And they were fired for cause.

Now these were not layoffs. These were people that just absolutely either did a terrible job, did not care about what they were doing, and they got laid off. And this is exactly what a bipartisan Congress intended to do is get this straight. Now these people have no business getting a paycheck from the taxpayers. It is criminal.

The law is still on the books, but for some reason we have reached a settlement. Somebody has reached a settlement with trial lawyers and we are not enforcing this anymore. The law is still on the books. This is not how the Constitution works, the last time I looked. You know, we pass the laws and we are supposed to go by the law. I mean, this has been in the playbook for a long time on the left to try to make this work like this, and we cannot do it. I mean, we keep trying to make the VA better, and we are making it worse. I mean, we are not making any progress here.

We saw under President Obama that things would change. We thought they would change. It did not change. Arguably, it got much worse. So now we have agreed to give free money to people that did not do their job. It is mind-boggling to me. I mean, we take one step forward and two steps back. This cannot be how the system works. I mean, that is not the reason I ran for this job, and hopefully the reason that you are not doing your job. Veterans need help, and obviously we all know it is the biggest health care system in the world. The VA is the biggest health care system, and it is hard. Understandably, it is hard.

But now, in my State of Alabama, we have 74 people who were fired for cause, not laid off, and now they are getting their jobs back. And I have heard some horror stories about what some of them did. And it is embarrassing to me now to talk to veterans

about the situation that we have got ourselves in, try to get ourselves out, and now we are back in it.

So it is no secret that it is getting worse, and we cannot continue to do this. I do not care what we have got to do. We have got to make it better. But when we make a law we have got to go by it, and we have got to make it work.

Ms. Therit, I want to believe that the VA is hiring only the best and the brightest employees, and we all want that—sometimes you do not know what you are getting—to serve our veterans. But as many of us have discussed since I have been here for 3 years, we know not everybody in the VA is going to be exactly what we want.

So how does the VA plan to protect these veteran patients from this grievous misconduct if we are not going to go by this Accountability Act? How are we going to do that?

Ms. THERIT. Senator Tuberville, I acknowledge that we want the best working at the VA and we want to protect the rights of veterans, and we do have authorities that allow us to take adverse actions. I mentioned in my opening statement that since 2021 we have not been using 714 for American Federation of Government Employees because we were found to have not bargained impact and implementation with them. We have used our existing authorities for performance and conduction actions under Chapter 43 and Chapter 75, and we continue to take over 4,000 adverse actions, which are removals, demotions, suspensions of more than 14 days. So we have found the opportunity to use the existing authorities that we have to hold employees accountable.

I do acknowledge, and I do not want any views on these bills to indicate that we are happy with the status quo or we do not see opportunity to improve and do better. We know there is still inconsistency in how actions are executed in the field. We know that things still take too long. And that is why we want to work with this Committee on something like the LEAD Act, where we can look at those policies and procedures that we take prior to proposing an action to make sure that we have evidence, as the Chairman had mentioned, that is thorough, that is timely, and affords employees due process. So at the end of the day we are able to remove those employees who should not be working for the VA.

We also just completed a record year of hiring, and we are learning from the authorities that we received in the PACT Act how to hire more effectively and efficiently. So with that we are looking at making sure that we have employees who are committed to those who have worn the uniform and that we are able to remove those with performance and conduct issues as the earliest point we see those issues.

Senator TUBERVILLE. These 4,000, will we have any special oversight? You know, they did something wrong at the beginning. You know what I am saying? I mean, somebody has got to be held accountable because if this happens again we will have people lose their lives. My goodness.

Ms. THERIT. No, I absolutely agree, Senator Tuberville, and what I would say in the settlement that we reached with the American Federation of Government Employees that impacts about 4,000 employees, we do have a provision in that settlement agreement that allows us to repropose the action which the FLRA determined was

not taken lawfully because we did not engage in impact and implementation bargaining.

So even though that action taken under 714 we could not sustain, we can look at actions and retake them under 43 and 75 and continue to make sure that individuals who should not be working in our medical centers are removed for the reasons that they should not be working there.

Senator TUBERVILLE. Well hopefully start with two strikes, you know, and not get three strikes.

Thank you, Mr. Chairman.

Chairman TESTER. Senator Hassan.

SENATOR MARGARET WOOD HASSAN

Senator HASSAN. Thank you, Chairman Tester and acting Ranking Member Cassidy, and thanks to our witnesses for being here today. This is a really important topic of accountability and transparency at the VA, and I look forward to discussing with you.

Ms. Therit, we have been discussing the importance of transparency and accountability, and the VA Office of the Inspector General is an important partner in this work. Senator Boozman and I joined together to introduce the VA OIG Training Act, which would require new VA employees to be trained about the role of the inspector general, the resources that the office provides, and its mission to root out waste, fraud, abuse, and misconduct at the VA. The Senate passed our bill this summer. We are hoping to see it pass the House as well.

In order to improve oversight and accountability why is it important that employees understand the role of the inspector general?

Ms. THERIT. Senator Hassan, I support the legislation that you have put forth and we are ready to implement it if enacted. The organization that I lead is responsible for our talent management system so any courses that we would require of our workforce would be tracked and monitored in that system. But as the Chairman had mentioned, our latest All-Employee Survey shows that only 25 percent of our workforce feels comfortable reporting issues and not being retaliated against for that.

Training, like what you are proposing, would help to increase the confidence that our employees can raise issues at the earliest point possible and bring them to the attention of either the inspector general or the Office of Accountability and Whistleblower Protection.

I know my colleague, Mr. Radley, has seen tremendous improvement in OAWP's ability to get employees to come to them with issues, to investigate those issues, and hold individuals accountable when they are found to have engaged in wrongdoing.

Senator HASSAN. Well, I appreciate that, and I am just going to kind of follow up this conversation and I am happy to take comments. Because obviously the women and men who work at the VA are our most critical assets in delivering care and benefits to veterans, and they are also best positioned within the Department to see when something or someone is not meeting the standards that the Department sets to ensure excellent service to our veterans.

Sometimes employees who notice something is wrong, as you are pointing out and as we are all talking about, may not know the

right way to bring up their concerns. So training is one thing we just talked about, but how can the VA foster a culture of transparency and provide employees with that information on where they go to report wrongdoing?

Ms. THERIT. I will start and then pass the question to Mr. Radley. There is a provision in the LEAD Act that talks about us increasing the surveys and the training that we do. I think getting the information out in multiple forms, whether it is in that All-Employee Survey, that 75 percent of our workforce recently took, making sure that they know where they can go, and if there are concerns that they have about going to those resources that are available that we are able to address those in real time.

I will ask Mr. Radway if he has any other additional thoughts on that question.

Mr. RADWAY. Just on training, we have, in the past year, trained over 405,000 VA employees on whistleblower rights and protections, over 40,000 supervisors, and that is through our TMS video system, trained over 13,000 supervisors live. OAWP has been reaching out and doing live training. We have also been meeting with division leadership on a one-on-one basis and advising them about what our office does, the opportunities. And we have also established a whistleblower navigator position that helps whistleblowers navigate through the process and understand their rights and abilities.

Senator HASSAN. Thank you. And that brings me really to my last question. Once an employee has lodged a complaint as a whistleblower he or she is obviously entitled to certain rights and protections. But VA employees have shared with my office that once a complaint is filed they never hear anything further about the status of the case, for example, whether it was investigated, whether any action was taken.

Now we understand that there is certain sensitive information that cannot be shared because of privacy concerns, but how can we better communicate with whistleblowers to ensure that they know that their concerns have been considered and that they can be part of the solution toward improving accountability at the VA?

Mr. RADWAY. Senator, we have recently modified our procedures in OAWP, and complainants will be notified approximately every 2 weeks, given an update on the status of their complaint.

Senator HASSAN. All right. That is very helpful. Thank you very much. Thanks, Mr. Chair.

Chairman TESTER. Senator Cassidy.

SENATOR BILL CASSIDY

Senator CASSIDY. Mr. Radway, I understand that you are responsible for investigating VA leadership. Again, I mentioned earlier my concerns regarding the Veterans Crisis Hotline. The VA inspector general uncovered systemic issues at the VCL, and that the VCL Director for Quality and Training provided advice and incorrect information to witnesses, potentially compromising the accuracy and integrity of the IG investigation. The Executive Director called off a necessary root cause analysis following a patient's suicide stating, quote, "There was insufficient information for us to

really move forward.” The root cause analysis only initiated after the VA received notice of an IG investigation.

And I also am told that this person remains in a leadership position at the Veterans Crisis Hotline and that the Veterans Crisis Executive Director was promoted to a senior executive role at VA headquarters, now serving as a senior advisor in the Secretary’s Office. Whoa.

Are you aware of the IG report, and explain this in a way which makes us feel better about the process taking place.

Mr. RADWAY. Thank you for the question, Senator. I am not aware of whether OAWP has a specific investigation in that matter but I believe Mr. Perry can provide some additional illumination on your question.

Mr. PERRY. Thank you, Senator Cassidy, for that question. To your point we do have the findings of the OIG report that came back early last month, so we are in the process of reviewing the recommendations and findings of that report.

The actual event itself, as tragic as it is, as we all know, there were some opportunities for us to look at the process and procedures that were in place, and some changes have been made already to account for those changes that needed to be taken. So retraining occurred for those crisis responders and then also looking at the process of who can fill in when those positions need to be staffed adequately. So those changes have already occurred in the actual procedures itself.

The supervisor you mentioned is still in staff but they are not in a direct veteran crisis responder role.

Senator CASSIDY. That is beside the point as it regards to the supervisor’s role. The question is if they interfere with an investigation, as is alleged, they should not be in any role. Why would you have any faith in the integrity of what they did when apparently what they have already done was to interfere with an investigation and to tamper with an investigation?

Mr. PERRY. Yes sir, and we agree with you, and so that is what we are currently reviewing.

Senator CASSIDY. So you said that you received this report early last month.

Mr. PERRY. About 3, maybe 4 weeks ago, at most.

Senator CASSIDY. So alacrity comes to mind, or the lack thereof. I mean, you have had 4 weeks to investigate something which is fairly significant. This is not a traffic ticket. This is something which may have resulted, or did result in somebody’s death, and which interfered with an investigation, so we are about accountability. When will you be complete, if 4 weeks is not enough?

Mr. PERRY. Four was just from the time we received the OIG report. It is actively being reviewed now.

Senator CASSIDY. So when will your active review be through?

Mr. PERRY. I cannot give you a timeline. I can tell you—

Senator CASSIDY. I have got to tell you, 4 weeks seems plenty enough time to investigate.

Mr. PERRY. Agree, sir. It is on the top of our priority list to make sure that we take the necessary—

Senator CASSIDY. It is on the top of your priority list and it is 4 weeks and it still has not been done. It suggests to me that your

priorities again lack alacrity, urgency, a reason to get on top of it right away. And I do not think I am being hard here. If there is a problem in my house I do not wait 4 weeks to fix it.

This person has been elevated, I mean elevated, after this was alleged. So again, tell us and the Committee of Oversight why we should have confidence in your processes.

Mr. PERRY. Sir, the report we received from the OIG is not a full investigative file, and so we are working through that process now to look at all the underlying evidence and recommendations, and corrective actions will be taken upon that review.

Senator CASSIDY. So, Mr. Perry, briefly, how are employees rated? I have been told by people in the VA workforce that it really depends on who you know. So what are the qualitative measures used to rate somebody?

Mr. PERRY. We put the performance measures in everyone's standards performance plans and they are measured accordingly, based on their performance. So that is consistently across, by occupation.

Senator CASSIDY. And who judges their performance?

Mr. PERRY. Their first-level supervisor, and then by their second level.

Senator CASSIDY. And do you have any sense of this person who is in question what their evaluations have shown in the past?

Mr. PERRY. Sir, I do not have access to their actual performance information, but that will be something that does get taken under review.

Senator CASSIDY. Okay. I yield.

Chairman TESTER. Senator Brown.

SENATOR SHERROD BROWN

Senator BROWN. Thank you, Mr. Chairman, for holding this hearing. I have two letters, one from 12 labor unions including the AFL, AFG, SEIU, and NNU, and one from the Fraternal Order of Police I would like to enter into the record, raising concerns about provisions in the Restore VA Accountability Act that would undermine workers and undermine patient safety. I ask unanimous consent.

Chairman TESTER. Without objection.

[The letters referred to by Senator Brown appear on pages 89 and 91 of the Appendix.]

Senator BROWN. Thank you, Mr. Chairman. These letters share my concerns over a section of this bill that would override current collective bargaining agreements. It is always open season in this Committee attacking Federal labor unions, or attacking labor unions anywhere, maybe. These collective bargaining agreements are that. They are an agreement. They are a contract between labor and management that come from hard-fought negotiations.

Throwing collective bargaining agreements to the side when one party does not like it undermines the bargaining process for the hardworking and dedicated VA employees who serve our veterans every day, and many of whom are veterans themselves, of course. We owe to the Americans who work in our VAs and care for our

veterans to respect the collective bargaining agreements that have been obviously agreed to by both sides.

A question for Ms. Therit. We want employees to come forward and tell section chiefs what is going right and what is going wrong at our facilities. Ohio has large facilities at Dayton, Chillicothe, Cincinnati, Cleveland, and big regional, that are not quite VA facilities and 28, 29, 30 CBOCs. We do not want employees afraid to raise concerns because of supervisory retaliation or because they do not think anything will change if they do report it.

In your judgment, will the LEAD Act improve the VA's process to hold individuals responsible for egregious actions like fraud and patient safety or retaliatory actions against whistleblowers?

Ms. THERIT. Senator Brown, I do. The LEAD Act gives us great opportunity to improve our processes, our procedures, our data collection, provide you with information for recurring reporting processes, improve our surveys, improve our training, and do some restructuring within the Veterans Health Administration to strengthen the oversight of our field.

Senator BROWN. Okay. No other comments, Mr. Chairman. Thank you.

Chairman TESTER. Senator Tillis.

SENATOR THOM TILLIS

Senator TILLIS. Thank you, Mr. Chair. Thank you all for being here.

Ms. Therit, I think in your testimony you made a reference to quoting someone else saying, "We are hiring and retaining the best, most talented, and dedicated employees in health care." Now I have recently learned that there have been at least 15 individuals that were let go due to grievous misconduct. That is defined elsewhere and I will expand the definition. Yet under the direction of the Central Office and the settlement agreement, the VISNs will have to offer these 15 people, who were judged to have been guilty of grievous misconduct, to offer them reinstatement.

So my understanding of grievous is defined as "misconduct related to patient abuse, reckless or intentional disregard for patient welfare, racial harassment, sexual harassment, impairment while on duty, violent threats, reckless or intentional endangerment of others, and/or criminal activity."

So explain to me how someone who may have been separated due to grievous misconduct has to be offered an opportunity to come back to work at the VISNs?

Ms. THERIT. Senator Tillis, no one from my office was involved in the negotiations of that settlement. The Veterans Health Administration, the Office of General Counsel participated in those negotiations. So I am going to ask Mr. Perry to speak to the process for identifying grievous misconduct cases.

Senator TILLIS. Thank you.

Mr. PERRY. Thank you, Senator, for that question. To your point we did look at those cases, and so when we received the court ruling we had to canvass all of our field sites to understand what their population of these cases that met the criteria of grievous misconduct. In that review, if we had questions we worked collaboratively back with those offices to make sure that we had complete

case files and could support the justification for the adverse action that was taken. In that review there was a lot of back-and-forth to make sure that we got it right, and those cases did go up, and that was part of the final settlement agreement.

Ultimately, anyone that does elect to come back and be reinstated, we did have that carve out, as Mr. Robison mentioned, that allows us to propose subsequent action upon their return under one of our other authorities.

Senator TILLIS. Subsequent disciplinary action or—

Mr. PERRY. Based on the original actions. Yes, sir. We can repropose those actions under 75 or 43.

Senator TILLIS. Okay.

Mr. PERRY. Yes, sir.

Senator TILLIS. I am sorry.

Mr. ROBISON. I would like to make one point. If an individual, under the settlement agreement, qualifies under the “grievous” category, “grievous misconduct” category, they do not get reinstated.

Senator TILLIS. Okay. You all are aware of the—I want to make sure I get the terminology right—the critical skills incentive. I know that is under investigation right now. I am not going to dig too deep, except to say let us assume that somebody thought that the population that got the bonuses, the executives, should have been subject to some sort of process. I do not want to talk about who got it. I want to talk about the methodology that was used that would have provided a rational basis that these certain skill categories fit congressional intent. Can I at least get an answer on that?

Ms. THERIT. Absolutely, Senator Tillis. First we are very grateful for the authorities in the PACT Act. It helped us to hire record levels in both VHA and VBA this past year, grow the workforce by a percentage we have not seen in the last 15 years.

With the critical skills incentives what I can offer is the purpose of that incentive is to close mission-critical skills gaps or to promote reskilling of employees. And in our policy we have two categories by which someone can be eligible for a critical skills incentive. Either they have a shortage skill, which is on an approved list—that means either our human capital operating plan includes that shortage skill or it is in one of the OIG shortage lists or VHA shortage occupation lists. Ninety-six percent of the critical skills incentives that we have approved to date fall within that category of a shortage skill on one of those approved lists.

Senator TILLIS. Would these executive positions have fit into that list?

Ms. THERIT. They did not, sir. There is a second category called high demand skills, which you need a market factor’s justification to support. Once these were processed and they were raised with our Secretary as having been approved, we looked back and we did not see that the precision that was needed to identify the individuals that were recommended for the CSI as having a high-demand skill that was supported by market factors. And the group incentives are to be very narrowly defined. This was way too broad, with too many occupational series, too many varied occupations.

So since that occurred the Office of Inspector General is doing a review so they can help us strengthen our policies and procedures,

add more internal controls to the use, and the Secretary has raised the delegation of authority for CSIs to senior executives to his level so that any recommendations in the future have to be approved by him.

Senator TILLIS. Okay.

Ms. THERIT. I am sorry. One more thing. We have also canceled all of the CSIs that were processed for our VHA and VBA Central Office executives, are establishing debts, and collecting those monies that were paid.

Senator TILLIS. Okay. So did I hear you say clawback?

Ms. THERIT. Yes, sir.

Senator TILLIS. Good. Okay. Thank you.

Chairman TESTER. Senator King.

Senator KING. I defer to Senator Manchin. He has a deadline. It is not something I do every day.

Chairman TESTER. That is no excuse. Senator Manchin.

SENATOR JOE MANCHIN III

Senator MANCHIN. Thank you. Thank you, Chairman. Let me just say, first of all, most everybody in West Virginia, and we have a lot of veterans, they all want to go to the veteran clinics or the veteran hospitals to get their care. They say they are better understood, they feel much more comfortable, and they feel that their care is just as good, if not better.

The problem we are having in West Virginia comes from my field workers. They are getting cancellations unbelievably because of lack of personnel. I do not know if you all have been getting that up at your level, Ms. Therit and Mr. Perry, but the medical staff and doctors, the staff of primary care and specialty, they are just not there. And the wait lines are so long they have to get community care because they cannot get their veterans care.

So I do not know what you all can do about that. If you can get back to me and let me know how we can help or do anything to recruit. We have four hospitals in West Virginia, and we have some CBOCs also, but we have four major hospitals, and we are running that—this is our highest request when they come. So are you getting this around the country or in rural areas?

Mr. PERRY. Senator Manchin, thank you for that question. Yes, we do have historic challenges in some of the rural areas with hiring and recruiting. I think thanks to the PACT Act that we received last year we are making some progress in those areas. To your point where we are not able to see a veteran in-house for primary care or specialty care, we do refer out to the community to make sure that we are not making the veteran wait longer than they have to.

Senator MANCHIN. I do not want to lose our veterans to—if we do, I can guarantee you, they might not come back. They do not want to go.

Mr. PERRY. Yes, sir.

Senator MANCHIN. They want to stay with us, with the VA.

Mr. PERRY. Yes. So we are working aggressively. I will tell you that what we are focused on now in VHA is looking at our upcoming access, to look at where we can actually improve access.

Senator MANCHIN [continuing]. The most egregious where we have in our four hospitals that we have in State, I will get our staff to get back with you and tell you the ones where we are really having shortages and long lines, long wait times.

The other one is the compensation and pension exams. That is our most requested thing, and they are having a tremendous backlog on these. I mean, it is probably part of the same problem. But these compensation and pension exams is something that it seems like almost every veteran is asking for, to see if they can get a little bit more financial help.

What I would like to know is, what is the rejection rate of people claiming they have a medical problem that was caused by the military service and you all find out it is not really caused by the military service?

Mr. PERRY. Yes, sir. I do not have that data. That is on our Veterans Benefit side. We are certainly happy to bring that back to you.

Senator MANCHIN. That is another thing that you should check on, any of you, to check on this.

I have been told that basically we have a higher percentage of new recruits coming into the service in all branches that within the first year they are claiming disability, and they are having a hard time justifying it, whether they were not examined properly before they came in. But then the Federal Government and the veterans end up with that responsibility. And we want to make sure that we are able to take care of those who truly have military-related illnesses and dependencies and different medical services, rather than those that are coming in with one and then claiming it once they get in. Does that make sense? Do you all see?

Ms. THERIT. So tracking exactly what you are saying, Senator Manchin, looking at the recruitment, looking at C&P exams, looking at the recruits identifying as having a disability, we are publishing, related to the PACT Act, a monthly dashboard that looks at all of that information. I think a lot of the data that we are seeing is supporting the information that you are providing to us as well, and we are happy to work with your staff on those issues.

Senator MANCHIN. Okay. That is all. Thank you, Mr. Chairman.

Chairman TESTER. Senator Boozman.

SENATOR JOHN BOOZMAN

Senator BOOZMAN. Well, thank you, Mr. Chairman, and thank you very much for having this hearing, and thank you all for being here and the good work that you do.

Accountability and transparency at the VA are imperative in ensuring quality care within the organization, and we look forward to continuing our work on this Committee to provide the VA with the tools it needs to deliver world-class care to veterans. And I apologize for not being here earlier but I am Ranking Member on VA MILCON, and we are pleased to have the bill on the floor right now. We are discussing it, and hopefully early next week we will get that passed and have some certainty on the Senate side and then work with our colleagues in the House.

The good news is there is tremendous support. You know, we hear about all the rancor going on up here, but the nice thing

about veterans, nobody cares if they are Democrats or Republicans, and this Committee is a very, very bipartisan group that with you all's help has done a lot for veterans in the last several years.

Leadership at the local medical center level is important, especially during times of operational changes to the organization. This importance has been highlighted during the deployment of the new electronic health record system that DoD has been able to implement the same system at almost all of its facilities in the U.S. However, the VA has not yet fully implemented this system even in one facility. It is my belief that leadership at the local level is critical to the success of the implementation of the EHRM. And I know that we have all been frustrated with that. You all have been frustrated with it and working really hard to get it going.

Ms. Therit, is the VA exploring options to put systems or processes in place to hold medical directors accountable if you encounter resistance in implementing EHR at their facility when there are no technical issues with the system?

Ms. THERIT. Senator, I am going to ask Mr. Perry if he has information related to the question that you posed with respect to VHA.

Senator BOOZMAN. You are like me.

Mr. PERRY. Thank you, Senator.

Senator BOOZMAN. Why don't you just say, "Take it, David."

Mr. PERRY. Yes, sir. I am not aware of specifically any leadership that is pushing back on the electronic health record deployment. I know what I can say is that we heard loud and clear from our clinical community that there were some real challenges with the system, and we wanted to make sure that we got it right. So when we made that strategic pause in the deployment of Cerner, that is exactly why we did so, so we could go back to the vendor to make sure that the concerns that were addressed by our clinicians were addressed, so that when we did go forward with more deployments we did not actually cause any more harm.

In the case of where we had a leader decide not to implement EHR we would take appropriate steps to make sure that did not occur. But that was not the reasoning for delaying any of the deployment, sir.

Senator BOOZMAN. Good. Very good. That is good to hear.

I recently joined Senator Peters in introducing the VA Peer Review Neutrality Act. This legislation is important. It would require peer reviewers to withdraw from the case where they have direct involvement or a conflict of interest, and have a peer review committee at another VA facility evaluate the findings. So Ms. Therit or Mr. Perry, whoever is appropriate, can you speak to the importance of having impartiality and neutrality when conducting quality management and administrative investigations?

Mr. PERRY. Absolutely, sir, and I think that is one of the main reasons we support the LEAD Act is to make sure that when we have those concerns come up that we have the appropriate oversight and reviews that happen from a point of neutrality. And so I think combining some of those focuses on the clinical and the administrative side, I think those outside neutral reviews are paramount to make sure that we get it right and that we do not have things continue to happen that lead to bad outcomes.

Senator BOOZMAN. Very good. Did you take note of that, Mr. Chairman, that they support this and feel like we need to get it pushed forward.

Chairman TESTER. It is your request, Senator Boozman.

Senator BOOZMAN. No, again, thank you all very much, and we do appreciate all of your hard work and look forward to continuing to work with you in the future on all of these different things. So again, thank you. Thank you, Mr. Chairman.

Chairman TESTER. Senator Boozman, I might add that the VA MILCON bill is on the floor to your good leadership.

Senator King.

Senator BOOZMAN. I do not know if that is true, but we will take it.

SENATOR ANGUS S. KING, JR.

Senator KING. Thank you, Mr. Chairman. I want to follow up on a point that Senator Manchin made, because I think it was a really important one. We are turning away and losing veterans because of lack of staff. It is an enormous problem, and I understand it is a problem throughout the society. Every business that I talk to is short of staff. But I want to talk about the staffing problem in the VA, and that is where you might be able to help us.

There are two issues that I have identified. One is pay and the other is red tape. Let us talk about pay for a minute. It is interesting. I will submit for the record, Mr. Chairman, a chart from the VA on VISN 1 on time to fill, and it is interesting. What I would like you to do is do some additional research. But of the time to fill, the lowest are generally urban areas and the highest are rural areas. Now this is a small sample, but I would like you to do this analysis on a broader sample and see if I am correct. But I believe that you will find that rural areas are having a harder time. The time to fill in Maine is 251, in White River Junction it is 261, in Providence it is 127.

[The chart referred to by Senator King appears on page 92 of the Appendix.]

And so I think that is where we get to the pay part, and the differential in pay between different areas of the country, I think, is obsolete because people can work anywhere. You can now live in rural Maine and work remotely for the VA in Boston. Why would you go to work for the VA in Togus, Maine, at a 15 or 20 percent pay cut, if you can work remotely in Boston? Do you see what I mean? We are hurting the competitiveness of our rural VA facilities.

So I think we should really have a rethinking of the pay differential, which is based on times you did not have remote working, people were not as mobile. This is national competition for professionals.

Ms. Therit, you have nodded a few times. What do you think?

Ms. THERIT. So I think Mr. Perry and I may join forces on answering this question. I agree. I think the authorities that we have in the PACT Act have helped us to level some of those gaps or close some of those gaps that you have talked about between urban and

rural because we are able to offer more incentives to those rural facilities.

Senator KING. But I know that Togus is not competitive with Boston or New Bedford or Providence.

Ms. THERIT. We still have a long way to go, and then working with organizations like the Federal Salary Council and the Federal Prevailing Rate Advisory Committee. That is where I am trying to spearhead some of these efforts at a broader level.

I know Mr. Perry's team is working on one deliverable that we still owe the Committee from the PACT Act, which is the Rural Recruitment and Retention Plan, where we can put more effort into reducing the red tape that you are seeing with—

Senator KING. Well, I have not gotten to that yet. But look at the pay issue. I mean, I believe that the whole idea of differential pay in different regions, based on cost of living, is somewhat obsolete because when you are competing, for a health care professional, they have nationwide choices. And to have a significant disadvantage in pay, I do not think it is any coincidence that White River and Togus are the ones that are lagging here, because they both have really good management. I know the people at Togus and they are terrific. So it is not a management issue. It is that they have got to compete, and they have to compete with local hospitals, and that is a real problem.

Let me talk about the red tape issue. Well, again, let's go back to competition. To hire a professional at Togus or White River is around 250 days' time to fill. Our Northern Light Health Care Facility, which is in the same region in northern and eastern Maine, it is 56 days. Maine Health is about 89 or 90 days, but significantly below. And yet that is who we are competing with.

We have to really think hard about all the steps, and here is one of them. My understanding and my research tells me that there is something like 24 steps to hire somebody in the VA, and at Northern Light it is 7. We have got to rethink that, it seems to me, because again, we are in a competitive situation and the net result is less service to veterans.

So how do we do that? I do not think Walmart has to go through some regional center when they want to hire somebody in Brunswick, Maine, or wherever they have a store. Why not empower the local managers, if they have a need give them a budget, they decide what they need, who they need, and do the hiring and hold them accountable. But do not have 24 steps in the process. Thoughts? She is passing it to you.

Mr. PERRY. Yes, sir. I agree with you there are a lot of steps in the hiring process, and I think we have a concerted effort to make sure we can streamline those where we can. Some of those steps that you mentioned are required.

Senator KING. Required by whom?

Mr. PERRY. Some of them are self-imposed. Some of them are from our Offices of Personnel Management. We have requirements around credentialing and privileging, so we have to make sure—

Senator KING. They work for you, or they work for Denis. I mean, in other words, if they are required by us, let me know, because that is something we can fix.

Mr. PERRY. Yes, absolutely.

Senator KING. If they are required within your system, that is what I want you to reexamine.

Mr. PERRY. And those are the ones that we are streamlining, sir, and to make sure that we reduce those redundant steps. But there are requirements that we have to apply because it is just the Federal rules that we have to comply with.

To your point about the time it takes, you are exactly right. I think it does happen not as quickly as we want.

To make one point of clarification, the decision to hire is at the local level and those budgets are managed at the facility level, so they have complete autonomy to decide when they want to hire and who they want to hire, or for what types of positions.

Senator KING. They still have to go through those 24 steps.

Mr. PERRY. Yes, sir. The steps do apply, so that is where we are looking to gain efficiency, as many as possible.

Senator KING. Well, I hope you can come back to this Committee and show us some changes that will deal with this problem because ultimately—and I know I am over time, Mr. Chairman—ultimately this is all about service to veterans. You can have the best hospital in the world, but if they cannot get an appointment because there is a lack of staff, then we are not meeting our commitment.

Thank you, Mr. Chairman.

Chairman TESTER. Well, just to further add on because I know Senators Blackburn, Moran, and Senator Blumenthal is already here, the end result of this is we cannot compete with the private sector. They are beating us to the punch for good employees. When employees want to work for the VA it just takes too long and people cannot survive on their good looks. They have got to have a check coming in.

And so it is important that if it is something that we need to do here, please let us know what that is. I have got a notion that King would probably write a bill up tomorrow, okay. I also have a notion that Boozman would probably co-sponsor it. So, you know, it is good.

Senator BOOZMAN. During COVID, did you all have the ability to cut through some of that stuff?

Ms. THERIT. So your question is appropriate because during COVID what we did is we either deferred or delayed certain steps in the process to get people on board in less days.

Senator BOOZMAN. So we have the ability to have essentially a study to look back and see if that caused problems, and to me, I do not think it did. And so, you know, it looks to me like you could come to us and say, “We did it this way” and somehow us be helpful of saying, “Hey, this has worked in the past. Why are we not doing it now?”

Ms. THERIT. I would welcome those conversations because we did have a GAO report that identified some lack of compliance with them going back in and updating the system or following up on actions that were delayed or deferred. Though on one hand you want to respect the findings of the GAO study and say, well, maybe we should not have done those things, but on the other hand, to your point, we do not want to lose talent because we are taking 24 steps and it should be 7 steps. So trying to find that right balance.

Chairman TESTER. So I was misinformed. People got waylaid on their way to the VA Committee. So I want to thank you for being our witnesses today. We have more work to be done in this space. I look forward to productive discussions on this and other issues that have been brought up today so that we can move VA forward.

The record will open for a week. This hearing is adjourned.

[Whereupon, at 4:28 p.m., the hearing was adjourned.]

A P P E N D I X

Prepared Statement

**STATEMENT OF TRACEY THERIT
CHIEF HUMAN CAPITAL OFFICER, OFFICE OF HUMAN RESOURCES AND
ADMINISTRATION/OPERATIONS, SECURITY AND PREPAREDNESS,
DEPARTMENT OF VETERANS AFFAIRS OFFICE OF HUMAN RESOURCES AND
ADMINISTRATION/OPERATIONS, SECURITY AND PREPAREDNESS
DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
ON
VA ACCOUNTABILITY AND TRANSPARENCY: A CORNERSTONE OF QUALITY
CARE AND BENEFITS**

October 25, 2023

Good afternoon, Chairman Tester, Ranking Member Moran, and Members of the Committee. Thank you for the opportunity to discuss employee and organizational accountability across the Department of Veterans Affairs (VA), as well as labor-management relationships, workforce management and accountability related to workplace misconduct or performance issues. We also look forward to providing our views on S. 2679, the Leadership, Engagement, Accountability and Development (LEAD) Act of 2023 and S. 2158, the Restore VA Accountability Act of 2023. I am joined today by David Perry, Chief Officer, VHA Workforce Management and Consulting Office, Veterans Health Administration (VHA), Ted Radway, Executive Director, Investigations, and Acting Executive Director, Compliance and Oversight, Office of Accountability and Whistleblower Protection, and Mr. Aaron Robison, Senior Attorney Advisor, Accountability, VA Office of the General Counsel.

While our testimony will address the elements of the hearing invitation, I want to echo a recent statement by the Under Secretary for Health Dr. Shereef Elnahal: "we're hiring and retaining the best, most talented and dedicated employees in health care." At VA, "we're bringing on new people with one goal in mind: providing world-class care to every Veteran who entrusts us with their health." I cannot think of a better way to exemplify our commitment to world-class care than to share a story about one of our valued employees, who epitomizes the ethos of service above self.

Bill Barksdale, Assistant Director of the Roanoke Regional Office, was recently recognized with an "Own the Moment Award" at a Customer Experience Symposium. When a Veteran experiencing homelessness came to Bill's office in crisis, Bill jumped into action. He phoned the Vet Center and was instructed to transport the Veteran to the Vet Center to get the medical attention he needed. Bill drove the Veteran to the Vet Center himself. Once there, it was determined the Veteran needed more care at the Salem Veterans Affairs Medical Center (VAMC) and Bill drove him there, too. While sitting in the waiting room, Bill made some calls, reached out to Support Services Division, checked on the Veteran's finances and checked to see if he was receiving his compensation checks.

Bill discovered that the Veteran was forced from his home in Newport News, Virginia, after a series of thefts. Bill called the Louisville Fiduciary Hub, asking them to help set up a temporary fiduciary. By night's end, after the Veteran was released from the VAMC, Bill drove him to the Roanoke Rescue Mission to set him up with temporary housing. Bill worked across VA, setting up support systems to help the Veteran manage his finances and facilitate his transition to a permanent place he can call home. Two weeks later, the Veteran was permanently housed in a senior living facility and Bill has been following up with the Veteran to ensure he is adjusting and getting the services and resources he needs. Every step of the way, Bill was right there—not because it is his job—but because getting Veterans the support they need to be successful is, to Bill, a sacred duty and source of personal pride.

This is just one of many examples of the high caliber of employees whose dedication and commitment to service and Veterans typifies VA. While we are very proud of our talented and outstanding employees, VA recognizes that more can be done in to ensure an effective and efficient management of a nearly 500,000-member workforce.

We thank Congress for providing critical authorities and appropriations in bills such as the Reforming American Immigration for Strong Employment Act, the PACT Act and the 2023 Consolidated Appropriations Act. Because of this legislation, VHA's total workforce has grown by 6%. That is the greatest growth we have seen in more than 15 years and VHA is on pace to exceed this year's goal of 52,000 new hires. As of September 2023, VHA has an onboard strength of 464,720 employees and continues to grow each year in response to increased demand for its services, improved access to care and benefits, reduced wait times, improved quality, enhanced Veteran satisfaction and overall mission growth. VHA accounts for approximately 89% of VA employees and most of the additional staffing needed at VA in the past 5 years have been in clinical occupations, which account for approximately 63% of VA employees. As the largest integrated health care delivery system in America, most of VA's challenges in maintaining a clinical workforce mirror those faced in the private health care industry.

A. Background on Section 714

Before we present VA's perspectives on the two accountability bills, context is important. Let me first provide some history on the VA Accountability and Whistleblower Protection Act of 2017, particularly the language codified at 38 U.S.C. § 714 and then share how we think proposed legislation may improve current processes and support VA's goals.

Since the Accountability Act was passed, decisions from the U. S. Court of Appeals for the Federal Circuit, the Merit Systems Protection Board (MSPB), independent arbitrators, and the Federal Labor Relations Authority (FLRA) have significantly limited the application of section 714. These courts and administrative bodies have interpreted section 714 to require higher standards for these disciplinary

actions. According to the Federal Circuit, VA was required to use a preponderant evidence standard and to apply Douglas factors (which are 14 specific factors that must be reviewed when a disciplinary decision is made under title 5) even when taking actions under section 714. The Court also decided that section 714 could not be used for conduct and performance actions that took place prior to its implementation. See *Sayers v Department of Veterans Affairs*, No. 18-2195 (Fed. Cir. 2020); *Connor v. DVA*, No. 2021-1064 (Fed. Cir. 2021); *Rodriguez v. DVA*, No. 2019-2025 (Fed. Cir. 2021). The decisions also limited section 714 coverage to fewer types and numbers of employees by excluding “hybrid” employees. Additionally, in March 2021, VA was ordered to cease using section 714 to take adverse actions against American Federation of Government Employees (AFGE) bargaining unit employees until retroactive bargaining was completed. Thus, VA is currently unable to use section 714 for a large portion of its workforce. Out of approximately 465,000 VA employees, the section 714 authority can only be used for approximately 75,000 employees, which is roughly 16% of VA’s workforce. Section 714 authority cannot be used for pure title 38 employees title 38 hybrid employees or AFGE bargaining unit employees. Because there are few remaining practical differences between the use of 38 U.S.C. § 714 and traditional title 5 adverse action authorities, and because VA could not use section 714 on an overwhelmingly majority of its workforce, VA ceased proposing new adverse actions under section 714 in April 2023.

B. VA’s Position on the Proposed Restore Accountability Act

Given the complexities and dynamics of our experience with section 714, VA is confident that the authorities currently available to VA are sufficient to hold employees accountable for misconduct and poor performance. Even without using section 714 against any AFGE bargaining unit members, its largest union, since 2021, VA has taken more than 4,000 adverse actions in each of the last 2 fiscal years using its existing authorities.

As such, VA does not support S. 2158, the Restore Accountability Act of 2023. VA has legal concerns regarding some of the language in the draft bill. Specifically, this language will continue to be the subject of extensive litigation and constitutional challenges, creating uncertainty and potentially leading to a continued pattern of overturned disciplinary actions. VA’s position is informed by the experience of using these authorities over the past 6 years and the morass of litigation they spawned.

While VA appreciates the Committee’s efforts, VA believes that other authorities available to address performance and conduct deficiencies (e.g., 5 U.S.C. Ch. 43 and 75) are sufficient to act against supervisory personnel when warranted. This includes being subject to mandatory proposed penalties for certain types of misconduct related to whistleblower retaliation or other prohibited personnel actions pursuant to 38 U.S.C. § 731 and 5 U.S.C. § 7515. Finally, this bill is potentially detrimental to VA in the form of legal risk, uncertainty and further litigation, potentially resulting in overturned adverse actions and substantial monetary damages, which VA experienced in its implementation of section 714. The enactment of 38 U.S.C. § 712 as well as the proposed amendments

to 38 U.S.C. §§ 713 and 714 will likely face the same gamut of legal challenges. VA recommends that disciplinary action continue to be taken under applicable existing authorities, providing certainty and minimizing legal risk to VA.

To be a model employer for the Federal Government, VA must focus on modernizing and improving VA's hiring, preserving rights of VA employees and fostering a positive and collaborative labor-management relationship. Ensuring we deliver the best health care, benefits and services to our Veterans is non-negotiable. Providing the very best outcomes means having agile and responsive workforce management policies and processes.

C. VA's Position on the Proposed LEAD Act

To ensure our workforce continues to meet the standards of excellence Veterans and their families deserve, VA generally supports S. 2679, the LEAD Act of 2023, subject to the availability of appropriations. This bill seeks to strengthen accountability and oversight at VA. VA has taken several steps to strengthen accountability and oversight across the Department, including implementing the VA Accountability and Whistleblower Protection Act of 2017 and being committed to continuous improvement in this area. VA supports this bill, if amended for clarity, legal sufficiency and more effective implementation as outlined in the Department's technical assistance and subject to the approval of funding to support. This testimony will highlight specific provisions of the bill that serve to strengthen VA's existing programs and will express where we do not support provisions of the legislation.

First, section 101 of S. 2679, the LEAD Act, would require VA to determine the steps and processes for responding to potential acts of misconduct and poor performance, provide training on this process and compile data regarding the outcomes. As VA already has policies governing these procedures, it will not need to establish a new system or standards for accountability. VA agrees with the underlying premise of this section, acknowledging that, while scenarios will differ, it is possible to provide overall steps to the process as established in existing policies. This information can be distributed, and training provided within the organization to ensure a better understanding of the process for investigating and addressing potential misconduct and poor performance and the rights of employees.

VA recommends this section be amended to include clarifying the definition of adverse actions given the differing definitions of that term in title 5 and title 38 and aligning the outcome metrics with available data. We estimate this section of the bill will cost \$5 million over fiscal year (FY) 2024 and FY 2025 and \$500,000 each year over a 10-year period to hire staff to manage this section; develop, deliver and track the training; and modify and maintain the system.

Section 102 establishes the Office of Transparency, Engagement, Accountability and Management (TEAM Office) in VHA. VA supports creating the TEAM Office, which aligns with ongoing consolidation efforts under VHA's optimization plan. VA requests

amendments to this section to: (1) expand the pool of qualified candidates for the head of the TEAM Office to include compliance professionals; (2) make technical edits to avoid conflict with 38 U.S.C. § 7306 and clarify reporting structures; (3) clarify that Government Accountability Office (GAO) and Office of Inspector General (OIG) recommendations are not mandatory; and (4) add functions and offices to the TEAM Office to align with VHA's operations.

Second, section 201 of the bill requires officials such as medical center directors, other medical center executive leaders and network directors to conduct oversight visits to medical facilities within their jurisdictions. This section also contains required reporting. VA supports the site visit requirement in section 201 since it is a good management practice and is currently a VHA practice. VA requests this section be amended by omitting or modifying the reporting requirements in subsection (b). The way this reporting is structured, it would potentially contain observations from more than 600 leaders and VHA will have difficulty providing all the submitted observations as required in section 201(b)(1). Instead, VHA will be able to provide data highlighting important changes from leadership engagements.

Section 202 creates a new provision at 38 U.S.C. § 7306B, which directs VHA to establish the Office of the Medical Inspector (OMI) and align OMI within the TEAM Office from 38 U.S.C. § 7306A. The provision also outlines the requirements for the head of the office, the Medical Inspector to codify the OMI functions and directs VHA to establish certain capabilities and internal controls for OMI. VA supports codifying OMI and its functions in the bill. OMI has existed as a health care investigation entity within VHA since 1980 and VHA wants to ensure the language in the bill supports this role and OMI's unique mission. VA requests amendments to section 202 to (1) ensure that the existing OMI office is realigned to the TEAM Office; (2) modify OMI's functions to confirm proper coordination of oversight functions in VHA; (3) ensure OMI's mission remains focused on health care related incidents; and (4) avoid duplicating efforts of other existing offices. VHA also seeks technical amendments to the provisions covering the appointment of the Medical Inspector to conform to the amendments made by section 203.

Section 204 requires VHA to either establish a new program or consolidate existing programs to create a mobile temporary staffing program to temporarily fill vacancies and provide coverage for extended absences for shortage occupations and report annually on the program. VA is requesting amendment to section 204 to refocus the legislation on expanding and supporting VHA's existing staffing contingency framework. VHA requests support for expanding its contingency staffing model. The contingency staffing model leverages float pool reserve staff established at the facility level in combination with Clinical Resource Hub (CRH) staff at the Veterans Integrated Services Network (VISN) level, supplemental staffing programs at the national level and contract staff or community care in emergency circumstances.

The CRH model is currently being used by VISNs to provide contingency staffing for multiple occupations including providers and VHA's Travel Corps is currently being used to provide contingency nursing coverage to the field from a national program. The

Disaster Emergency Medical Personnel System Program and the more recently established Clinical Deployment Teams support the field and Fourth Mission in the event of emergencies. However, to support the contingency staffing model, VHA is seeking additional amendments to address recruitment and retention issues for the contingency float pool fund, CRH staff and the Travel Corps. Shortage occupations may result from nationwide shortages of specific occupations in the health care industry. Without monetary or other incentives, finding employees willing to participate in a program requiring mobility and frequent assignment changes to short- or long-term duty locations will be difficult.

Third, while VA generally supports most of the provisions in title 3, VA does not support certain provisions of section 3, most notably, establishing a second General Counsel housed within the Office of Accountability and Whistleblower Protection (OAWP). Under 38 U.S.C. § 311 and 38 C.F.R. Part 14, VA's General Counsel is the chief legal officer of the Department and is the principal legal advisor to the Secretary concerning all programs and policies of the Department. The General Counsel is responsible to the Secretary for all litigation, interpretive legal advice and legal services. The General Counsel also serves as the Regulatory Policy Officer for the Department - managing, directing and coordinating all rulemaking activities. Establishing a second General Counsel within OAWP would create significant legal risk to VA through the potential for conflicting legal advice to the Secretary.

The statute establishing OAWP was passed in 2017 and was designed to improve accountability within VA and to increase protection of whistleblowers. Its provisions are innovative within the Federal Government and created an additional tool for whistleblowers. OAWP has made significant strides these last several years involving its investigative work, disciplinary recommendations, training and outreach. OAWP is implementing valuable non-disciplinary tools that are part of the statute that include: (1) the ability to issue reports and recommendations that enable advice to the Secretary on matters that involve accountability and (2) analyzing trends involving intake data and recommendations by oversight bodies such as OIG, GAO, OMI and the Office of Special Counsel (OSC), that will permit VA to address issues timely. VA looks forward to continuous improvement and execution of the important tools that Congress provided when it created OAWP.

VA believes the current organizational structure that includes attorneys within OAWP's investigations directorate and who are not attorneys within the Office of General Counsel (OGC), meets the intent of this proposed amendment concerning independence in investigations while maintaining appropriate legal consistency, uniformity and reliability within the Department. As an alternative to striking the section, VA proposes alternative language, which was also proposed in response to H.R. 8510, the Strengthening Whistleblower Protections at the Department of Veterans Affairs Act, in 2022. The language codifies OAWP's current investigative attorney division which VA developed to alleviate concerns regarding OGC involvement in providing legal advice in OAWP investigations.

Additionally, VA does not support the proposed language which would require OAWP to get involved in the negotiation and enforcement of settlement agreements involving whistleblower retaliation claims by tracking negotiation of agreements and developing metrics and standards for negotiation. OAWP involvement in tracking negotiations of settlement agreements will not increase efficiency, timeliness or effectiveness of the negotiations. Settlement negotiation and agreements are largely driven by fact-specific privileged legal advice and delegations of authority within VA. VA recommends limiting any tracking of such settlement agreements to only implementation of a settlement agreement once it is signed and effective (i.e., after the agreement is executed).

OAWP policies generally defer to the choice of the whistleblower to pursue corrective action through OSC and/or OGC involvement and therefore does not have any clear role in settlement negotiations for complaints which were not presented to it. OAWP involvement in tracking negotiation of settlement agreements may also interfere with the Complainant's interests which may be driven by privileged legal advice from Complainant's legal advisor. Confidentiality provisions of other complaint statutes (e.g., OSC, OIG reports) and those that are parties to a mediation process may also be implicated.

It is also unclear what tracking enforcement of settlement agreements means. Settlement agreements are generally enforced through mediation or judicial proceedings. OAWP does not have a role in these proceedings and does not have enforcement authority.

Finally, VA generally supports section 4 with amendments, and we look forward to continuing to work with the Committee to provide greater clarity regarding scope and more specificity to the training requirements.

D. AFGE Settlement Agreement

VA understands the Committee has interest in the recent AFGE settlement. In 2017, AFGE filed a grievance asserting VA failed to bargain impact and implementation of 38 U.S.C. 714's enhanced disciplinary authority prior to implementation. After extensive litigation, FLRA ruled that VA was required to bargain impact and implementation prior to implementation. In March 2021, VA was ordered to cease using section 714 until retroactive bargaining was completed and make whole those who suffered loss of pay, benefits, allowances or differentials due to VA's failure to bargain prior to implementation. Consequently, pursuant to these rulings, in April 2021, VA ceased using section 714 for AFGE bargaining unit employees and the parties entered into retroactive bargaining in May 2021, in accordance with the order. During this period, the parties reached an impasse and jurisdiction was declined by the Federal Impasse Services Panel. AFGE filed additional charges of unfair labor practices against VA. In November 2021, the parties began negotiating an agreement to resolve all disputes associated with the matter. After more than 6 months of mediation with AFGE, which included FLRA involvement, on July 28, 2023, VA and AFGE-National VA Council

signed a settlement resolving all current disputes associated with AFGE's failure to bargain grievance.

This settlement may impact approximately 4,000 current and former VA employees. As part of the agreement with AFGE, many former VA employees will have the option to either return to work at VA or receive compensation in lieu of being reinstated. However, according to the terms of the agreement, hundreds of former VA employees who VA and AFGE mutually agree were terminated for grievous misconduct will not be eligible to return to work. The total cost of this settlement will not be known for several years since it depends on how many former employees elect to return to VA or choose compensation in lieu of reinstatement. For those AFGE bargaining unit employees who choose to be reinstated, VA retained the right to elect to move forward with a removal using other disciplinary authorities.

Conclusion

VA appreciates the close collaboration with Committee staff and looks forward to continuing future legislative efforts, especially those centered around more pay flexibilities and hiring provisions that are critical to recruiting and retaining health care professionals in an increasingly competitive labor market. We continue to seek legislative and regulatory interventions to make VA a fully competitive health care employer.

I am proud to be part of this noble mission to care for the Nation's Veterans. I look forward to working with each of you on this Committee on health care hiring and staffing opportunities across VA, as well as investing in our current employees so they can continue to provide the best care and service to deserving Veterans and their families. This concludes my testimony. My colleagues and I are prepared to respond to any questions you may have.

Questions for the Record

Department of Veterans Affairs (VA)
Questions for the Record
Committee on Veterans' Affairs Committee
United States Senate
VA Accountability and Transparency: A Cornerstone of Quality Care and Benefits
Invisible

October 25, 2023

Questions for the Record from Senator Kirsten Sinema:

Question 1: I want to ask about the reassignment of senior executives in the VA leadership. In 2018, Congress passed the Senior Executive Accountability Act, which, among other things required a report to Congress on the full costs to reassignments including salary increases, paid incentives, travel expenses for the individual and family, as well as moving expenses. Do you generally believe that these incentives are necessary and fair?

Response: Yes, these incentives are necessary and fair. The adjustments to salary, payment of incentives, and travel expenses are in accordance with regulation and policy. Salary adjustments are necessary when a member of the senior executive service (SES) moves to a position of greater responsibility. Regulation requires Federal agencies to cover costs such as relocation expenses when reassigning an SES member to a position outside their current geographic location. Travel expenses are managed by VA's Office of Management and must be documented to support reimbursement.

Question 2: I'm hoping you can walk me through the computation of "PCS Expenses" which I believe is the cost of moving an individual to their new duty station. In the VA's most recent report to Congress, in addition to a salary increase and an incentive payment, one individual was paid 190 thousand dollars for PCS expenses. Three more individuals were paid over 130 thousand dollars in moving expenses. But these four executives were conducting interstate moves. Why are these moves so expensive?

Response: Relocation allowances are governed by the Federal Travel Regulation and are generally comprised of two categories of expenses: 1) mandatory, expenses an agency must reimburse if the employee is eligible and 2) discretionary, expenses an agency may reimburse when in the best interest of the Government.

The actual cost of a relocation depends on the package of mandatory and discretionary benefits agreed to by both the individual and the Government. The Government may offer more robust relocation benefits if it is a critical or hard-to-fill position, and it is determined to be in the Government's best interest. Higher cost relocations, like the

ones referenced in your question, are not necessarily the norm; however, they typically involve buying and/or selling support for real estate transactions.

Question 3: I'm told incentive payments are limited to 25% of the salary listed. In one report last year, I saw individuals receiving 75% incentive payments, and many more making 30 or 45%. What is the process by which these incentives are calculated?

Response: Recruitment, retention, and relocation incentives—referred to as the 3Rs—are generally limited to 25% of salary. The Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics (PACT) Act has provided VA the temporary authority to approve incentives up to a 50% cap based on a critical agency need if a total relocation or recruitment incentive does not exceed 100% of the employee's annual rate of basic pay in effect at the beginning of the service period. A 75% incentive cannot be authorized per existing Federal regulations and policy.

Relocation incentives are based on the individual's annual rate of basic pay (i.e., salary) at the beginning of the service period, and generally may not exceed 25% of that basic pay. Service periods can include fractions of a year but cannot exceed a total of 4 years. The approved incentive percentage and length of service selected will reasonably correlate to difficulties experienced in obtaining high quality candidates or documented evidence of long-term staffing difficulties.

The total amount of incentive payments paid to an individual is calculated by multiplying the individual's annual rate of basic pay by the percentage authorized for the incentive, multiplied by the total year(s) in the service period, which equals the incentive amount ((basic pay x %) x service period = incentive amount). For example, Individual A has an annual rate of basic pay at the beginning of the service period of \$75,000. A relocation incentive of 15% with a 3-year service agreement has been authorized. The total incentive amount for Individual A is \$33,750 ((75,000 x 15%) x 3 = \$33,750).

Question 4: Are these incentives and PCS expenses in line with the market rate for these kinds of payments?

Response: Yes, these permanent change of station expenses are in line with market relocation payments, which include the mandatory and discretionary entitlements discussed in question 2. Market rates for per diem, mileage, and household good transportation are established by the General Services Administration and used by all Federal agencies. In addition to salaries paid outside the Federal Government for similar positions, incentive amounts also take several other factors into consideration, including availability and quality of candidates, position turnover, special or unique competencies required, non-pay authority utilization, desirability of the position and/or location, and any other special factors or circumstances that may be applicable.

Question 5: We only have a small snapshot in time to observe these movements of senior executives. However, we are already starting to see patterns of individuals leaving one VA posting for another for an incentive, leaving a vacancy in their wake and setting of a domino effect of continued incentive payments. One individual movement can have several hundred thousand dollars of incentive payments to fully replace. What can we do to capture the full impact of these knock-on costs?

Response: VA understands the concern raised about creating incentives for executives to move across the system in search of a higher compensation package, which may have the unintended consequence of creating vacancies elsewhere in the system and increasing total costs. As such, VA has taken several recent steps to improve total compensation packages for field leaders, including a consistent national approach to implementing PACT Act title IX authorities. Specifically, all eligible Medical Center Directors (MCD), Deputy MCDs, Associate Directors, and Assistant Directors are receiving a consistent level of Critical Skills Incentive (i.e., there is no variation at each facility). Additionally, the Veterans Health Administration (VHA) will use the Critical Position Pay authority recently approved by the Office of Management and Budget. This will allow VHA to implement a new executive compensation model that is decoupled from facility complexity level, and instead uses market-aligned criteria to align positions within relevant pay bands. While it is too early to see the full impact of these new authorities, early signs indicate that this consistent approach has supported the lowest MCD vacancy rate VHA has seen in many years, and we expect that the need to use individual recruitment or retention incentives to fill these positions will be reduced.

Questions for the Record from Senator Marsha Blackburn:

Question 6: As of October 21st, 2023, the current case log for veterans applying for benefits was one million, ninety-eight thousand, three hundred and sixty-nine. Can you explain why the current case log is so backlogged, and what the VA plans to do to address this backlog?

Response: As of December 3, 2023, the inventory was 1,081,025 with 325,361 claims pending over 125 days. This translates to 30.1% of the total inventory being considered backlog claims—53.2% below the Agency's backlog peak on March 25, 2013 (611,073).

Since the PACT Act was signed in August 2022, Veterans and their families have filed more than 3,111,115 total claims. The Veterans Benefits Administration (VBA) projects they will continue to receive a high rate of claims into fiscal year (FY) 2024, based on the high number of Intents to File (ITF) submitted. ITFs are protective filings for the effective date of payment, should entitlement to benefits be granted. As expected, VBA is seeing an accelerated growth of claims pending over 125 days heading into FY 2024, due to the increased demand for benefits because of the PACT Act.

To address the backlog, VBA is hiring and training new claims processors, and expanding the use of automated decision support tools. Explained in detail:

- VBA is aggressively hiring, and has grown by nearly 23.3% from October 1, 2022, through September 30, 2023—with a total end-strength of more than 31,000 people—allowing VA to ensure timely service to Veterans.
- Over the past 2 years, VA has hired and trained 11,480 new claims processors, growing our claims processing workforce by approximately 58% since FY 2021. To continue increasing claims processing speed, we plan to bring on thousands of additional claims raters in the coming year.
- VBA is expanding the use of automated decision support tools and training our processors on how to use them. VBA is in the early process of leveraging automated tools, with the full potential yet to be realized. However, the potential benefit is two-fold: 1) improving the efficiency of our claims processors and 2) potentially reducing the number of examinations Veterans must attend.

By the end of 2025, VBA aims to reduce claims pending over 125 days to approximately 100,000. VA remains committed to delivering accurate and timely benefits to Veterans, survivors, and other beneficiaries in a manner that honors their service.

In FY 2024, through December 3, 2023, VBA completed 386,669 claims—24.7% greater than at this point in FY 2023. FY 2023 claims completions of 1,981,854 exceeded VBA's prior record-breaking completions in FY 2022, with 1,709,765 claims completed.

Question 7: The report the SVAC minority staff requested regarding the employees that were reinstated following their expulsion for grievous misconduct asked for specific evidence for how the determination was made to overturn each grievous misconduct decision. Will the VA be providing the specific determination for each of the several thousand employees that were granted reinstatement?

Response: Employees removed for grievous misconduct will not be granted reinstatement. Only those employees that were removed for misconduct that did not meet the definition of grievous misconduct, per the settlement agreement, will be offered or granted reinstatement. The American Federation of Government Employees does not agree with 30 cases that the agency asserts qualify as grievous misconduct removals. These cases will be arbitrated to determine their final settlement category. The arbitrator will provide a written explanation for any decision in favor of the Union that a specific removal was not based on grievous misconduct and, if this occurs, the employee will be offered reinstatement. As of May 2, 2024, no hearing date has been set.

Question 8: Are you personally comfortable with receiving medical care from an individual that has evidence of prior patient abuse, reckless or intentional disregard for patient welfare, racial harassment, sexual harassment, impairment on duty, violent threats, reckless or intentional endangerment of others, and/or criminal activities?

Response: No. The Department of Veterans Affairs takes allegations of misconduct very seriously and works to ensure allegations are investigated and actioned appropriately. The categories of misconduct listed above are very serious; per the 714 settlement agreement, individuals who were found to have committed misconduct of this nature have not been offered reinstatement.

Question 9: Following up on the team leader responsible for scheduling for the Atlanta VA Medical Center's community care office. If you recall this team leader is the one that had posted a picture to their social media accounts of them teleworking in their bathtub. Is this employee still employed by the VA, and if so in what role is this individual employed?

Response: The agency is committed to investigating instances of potential misconduct and actioning them appropriately. The agency has reviewed the circumstances surrounding the situation and taken appropriate actions.

**Department of Veterans Affairs
May 2024**

Statements for the Record

**Senator Sinema
Statement for the Record
Senate Veterans' Affairs Committee
VA Accountability and Transparency:
A Cornerstone of Quality Care and Benefits for Veterans
10/25/23**

Senator Sinema Statement

Thank you, Chairman Tester, for holding this hearing and thank you to our witnesses for being here today.

It is our duty to assess and improve the policies and initiatives that govern the care of our most vulnerable citizens, including our aging population and individuals with disabilities. We trust the VA to make the most of taxpayer money they are given to provide essential services and support to the United States' 16.2 million veterans. In Arizona, we face significant challenges in ensuring equitable access to high-quality and affordable care. Workforce shortages and disparities in availability and quality of services require the VA to come up with innovative solutions that increase accessibility and reduce waste resulting from poor money management.

Arizonans should be able to trust that their tax dollars are funding a system that is able to attract a highly qualified and passionate workforce. This is to say that the care they expect to receive is timely, high quality, and accommodating of their diverse needs. By collaborating across party lines, I believe we can find innovative solutions to improve VA care, as well as increase community-based care options for veterans and cultivate a skilled and compassionate caregiver workforce.



CONGRESSIONAL TESTIMONY

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PROVIDED TO THE

SENATE COMMITTEE ON VETERANS' AFFAIRS

HEARING ON

"VA ACCOUNTABILITY AND TRANSPARENCY: A CORNERSTONE OF QUALITY CARE AND
BENEFITS FOR VETERANS"

OCTOBER 25, 2023

Chairman Tester, Ranking Member Moran, and Members of the Committee:

The American Federation of Government Employees, AFL-CIO (AFGE) and its National Veterans Affairs Council (NVAC) appreciate the opportunity to submit a statement for the record on today's hearing entitled "VA Accountability and Transparency: A Cornerstone of Quality Care and Benefits for Veterans." AFGE represents more than 750,000 federal and District of Columbia government employees, 300,000 of whom are dedicated Department of Veterans Affairs (VA) employees. These include front-line employees at the Veterans Health Administration (VHA) who provide exemplary specialized medical and mental health care to veterans, the Veterans Benefits Administration (VBA) workforce who process veterans' claims, the Board of Veterans' Appeals (Board) employees who shepherd veterans' appeals, and the National Cemetery Administration Employees (NCA) who honor the memory of the nation's fallen veterans every day.

With this firsthand and front-line perspective, we offer our observations on the VA's implementation of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, and the following bills being considered at today's hearing:

S. 2158, the "Restore Department of Veterans Affairs Accountability Act"

AFGE strongly opposes S. 2158, the "Restore Department of Veterans Affairs Accountability Act." As we have stated to the Senate and House Veterans Affairs' Committees since 2017, AFGE strongly objected to the design and implementation of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017. Specifically, AFGE has long objected to the VA's use of the disciplinary authority in 38 U.S.C. 714 (§714) of the law and how it has harmed hardworking and dedicated employees for often petty infractions.

Additionally, through this experience AFGE is also aware of the failure of VA leadership to hold managers accountable under other provisions of the law. AFGE has supported efforts to amend the law to restore fairness to VA employees, including H.R. 4906, the bi-partisan “Protecting VA Employees Act.”

Contrary to this, S. 2158, the “Restore Department of Veterans Affairs Accountability Act” will again counterproductively diminish the due process and collective bargaining rights of VA employees compared federal employees in other agencies, including those in the Department of Defense who take care of the nation’s active-duty military. In particular, the bill’s proposed abrogation of collective bargaining agreements, reinforcing the use of the “Substantial Evidence Standard,” restating the prohibition on the Merit Systems Protection Board to mitigate penalties, limiting the use of the “Douglas Factors,” and using this bill retroactively go out of their way to treat VA employees like second class federal workers, despite their noble mission. AFGE strongly opposes the bill.

Background

Public Law 115-41, the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act or Act), was signed into law on June 23, 2017. At the time of its passage, supporters claimed the Act was intended to simplify and expedite the disciplinary process at VA so that it could better hold bad employees accountable. The Act is divided into two parts, Title I, which established the Office of Accountability and Whistleblower Protections (OAWP) and Title II, which governs Accountability and Adverse Actions for Senior Executives, VA Employees, and Supervisors disciplinary procedures. Within Title II, the bill enacted 38 U.S.C. §714 which changed the following disciplinary procedures for bargaining unit employees (38 U.S.C. §713 is for managers in the Senior Executive Service):

- Required management to make a final decision within 15 business days of proposing an adverse action (i.e., suspension of more than 14 days, demotion, or removal);
- Reduced the time period for an employee to respond to a proposed adverse action to 7 business days;
- Reduced the time period for an employee to appeal the final adverse action to 10 business days;
- Lowered the standard of proof necessary to sustain an adverse action before a third party, such as arbitrators and the Merit Systems Protection Board (MSPB), from preponderance of the evidence to substantial evidence;
- Prevented third part adjudicators from mitigating unreasonable penalties assigned by VA.

Oversight

Since the Act's enactment, there has been robust oversight over the Act's implementation, and its effect on the workforce in multiple venues:

Congressional Oversight

The House Veterans' Affairs Committee held an oversight hearing in July 2018 entitled "*The VA Accountability and Whistleblower Protection Act: One Year Later.*"¹ The committee's goal was to address problems caused by the VA's implementation of the Act. In his opening statement, then-Ranking Member Mark Takano addressed the VA's penchant to use the Act to disproportionately discipline rank and file employees as opposed to supervisors and other management officials stating:²

"[Of] the 1,086 removals during the first five months of 2018, the majority of those fired were housekeeping aides...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 fifteen were supervisors which is

¹ *The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018), <https://republicans-veterans.house.gov/calendar/eventsingle.aspx?EventID=2212>.

² *The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018) (statement of Mark Tano, ranking member), <https://republicans-veterans.house.gov/calendar/eventsingle.aspx?EventID=2212>.

less than 1.4 percent. Firing rank and file employees does nothing to resolve persistent management issues.” He continued “it is not possible to fire your way to excellence.” AFGE also testified at this hearing citing how the law disproportionately harmed lower paid federal workers and not the managers who supervised them, and also further explained many of the structural problems with the law that continue to exist today.³ AFGE has also commented on the Accountability Act at a May 19, 2021 House Veterans’ Affairs Committee Subcommittee on Oversight and Investigations hearing titled “*Protecting Whistleblowers and Promoting Accountability: is VA Making Progress?*”⁴ citing the problems with the current law and the need to pass reforms.

Inspector General Investigation

In response to requests for an investigation from multiple legislators, the Office of Inspector General (OIG) highlighted VA’s failure to properly implement the portion of the Act pertaining to whistleblower protection. The OIG issued a report, which explained, “in many instances, [OAWP] focused only on finding evidence sufficient to substantiate the allegations without attempting to find exculpatory or contradictory evidence.”

Further, while VA front-line employees were being disciplined more often and more harshly under §714 of the Accountability Act, the OIG report found that VA “struggled with implementing the Act’s authority to hold executives accountable.” OIG explained that despite statements from then-Secretary Shulkin, as of May 22, 2019, VA had only removed one covered senior executive employee under 38 U.S.C. 713. Further, of thirty-five cases involving senior

³ *The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs, 115th Congr. (2018)* (statement of then-AFGE National President J. David Cox). <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=108516>.

⁴ *Protecting Whistleblowers and Promoting Accountability: is VA Making Progress? Before the H. Comm. On Veterans Affairs Subcommittee on Oversight and Investigations, 117th Congr. (2021)* (AFGE Statement for the Record).

executives, VA deciding officials mitigated the discipline of thirty-two before issuing a final decision.

The OIG investigation revealed unlawful whistleblower retaliation by OAWP itself, noting that after an OAWP employee made a whistleblower complaint, Executive Director O'Rourke instructed a subordinate to remove the employee. Finally, the OIG found that the VA did not comply with reporting and training requirements of the Act and failed to adequately report to Congress regarding the outcomes of disciplinary actions.

Freedom of Information Act

In an attempt to learn more about the VA's use of its authorities under the Accountability Act, on May 31, 2022, AFGE submitted a Freedom of Information Act (FOIA) Request to the VA. This request asked the VA to share, without violating the privacy of employees, the VA's use of Section 204 of the Veterans Affairs Accountability and Whistleblower Protection Act of 2017, 38 U.S.C. §721, which authorizes the Secretary to issue an order, under certain circumstances, directing an employee to repay an award or bonus paid to the employee. This request covered the period from June 23, 2017, through May 31, 2022. In response to the AFGE's request, the VA responded on June 2, 2022, and stated that "This is a recently enacted VA policy and there are no responsive records." This is evidence that the VA has not utilized all of the tools at its disposal to hold employees accountable, and that the VA does not need additional tools for accountability. Instead, for the last six years, VA abused its authority under 38 U.S.C. §714 to remove thousands of front-line employees and service-connected veterans while failing to hold senior executives and management officials to the same standard.

Challenges in Federal Court

Since the enactment of the Accountability Act, several parts of the law have been successfully challenged in federal courts, resulting in multiple rebukes from the United States Court of Appeals for the Federal Circuit (Federal Circuit or Court) finding that VA violated the law and fundamental civil service protections through its abuse of 38 U.S.C. §714. One line of cases is related to the restrictions on the MSPB or third-party adjudicators to consider the reasonableness of a penalty or to mitigate that penalty. In *Sayers v. Dep't of Veterans Affairs*, the Federal Circuit determined that, contrary to VA's contentions, the MSPB was permitted to review the reasonableness of the penalty imposed by deciding officials in light of the facts of a particular case under §714. The Court explained that "[d]eciding that an employee stole a paper clip is not the same as deciding that the theft of a paper clip warranted the employee's removal." It is clear that prior to *Sayers*, the Agency promoted a limited review and harshly disciplined employees under §714, often for similarly trivial acts.

The perceived inability to consider the reasonableness of VA's chosen penalty led judges to affirm decisions where even a single charge was proven by substantial evidence. Where the harshest available penalty, removal, was used liberally, this led to a loss of employee resources for relatively minor infractions. VA's rush to remove employees was clear in performance cases as well. As Administrative Judges believed they could not consider the reasonableness of the penalty in those instances, employees were removed for easily remedied performance failures.⁵

Another key element of the law examined by the courts is the VA's mistaken claim that the Accountability Act eliminated the preponderance of the evidence standard at the administrative level and replaced it with the new substantial evidence standard that applies to

⁵ *Brenner v. Dep't of Veterans Affairs*, 990 F.3d 1313, (Fed. Cir. 2021)

third party review. In *Rodriguez v. Dep't of Veterans Affairs*, the Court held that the “preponderance of the evidence, rather than substantial evidence was the correct standard for management to apply at the administrative level in conduct cases under [§]714.”⁶ The Court explained that when determining whether conduct justified discipline under §714, preponderance of the evidence was the correct evidentiary burden, and the MSPB’s standard of review should be substantial evidence. Consequently, the Court found that VA had applied the wrong evidentiary standard in its §714 conduct cases. The Court held in August 2021 that VA and MSPB must apply the *Douglas Factors* in deciding and reviewing the imposed penalty.⁷

By subjecting management’s decisions to additional scrutiny, the Court demonstrated VA’s overreach in its use of the Accountability Act. The use of §714 has proven to have had its greatest impact on lower-level employees, many of whom are veterans themselves, compounding a chronic staffing crisis while doing little to address systemic problems such as inadequate training and hostile managers. Thus, while the reviewing arbitrators, Administrative Law Judges, and Federal Circuit Judges have done much to curtail VA’s broad interpretation of the law, the law itself must be amended if it is to accomplish its stated goal of improving systemic flaws in the Agency.

Furthermore, in the recent case *Richardson v. Department of Veterans Affairs*, the MSPB further limited the applicability of the law.⁸ In *Richardson*, the MSPB ruled that an employee appointed under 38 U.S.C 7401(3), a “hybrid” Title 38/Title 5 employee, could not be terminated

⁶ *Ariel Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290 (Fed. Cir.) (2021).

⁷ *Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).

⁸ *Richardson v. Department of Veterans Affairs*, Docket No. AT-0714-21-0109-I-1 (MSPB) (2023).

under §714 as the text of 38 U.S.C. 7403(f)(3) dictated its reliance on “the procedures” of chapter 75 of Title 5.⁹

As a result of these and other legal rulings and determinations, the VA announced on March 5, 2023, that the VA will prospectively “cease using the provisions of 38 U.S.C. § 714 to propose new adverse actions against employees of the Department of Veterans Affairs (VA), effective April 3, 2023.”

Specific Objections to the “Restore Department of Veterans Affairs Accountability Act”

In response to the court rulings since the enactment of the Accountability Act, H.R. S. 2158 the “Restore Department of Veterans Affairs Accountability Act” was introduced to reverse these decisions and expand the powers of the original Accountability Act. AFGE strongly objects to several provisions in the bill that will infringe upon the rights of VA employees, and harm recruitment and retention:

Abrogation of the Collective Bargaining Agreement

On Page 14, line 22 of the legislation, the bill states “[t]he procedure in this section shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.” The VA workforce is second largest workforce in the federal government, second only to the Department of Defense. AFGE is proud to represent more than 300,000 bargaining unit employees at VA, making the union contract that was signed by AFGE and Secretary McDonough on August 8, 2023, the largest collective bargaining agreement in the government. To say that any procedures that were meticulously negotiated at the bargaining

⁹ *Id.*

table in this and prior contracts are now out the window is grossly unfair, as both parties compromised to arrive at this agreement given the state of the law at the time. This would also provide the VA the opportunity to cease using Performance Improvement Plans (PIPs) prior to disciplining an employee for performance, which is a common practice within the federal workforce. Additionally, while members of both parties proudly support rank and file union members at other agencies and in the private sector, including law enforcement officers, firefighters, electricians, and plumbers, the choice to hold these employees at the VA to a standard not used for similarly situated employees at other departments is unnecessary, and only serves to dissuade potential employees from working at the VA when they could similar if not identical jobs with better protections at another agency.

Reinforcing the Use of the “Substantial Evidence Standard”

38 U.S.C. § 714 established by the Accountability Act mandates that the MSPB uphold management’s decision to remove, demote, or suspend an employee if the decision is supported by substantial evidence. While not defined in the law, management guidance defined substantial evidence as “relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree, or evidence that a reasonable mind would accept as adequate to support a conclusion.”

As discussed in *Rodriguez v. Dep’t of Veterans Affairs*, VA improperly read §714 to mean that its burden of proof at the administrative level in justifying discipline was lowered to the substantial evidence standard. The Federal Circuit disagreed with the Agency’s position, finding that the Agency conflated burden of proof and standard of review. Consequently, the Court found that the VA still had to meet the preponderance of the evidence burden of proof in its decision to discipline for conduct.

With the proposed text on Page 12, lines four through 10, the bill is plainly trying to overturn *Rodriguez v. Dep't of Veterans Affairs*, and force the VA, even in cases where the balance of evidence favors the employee, the opportunity if not obligation to dismiss the employee. This is especially prevalent in “he said, she said” cases based on allegations of misconduct. For example, if 10 individuals were witnesses to an incident and seven sided with the employee’s story, but three sided with the VA’s, the VA would meet its burden under “Substantial Evidence” and could dismiss the employee. This is unfair and deprives VA employees of the same protections enjoyed in other departments in the federal government.

Restating the MSPB’s Inability to Mitigate Unreasonable Penalties

Under current statute established by the Accountability Act, the law provides that where the Agency’s decision is supported by substantial evidence, the MSPB or an arbitrator may not mitigate the penalty. Thus, the MSPB or an arbitrator could only reverse an Agency decision it determined was unreasonable. MSPB had an extremely high rate of affirming Agency decisions even before the enactment of the Accountability Act. MSPB’s affirmance rate of VA decisions was 83.7 percent, of the years recorded since, 2019 was the highest rate of affirmance at 89.44 percent. Few cases were mitigated prior to 2017, however, mitigation was available to reviewing entities, saving the time of sending back a case, causing needless delay.

The text on page 14, lines seven through 10 of the legislation is a doubling down on a bad policy of letting the MSPB or a third-party arbitrator from righting obvious abuses by the VA. Not only should this provision be stricken, but the ability to mitigate a penalty should be restored to the MSPB. This change would ensure fair determinations and restore basic notions of due process and fairness to the workforce by treating similarly situated employees in a consistent manner.

Limiting the Use of the Douglas Factors

Connor v. Department of Veterans Affairs, spoke to the issue of mitigation. In that case, on appeal, the MSPB sustained only one of the 27 charges against the employee. On appeal to the Federal Circuit, the Agency argued it need not consider the *Douglas Factors* in §714 proceedings.¹⁰ In its ruling, the Court ruled that the “[t]here is no basis for the government’s argument that the statutory ban on penalty mitigation by the Board eliminated the obligation to consider and apply the Douglas factors.”¹¹ In response to this, the “Restore Department of Veterans Affairs Accountability Act” would require that only five of the Douglas Factors be considered when determining the reasonability of discipline, but goes out of its way to actively exclude the other seven Douglas Factors. This is counter to the opinion in *Connor*, where the court referenced *Douglas v. Veterans Administration* and wrote while citing to *Douglas* “While not all of the factors will be pertinent to every case, the Board in *Douglas* explained that the agency must ‘consider the relevant factors’ and ‘strike a responsible balance’ in selecting a penalty.”¹² In turn, by excluding seven “Douglas Factors” the legislation goes out of its way to exclude reasonable reasons why an employee should have a penalty reduced, including the sixth Douglas Factor which considers “consistency of the penalty with those imposed upon other employees for the same or similar offenses.”¹³ AFGE urges that every deciding official and third party adjudicator have the obligation to consider all 12 Douglas Factors that may be relevant, not just the five which the bill considers important. Not only should the agency be required to use

¹⁰ *Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).

¹¹ *Id.*

¹² *Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021); *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981) at 332-33.

¹³ *Id.*

the Douglas factors, but appellate bodies should be able to review the agency's appropriate consideration of these factors governing the severity of discipline.

Retroactive Application of the Bill

Beyond each of the individual policy objections AFGE has with the bill, the text proposed on page 15, lines one through five stating that "[t]his section shall apply to any performance or misconduct of a covered individual beginning on the date of enactment of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115-41)." Considering the significant discipline and litigation that has occurred over the past six years, the idea that old disciplinary actions, including the possibility of those already resolved could now be subject to new rules after the fact only creates more tumult for a workforce that has had its fill. Retroactivity is not only unjust but creates chaos and should be stricken.

AFGE opposes S. 2158, the "Restore Department of Veterans Affairs Accountability Act" in the strongest possible terms.

S. 2679, the "Leadership, Engagement, Accountability, and Development (LEAD) Act of 2023"

AFGE appreciates the bi-partisan approach that Chairman Tester, Ranking Member Moran, and Senator Rounds took with the introduction of S. 2679, the "Leadership, Engagement, Accountability, and Development (LEAD) Act of 2023." This bi-partisan bill creates a number of opportunities for the Senate Committee on Veterans' Affairs to pursue oversight of the VA on the way it manages and disciplines its employees.

AFGE supports of Section 101 of the bill which will improve training on how to process adverse actions against employees at VA. If managers are appropriately trained on how to correctly implement discipline at the VA, including on how to correctly address issues related to due process, civil service protections, and collective bargaining agreements, the VA will make fewer mistakes in future, and lessen the number of appeals and ensuing litigation. This will better serve the VA, employees, and the veterans they serve.

In addition, AFGE approves of many of the studies and reports that the bill requires to help the Congress perform its oversight function and craft legislation to improve the VA in the future.

Conclusion

AFGE thanks the Senate Committee on Veterans' Affairs for the opportunity to submit a Statement for the Record for today's hearing. AFGE stands ready to work with the committee and the VA to address the workforce issues currently facing the department and find solutions that will enable VA employees to better serve our nation's veterans.

STATEMENT FOR THE RECORD OF
MS. TIFFANY ELLETT
VETERANS AFFAIRS & REHABILITATION DIVISION DIRECTOR
THE AMERICAN LEGION
TO THE
COMMITTEE ON VETERANS' AFFAIRS,
UNITED STATES SENATE
ON
"VA ACCOUNTABILITY AND TRANSPARENCY: A CORNERSTONE OF QUALITY
CARE AND BENEFITS FOR VETERANS"

OCTOBER 25, 2023

Chairman Tester, Ranking Member Moran, and distinguished members of the Committee, on behalf of our National Commander Daniel Seehafer and our 1.6 million members, the American Legion thanks you for the opportunity to offer this statement on accountability and transparency within the Department of Veterans Affairs (VA). The American Legion is directed by active Legionnaires who dedicate their time and resources to serve veterans and their families. As a resolution-based organization, our positions are guided by more than 104 years of advocacy that originates at the grassroots level.

S.2158 – Restore Department of Veterans Affairs Accountability Act

In 2017, the 115th Congress passed the *VA Accountability and Whistleblower Protection Act of 2017* (AWP) to assist the Department of Veterans Affairs (VA) in protecting veterans and employees by holding employees accountable and providing protection for whistleblowers.¹ In 2017 the VA Office of Accountability and Whistleblower Protection (OAWP) was established as a result of the new public law. Shortly thereafter, complaints were reported, identifying a possibility that VA was implementing the act improperly. As a result, the Office of Inspector General (OIG) conducted a review in 2018 that continued to 2019.² In this report, OIG identified 22 deficiencies, all of which VA concurred and planned to take action on.

During the peak of the COVID-19 pandemic, The American Legion supported the VA's decision to exercise its new authority granted under AWP against those found guilty of neglect and incompetence at State Veterans Homes.³ Beyond this, data showed that AWP was working: in a

¹ Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat. 862 (2017).

² Department of Veterans Affairs Office of Inspector General. "Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017." VA OIG 18-04968-249. October 4, 2019. Unless otherwise noted, all hyperlinks accessed October 18, 2023. <https://www.va.gov/oig/pubs/VAOIG-18-04968-249.pdf>

³ The American Legion. "American Legion calls for accountability at Holyoke and other state homes." June 27, 2020. <https://www.legion.org/commander/249341/american-legion-calls-accountability-holyoke-and-other-state-homes>

12-month period from June 2019 to 2020, the VA had initiated 1,410 adverse actions, a 40% increase from 2016-2017.⁴

However, In August of 2021, it was found in court that VA misinterpreted the AWP Act of 2017 by the United States Court of Appeals for the Federal Circuit.⁵ Though one of the protections assumed in the AWP Act of 2017 was to mitigate the involvement of the U.S. Merit Systems Protection Board in certain decisions surrounding an employee, there was nothing written in the law to do so. The lack of clarity and specific verbiage in the AWP Act of 2017 has given room for courts to dilute the Secretary of Veterans Affairs' authority in making decisions to hold employees accountable, protect whistleblowers, and keep veterans safe.

Having these newly granted disciplinary authorities hamstrung by different interpretations of law and policy after the bipartisan-supported legislation was passed is a difficult result for veterans and families harmed by misconduct and wrongdoing to process. The American Legion's System Worth Savings Task Force has previously uncovered numerous mistruths and wrongdoings at VA Medical Centers, and the Legion will continue to demand a process that delivers swift accountability for front-line workers, middle managers/ supervisors, and even senior executives. In the adjacent perspective, the Legion also advocates for safe working environments to increase staff protection and decrease attrition rates.

Restoring confidence in the VA system necessitates ensuring VA leaders possess the tools to hold ill-intentioned actors accountable and to protect those trying to create a more productive and safer environment. This legislation clarifies and reinforces these critical authorities initially granted in 2017 and introduces a supremacy clause to close the loopholes revealed in recent court rulings and labor union disputes, thereby reinstating the heightened accountability established by the AWP Act of 2017.

There are some apprehensions about VA's capacity to enforce the provisions of this bill that we would like to address. In a press conference this past March, Secretary McDonough expressed that Section 714 of the *VA Accountability and Whistleblower Protection Act* "wasn't really helping us necessarily manage our workforce as much as it was getting us in front of federal judges and in front of administrative bodies."⁶ Every provision of the *Restore Department of Veterans Affairs Accountability Act* has been written not to expand the scope of the 2017 law, but rather to address the technical legal challenges the Secretary alluded to. VA's track record of enforcing AWP in the initial years after its passage demonstrated a good faith effort to address systemic workforce challenges that have plagued the Department for decades; The American Legion expects the VA to resume this effort with the passage of the *Restore Department of Veterans Affairs Accountability Act*.

⁴ Adverse Action Data Request as-of June 14, 2023. HRSmart Data.

⁵ Dirks, Connor D. "Federal Circuit Disputes VA's Interpretation of 2017 Accountability Law." FED Manager, Shaw Bransford & Roth P.C. August 17, 2021. <https://fedmanager.com/news/federal-circuit-knocks-vas-interpretation-of-2017-accountability-law>

⁶ VA Secretary Press Conference. March 23, 2023. <https://news.va.gov/press-room/va-secretary-press-conference-march-3-2023>

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports legislation urging the VA to hold any employee or VA-contracted vendor found guilty of misconduct or wrongdoing fully accountable.⁷

The American Legion supports S. 2158 as currently written.

S.2679 – Leadership, Engagement, Accountability, and Development Act of 2023

The American Legion has long held that veterans deserve top-quality healthcare on par with comparable civilian hospitals. An important part of having such a healthcare system is ensuring proper oversight is conducted and documented. In testimony before the House Veterans Affairs Committee on July 12, 2023, American Legion Veterans Benefits Policy Analyst Joshua Hastings stated that “The American Legion’s Systems Worth Savings program has previously uncovered numerous mistruths and wrongdoings at VA Medical Centers, and the Legion will continue to demand a process that delivers swift accountability for front-line workers, middle managers, supervisors, and even senior executives.”⁸

Several barriers stand in the way of such accountability at the Department of Veterans Affairs (VA). For example, a 2018 Government Accountability Office (GAO) report found multiple issues with VA’s handling of employee misconduct and treatment of whistleblowers.⁹ These included items such as: improperly maintained records for adjudication, arbitrary and unevenly applied consequences for misconduct, and VA whistleblowers being 10 times more likely to receive disciplinary action than their peers. This inconsistently documented disciplinary process, along with retaliation against whistleblowers, is not conducive to a top-quality healthcare system.

The pattern of VA retaliation against whistleblowers is particularly disconcerting. A further 2023 GAO report on VA whistleblowers found that from FY 2018-2022, 69% of all cases involving VA employees included claims of whistleblower retaliation. Of these, less than 1% were closed with a settlement agreement, and 59% of allegations of whistleblower retaliation were closed without action.¹⁰ It is clear that improving the process and protection for whistleblowers needs to be made a priority.

The *Leadership, Engagement, Accountability, and Development (LEAD) Act of 2023* would address the VA’s accountability and whistleblower protection deficiencies in several ways. One important step that this bill takes is requiring the VA to develop a consistent internal process to

⁷ The American Legion Resolution No.16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. <https://archive.legion.org/node/7908>

⁸ Testimony Of Joshua Hastings Veterans, Benefits Policy Analyst Veterans Affairs & Rehabilitation Division, The American Legion, before the Subcommittee on Oversight and Investigations Committee on Veterans’ Affairs United States House of Representatives. July 12, 2023. <https://docs.house.gov/meetings/VR/VR08/20230712/116186/HHRG-118-VR08-TTF-HastingsJ-20230712.pdf>

⁹ U.S. Government Accountability Office. “Department of Veterans Affairs: Actions Needed to Address Employee Misconduct Process and Ensure Accountability.” Report # GAO-18-137. July, 2018. <https://www.gao.gov/assets/gao-18-137.pdf>

¹⁰ U.S. Government Accountability Office. “VA Whistleblowers: Resolution Process for Retaliation Claims.” Report # GAO-23-106111. May 3, 2023. <https://www.gao.gov/assets/gao-23-106111.pdf>

deal with employee wrongdoing, while ensuring that whistleblowers are properly protected, and reporting annually to Congress. Another important step the bill would take is to consolidate the VA's existing oversight, patient safety, and accountability offices into one new entity called the Transparency, Engagement, Accountability, and Management (TEAM) office. This will greatly streamline accountability at the VA and result in a less confusing and overlapping oversight system. Additionally, the bill will increase the empowerment of frontline VA staff by strengthening whistleblower protections and soliciting input from VA employees on how to continue improving the system. These and other provisions in the bill will greatly increase accountability at the VA and help ensure that bad actors are properly dealt with.

The American Legion supports this legislation through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*. This resolution expresses the Legion's view that the VA should have clear and that the VA should maintain close oversight and accountability for all VA care provided to veterans.

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports clear pathways and protections for whistleblowers to report on wrongdoings without fear of retaliation.¹¹

The American Legion supports S. 2679 as currently written.

Conclusion

Chairman Tester, Ranking Member Moran, and distinguished members of the Committee; The American Legion thanks you for your leadership and for allowing us the opportunity to explain the positions of our 1.6 million members on the importance of these pieces of proposed legislation. Questions concerning this testimony can be directed to John Kamin at (202) 263-5748, or jkamin@legion.org.

¹¹ The American Legion Resolution No.16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. <https://archive.legion.org/node/7908>



Max Stier
President and CEO
Partnership for Public Service

Written statement for the record prepared for

Senate Committee on Veterans' Affairs

**VA Accountability and Transparency: A Cornerstone of Quality Care
and Benefits for Veterans**

October 25, 2023

Introduction

Chairman Tester, Ranking Member Moran and members of the Senate Committee on Veterans' Affairs, thank you for the opportunity to share the Partnership for Public Service's views on improving accountability and transparency at the Department of Veterans Affairs (VA), particularly regarding S. 2679, the Leadership, Employment, Accountability, and Development Act (LEAD Act) and S. 2158, the Restore VA Accountability Act.

The Partnership for Public Service is a nonpartisan, nonprofit organization that works to revitalize our federal government by helping it attract mission-critical talent, engage employees, modernize its management systems, develop effective leaders and deliver a high-performing and accountable government.

Over the past decade, the Partnership has provided the committee with recommendations to strengthen workforce management practices at the VA. Given that any agency must rely on its top resource – people – it is critical that there are processes and rules in place to recruit and retain world-class talent, develop their skills throughout their tenure at an agency and hold them accountable for their performance. Accountability ranges from rewarding outstanding performance to dealing with poor performance, and, where it becomes necessary, to dismiss poor performers.

In 2017 Congress passed major pieces of legislation addressing accountability at the VA, notably the VA Accountability and Whistleblower Protection Act¹ and the VA Choice and Quality Employment Act of 2017.² The Partnership worked with this committee, and with your counterparts in the House, on a number of provisions in these laws concerning hiring and retention, talent development, supervisor accountability and training for human resources professionals. We commend the committees for revisiting these laws this year to assess their effectiveness and determine what revisions might be needed to help VA meet future needs. As part of our written submission here, we are attaching a statement submitted to the House Committee on Veterans Affairs, Subcommittee on Oversight and Investigations in July, addressing accountability and providing key data from the Partnership's Best Places to Work rankings.³

While challenges still remain in hiring, employee development, and employee accountability at the VA and across all of government, the VA has made positive strides in strengthening its management practices. Results from the Partnership's [Best Places to Work in the Federal Government rankings](#),⁴ based on the Office of Personnel Management's [Federal Employee Viewpoint Survey \(FEVS\) and other agency-administered surveys](#), highlight workforce trends across the government.⁵ Although the VA conducts its own internal survey, many elements track to the FEVS and show an upward trend in employee experience. The Department of Veterans Affairs [ranked fifth this year](#) out of all large agencies for the overall Best

¹ P.L. 115-41.

² P.L. 115-46.

³ "Statement of Max Stier, President and CEO, Partnership for Public Service." Hearing on Pending Legislation, House Committee on Veterans' Affairs, Subcommittee on Oversight and Investigations, 2023. Retrieved from <https://docs.house.gov/meetings/VR/VR08/20230712/116186/HHRG-118-VR08-20230712-SD006.pdf>.

⁴ 2022 *Best Places to Work in the Federal Government*, P'ship for Pub. Serv., <https://bestplacetowork.org/>.

⁵ Off. of Pers. Mgmt., Federal Employee Viewpoint Survey Results (2022), <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2022/2022-governmentwide-management-report.pdf>.

Places to Work rankings.⁶ By contrast, in 2014, VA's index score was 54.6 out of 100, its lowest level since the Partnership began the rankings in 2003, and VA ranked 18 out of 19 large agencies in employee satisfaction.⁷ This improvement is important because an engaged workforce is more productive and provides better customer service. We encourage the committee to work with VA leadership to better understand what is contributing to this upward trend and to support those efforts to ensure that the agency delivers positive outcomes for our veterans.

Despite the progress made at the VA, the Partnership recognizes that there is still work to be done, especially in ensuring employees and supervisors have appropriate tools to drive increased accountability. As the Partnership has stressed in prior testimony, employee accountability encompasses a range of actions. The culture of accountability and service delivery begins with the people who work at the agency. It is critical to strengthen and streamline the front end of the process – including recruitment and hiring, employee development, data collection and supervisor training. We highlight here several areas across the full lifecycle of talent management for the committee to consider:

- *Develop and strengthen an enterprise-wide approach to workforce management.* Agency leaders should be responsible for ensuring their agency identifies strategic workforce needs and has a plan in place to meet current and future needs. Executives, along with supervisors and managers, should be held accountable in their performance plans for hiring and developing the next generation of talent. VA also needs to ensure that HR staff and hiring managers are trained in the use of the hiring tools available to them. This should include leveraging the Office of Personnel Management's (OPM) work to identify qualified candidates through skills-based hiring, technical assessments and pooled hiring.
- *Identify additional areas to streamline employee performance and accountability.* While supervisor development, training and leadership attention are critical to holding employees accountable for performance and outcome delivery, there are other areas the committee should consider when streamlining accountability processes. An initial step is to strengthen the probationary period for new supervisors. Managers at VA should be required to make an affirmative decision to pass a new supervisor through their probationary period (typically the first year in a new position) and only do so if the employee has exhibited the necessary management capabilities, in addition to possessing technical qualifications. Managers should also be held accountable in their performance plans for providing feedback to new supervisors throughout the probationary period and for making affirmative decisions regarding whether supervisors should continue on after the probationary period has ended. Additionally, it is the Partnership's understanding that the FEVS question about whether or not steps are taken to deal with poor performers in their work units has been removed from VA's employee survey. Adding this question back would allow employee views on performance management to be tracked over time.
- *Move toward a unified personnel system.*⁸ Currently the VA has a complex mix of employee personnel systems through Title 38, Title 5 and hybrid. Anecdotally, we have heard that this makes

⁶ 2022 Best Places to Work in the Federal Government, P'ship for Pub. Serv., <https://bestplacestowork.org/>.

⁷ *Ibid.*

⁸ *More than Just Filling Vacancies: A Closer Look at VA Hiring Authorities, Recruiting, and Retention Before the Subcomm. on Health of the H. Comm. on Veterans' Affs.*, 115th Cong. Appendix (2018) (statement of Max Stier,

it challenging for human resources to streamline efforts to recruit and retain employees. The Partnership strongly encourages the committee to work with the administration towards a unified personnel system for the department that will allow it to fully address its hiring, classification, pay and accountability issues.

- *Continue to resource and leverage VA's customer experience efforts.* One of the best ways that VA can continue to deliver strong outcomes from veterans is through continued investment into customer experience. In addition to modern technology and modern ways of working, a key tenet of a modernized organization is understanding its customers and how they experience services. VA is a leader in customer experience practices through the Veterans Experience Office (VEO). The Partnership has long called for this type of work to be prioritized, resourced and embedded in the governance structures at the highest levels of an agency. For example, the VA [addressed](#) low employee engagement at several health centers by creating leadership development and training opportunities, using employee feedback to connect employees to the mission and recognizing high performers.⁹ These low-cost, talent-focused efforts led to improved patient satisfaction, a decline in turnover of registered nurses and increased call center answer speed.¹⁰ The committee should identify and promote ways to accelerate and scale customer experience work across the VA to streamline processes and make it easier for employees to serve veterans. Improving the VA's customer experience infrastructure, including defining expectations of federal employees, will help drive accountability and outcomes across the agency.
- *Maintain third party review for removal/adverse actions.* One of the merit principles – the core values of the civil service which are enshrined in law – is that employees who cannot or will not improve their performance to meet standards should be separated. To balance efficiency and due process in VA removal actions, the committee should ensure third-party, independent executive review by the Merit Systems Protection Board (MSPB). Independent review of removal decisions from outside the agency helps hold leadership accountable for overseeing their workforce effectively and for avoiding prohibited personnel practices. Survey data available from the MSPB shows that, throughout the government, supervisors themselves overwhelmingly agree that employees deserve protection from managers who make mistakes or act in bad faith during removal proceedings.¹¹ MSPB appeal rights provide such independent protections. Moreover, MSPB review also provides deterrence against unmerited removal proceedings, as indicated by the fact that agency removal decisions are upheld in the vast majority of cases. Our statement submitted for the record to the House Committee on Veterans Affairs on July 12, 2023 (attached) explains our views in more detail and is relevant to the committee's consideration of S. 2158.

We also must work to overcome other major barriers to removal – namely agency cultures where it is assumed that it is difficult to fire employees and a lack of adequate training and resources for

President and Chief Executive Officer, Partnership for Public Service) (available at <https://docs.house.gov/meetings/VR/VR03/20180621/108430/HHRG-115-VR03-Wstate-StierM-20180621.pdf>).

⁹ A Prescription for Better Performance: Engaging Employees at VA Medical Centers, P'ship for Pub. Serv. & Bos. Consulting Grp. 1 (Mar. 2019), https://ourpublicservice.org/wp-content/uploads/2019/03/BPTW18_VA-issue-brief.pdf.

¹⁰ *Ibid.* at 1-2.

¹¹ Off. of Pol'y & Evaluation, *Addressing Misconduct in the Federal Service: Management Perspectives*, U.S. Merit Sys. Prot. Bd. 3 (Dec. 2016), https://www.mspb.gov/studies/researchbriefs/Addressing_Misconduct_in_the_Federal_Civil_Service_Management_Perspectives_1363799.pdf.

managers and supervisors on how to discipline or fire an employee. Congress could also look to streamline the appeals process for removal and adverse procedures – not only at VA but government-wide.

Perspectives on the LEAD Act, S. 2679 and the path on accountability going forward

The LEAD Act provides an additional approach to accountability by ensuring that oversight recommendations are centralized and implemented. This provides an opportunity to encourage best practices across the agency, and particularly at Veterans Health Administration (VHA), to meet common challenges. More broadly, the LEAD Act has a number of policy approaches consistent with the Partnership's recommendations to Congress, including centralizing data to allow for evaluation of effectiveness and improved decision-making, training for supervisors on requirements contained in the bill and the exploration of improved management processes. Furthermore, assigning responsibility for ensuring implementation and follow-through on oversight recommendations to a clearly designated entity (the TEAM Office) allows for an enterprise approach to management across VHA. The Partnership suggests a few additional areas for consideration as the committee continues its work in this area.

- Ensure the supervisor training called for in Title 1 of the bill is evaluated for effectiveness. Across the government, supervisor training – when it does occur – has often become an afterthought or a check the box exercise. The Partnership applauds the sponsors of the bill for requiring supervisor training. While the intent is to provide supervisors with a level of familiarity with adverse actions and related data collection, this is a complex issue. As mentioned previously in this statement, there often exists a culture of myths around the ability of supervisors to hold employees accountable. Ensuring that VA's human capital officials regularly evaluate the impact of the training, by using methods other than self-assessment questionnaires, and its effects on outcomes would likely increase the effectiveness of the training.
- Increase the impact of the newly created TEAM office through the use of dashboards to track recommendations and best practices. Oversight and implementation functions are often scattered across an agency and its components. In a large organization, offices may be especially siloed. The TEAM office could provide much needed consistency and transparency to the oversight functions across VHA and provide sustained focus on addressing challenges and applying best practices. Given the multitude of functions and oversight that the TEAM office would bring together, a dashboard containing the status of recommendations and compiling resources and best practices could accelerate progress. The legislation directs VHA to consider best practices from the Government Accountability Office (GAO). The Partnership recently had the opportunity to testify on modernizing GAO before the House Administration Committee Modernization Subcommittee.¹² In that statement we recommended that consolidating disparate information (such as that produced by GAO, the Congressional Budget Office, and Congressional Research Service) could lead to less duplication of reports and more transparency on recommendations to allow for more effective decision-making. In addition, the committee and

¹² "Written Testimony of James Christian-Blockwood, Executive Vice President, Partnership for Public Service." Hearing on "Legislative Branch Advancement: GAO Modernization," Committee on House Administration, Subcommittee on Modernization, 2023. Retrieved from <https://docs.house.gov/meetings/HA/HA27/20230927/116332/HHRG-118-HA27-Wstate-BlockwoodJ-20230927.pdf>

VHA might consider the [recommendations](#) dashboard that GAO manages¹³ as a potential example.

- *Consider streamlining reporting requirements and reducing possible overlap.* Throughout the bill there are various data and survey requirements, as well as multiple requests for reports. While each of these is individually important, multiple reports and surveys are resource intensive. Like many federal agencies the VA is subject to numerous, sometimes competing, reporting requirements. While formal reports can help consolidate information, they can also turn attention away from mission delivery. Additionally, multiple surveys run the risk of creating survey fatigue among employees, especially since the VA already conducts the All Employee Survey that may have related information to that being sought through this bill. To ensure that this committee and the agency get the information necessary to inform decisions and policies, the Partnership encourages the committee to consider whether existing survey and reporting mechanisms could be repurposed for these reports, whether briefings or other methods of information sharing, including dashboards, might better serve Congress' needs, or whether there are outdated reporting requirements that could be eliminated to reduce the overall reporting burden on the department.

Conclusion

Thank you again for the opportunity to provide this statement. Reforming the VA has and will continue to require sustained attention and support from Congress, and I commend this committee for remaining deeply engaged on this issue. The Partnership looks forward to continuing to work with you to ensure a strong, accountable VA workforce delivering results for veterans and their families.

¹³ Government Accountability Office, "Recommendations Database." Retrieved from <https://www.gao.gov/reports-testimonies/recommendations-database>.



**Max Stier
President and CEO
Partnership for Public Service**

Written statement for the record prepared for

**The House Veterans Affairs Committee
Subcommittee on Oversight and Investigations**

Hearing on Pending Legislation

July 12th, 2023

Chairwoman Kiggans, Ranking Member Mrvan, and members of the House Committee on Veterans' Affairs, Subcommittee on Oversight and Investigations, thank you for the opportunity to share the Partnership for Public Service's views on H.R. 4278, the Restore VA Accountability Act.

The Partnership for Public Service is a nonpartisan, nonprofit organization that works to revitalize our federal government by helping it attract mission-critical talent, engage employees, modernize its management systems, develop effective leaders, and deliver a high-performing and accountable government.

Over the years I have had the privilege of addressing this committee on issues surrounding leadership development, recruiting and retaining a worldclass workforce, and modernizing talent and performance management to ensure an accountable, effective system at the Department of Veterans Affairs (VA). I commend the subcommittee for continuing to identify ways to help VA best meet its mission and deliver strong services to veterans and their families.

The VA has made great strides in strengthening management practices since the department was rocked by several scandals roughly a decade ago, yet there is more work to be done. While the Partnership had concerns about the procedures for removal included in the VA Accountability and Whistleblower Protection Act, we also worked on a bipartisan basis with the House and Senate Veterans Affairs committees to help enact strong management provisions in that law as well as in the VA Choice and Quality Employment Act. New tools that the Partnership championed included direct hire authority for medical center and Veterans Integrated Service Network (VISN) directors, a VA Executive Management Fellowship Program, required performance plans for political appointees, a provision allowing for easier hiring of former employees, and training for VA human resource professionals. The extent to which these tools have been implemented and evaluated for outcomes is unclear, though. I encourage the committee to work with VA to ensure that these laws are put into practice and that additional barriers to strong management and leadership are addressed.

I understand the committee's continued focus on dealing with poor performers, and it is imperative that they are held accountable and that necessary actions are taken. One of the merit principles – the core values of the civil service which are enshrined in law – is that employees who cannot or will not improve their performance to meet standards should be separated.¹ In this statement I will describe some options the committee should consider for dealing with poor performers and other ideas for creating strong employee performance, which is crucial to providing effective service for veterans. I encourage the committee to focus on the entirety of employee accountability – from skills-based hiring, to developing employees and training managers, to modernizing the systems that allow employees to effectively work across the enterprise. These elements are critical to a high-performing organization and are all critical parts of accountability.

The VA has an important mission – to provide benefits and support to veterans and their families. I am encouraged by the work the agency has done to improve veterans' experiences with the services VA provides. This focus by VA on the customer experience is meaningful, and the committee should identify and promote ways to accelerate and scale the customer experience work across the VA to streamline processes and make it easier for employees to serve veterans. Improving the VA's customer experience

¹ 5 U.S.C. § 2301(b)(6).

infrastructure, including defining expectations of federal employees, will help drive accountability and outcomes across the agency.

Perspective on H.R. 4278 and the current employee accountability system.

There are several possible reforms that could improve the balance between efficiency and due process in VA removal actions. However, in its pursuit of greater efficiency, H.R. 4278 builds upon the same approach from the 2017 VA Accountability and Whistleblower Protection Act with which the Partnership expressed concern at the time. Specifically, H.R. 4278 continues to erode and eliminate the role of third-party, independent executive review by the Merit Systems Protection Board (MSPB). This approach unnecessarily compromises due process for line employees while *reducing* accountability for senior executives and political leaders during removal proceedings. The Partnership also believes that the bill's removal of 10 of the 12 so-called Douglas factors (which are factors laid out by MSPB that must be considered when determining employee punishment) is unnecessary. Additionally, the bill's provisions providing for retroactivity of the new procedures are likely to tie the VA up in extensive litigation, diverting resources and attention from other urgent needs of the department.

Independent review of removal decisions from outside the agency helps hold leadership accountable for overseeing their workforce effectively and for avoiding prohibited personnel practices. Survey data available from the MSPB shows that, throughout the government, supervisors themselves overwhelmingly agree that employees deserve protection from managers who make mistakes or act in bad faith during removal proceedings.² MSPB appeal rights provide such independent protections. Moreover, MSPB review also provides deterrence against unmerited removal proceedings, as indicated by the fact that agency removal decisions are upheld in the vast majority of cases.

H.R. 4278 moves away from this procedural accountability by removing MSPB review and vesting final decision-making authority on adverse personnel actions with the Secretary. Elsewhere, this approach has not been successful in increasing accountability throughout an agency. For example, the Transportation Security Administration (TSA) initially used a completely internal removal process with no third-party review. However, a Government Accountability Office report from 2013 found that the TSA investigations and adjudications process had procedural weaknesses that were impairing transparency and potentially compromising uniformity,³ leading some to believe that the TSA was administering arbitrary punishments.⁴ The TSA has moved away from the completely internal approach, and recently granted appeal rights at the MSPB to all Transportation Security Officers.⁵

² Off. of Pol'y & Evaluation, *Addressing Misconduct in the Federal Service: Management Perspectives*, U.S. Merit Sys. Prot. Bd. 3 (Dec. 2016), https://www.mspb.gov/studies/researchbriefs/Addressing_Misconduct_in_the_Federal_Civil_Service_Management_Perspectives_1363799.pdf.

³ U.S. Gov't Accountability Off., GAO-13-624, *Transportation Security: TSA Could Strengthen Monitoring of Allegations of Employee Misconduct* 22 (2013).

⁴ *TSA Integrity Challenges: Examining Misconduct by Airport Security Personnel: Joint Hearing Before the Subcomm. on Oversight and Mgmt. Efficiency and the Subcomm. on Transp. Security of the H. Comm. on Homeland Sec.*, 113th Cong. 11 (2013) (statement of Rep. Cedric L. Richmond, Ranking Member, Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.) (available at <https://www.govinfo.gov/content/pkg/CHRG-113hrg86032/html/CHRG-113hrg86032.htm>).

⁵ James P. Garay Heelan, *TSA Gives Screening Personnel MSPB Appeal Rights*, Fed Manager (Oct. 5, 2021), <https://fedmanager.com/news/tsa-gives-screening-personnel-mspb-appeal-rights>.

While H.R. 4278 does allow employees to appeal adverse removal decisions in federal court, that option can be costly and time-consuming for both employees and agencies. Obtaining MSPB review is a straightforward process for employees, and since 2018, the average appeal processing time has consistently been between three and three and a half months.⁶ On the other hand, obtaining an attorney for federal court can be prohibitively expensive for some federal employees, and federal court cases can drag on for long periods of time.

There are certainly ways to continue reforming due process procedures to streamline removal proceedings and the Partnership looks forward to working with you to identify these changes. Moreover, we must work to overcome other major barriers to removal – namely agency cultures where it is assumed that it is difficult to fire employees and a lack of adequate training and resources for managers and supervisors on how to discipline or fire an employee.⁷

VA data trends highlight strides to greater management accountability and employee engagement along with improved veterans experience.

Over the past decade, and across administrations of both parties, the VA has increased expectations for its leaders and employees at all levels to focus on customer experience to drive improved services for veterans. I encourage the committee, and the agency, to focus on increasing tools to further this work, and ensuring that the employee accountability process supports, rather than unintentionally hinders, forward progress.

Data from the Partnership's the [Best Places to Work in the Federal Government rankings](#),⁸ based on the Office of Personnel Management's [Federal Employee Viewpoint Survey](#) (FEVS) and other agency-administered surveys, highlights workforce trends across the government.⁹ Since 2018, the VA has administered its own employee survey, the VA All Employee Survey, to collect data. We utilize data from the VA's internal survey when analyzing trends for the Department. The trends for most of the survey data are headed in the right direction, meaning the employee experience is improving overall at the VA. The Department of Veterans Affairs [ranked fifth this year](#) out of all large agencies for the overall Best Places to Work rankings.¹⁰ By contrast, in 2014, VA's index score was 54.6 out of 100, its lowest level since the Partnership began the rankings in 2003, and VA ranked 18 out of 19 large agencies in employee satisfaction.¹¹

⁶ *Annual Performance Report (APR) for Fiscal Year (FY) 2022 and Annual Performance Plan (APP) for FY 2023 (Final) & FY 2024 (Proposed)*, U.S. Merit Sys. Protection Bd., https://www.mspb.gov/about/annual_reports/MSPB_APR_APP_for_FY_2022_2024_2010982.pdf.

⁷ Off. of Pol'y & Evaluation, *Remedying Unacceptable Employee Performance in the Federal Civil Service*, U.S. Merit Sys. Prot. Bd. 15 (June 18, 2019), https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf.

⁸ *2022 Best Places to Work in the Federal Government*, P'ship for Pub. Serv., <https://bestplacetowork.org/>.

⁹ Off. of Pers. Mgmt., *Federal Employee Viewpoint Survey Results* (2022), <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2022/2022-governmentwide-management-report.pdf>.

¹⁰ *2022 Best Places to Work in the Federal Government*, P'ship for Pub. Serv., <https://bestplacetowork.org/>.

¹¹ *Ibid.*

This improvement is important because an engaged workforce is more productive and provides better customer service.

The following are additional points of data, both from OPM's FEVS and the VA's own condensed survey, [the VA All Employee Survey](#), that provide an encouraging picture of management changes at the agency.¹²

- In response to the question, "I can disclose a suspected violation of any law, rule or regulation without fear of reprisal," the number of positive responses ("good" or "very good") has steadily increased every year, with 68% of employees affirming the question in 2020, 69% in 2021, and 70% in 2022.¹³
- For the question, "Overall, how good a job do you feel is being done by your immediate supervisor?," 76% responded affirmatively in 2020, 78% in 2021, and 78% in 2022.¹⁴
- With the question, "In my work unit, differences in performance are recognized in a meaningful way," 53% of respondents answered affirmatively in 2020, 54% in 2021, and 55% in 2022.¹⁵
- The VA is also trending higher in some areas than the government as a whole. In the question, "Considering everything, how satisfied are you with your job?," the VA-specific affirmative response was 69%,¹⁶ while the government-wide affirmative response to this question in 2022 was just 66%.¹⁷

We also recommend that the committee engage the secretary and the department's staff to recognize the innovative work the VA civil servants are doing, and how those lessons learned from their success can be applied across the department. The Partnership's [Samuel J. Heyman Service to America Medals \(Sammies\) program has recognized many VA employees for their groundbreaking work](#).¹⁸ From using virtual reality and immersive technologies to treat veterans for medical issues such as anxiety and depression, to building a customer-oriented culture of service delivery that is responsive to the needs of veterans and their families, the stories from our Sammies finalists and winners demonstrate that the VA's employees are driving results across the organization.

One area where the VA has been particularly effective is in the work to improve customer experience (CX) for veterans and their families. Our [research](#) has shown that positive employee experiences in the federal government lead to better customer experience.¹⁹ The Partnership has released several reports

¹² *VA All Employee Survey*, U.S. Dep't of Veterans Affs., <https://www.datahub.va.gov/stories/s/VA-All-Employee-Survey-AES-r32e-i4vi>.

¹³ *Ibid.* (AES-FEVS Percents Public Data Reports for years 2020, 2021, and 2022).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Off. of Pers. Mgmt., *Federal Employee Viewpoint Survey Results 20 (2022)*, <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2022/2022-governmentwide-management-report.pdf>.

¹⁸ *Samuel J. Heyman Service to America Medals: Honorees*, P'ship for Pub. Serv., <https://servicetoamericamedals.org/honorees/?agency=department-of-veterans-affairs> (filtered for honorees from the Department of Veterans Affairs).

¹⁹ *A Prescription for Better Performance: Engaging Employees at VA Medical Centers*, P'ship for Pub. Serv. & Bos. Consulting Grp. 1 (Mar. 2019), https://ourpublicservice.org/wp-content/uploads/2019/03/BPTW18_VA-issue-brief.pdf.

over the years that examine this relationship, as well as the overall health of the VA's workforce and CX infrastructure.

The VA [addressed](#) low employee engagement at several health centers by creating leadership development and training opportunities, using employee feedback to connect employees to the mission, and recognizing high performers.²⁰ These low cost, talent-focused efforts [led](#) to improved patient satisfaction, a decline in turnover of registered nurses, and increased call center answer speed.²¹

The VA's dedicated workforce has also improved its ability to provide a wide array of services for veterans and their families through modernization efforts. During the pandemic, the Veterans Benefits Administration [made it easier for veterans to receive information](#) about their eligibility and benefits by using texts and other mobile device applications.²² By collecting and learning from [customer feedback](#), the Veteran Health Administration identified various pain points when veterans navigated VHA services, allowing the VHA to understand and decrease specific barriers customers faced when accessing VHA services.²³

In addition to highlighting success, our reports also recommend a variety of actions the department and Congress can take to ensure the VA continues to meet its mission. Adopting these recommendations would help the VA continue to build a user-centric mindset and establish accountability across every function. Some of these recommendations include:

- Congress and the VA should work together to promote the use of [human-centered designs](#) by making it easier for the agency to collect, learn from and incorporate veteran experiences in service and program designs, which would improve customer experiences.²⁴
- Congress should [support the VA's workforce health](#) by streamlining hiring and recruitment for CX-focused talent, prioritizing positions that execute CX projects, such as public-engagement specialists and digital service designers, and data managers, which will increase the VA's ability to serve veterans effectively.²⁵
- The VA should [create opportunities for professional development](#), such as CX training, promoting cross-government rotations, and other opportunities to develop skills, which can help improve employee engagement.²⁶

²⁰ *Ibid.* at 3.

²¹ *Ibid.* at 1-2.

²² *Veterans Education and Training Benefits*, P'ship for Pub. Serv. (2021), <https://ourpublicservice.org/our-solutions/customer-experience/v2021/veterans-education-and-training-benefits/>.

²³ *Outpatient Health Care Services for Veterans*, P'ship for Pub. Serv. (2021), <https://ourpublicservice.org/our-solutions/customer-experience/v2021/outpatient-health-care-services-for-veterans/>.

²⁴ Paul Pietsch & Anthony Vetrano, *The Good Government Connection: Linking the Federal Employee and Customer Experiences*, P'ship for Pub. Serv. (May 18, 2023), <https://ourpublicservice.org/publications/the-good-government-connection/>.

²⁵ Nadzeya Shutava, Loren DeJonge Schulman, & Sarah Hughes, *Designing a Government for the People: Collaborative Approaches to Federal Customer Experience*, P'ship for Pub. Serv. (Dec. 6, 2022), <https://ourpublicservice.org/publications/designing-a-government-for-the-people/>.

²⁶ *Ibid.*

- Congress should [support the VA's data and information management](#) by investing in a secure and transparent environment that will reduce administrative burden and ensure the unique needs of all veterans are met.²⁷

As recommended in my 2018 letter to the full committee on the state of the VA,²⁸ the committee should continue to engage with the secretary and the department's staff to understand the conditions that allowed these civil servants to innovate and solve problems, and how those lessons can be applied across the department. As the stories above demonstrate, the VA's employees are a significant asset. Focusing on talent management and enabling strong performance is crucial to building a culture of excellence.

The scope of accountability must encompass the entire lifecycle of talent management to drive outcomes for veterans.

Driving reform at the VA must, as a matter of necessity, be a sustained and long-term effort. The VA's work is taking place against a backdrop of an aging population and medical and technical professional shortages across the whole of society, not just VA alone. As noted above, the VA has achieved important successes and made notable improvements strengthening the workforce. While this work is clearly still not complete, we urge the committee to focus on long-term investment and expanded adoption of best practices and approaches that have already been proven to foster meaningful change at the VA.

The culture of accountability and service delivery begins with the people who work at the agency. It is critical to strengthen and streamline the front end of the process – including recruitment and hiring, employee development, data collection, and supervisor training. In 2018, I submitted a written statement to the committee citing several recommendations that remain relevant today.²⁹ The following derive from the 2018 list and include the areas that continue to be critical to stronger management.

- *Develop and strengthen an enterprise-wide approach to workforce management.* Agency leaders should be responsible for ensuring their agency identifies strategic workforce needs and has a plan in place to meet current and future needs. Executives, along with supervisors and managers, should be held accountable in their performance plans for hiring and developing the next generation of talent. VA also needs to ensure that HR staff and hiring managers are trained in the use of the hiring tools available to them.

The decentralized nature of the organization means data is often not aggregated to provide a complete picture of the state of the organization. Better data about the composition of the workforce and more sophisticated dashboards that offer real-time views of the critical information that enables better management decisions would greatly enhance the department's talent management and use of workforce flexibilities.

²⁷ *Ibid.*

²⁸ *The State of the VA: A 60-Day Report: Hearing Before the S. Comm. on Veterans' Affs.*, 115th Cong. 73 (2018) (statement of Max Stier, President and Chief Executive Officer, Partnership for Public Service) (available at <https://www.veterans.senate.gov/services/files/37C27E61-4069-4CAB-A2DC-DFA9254293E4>).

²⁹ *More than Just Filling Vacancies: A Closer Look at VA Hiring Authorities, Recruiting, and Retention Before the Subcomm. on Health of the H. Comm. on Veterans' Affs.*, 115th Cong. Appendix (2018) (statement of Max Stier, President and Chief Executive Officer, Partnership for Public Service) (available at <https://docs.house.gov/meetings/VR/VR03/20180621/108430/HHRG-115-VR03-Wstate-StierM-20180621.pdf>).

- *Encourage and resource sustained hiring efforts and innovations.* These efforts should include developing, collecting and reporting more comprehensive measures of hiring effectiveness as well as supporting HR in developing robust capacity to recruit, hire and retain employees. The Partnership has previously advocated for expanded collection and reporting requirements for aggregated applicant and hiring data. Given the ongoing concerns about shortages of workforce data raised by GAO and others, the Partnership believes this recommendation remains relevant. Beyond simply looking at vacancies in specific clinical or non-clinical positions, these data would also examine applicant pools, recruiting efforts and manager satisfaction with candidates. The Federal Hiring Process Improvement Act of 2010, introduced by former Senators Daniel Akaka and George Voinovich, includes several measures of hiring effectiveness that could be instructive, as well the data being collected in the hiring assessments and selections dashboard³⁰ that could be further expanded by the agency and utilized to make strategic hiring decisions. Such data driven planning would allow VA to examine its early career talent needs, including the use of interns and entry-level positions, which the Partnership strongly recommends as a means of building a robust talent pipeline. Providing such detailed information and analysis would make it easier for the committee to target further reforms to the talent management process.

In addition, the work being done currently through OPM to identify qualified candidates through the use of skills-based hiring, technical assessments and pooled hiring can be instructive to VA's efforts. In work spanning the previous and current administrations, OPM has learned valuable lessons that can now start to be scaled. Building on those lessons, bipartisan, bicameral legislation, the Chance to Compete Act (H.R. 159 and S. 59), would encourage the use of high-quality, skills-based assessments in federal hiring, among other improvements. There is potential to increase applicant and hiring manager satisfaction, develop pools of qualified candidates, and potentially lower hiring times. However, the Chance to Compete Act currently being considered by Congress only applies to Title 5 employees. More work is needed to determine whether these hiring innovations might also be appropriate for Title 38 employees as well as to ensure that the HR functions work together across the agency and have appropriate funding to develop assessments.

- *Identify additional areas to streamline employee performance and accountability.* While supervisor development, training and leadership attention are critical to holding employees accountable for performance and outcome delivery, there are other areas the committee should consider when streamlining the process. An initial step is to strengthen the probationary period for new supervisors. Many supervisors in government are selected for their technical expertise, rather than their leadership skills, and have little incentive to manage effectively. To fix this, managers at VA should be required to make an affirmative decision to pass a new supervisor through their probationary period – the period during which the individual must demonstrate successful performance as a supervisor – only if the employee has exhibited the necessary management capabilities, in addition to possessing technical qualifications. Managers should also be held accountable in their performance plans for providing feedback to new supervisors throughout the probationary period and for making a decision whether the supervisor should continue on after the probationary period has ended.

³⁰ *Hiring Assessment and Selection Outcome Dashboard*, Gen. Serv. Admin., <https://d2d.gsa.gov/report/hiring-assessment-and-selection-outcome-dashboard>.

Moreover, requiring affirmative decisions at the end of the probationary period for *all* employees is a good use of the tool. This provides a concrete opportunity for managers to ensure that the employee has the necessary skills to be successful in the job, identify additional training and development, or even let the employee go before further investing in them. This change will require robust supervisor training as well as improved HR data and tracking of the probationary status of each new hire.

Changes made through these efforts can be tracked by amending questions in the VA's employee survey to explicitly ask about employee accountability. It is the Partnership's understanding that the FEVS question about whether or not steps are taken to deal with poor performers in their work units has been removed from the VA survey. Adding this question back would allow employee views on performance management to be tracked over time.

- *Move toward a unified personnel system.*³¹ Currently the VA has a complex mix of employee personnel systems through Title 38, Title 5 and hybrid. Anecdotally we have heard that this makes it challenging for human resources to create streamlined efforts to recruit and retain employees. Beyond small-bore changes to the department's current personnel operating authorities the Partnership strongly encourages the committee to work with the administration to move towards a unified personnel system for the department that will allow the agency to fully address its hiring, classification, pay and accountability issues. The system should be the product of strong leadership across the branches, employee buy-in, and investment in agency HR and other implementation functions, and should reflect a commitment to the Merit System Principles that serve as the bedrock of the civil service system.

Conclusion

While dealing with poor performers is a process every organization needs to be prepared for, it is impossible to fire one's way to success. As this subcommittee has shown through its oversight, accountability means tracking and improving outcomes over the entirety of an employee's time at the agency, as well as investing in the workforce population as a whole – from hiring to professional development and growth, to strategic workforce and succession planning – and streamlining the systems and tools they need to work effectively.

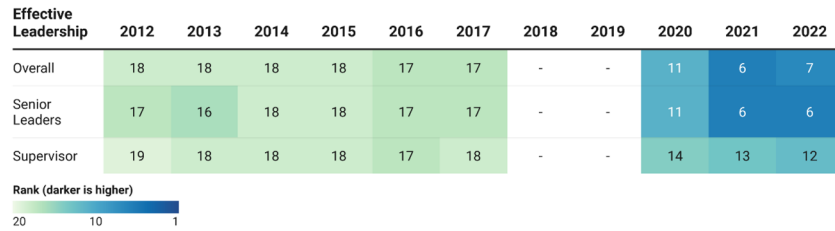
We appreciate your continued work on management reforms, increasing the use of data, and technology modernization efforts. The Partnership looks forward to working with you to build out proposals, provide data and stories, and ensure that the VA has a strong, accountable workforce delivering results for veterans and their families.

³¹ *Ibid.* at 10.

I. Appendix I

With our Best Places to Work in the Federal Government Rankings, we have provided data visualizations with some key takeaways from data trends for not only the Department of Veterans Affairs, but also how the VA ranks in comparison to the government-wide trends.

VA Effective Leadership Rankings Among Large Agencies; 2012-2022



2018-2019 gap due to Veteran Affairs' transition from the Federal Employee Viewpoint Survey to the VA All Employee Survey.
Table: Partnership for Public Service • Source: Best Place to Work in the Federal Government Workplace Categories • Created with Datawrapper

Veterans Affairs BPTW Ranking Among Large Agencies; 2012-2022

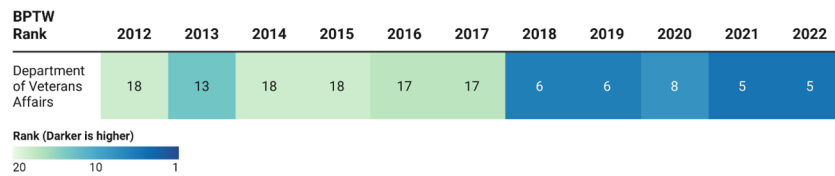


Table: Partnership for Public Service • Source: Best Places to Work in the Federal Government • Created with Datawrapper

I can disclose a suspected violation of any law, rule, or regulation without fear of reprisal.

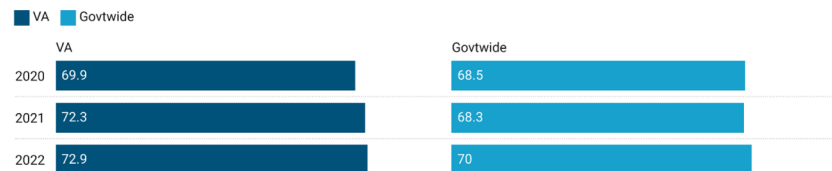


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

Considering everything, how satisfied are you with your job?

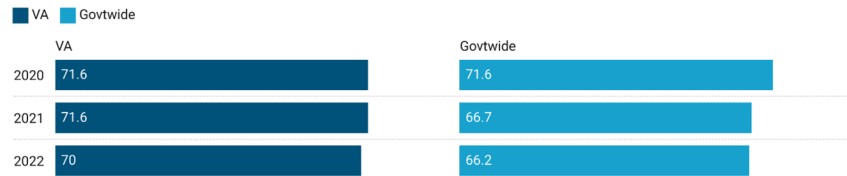


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

How satisfied are you with the recognition you receive for doing a good job?

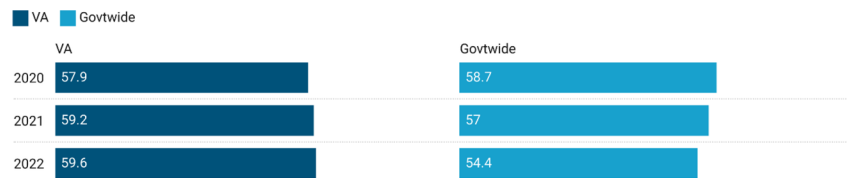


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

In my work unit, differences in performance are recognized in a meaningful way.

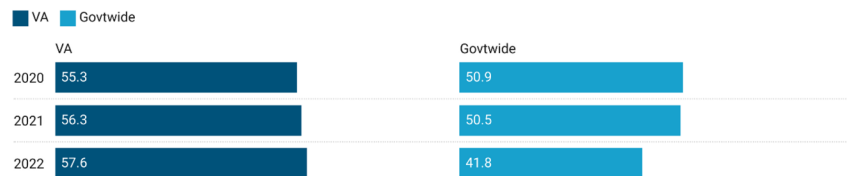


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

My organization's senior leaders maintain high standards of honesty and integrity

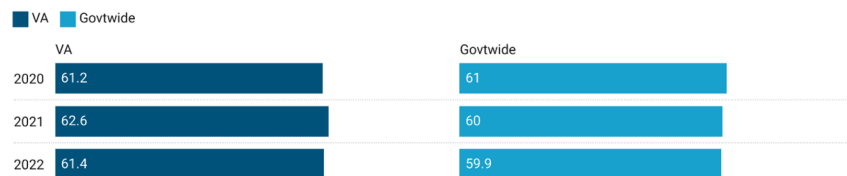


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

Overall, how good a job do you feel is being done by your immediate supervisor?

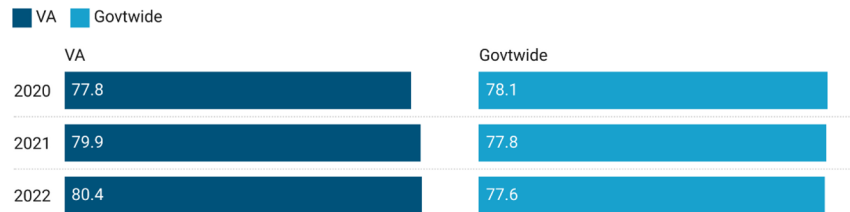


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

II. Appendix II

Department of Veterans Affairs Samuel J. Heyman Service to America Medals Winners and Finalists Since 2017

Every year, the nonpartisan, nonprofit Partnership for Public Service recognizes federal employees for excellence in public service with the Samuel J. Heyman Service to America Medals (Sammies). Referred to as the Oscars of Public Service, the Sammys is the premier awards program for career federal employees. These awards spotlight remarkable accomplishments that benefit the nation, build trust in our government and inspire more people to consider careers in public service. Every year, hundreds of federal employees across the government are nominated for the Sammys, but only forty nominations become finalists, and seven are recognized as winners. The categories include: Federal Employee of the Year, Paul A. Volcker Career Achievement, Emerging Leaders, Safety, Security and International Affairs, Management Excellence, Science, Technology and Environment and the People's Choice Award. Please read below for a complete list of every VA finalist and winner over the past six years.

2023

[Anne Lord Bailey, Caitlin Rawlins and the VA Immersive Team](#) – Anne, the Director of Clinical Tech Innovation and Immersive Technology Lead worked with Caitlin, Deputy Director of Clinical Tech and Innovation and Veterans Health Administration Extended Reality Network Lead, to build a cutting-edge nationwide immersive technology network to empower front-line staff and enable the treatment of veterans for a wide range of medical issues such as anxiety, depression, pain management, spinal cord injuries and more (**Awards to be given on Oct. 17, 2023**)

2022

[Barbara C. Morton](#) – Barbara, Deputy Chief Veterans Experience Officer, built trust and a customer-oriented culture among veterans and their families seeking services and benefits from the Department of Veterans Affairs by listening and responding to their needs – **Winner, Management Excellence**

2021

[Mary Frances Matthews](#) – Mary, an Operations Senior Management and Program Analyst, reduced the lengthy backlog of disability appeals for veterans by 87% in two years, providing long-awaited decisions on benefits to thousands of individuals

2020

[Beth Ripley, M.D., Ph.D.](#) – Beth, National Director for VHA 3D Printing Network, created an interconnected, hospital-based 3D printing network that assists health care providers with medical procedures, reducing unnecessary surgeries to help improve quality of life for veterans – **Winner, Science, Technology and Environment**

[Neil C. Evans, M.D., Kathleen L. Frisbee, Ph.D. and Kevin Galpin, M.D.](#) – Neil, Chief Officer, Office of Connected Care, Kathleen, Executive Director, Connected Health Office and Kevin, Executive Director, Telehealth Services, developed vital telehealth options, mobile apps and digital services for veterans to receive health care virtually, while removing barriers to implementation through policy, regulatory and administrative changes – **Winner, Management Excellence**

2019

[Victoria Brahm](#) – Victoria, the Medical Center Director for Tomah VA Medical Center, restored the quality and safety of a broken health care center for veterans that had become notorious for unsafe medical practices, excessive opioid use and a toxic work environment – **Winner, Federal Employee of the Year**

[Anne McKee, M.D.](#) – Anne, Chief of Neuropathology at the VA Boston Healthcare System, revolutionized scientific research and our understanding of the long-term effects of concussions, including chronic traumatic encephalopathy, in veterans and athletes – **Winner, Paul A. Volcker Career Achievement**

[Paul Shute, Christopher Aragao and David Enright](#) – Paul, Chief of Operational Innovation, Christopher, Supervisory Veterans Service Representative and David, a Management Analyst, dramatically cut the time and manpower needed to make decisions on service-related mental health claims for veterans, helping tens of thousands of individuals each year receive their benefits faster

2018

[Marcella Jacobs and the VA Digital Service Team](#) – Marcella, Executive Director of Digital Service, created online digital tools for veterans to more easily access benefits and services, delivering a high-quality and seamless user experience – **Winner, Management Excellence**

[Jordan T. Manos](#) – Jordan, as the Director of Operations at the Acquisition Academy, improved the system used to assess flood damage from hurricanes and other major storms, helping residents receive aid more quickly and saving the government millions of dollars in appraisal costs

2017

[Rory A. Cooper](#) – Rory, the Director of Human Engineering Research, designed innovative wheelchairs and other assistive technology equipment that has greatly improved the mobility and quality of life for hundreds of thousands of disabled veterans and other Americans – **Winner, Science, Technology and Environment**



SENIOR
EXECUTIVES
ASSOCIATION

The voice of career federal executives since 1980

October 27, 2023

The Honorable Jon Tester
Chairman
Senate Committee on Veterans' Affairs
Washington, DC 20510

The Honorable Jerry Moran
Ranking Member
Senate Committee on Veterans' Affairs
Washington, DC 20510

RE: SEA Written Statement for Record for SVAC 10-25-23 Hearing, "VA Accountability and Transparency: A Cornerstone of Quality Care and Benefits for Veterans"

Dear Chairman Tester, Ranking Member Moran, and Members of the Committee:

On behalf of the Senior Executives Association (SEA) – which represents the interests of career federal executives in the Senior Executive Service (SES), those in Senior Level (SL), Scientific and Professional (ST) and equivalent positions and other senior career federal leaders, including our members at the Department of Veterans Affairs (VA) – I write to provide SEA's comments on VA workforce and accountability legislation before the committee.

S. 2679 - Leadership, Engagement, Accountability, and Development Act of 2023 (LEAD Act of 2023)

SEA commends the bipartisan leaders of this committee for working together to craft this legislation. This bill suggests that Senators have learned critical lessons from the past decade of attempted VA accountability reforms, and many of the principles and proposals resonate with recommendations SEA and other good government advocates have made during that time period. SEA encourages the committee and Congress to continue following this path to reform, and to continue strengthening the bill based on input provided at the hearing and from the VA itself. Congress and the agency working collaboratively is the ideal path to improving VA operations, accountability, and transparency, and ultimately service to our nation's veterans.

S. 2158 / H.R. 4278 - Restore VA Accountability Act of 2023

It is SEA's view that some members of Congress are using veterans as political pawns to erode the VA's capacity and the American people's trust in its workforce. While accountability issues exist at the VA and across the federal workforce, S. 2158 / H.R. 4278 is not the answer. SEA views this proposed legislation as completely unnecessary for holding career VA employees accountable. In fact, it is very likely this legislation will have a significant adverse effect on the

VA's ability to attract, recruit, and retain quality supervisors, managers, and executives, as have the 2014 and 2017 laws.

There are real accountability issues across the federal workforce, but talking-point reforms based on cherry picked VA anecdotes will not solve them. This proposed legislation selectively picks anecdotes that admittedly look, sound, and seem bad, such as the situation at the Loma Linda VA Medical Center, but uses them as justification for extraordinary broad and far-reaching policy proposals such as this overreaching legislation.

Over the last decade, Congress has twice passed VA Accountability reform measures, in 2014 and 2017. In both instances, the VA Secretary solicited Congress for more authority to manage the workforce; the same is not true today. SEA had the foresight and resolve to oppose those earlier efforts because it was clear the proposals were constitutionally suspect, and thus unworkable in promoting greater accountability to those who have sacrificed so much for our country.

Our concerns were validated as the VA Office of Inspector General, the U.S. Merit Systems Protection Board (MSPB), the U.S. Office of Special Counsel (OSC), the Federal Labor Relations Authority (FLRA), and federal courts found repeated abuses of power and authority by the VA in implementing these laws. The result was perverse—personnel actions were overturned and employees who were fired were reinstated, with back pay.

While opposing those bills, SEA never disagreed with the bipartisan recognition that managing the federal workforce is entirely too complex and cumbersome; indeed, SEA has championed civil service reforms for the Association's entire 40+ year history.

Sadly, some of the rhetoric surrounding this bill irresponsibly foments distrust of the other co-equal branches of government, including the federal judiciary and executive administrative agencies including the MSPB and FLRA.

Our American system of government is a system of checks and balances, a genius design of our nation's founders. Recent decisions by federal courts and administrative agencies that have [disrupted elements of the Accountability law](#) are proof that this constitutional system of checks and balances work—a system of rule of law that servicemembers and veterans have fought and died to protect. While it may be frustrating to some members of Congress that the courts have acted, it is equally important for Congress to respect the rule of law and learn lessons from these episodes. Congress must listen to the VA about what it says are the barriers and opportunities to managing a workforce of over 425,000 employees and an ever-expanding mandate to provide benefits and services to veterans.

For a decade, SEA has consistently expressed to Congress that the VA cannot fire its way to excellence. The association has never shied away from assisting agencies, congress, and administrations explore constitutional, good government solutions to enhance agencies' effectiveness.

Recent actions by Congress to positively support and strengthen the VA workforce, for example through passage of the PACT Act, this committee's advancing of the Veterans Health Administration Leadership Transformation Act (H.R. 1256), and bipartisan consideration of the VA Clinician Appreciation, Recruitment, Education, Expansion, and Retention Support (CAREERS) Act of 2023, are notable, as is the positive rhetoric that has come with them. These actions address real impediments. The VA workforce is the key to achieving consistent, mission excellence that Congress, the VA, and veterans expect. The ability to attract, recruit, and retain exceptional talent are paramount to this effort.

Congress must take action to ensure VA is an attractive and welcoming employer for supervisors, managers, and executives who are critical to its operations, rather than constantly denigrating these dedicated professionals.

SEA continues to hear concern from our members, both at the VA and other agencies, that punitive accountability laws do not work. They harm the ability of the VA to attract, recruit, and retain talent. This challenge is particularly acute for the VA's Senior Executive Service (SES) employees, who Congress excluded from having any whistleblower protections whatsoever (38 U.S.C. § 713). Members of Congress persisting to push legislation to address a false accountability narrative will continue to discourage excellent leaders from considering VA employment.

As the past decade has demonstrated, agency-specific reforms such as "VA Accountability" that do not address root causes, adopt lessons learned, and engage the expertise of committees of primary jurisdiction—in this case the Oversight Committee's expertise on federal personnel laws—are simply a recipe for mediocrity and wasting taxpayer money.

SEA strongly believes that the current processes for managing the federal workforce are too cumbersome and time consuming and need to be streamlined. SEA is eager to work with Congress to enact civil service modernization for all of the federal government that is constitutional, backed by empirical evidence, and responsive to the American people. Advancing punitive talking point legislation that fails to address agency needs will not benefit VA, its workforce, nor veterans.

Politically motivated, under the auspices of better serving veterans, S. 2158 / H.R. 4278 represents a solution in search of a problem. SEA **strongly opposes S. 2158 / H.R. 4278**, the Restore Department of Veterans Affairs Accountability Act, which is an unnecessary distraction.

If you wish to further discuss SEA's views, please contact SEA Director of Policy & Outreach Jason Briefel at Jason.Briefel@seniorexecs.org.

Sincerely,



Marcus L. Hill
President

Submissions for the Record

October 25, 2023

The Honorable Jon Tester
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

The Honorable Jerry Moran
Ranking Member
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Chairman Tester, Ranking Member Moran, and Members of the Senate Committee on Veterans' Affairs,

We, the undersigned unions representing hundreds of thousands of bargaining unit employees at the Department of Veterans Affairs, stand united in our opposition to S. 2158, the "Restore VA Accountability Act."

As the duly appointed representatives of VA frontline workers – a third of whom are veterans themselves – we unequivocally support collective bargaining and due process rights of VA employees. In turn, we firmly believe that disciplinary actions handed out by federal agencies, including the VA with its mission to "promise to care for those who have served in our nation's military and for their families, caregivers, and survivors," must respect traditional civil service protections to help recruit and retain its dedicated workforce.

The "Restore VA Accountability Act" will directly undermine this recruitment and retention goal with its proposed changes to 38 U.S.C. 714 in Section 4 of the bill. Specifically, we oppose the proposed language that overrides collective bargaining agreements (CBA) on disciplinary matters covered by this section. Negotiating is a cornerstone of all CBAs that require give-and-take by both labor and management. Undermining the agreements that cover the VA clinicians who care for veterans, the VA police officers and firefighters who keep veterans safe, the claims processors who ensure veterans get the benefits they have earned, and the electricians, plumbers, and janitors who keep facilities running is a red line.

In terms of civil service protections, we also strongly object to the proposed legislation that treats VA employees like second-class federal employees. Specifically, this includes the reinstatement of the "Substantial Evidence Standard" instead of the widely used "Preponderance of the Evidence Standard," a prohibition on the Merit Systems Protection Board's or an arbitrator's ability to mitigate excessive penalties and limiting which "Douglas Factors" can be considered when determining the appropriateness of a penalty. We also oppose the bill's proposed retroactive coverage for issues that may have occurred up to six years ago when the 2017 Accountability Act was enacted.

We urge you to oppose this bill and instead allow the VA to continue using the disciplinary statutes in Title 5 that are used throughout the vast majority of the federal workforce, including those at the Department of Defense taking care of the nation's active duty military, and provide the VA the resources it needs to effectively train managers on Title 5 laws and procedures to hold bad actors accountable.

Respectfully,

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Federation of Government Employees (AFGE)
American Federation of State, County, and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
International Brotherhood of Teamsters (IBT)
International Association of Firefighters (IAFF)
Laborers' International Union of North America (LIUNA)
National Association of Government Employees, SEIU (NAGE)
National Federation of Federal Employees (NFFE)
National Nurses United (NNU)
National Veterans Affairs Council, AFGE (NVAC)
Service Employees International Union (SEIU)



NATIONAL FRATERNAL ORDER OF POLICE

PATRICK YOES NATIONAL PRESIDENT

JIM PASCO EXECUTIVE DIRECTOR

328 Massachusetts Ave NE | Washington DC 20002

(202) 547-8189 | www.fop.net | legislative@fop.net

18 July 2023

The Honorable Michael J. Bost
Chairman
Committee on Veterans Affairs
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Mark A. Takano
Ranking Member
Committee on Veterans Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman and Representative Takano,

I am writing on behalf of the members of the Fraternal Order of Police to advise you of our opposition to H.R. 4278, the "Restore VA Accountability Act."

This legislation would take the unprecedented step of amending 38 U.S.C. 714 to allow existing Collective Bargaining Agreements (CBA)—contracts between Federal employees and the U.S. Department of Veterans Affairs (VA)—to be abrogated. This would include the recent CBA ratified and approved by VA Secretary Denis R. McDonough last month after the Department elected to suspend the use of its §714 authority, which gutted the due process protections for VA employees—including the officers of the VA Police.

Contracts represent an agreement between employers and employees to ensure that the agency's mission—serving the needs of our nation's veterans and protecting its facilities from crime and violence—is a success. If H.R. 4278 is enacted, it would set a terrible precedent that existing contracts could be ignored and threaten the right to bargain collectively for all Federal employees—not just those at the VA. If CBAs can be set aside or ignored, then the bargaining process has no real value for employees or their employers.

The legislation would also reinforce the continued use of the "substantial evidence" standard in disciplinary review and prevent the United States Merit Systems Protection Board (MSPB) or any arbitrator to mitigate any punishment they consider excessive—which is exactly why the VA suspended its §714 authority in the first place. We expect our laws to protect due process rights, not undermine them. Should this bill become law, Federal employees in the VA would lose their voice in the workplace, leaving us to wonder who will be next? The FOP cannot support the legislation as currently drafted.

On behalf of the more than 367,000 members of the Fraternal Order of Police, and especially our VA Police members, I urge the Members of this Committee to reject H.R. 4278. If I can provide any additional assistance or information, please do not hesitate to contact me or Executive Director Jim Pasco in our Washington, D.C. office.

Sincerely,

Patrick Yoes
National President

THE VOICE OF OUR NATION'S LAW ENFORCEMENT OFFICERS
- Since 1915 -

