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SENATE

REPORT
114–163

DEPARTMENT OF VETERANS AFFAIRS ACCOUNTABILITY ACT OF 2015

NOVEMBER 3, 2015.—Ordered to be printed

Mr. ISAKSON, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 1082]

The Committee on Veterans' Affairs (hereinafter, "the Committee"), to which was referred the bill (S. 1082) to amend title 38, United States Code (hereinafter, "U.S.C."), to provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

INTRODUCTION

On April 23, 2015, Senator Marco Rubio introduced S. 1082, the proposed Department of Veterans Affairs Accountability Act of 2015, which would give the Secretary of the Department of Veterans Affairs (hereinafter, "VA" or "Department") the authority to remove or demote a VA employee if the Secretary determines the performance or misconduct of the individual warrants such removal or demotion. Senators Ayotte, Barrasso, Burr, Cassidy, Cornyn, Flake, Hatch, Johnson, Kirk, McCain, Moran, Tillis, Toomey, and Vitter were later added as cosponsors of the bill. The bill was referred to the Committee.

On April 28, 2015, Senator Ron Johnson introduced S. 1117, the proposed Ensuring Veteran Safety Through Accountability Act of

2015, which would give the Secretary of the Department of Veterans Affairs the authority to remove VA health care professionals for performance or misconduct. Senators Cassidy, Collins, Crapo, Cruz, Daines, Flake, Inhofe, Lee, McCain, Perdue, Toomey, and Vitter are original cosponsors of the bill. Senators Ayotte, Cochran, Hatch, and Risch were later added as cosponsors of the bill. The bill was referred to the Committee.

COMMITTEE HEARING

On June 24, 2015, the Committee held a hearing on pending legislation. Testimony on S. 1082 and S. 1117 was offered by: Dr. Rajiv Jain, Assistant Deputy Under Secretary for Health for Patient Care Services, Veterans Health Administration; Ian de Planque, Legislative Director, The American Legion; Peter B. Hegseth, CEO, Concerned Veterans of America; Adrian Atizado, Assistant National Legislative Director, Disabled American Veterans; Carl Blake, Associate Executive Director, Paralyzed Veterans of America; Max Stier, President and CEO, Partnership for Public Service; and John Rowan, National President, Vietnam Veterans of America.

COMMITTEE MEETING

After carefully reviewing the testimony from the foregoing hearing, the Committee met in open session on July 22, 2015, to consider, among other legislation, an amended version of S. 1082, consisting of provisions from S. 1082 as introduced and S. 1117 and changes suggested during testimony noted above. The Committee voted, by voice vote, to report favorably S. 1082 as amended.

SUMMARY OF S. 1082 AS REPORTED

S. 1082, as reported with amendments (hereinafter, "the Committee bill"), consists of three sections, summarized below:

Section 1 provides a short title.

Section 2 of the bill adds a new section 714 to title 38, U.S.C., providing for removal or demotion based on performance or misconduct.

Section 3 of the bill amends the required probationary period for new employees.

Section 1 provides the short title, "Department of Veterans Affairs Accountability Act of 2015."

Section 2 would provide the Secretary of VA the authority to remove or demote a VA employee (other than a senior executive or political appointee) if the Secretary determines the performance or misconduct of the individual warrants such removal or demotion. A determination of such performance or misconduct may consist of any of the following: Neglected a duty of the position in which the individual was employed; engaged in malfeasance; failed to accept a directed reassignment or to accompany a position in a transfer of function; violated a policy of the Department; violated a provision of the law; engaged in insubordination; over prescribed medication; contributed to the purposeful omission of the name of one or more veterans waiting for health care from an electronic wait

list; or was the supervisor of an employee that contributed to the purposeful omission of the name on an electronic wait list.

Also, section 2 would require the Secretary of VA to submit to the Committees on Veterans' Affairs of the Senate and House notice in writing of such removal or demotion and the reason, no later than 30 days after removing or demoting an individual under this authority. A removal or demotion may be appealed to the Merit Systems Protection Board (hereinafter, "MSPB") not later than 7 days after the date of the removal or demotion. Upon receipt of an appeal, the MSPB must refer the appeal to an administrative law judge. The administrative law judge must expedite the appeal and issue a decision not later than 45 days after the date of the appeal. Notwithstanding any other provision of law, the decision of an administrative judge will be final and not be subject to any further appeal. During the period beginning when an individual appeals a removal from the civil service and ending when the administrative judge issues a final decision, the individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

Finally, in the case of an individual seeking corrective action from the Office of Special Counsel (hereinafter, "OSC") based on an alleged prohibited personnel practice, the Secretary may not remove or demote such individual under this authority without the approval of the Special Counsel. Further, OSC is required to establish a mechanism to expedite cases for corrective action and establish a standard for approval of removal or demotion.

Section 3 would amend the probationary period for new Department employees by adding a new section, "Section 715. Probationary period for employees," to title 38, U.S.C. It would extend the probationary period for all new employees, excluding any individual prescribed by section 7403 of title 38 (medical professionals) from 12 months to 18 months. The Secretary would have discretion to extend the probationary period beyond 18 months. Upon the expiration of this probationary period, the supervisor of the employee must determine whether the appointment becomes final based on regulations prescribed for such purpose by the Secretary.

BACKGROUND AND DISCUSSION

Sec. 2. Removal or demotion of employees based on performance or misconduct.

Section 2 of the Committee bill, which is derived from S. 1082 as introduced and S. 1117, would allow for removal or demotion, for cause, of employees of the Department if the Secretary determines the performance or misconduct warrants such a removal or demotion by adding "Section 714. Employees: removal or demotion based on performance or misconduct" at the end of chapter 7 of title 38, U.S.C.

Background. On August 7, 2014, in an effort to address the many scandals plaguing VA and hold those responsible accountable, the Veterans Access, Choice, and Accountability Act of 2014 (hereinafter, "Choice Act") was signed into law by President Obama, and gave the Secretary the authority to expedite the removal or demotion of Senior Executive Service (hereinafter, "SES") employees for performance or misconduct. Under the Choice Act, section 713 of

title 38, U.S.C., an SES employee's appeal rights after they have been removed or demoted are limited. Specifically, the Secretary may remove an SES employee with no advance written notice to the individual and employees have 7 days to appeal the decision to the MSPB. The MSPB then is required to adjudicate the appeal within 21 days. The Choice Act only applies to career appointees in the SES or individuals appointed under 38 U.S.C. 7306(a) or 7401(1) to an administrative or executive position. Under current law, section 7513 of title 5, U.S.C., other VA employees are entitled to at least 30 days advance written notice before removal or demotion, a reasonable time but not less than 7 days to reply, representation by an attorney, a written decision from VA, and an opportunity to appeal the decision to the MSPB. Since the passage of the Choice Act, VA has remained in the news for a wide range of poor performance and mismanagement issues.

A Federal indictment, cost overruns, allegations of manipulation of disability claims data, alleged improper shredding of VA benefit applications, contract mismanagement, and many other examples of poor performance or misconduct continue to occur at VA, as reported by the VA Inspector General. Despite so many examples of situations that should result in disciplinary action, it has become clear that VA continues to be hesitant to take disciplinary action against an employee as a result of an unwieldy process that results in very few terminations. A recent study done by the U.S. Government Accountability Office (hereinafter, "GAO") found that, on average, it takes 6 months to 1 year, if not longer, to remove a permanent civil servant in the Federal government.[1]

On June 24, 2015, at a Committee hearing to consider pending legislation, Chairman Isakson discussed the need for all VA employees to be held accountable and to provide the necessary tools to break down barriers that may have existed in the past. Chairman Isakson discussed the need to include language on removal or demotion for cause that was clearly defined. The Committee bill includes a list of provisions, based on this discussion, to define many of the infractions that could be used to hold employees accountable.

These infractions include, but are not limited to: neglected a duty of the position in which the individual was employed; engaged in malfeasance; failed to accept a directed reassignment or to accompany a position in a transfer of function; violations of Department policy or provisions of law; insubordination; over prescription of medication; and waitlist manipulation or knowingly supervising waitlist manipulation. These specific inclusions were the result of testimony at the June 24, 2015, hearing from VA in response to questions from Chairman Isakson and honorary guest, Senator Ron Johnson. Additional input in the Committee bill was received from Senator Johnson's concurrent efforts in regard to S. 1117, the proposed Ensuring Veteran Safety Through Accountability Act of 2015, which was introduced in response to allegations of misconduct, mismanagement, and abuse at the VA Medical Center in Tomah, Wisconsin.

Senator Johnson, as Chairman of the Committee on Homeland Security and Governmental Affairs, launched an investigation into

[1] U.S. Government Accountability Office, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods are Needed to Address Substandard Employee Performance* http://www.gao.gov/assets/670/668339.pdf.

the allegations concerning the Tomah VA Medical Center in January 2015 and issued a subpoena on April 29, 2015, for documents and communications relating to work at the facility. During his statement for the record before this Committee on June 24, 2015, he revealed a few findings from his investigation which include:

- "In November 2007, a veteran named Kraig Ferrington died from a lethal mixture of seven different drugs shortly after receiving treatment at Tomah.
- "In July 2009, Dr. Chris Kirkpatrick was fired from Tomah after raising concerns about over-medication. Tragically, the same day he was terminated, Dr. Kirkpatrick committed suicide.
- "On August 30, 2014, Jason Simcakoski died in the Tomah Mental Health Wing as a result of, quote, 'mixed drug toxicity.' His autopsy revealed he had over a dozen different medications in his system.
- "On January 12, 2015, Candace Delis brought her father, Thomas Baer, to the Tomah VA Urgent Care Center with stroke like symptoms. Mr. Baer waited over 2 hours for attention. His family believes he died of neglect. It is hard not to agree."[2]

Senator Johnson further stated, "To date, no one at Tomah has been fired. The medical professionals who prescribed the lethal cocktail of drugs that killed Jason Simcakoski are still collecting a paycheck from the American taxpayer. The events in Tomah make it abundantly clear that there must be more accountability for VA medical professionals."[3] S. 1117 would increase accountability with VA health care professionals. The Committee bill incorporates the objective of S. 1117 and not only increases accountability among VA medical professionals but all VA employees.

Senator Marco Rubio submitted the following statement for the record which outlined his views on the legislation:

> In the wake of reports detailing how very few people have been held accountable for last year's scandal at the Department of Veterans Affairs, on April 23, 2015, I introduced the 'Department of Veterans Affairs Accountability Act of 2015,' which would give the VA secretary new, expanded authorities to remove or demote any VA employee based on poor performance or misconduct.
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> This legislation would expand on last year's VA reform law by giving the VA secretary the authority to terminate any employees for performance-related issues, not just managers. It mirrors legislation (H.R. 1994) filed in the U.S. House of Representatives by House Veterans' Affairs Committee Chairman Jeff Miller.
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> Last year, I was proud to lead the effort to give the VA secretary the authority to fire senior executives based on performance. A year later, it's clear additional authorities are needed to deal with the full scope of the problems at the VA. Once enacted into law, this new legislation will leave the VA secretary with no excuse but to hold people accountable for the dysfunction and incompetence plaguing our VA system, while protecting whistleblowers from retal-

[2] Testimony of the Honorable Ron Johnson, during a hearing entitled, "Pending Health Care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015.
[3] *Id.*

> iation. We must show our veterans the respect they have earned by removing any employees with terrible performance from the system our veterans rely on.
>
> I also want to recognize that later this week the Subcommittee of the House Committee on Oversight and Government Reform will hold its own hearing on reforming the VA. It will hear testimony from Florida constituent and St. Johns County Assistant Administrator Jerry Cameron about problems stemming from the VA's selection and leasing process for new facilities. It represents part of a larger national problem regarding our VA facilities, which are experiencing significant delays and cost overruns that ultimately hurt both veterans and taxpayers.
>
> I strongly support S. 1082 and recommend the committee favorably report the bill out as soon as possible so that it receives a vote by the full U.S. Senate. I also hope today's hearing will help shed light on VA accountability reform and provide the committee with a better understanding of how we can best serve our veterans.[4]

Based on the work of Chairman Isakson in conjunction with Senators Johnson and Rubio, the Committee print of S. 1082 made significant improvements to ensure additional safeguards are in place providing whistleblower protections. The Committee receives critical information from veterans and VA employees who communicate their concerns regarding problems at VA. Allegations continue to arise from these same VA employees who report retaliation within the VA. The Committee takes very seriously the charge to protect these whistleblowers and believes the culture of intimidation to cover up problems has harmed VA's ability to appropriately care for our veterans.

The bill strictly prohibits the Secretary from removing or demoting anyone who has sought corrective action from the Office of Special Counsel based on what they believe is whistleblower retaliation. Additionally, the bill requires the Office of Special Counsel to establish a mechanism to expedite all cases in which the employee is under investigation or the Secretary has requested a personnel action take place. The legislation provides notice be given to the employee as well as reasons for the termination of the investigation in order for the Office of Special Counsel to close out the employee's whistleblower complaint.

The Committee holds a critical responsibility of providing protections to whistleblowers in an effort to improve care for our Nation's veterans. Unfortunately, according to data provided by the Office of Special Counsel, VA employees have filed the largest number of complaints compared to any other executive branch agency. Secretary McDonald has testified on multiple occasions about changing the culture at VA, and the Committee believes the protections added to S. 1082 will help address the history of intimidation or retaliation to tamp down whistleblower complaints.

Committee Bill. Section 2 of the Committee bill would amend chapter 7 of title 38, U.S.C., to add additional authority to the Sec-

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[4] Statement for the Record of the Honorable Marco Rubio, submitted for a hearing entitled, "Pending Health Care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015. http://www.veterans.senate.gov/imo/media/doc/Senator%20Marco%20Rubio%20FTR%206.24.15.pdf.

retary to remove or demote underperforming employees. Specifically, section 2 outlines types of misconduct that the Secretary may consider warrants removal or demotion and requires the Secretary to submit to the Committees on Veterans' Affairs of the Senate and House notice in writing of such removal or demotion and the reason, no later than 30 days after removing or demoting an individual under this authority. Under section 2, an employee may appeal their removal or demotion to the MSPB not later than 7 days after the notice date. During this appeal period, the individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits. In an effort to increase protections given to whistleblowers within VA, section 2 prohibits the Secretary from removing or demoting an individual seeking corrective action from OSC based on an alleged prohibited personnel practice without approval of the Special Counsel. Further, OSC is required to establish a mechanism to expedite cases for corrective action and a standard for approval of removal or demotion.

The Committee believes these additional tools will allow the Secretary to remove poor performing employees and increase productivity and morale at the Department of Veterans Affairs.

Sec. 3. Required probationary period for new employees of Department of Veterans Affairs.

Section 3 of the Committee bill, which is derived from S. 1082 as introduced, extends the current probationary period for VA employees from 12 months to 18 months by adding "Section 715. Probationary period for employees" to chapter 7 of title 38, U.S.C.

Background. An effective, skilled, and high performing workforce is essential to the mission of all Federal agencies, particularly the Department of Veterans Affairs. A probationary period, as required by statute in section 3321(a)(1) of title 5, U.S.C., serves as the last step before an individual is permanently hired by an agency in the competitive civil service and is designed as a screening process to ensure only highly qualified employees serve within the Federal government. During his testimony before this Committee on June 24, 2015, Max Stier, President and CEO of the Partnership for Public Service, stated, "The probationary period serves as a continuation of the assessment process and gives the manager a chance to determine further an individual's fitness for the position; individuals who have not demonstrated the competencies needed to perform well can be removed more easily during this period." [5] An employee's appeal rights are limited during their probationary period and the agency does not have to follow formal procedures for removing an employee as is the case with permanent employees.

Unfortunately, there are widespread concerns that the probationary period is being underutilized and not fulfilling its intent across the Federal government. According to a February 2015 GAO report, "supervisors are often not making performance-related decisions about an individual's future likelihood of success with the

[5] Testimony of Max Stier, President and CEO Partnership for Public Service, during a hearing entitled, "Pending Health care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015. http://www.veterans.senate.gov/imo/media/doc/ PPS%20Stier%20 Testimony%206.24.15.pdf.

agency during the probationary period."[6] The report attributes this to an inadequate amount of time for the supervisor to fully observe the individual's ability to perform all parts of the job and the supervisor's lack of knowledge relating to the timeframe of the individual's probationary period. These issues put agencies at great risk of hiring poor performing individuals.

Notably, the GAO report found that agencies that extended probationary periods beyond the Office of Personnel Management-required year were able to enhance the quality of their workforce. In addition, training for VA employees processing veterans' claims is complex and often can require more than 12 months. Therefore, the Committee believes that extending the probationary period from 12 months to 18 months as in the Committee bill would provide the additional needed time to accurately review an individual's capabilities and enhance the quality of the VA workforce. The amended probationary period in the Committee bill would not apply to health care professionals, including physicians, dentists, podiatrists, optometrists, nurses, physician assistants, expanded-function dental auxiliaries, and chiropractors, who are subject to a probationary period of 24 months as provided by section 7403 of title 38, U.S.C.

Additionally, as the GAO report pointed out, Federal employees are achieving non-probationary status by default as a result of supervisors not knowing when an employee's probationary period ends. The Committee bill addresses this shortcoming by requiring an affirmative decision from the employee's supervisor before the employee's appointment within VA is permanent. It is essential that the supervisor make a conscious evaluation of the individual's capabilities and performance. In his testimony, Max Stier stated, "As an employee's probationary period is coming to a close, we believe managers should be required to make an affirmative decision as to whether the individual has demonstrated successful performance and should continue on past the probationary period."[7] The Committee believes this is an important safeguard to ensuring only highly qualified individuals are made permanent employees. Further, this has the potential to help reduce the amount of employees that should be removed due to poor performance down the road.

Committee Bill. Section 3 of the Committee bill would amend chapter 7 of title 38, U.S.C., to extend the probationary period for new VA employees from 12 months to 18 months. However, it would exclude health care professionals covered under section 7403 of title 38, U.S.C. Section 3 gives the Secretary the authority to extend the probationary period at the discretion of the Secretary. Under section 3 of the Committee bill, the supervisor of the employee in a probationary period is required to determine whether the appointment becomes final based on regulations prescribed for such purpose by the Secretary, upon the expiration of the probationary period.

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[6] U.S. Government Accountability Office, *Federal Workforce: Improved Supervision and Better Use of Probationary Periods are Needed to Address Substandard Employee Performance* http://www.gao.gov/assets/670/668339.pdf.

[7] Stier testimony.

COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the Congressional Budget Office (hereinafter, "CBO"), estimates that enactment of S. 1082 as amended would, relative to current law, have an insignificant effect on spending. The cost estimate provided by CBO, setting forth a detailed breakdown of costs, follows:

CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 30, 2015.

Hon. JOHNNY ISAKSON,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1082, the Department of Veterans Affairs Accountability Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dwayne M. Wright.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 1082—Department of Veterans Affairs Accountability Act of 2015

S. 1082 would modify personnel processes of the Department of Veterans Affairs (VA). CBO estimates that implementing S. 1082 would have an insignificant effect on spending subject to appropriation.

Section 2 would expedite the process for VA to remove or demote employees whose performance or misconduct warrants such an action. CBO expects that the demotion or removal of those employees would have no net budgetary effect because it would result in the promotion or hiring of other employees.

Section 3 would require VA to implement an 18-month probationary period for all new employees. After that time VA could extend the probationary period, make an offer of permanent employment, or terminate the employment. VA currently employs a 12-month probationary period for new employees to the competitive service and career Senior Executive Service employees of the department. CBO estimates that implementing section 3 would have no net budgetary effect.

Enacting S. 1082 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 1082 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On July 20, 2015, CBO transmitted a cost estimate for H.R. 1994, the VA Accountability Act of 2015, as ordered reported by the House Committee on Veterans' Affairs on July 15, 2015. Sections 2 and 3 of S. 1082 are similar to sections 2 and 3 of H.R. 1994 and the estimated budgetary effects are the same.

The CBO staff contact for this estimate is Dwayne M. Wright. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact that would be incurred in carrying out the Committee bill. The Committee finds that S. 1082 as reported would not entail any regulation of individuals or businesses or result in any impact on the personal privacy of any individuals and that the paperwork resulting from enactment would be minimal.

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7(b) of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or by proxy by Members of the Committee on Veterans' Affairs at its July 22, 2015, meeting. On that date, the Committee voted by voice vote to order favorably reported with amendments S. 1082, a bill to amend title 38, United States Code, to provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes.

AGENCY REPORT

On June 24, 2015, Dr. Rajiv Jain, Assistant Deputy Under Secretary for Health for Patient Care Services, Veterans Health Administration, Department of Veterans Affairs, appeared before the Committee on Veterans' Affairs and submitted testimony on, among other things, S. 1082. In addition, on July 15, 2015, VA provided views on S. 1117. Excerpts from those statements are reprinted below:

STATEMENT OF DR. RAJIV JAIN, ASSISTANT DEPUTY UNDER SECRETARY FOR HEALTH FOR PATIENT CARE SERVICES, VETERANS HEALTH ADMINISTRATION, U.S. DEPARTMENT OF VETERANS AFFAIRS

Good morning Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee. Thank you for inviting us here today to present our views on several bills that would affect VA benefits programs and services. Joining us today is Catherine Mitrano, Deputy Assistant Secretary for Resolution Management, and Jennifer Gray, Staff Attorney in VA's Office of General Counsel.

We do not yet have cleared views on the Draft Biological Implant Tracking and Veteran Safety Act of 2015 or on S. 1117, the Ensuring Veteran Safety Through Accountability Act of 2015. Additionally, we do not have cleared views on sections 203, 205, 208, and 209(b) of S. 469, sections 3 through 8 of S. 1085, section 2 of the draft bill referred to on the agenda as "Discussion Draft" or sections 101–106, 204, 205, 403 and 501 of The Jason Simcakoski Memorial Opioid Safety Act. We will be glad to work with the Committee on prioritization of those views and cost estimates not included in our statement.

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S. 1082—DEPARTMENT OF VETERANS AFFAIRS ACCOUNTABILITY ACT OF 2015

Section 2 of S. 1082 would give the Secretary of Veterans Affairs the same authority for VA non-Senior Executive employees granted to him for VA Senior Executives under 38 U.S.C. § 713. Under section 2, the Secretary could remove a VA non-Senior Executive employee from the civil service or demote the employee, either through a reduction in grade or annual rate of pay. If the individual being removed or demoted is seeking corrective action from the Office of Special Counsel (OSC) the Secretary could not take an action under this section without approval from OSC. Individuals removed or demoted under section 2 could appeal that action to a Merit Systems Protection Board administrative judge (AJ), who would be required to issue a decision on the appeal within 45 days. Decisions issued by an AJ would be final and not subject to further appeal.

Section 3 of this bill would require all new VA employees who are competitively appointed or appointed to the Senior Executive Service at VA to serve a probationary period of at least 18 months. The probationary period could be extended past 18 months by the Secretary.

S. 1082 is the latest in a series of legislative proposals targeting VA employees by providing extraordinary authority to sanction

them, not available in other Federal agencies. Last summer, section 707 of the Veterans Access, Choice, and Accountability Act of 2014 added 38 U.S.C. § 713, establishing an expedited removal authority that strictly limits VA Senior Executives' post termination appeal rights. While that provision gave the Secretary additional flexibility in terms of holding VA Senior Executives accountable for misconduct or poor performance, it constrained the Secretary's ability to retain gifted senior leaders by singling out VA Senior Executives for disparate treatment from their peers at other agencies.

It is likely that S. 1082 would result in unintended consequences for VA, such as a loss of qualified and capable staff to other government agencies or the private sector. Section 2 of this bill, which is based on 38 U.S.C. § 713, would apply to all VA employees regardless of their grade or position. VA's workforce consists of a diverse array of employees, including employees with advanced degrees in business, law, and medicine. Many of these employees accept lower pay to serve at VA, and a large number of these employees are Veterans. While VA's employees are motivated first and foremost by a desire to serve Veterans, another motivation to accept lower pay shared by many Federal employees is the job security afforded by protections such as appeal rights that attach at the end of a probationary period. Diminishing those appeal rights or expanding the probationary period will reduce the motivation to pursue public service at VA.

Section 2 of the bill poses due process concerns, due to its failure to provide the employee with a chance to be heard prior to losing the benefits of employment and its failure to guarantee that an employee's case will be fairly judged before the sanction becomes final.

Section 3 of this bill would also adversely impact recruitment at VA by extending the probationary period for employees from what is usually 12 months to 18 months and authorizing the Secretary of Veterans Affairs to extend the probationary period beyond that time at his discretion. In general, the probationary period serves as a way of examining whether an employee is suitable for his or her position. The 12-month cap of probationary periods serves a dual role: it gives management a finite amount of time within which to gauge an employee's performance, and it gives the employee a reasonable period of time within which he or she would be made a permanent Federal employee. By expanding that time to 18 months and allowing the Secretary to extend the probationary period past 18 months, section 3 of this bill may impact VA's ability to recruit employees. Like the diminishment of due process and appeal rights, the longer probationary period simply makes VA less competitive for the candidates seeking job security. In effect, S. 1082 would create a new class of employees in the government, a "VA class." These "VA class" employees could be removed or demoted at the discretion of the Secretary, would receive fewer due process rights and abbreviated MSPB appeal rights in actions taken under section 2 of the bill and would serve longer probationary periods than their peers at other government agencies. This will hinder VA efforts to make the "VA class" of employee the very finest employees to serve our Veterans and ensure that they timely receive the benefits and care to which they are entitled.

By singling out VA employees, the legislation would dishearten a workforce dedicated to serving Veterans and hurt VA's efforts to recruit and retain high performing employees. VA will continue to work with the Committee and VSO's on how the Secretary can best hold employees accountable while preserving the ability to recruit and retain the highly skilled workforce VA needs to best serve Veterans.

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THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

JUL 15 2015

The Honorable Johnny Isakson
Chairman
Committee on Veterans' Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The agenda for the Senate Committee on Veterans' Affairs' June 3, 2015, and June 24, 2015, legislative hearings included a number of bills that the Department of Veterans Affairs (VA) was unable to address in our testimony. We are aware of the Committee's interest in receiving our views and cost estimates for those bills.

With this letter, we are providing the following remaining views and cost estimates for the following bills from the June 3, 2015, legislative hearing: S. 471, the Women Veterans Access to Quality Care Act of 2015 and sections 4(b)-(c) and 5 of the draft Veterans Health Act of 2015.

We are also providing views and costs on the following bills from the June 24, 2015, legislative hearing: the Draft Biological Implant Tracking and Veteran Safety Act of 2015; on S. 1117, the Ensuring Veteran Safety through Accountability Act of 2015; sections 203, 205, 208, and 209(b) of S. 469, the Women Veterans and Families Health Services Act of 2015; sections 3 through 8 of S. 1085, the Military and Veteran Caregiver Services Improvement Act of 2015; section 2 of the draft bill referred to on the agenda as "Discussion Draft"; and sections 101-106, 204, 205, 403, and 501 of the draft Jason Simcakoski Memorial Opioid Safety Act.

In the time requested for transmittal of follow-up views, VA was not able to include in this letter the following views: sections 2 and 4 of S. 297, the Frontlines to Lifelines Act of 2015; the draft bill on establishing a joint VA-Department of Defense formulary for systemic pain and psychiatric medications; sections 2, 3, and 5 of the draft Veterans Health Act of 2015, sections 203, 208, and 209(b) of S. 469, the Women Veterans and Families Health Services Act of 2015; sections 4(b) and 8 of S. 1085, the Military and Veteran Caregiver Services Improvement Act of 2015; and sections 105, 205, 403, and 501 of the Jason Simcakoski Memorial Opioid Safety Act. The remaining views can be forwarded in a separate and final follow-up views letter.

We appreciate the opportunity to comment on this legislation and look forward to working with you and other Committee Members on these important legislative issues.

Sincerely,

Robert A. McDonald

Enclosure

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JUNE 24, 2015, AGENDA

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S. 1117, ENSURING VETERAN SAFETY THROUGH ACCOUNTABILITY ACT OF 2015

S. 1117 would amend 38 U.S.C. 713 to allow the Secretary to remove individuals appointed under 38 U.S.C. 7401, which include health care and scientific professionals (e.g., physicians, dentists, nurses), if the Secretary determines the performance or misconduct of the individual warrants removal. Under S. 1117, actions taken under 38 U.S.C. 713 would not be subject to the provisions of 38 U.S.C. 7461(b) and 7462, or 5 U.S.C. 7503, 7513, and 7543(b). The bill would also make conforming amendments to 38 U.S.C. 7461(b) and 7462.

38 U.S.C. 713 was established last summer under section 707 of the Veterans Access, Choice, and Accountability Act of 2014 (Public Law 113–146). Under 38 U.S.C. 713, the Secretary may remove or, under certain circumstances, transfer an employee to a General Schedule position, if the Secretary determines that the performance or misconduct of the individual warrants such a removal or transfer. Individuals who are removed or transferred under 38 U.S.C. 713 have limited post-termination or transfer appeal rights.

At present, 38 U.S.C. 713 only applies to VA Senior Executives: career appointees in the Senior Executive Service or individuals appointed under 38 U.S.C. 7306(a) or 7401(1) to an administrative or executive position. S. 1117 would expand the application of 38 U.S.C. 713 to allow the Secretary to remove other Title 38 employees, including practicing physicians, dentists, nurses, and other individuals, regardless of their grade or rank, while limiting the post-termination appeal rights for these employees.

While 38 U.S.C. 713 gave the Secretary additional flexibility in terms of holding VA Senior Executives accountable for misconduct or poor performance, it constrained the Secretary's ability to retain gifted senior leaders by singling out VA Senior Executives for disparate treatment from their peers at other agencies. It is likely that S. 1117 would result in unintended consequences for VA, such as a loss of qualified and capable health care and scientific professionals to other government agencies or the private sector. Many of these employees accept lower pay to serve at VA, and a large number of these employees are Veterans. While VA's employees are

motivated first and foremost by a desire to serve Veterans, another motivation to accept lower pay shared by many Federal employees is the job security afforded by protections such as appeal rights that attach at the end of a probationary period. Diminishing those appeal rights will reduce the motivation to pursue public service at VA.

The bill also poses due process concerns, due to its failure to provide the employee with a chance to be heard prior to losing the benefits of employment and its failure to guarantee that an employee's case will be fairly judged before the sanction becomes final.

By singling out VA employees, the legislation would dishearten a workforce dedicated to serving Veterans and hurt VA's efforts to recruit and retain high performing employees. VA will continue to work with the Committee and VSO's on how the Secretary can best hold employees accountable while preserving the ability to recruit and retain the highly skilled workforce VA needs to best serve Veterans.

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MINORITY VIEWS OF HON. RICHARD BLUMENTHAL, RANKING MEMBER, HON. PATTY MURRAY, HON. BERNARD SANDERS, HON. SHERROD BROWN, HON. JON TESTER, AND HON. MAZIE K. HIRONO ON S. 1082, AS REPORTED BY THE VETERANS' AFFAIRS COMMITTEE

On July 22, 2015, the Senate Committee on Veterans' Affairs (hereinafter, "Committee") voted, by voice vote, to approve S. 1082, as amended, the Department of Veterans Affairs Accountability Act of 2015 (hereinafter, "S. 1082"). We strongly believe that all Federal employees should be held accountable for their performance and conduct. S. 1082, however, fails to provide the Department of Veterans Affairs (hereinafter, "VA" or "Department") with the tools it needs to increase accountability and address underlying performance problems at VA. We also believe that there are serious questions about the constitutionality of section 2 of S. 1082.

As summarized in the Minority Views, the constitutional defects with S. 1082 were raised during the Committee's June 24, 2015, hearing by Ranking Member Blumenthal and witnesses for the Department. In its Statement for the Record, the U.S. Merit Systems Protection Board (hereinafter, "MSPB") outlined these constitutional defects, articulated due process requirements, and noted that "the requirements of the Constitution have shaped the rules under which Federal agencies may take adverse action against Federal employees."[1] MSPB also noted that the constitutionality of section 713 of title 38, United States Code (hereinafter, "U.S.C."), which authorize the Secretary to expedite the removal or demotion of a Senior Executive Service employee, is currently the subject of litigation at the U.S. Court of Appeals for the Federal Circuit.[2] Subsequently, during the Committee's meeting of July 22, 2015, Ranking Member Blumenthal filed and offered an amendment to S. 1082 that would have cured the constitutional concerns with the legislation along with other material weaknesses. In addition, the Blumenthal amendment would have addressed employee performance issues and the broader management challenges at VA. However, at the request of the Chairman, the Blumenthal amendment was subsequently withdrawn. We believe that as Members of the Senate, we have a responsibility to ensure that the legislation we pass comports with the Constitution.

On June 24, 2015, the Committee held a legislative hearing to consider certain benefits and health care legislation pending before the Committee, including S. 1082. The witnesses at this hearing included VA officials, leaders of veterans service organizations (here-

[1] Statement for the Record of Susan Tsui Grundmann, Chairman, MSPB, for a hearing, entitled "Pending Health Care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015, available at http://www.veterans.senate.gov/imo/media/doc/MSPB%20Statement%20FTR%206.24.15.pdf

[2] *Id.*

inafter, "VSOs"), and a nonprofit, nonpartisan organization whose goal is reforming our civil service system, the Partnership for Public Service (hereinafter, "Partnership"). In its testimony, the Partnership suggested a number of reforms to address underlying performance problems and the barriers to hiring, managing, and retaining talent at VA.[3] For instance, the Partnership suggested holding VA political leaders accountable for managing the Department by requiring that all political appointees have annual performance plans similar to the performance plans required for career employees. The Partnership also suggested holding managers accountable for managing employee performance, including poor performance or misconduct, and improving training for managers. According to the Partnership, the "biggest contributor to the performance problems at the VA is the quality of the management, rather than the quality of the system."[4] Another suggestion from the Partnership is the creation of a new promotion track at VA so that technical experts can advance in their careers without having to go into management positions for which they may be ill-suited. Finally, the Partnership mentioned that in their discussions with leaders across the Federal Government, the Partnership hears that "many of the delays in dealing with performance and accountability happen at the agency level before action is even taken." To address this, the Partnership suggested a review of VA's internal processes for addressing performance issues. Rather than simply attempting to find ways to fire employees more quickly, we believe that these reforms should be the focus of the Committee's legislative efforts in trying to increase accountability and address underlying performance problems at VA. None of these reforms are included in S. 1082 as reported by the Committee.

Section 2 of S. 1082 would authorize the Secretary of Veterans Affairs (hereinafter, "Secretary") to remove or demote a VA employee if the Secretary determines the performance or misconduct warrants such removal or demotion. The conduct that would be covered under section 2 of S. 1082 includes any "performance or misconduct the Secretary determines warrants the removal or demotion" of an employee, thus giving the Secretary total discretion to fire or demote employees. Besides turning all VA employees into "at-will" employees, section 2 of S. 1082 removes due process protections for all VA employees. Specifically, section 2 of S. 1082 provides that the procedures listed in 5 U.S.C. § 7513(b) ("Cause and Procedure") and chapter 43 of title 5 ("Performance Appraisal") "shall not apply to a removal or demotion" referred in that section. Because S. 1082 eliminates every VA employee's right to notice and an opportunity to respond prior to the imposition of an adverse personnel action, its constitutionality is in question. As MSPB noted in its Statement for the Record for the Committee's June 24, 2015, hearing, according to the Supreme Court of the United States:

> * * * the Constitution requires that any system which provides that a public employee may only be removed for

[3] Testimony of Max Stier, President and CEO of the Partnership for Public Service, during a hearing entitled, "Pending Health Care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015, available at http://www.veterans.senate.gov/imo/media/doc/PPS%20Stier%20Testimony%206.24.15.pdf

[4] *Id.*

> specified causes must also include an opportunity for the employee—prior to his or her termination—to be made aware of the charges the employer will make, present a defense to those charges, and appeal the removal decision to an impartial adjudicator.[5]

Section 2 of S. 1082 fails to meet this constitutional requirement. The importance of making sure a law is constitutional relates to enforcement. A law that is unconstitutional is unenforceable. Consequently, a law that is unenforceable is not effective in preventing the wrong that it was designed to correct as it creates an expectation that cannot be fulfilled, thus making an unenforceable law worse than no law at all.

In addition to undermining pre-removal due process rights for all VA employees, section 2 of S. 1082 severely limits post-removal appeal rights, raising a second concern about the constitutionality of this section. Specifically, section 2 of S. 1082 provides that a VA employee who has been demoted or removed may appeal to the MSPB, which would be required to refer the appeal to an MSPB administrative judge for adjudication. An MSPB administrative judge would then be required to issue a decision "no later than 45 days after the date of the appeal," and that decision would "final" and not subject to further review, either by the three-member Board or a Federal court. The justification for removing the three-member Board at MSPB and the courts from the appeal process is not clear to us, especially since employees who are removed are no longer employed and therefore do not receive pay during the entire MSPB adjudication process. As drafted, section 2 of S. 1082 authorizes MSPB administrative judges—who are Federal employees employed under the General Schedule—to make a final decision on behalf of an agency which is in the executive branch of the Federal Government. We have serious concerns that this violates the Appointments Clause contained in Article II, Section 2, of the U.S. Constitution. In its Statement of Administration Policy (hereinafter, "SAP") on H.R. 1994, the House companion legislation of S. 1082, the White House also noted the Appointments Clause concerns.[6]

In addition to the constitutional concerns outlined herein, S. 1082 will have several damaging, unintended consequences—all of which were articulated by some of the witnesses during the Committee's June 24, 2015, hearing.

First, section 2 of S. 1082 would suppress whistleblowers. In its testimony for the Committee's June 24, 2015, hearing, the Partnership noted that S. 1082 "will do more harm than good" and that "* * * as written, there are no protections for whistleblowers or employees who believe they have been fired for partisan or other discriminatory reasons."[7] In a letter to Members of the Committee, the American Federation of Government Employees also noted the lack of whistleblower protections in section 2 of S. 1082:

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[5] Tsui Grundmann

[6] Statement of Administration Policy, H.R. 1994—VA Accountability Act of 2015, Executive Office of the President, Office of Management and Budget, July 28, 2015, available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1994r_20150728.pdf. The President's senior advisors have recommended that he veto H.R. 1994.

[7] Stier.

> Under Section 2 of S. 1082, every whistleblower, along with every other VA employee, would become at-will employees. Without due process rights, no VA employee who wishes to keep his or her job should ever again become a whistleblower in the workplace or at the Congressional witness table.[8]

The lack of whistleblower protections in section 2 of S. 1082 is particularly troubling, for VA has a history of retaliation against whistleblowers[9] and, according to the "2014 Federal Employee Viewpoint Survey," which is conducted by the U.S. Office of Personnel Management, 44 percent of employees at VA do not believe they can disclose a suspected violation of law or regulation without fear of reprisal.[10] Should S. 1082 as reported by the Committee be signed into law, we believe that this figure will increase.

Second, section 2 of S. 1082 will significantly impact VA's ability to recruit and retain talent. As VA noted in the Committee's June 24, 2015, hearing, "S. 1082 is the latest in a series of legislative proposals targeting VA employees by providing extraordinary authority to sanction them, [which is] not available in other Federal agencies," and that by "singling out VA employees," S. 1082 will "dishearten a workforce dedicated to serving veterans and hurt VA's efforts to recruit and retain high performing employees."[11] The Partnership, in its testimony for the Committee's June 24, 2015, hearing, and the White House, in its SAP for the House companion legislation to S. 1082, also noted how S. 1082 will hinder VA from attracting and retaining qualified professionals. During the hearing, the Disabled American Veterans (hereinafter, "DAV"), reminded the Committee that:

> "* * * it is vitally important to VA's long-term future to create an environment in which the best and the brightest professionals choose VA over other Federal or private employers. While poor performance and misconduct cannot be tolerated, VA employees must be confident that fairness and due process govern how they are selected, promoted, demoted, sanctioned, or terminated.
>
> Without assurances of fairness and due process in the workplace, talented doctors, nurses and other professionals may not even entertain working in the VA, especially since they must already be willing to accept below-market salaries, pay and hiring freezes, government shutdowns, and other challenges of working in the Federal Government."[12]

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[8] Letter from the American Federation of Government Employees to Members of the Senate Committee on Veterans' Affairs, July 21, 2015.

[9] See Eric Lichtblau, *V.A. Punished Critics on Staff, Doctors Assert*, N.Y. Times, June 15, 2014, available at http://www.nytimes.com/2014/06/16/us/va-punished-critics-on-staff-doctors-assert.html?hpw&rref=us&_r=0

[10] The "2014 Federal Employment Viewpoint Survey Results" is available at http://www.fedview.opm.gov/2014FILES/2014_Governmentwide_Management_Report.PDF

[11] Statement of Dr. Rajiv Jain, Assistant Deputy Secretary for Health for Patient Care Services, Veterans Health Administration, VA, for a hearing, entitled "Pending Health Care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015, available at http://www.veterans.senate.gov/imo/media/doc/VHA%20Jain%20Testimony%206.24.15.pdf

[12] Testimony of Adrian M. Atizado, Assistant National Legislative Director, DAV, during a hearing entitled, "Pending Health Care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015, available at http://www.veterans.senate.gov/imo/media/doc/DAV%20Atizado%20Testimony%206.24.15.pdf

Section 3 of S. 1082 will also make conditions of employment at VA significantly less attractive than in other Federal agencies by extending the probationary period for employees from 12 months to 18 months, and authorizing the Secretary to extend the probationary period beyond 18 months at the Secretary's discretion. As VA noted during the Committee's June 24, 2015, hearing, this provision—like the provisions that would diminish due process and appeal rights—"simply makes VA less competitive" because VA employees "would serve longer probationary periods than their peers at other government agencies."[13] Arguably, the longer probationary period in section 3 of S. 1082—which would only apply to VA and not the rest of the Federal Government—will negatively impact VA's ability to recruit talent.

Third, section 2 of S. 1082 will have a "dramatic impact" on the workload of MSPB administrative judges.[14] As noted above, section 2 of S. 1082 excludes the three-member MSPB board from playing any role in the appellate process. MSPB administrative judges would have all adjudicatory responsibility for claims arising under section 2 of S. 1082 "not later than 45 days after the date of the appeal." Besides failing to pass constitutional muster, the timeframe to adjudicate appeals provided in section 2 of S. 1082 will, according to the MSPB, "make proper adjudication extremely difficult for MSPB administrative judges."[15] The impracticality of the timeframe is clear once we consider the average case processing time for MSPB administrative judges for the last two fiscal years: during Fiscal Year (hereinafter, "FY") 2013, MSPB administrative judges adjudicated 6,340 appeals, with an average case processing time of 93 days per appeal; during FY 2014, MSPB administrative judges adjudicated 16,354 appeals, with an average case processing time of 262 days per appeal.[16] We have concerns about the ability of MSPB to review cases within 45 days. It is not clear to us why section 2 of S. 1082 would dramatically shorten the time MSPB has to make a decision since individuals who are fired do not receive pay during the entire MSPB adjudication process.[17]

Finally, section 2 of S. 1082 will negatively impact the whistleblower protection efforts of the U.S. Office of Special Counsel (hereinafter, "OSC") by tying OSC's limited resources to "thousands of pre-emptive and otherwise non-meritorious complaints brought by VA workers."[18] As drafted, section 2 of S. 1082 prohibits the Secretary from using the disciplinary authority if an employee has a complaint pending with OSC "without the approval of the Special Counsel." While the intent of this provision is to allow OSC to review a pending whistleblower complaint to ensure that the removal or demotion is not retaliatory, we are concerned that it will result in a massive increase of claims, some of them without merit, filed with OSC by VA employees. In its Statement for the Record for the

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[13] Dr. Jain
[14] Tsui Grundmann
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Statement for the Record, Carolyn N. Lerner, Special Counsel, OSC, for a hearing, entitled "Pending Health Care and Benefits Legislation," before the Senate Committee on Veterans' Affairs, June 24, 2015, available at http://www.veterans.senate.gov/imo/media/doc/OSC%20Statement%20FTR%206.24.15.pdf

Committee's June 24, 2015, hearing, the Special Counsel mentioned:

> With limited staff and resources, [section 2 of S. 1082] will make it extraordinarily difficult for OSC to manage our caseload effectively, and to separate the meritorious whistleblower cases from those that are filed primarily to stall an anticipated or feared disciplinary action.[19]

This blow to OSC's whistleblower protection efforts is particularly troubling as, according to the Special Counsel, the "percentage of OSC cases filed by VA employees is already overwhelming, and continues to climb."[20] In 2015, OSC estimates that nearly 40 percent of its incoming cases will be filed by VA employees.[21]

[19] *Id.*
[20] *Id.*
[21] *Id.*

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

Title 5. Government Organization and Employees

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Part III. Employees

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Subpart B. Employment and Retention

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Chapter 33. Examination, Selection, and Placement

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Subchapter I. Examination, Certification, and Appointment

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SEC. 3321. COMPETITIVE SERVICE; PROBATIONARY PERIOD

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(c) Subsections (a) and (b) of this section shall not apply with respect to appointments in the Senior Executive [Service or] *Service,* the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service*, or any individual covered by section 715 of title 38.*

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Subchapter VIII. Appointment, Reassignment, Transfer, and Development in the Senior Executive Service

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SEC. 3393. CAREER APPOINTMENTS

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(d) An individual's initial appointment as a career appointee shall become final only after the individual has served a 1-year probationary period as a career appointee. *The preceding sentence shall not apply to any individual covered by section 715 of title 38.*

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Subpart C. Employee Performance

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Chapter 43. Performance Appraisal

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Subchapter I. General Provisions

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SEC. 4303. ACTIONS BASED ON UNACCEPTABLE PERFORMANCE

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(f) This section does not apply to—

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(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, **[**or**]**

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions**[**.**]** *, or*

(4) any removal or demotion under section 714 of title 38.

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Title 38. Veterans' Benefits

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Part I. General Provisions

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Chapter 7. Employees

Sec.

701. Placement of employees in military installations.

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SEC. 714. EMPLOYEES: REMOVAL OR DEMOTION BASED ON PERFORMANCE OR MISCONDUCT

(a) IN GENERAL.—(1) The Secretary may remove or demote an individual who is an employee of the Department if the Secretary determines the performance or misconduct of the individual warrants such removal or demotion.

(2) A determination under paragraph (1) that the performance or misconduct of an individual warrants removal or demotion may consist of a determination of any of the following:

(A) The individual neglected a duty of the position in which the individual was employed.

(B) The individual engaged in malfeasance.

(C) The individual failed to accept a directed reassignment or to accompany a position in a transfer of function.

(D) The individual violated a policy of the Department.

(E) The individual violated a provision of law.

(F) The individual engaged in insubordination.

(G) The individual over prescribed medication.

(H) The individual contributed to the purposeful omission of the name of one or more veterans waiting for health care from an electronic wait list for a medical facility of the Department.

(I) The individual was the supervisor of an employee of the Department, or was a supervisor of the supervisor, at any level, who contributed to a purposeful omission as described in subparagraph (H) and knew, or reasonably should have known, that the employee contributed to such purposeful omission.

(J) Such other performance or misconduct as the Secretary determines warrants the removal or demotion of the individual under paragraph (1).

(3) If the Secretary removes or demotes an individual as described in paragraph (1), the Secretary may—

(A) remove the individual from the civil service (as defined in section 2101 of title 5); or

(B) demote the individual by means of—

(i) a reduction in grade for which the individual is qualified and that the Secretary determines is appropriate; or

(ii) a reduction in annual rate of pay that the Secretary determines is appropriate.

(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1) Notwithstanding any other provision of law, any individual subject to a demotion under subsection (a)(3)(B)(i) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade.

(2) An individual so demoted may not be placed on administrative leave or any other category of paid leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the individual reports for duty. If an individual so demoted does not report for duty, such individual shall not receive pay or other benefits pursuant to subsection (e)(5).

(c) NOTICE TO CONGRESS.—Not later than 30 days after removing or demoting an individual under subsection (a), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives notice in writing of such removal or demotion and the reason for such removal or demotion.

(d) PROCEDURE.—(1) The procedures under section 7513(b) of title 5 and chapter 43 of such title shall not apply to a removal or demotion under this section.

(2)(A) Subject to subparagraph (B) and subsection (e), any removal or demotion under subsection (a) may be appealed to the Merit Systems Protection Board under section 7701 of title 5.

(B) An appeal under subparagraph (A) of a removal or demotion may only be made if such appeal is made not later than seven days after the date of such removal or demotion.

(e) EXPEDITED REVIEW BY ADMINISTRATIVE LAW JUDGE.—(1) Upon receipt of an appeal under subsection (d)(2)(A), the Merit Systems Protection Board shall refer such appeal to an administrative law judge pursuant to section 7701(b)(1) of title 5. The administrative law judge shall expedite any such appeal under such section and, in any such case, shall issue a decision not later than 45 days after the date of the appeal.

(2) Notwithstanding any other provision of law, including section 7703 of title 5, the decision of an administrative judge under paragraph (1) shall be final and shall not be subject to any further appeal.

(3) In any case in which the administrative judge cannot issue a decision in accordance with the 45-day requirement under paragraph (1), the removal or demotion is final. In such a case, the Merit Systems Protection Board shall, within 14 days after the date that such removal or demotion is final, submit to Congress and the Committees on Veterans' Affairs of the Senate and House of Representatives a report that explains the reasons why a decision was not issued in accordance with such requirement.

(4) The Merit Systems Protection Board or administrative judge may not stay any removal or demotion under this section.

(5) During the period beginning on the date on which an individual appeals a removal from the civil service under subsection (d) and ending on the date that the administrative judge issues a final decision on such appeal, such individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

(6) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board, and to any administrative law judge to whom an appeal under this section is referred, such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

(f) WHISTLEBLOWER PROTECTION.—(1) In the case of an individual seeking corrective action (or on behalf of whom corrective action is sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in section 2302(b) of title 5, the Secretary may not remove or demote such individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(2) The Office of Special Counsel shall establish—

(A) a mechanism to expedite cases for corrective action under paragraph (1); and

(B) a standard for the approval under paragraph (1) of removal or demotion under subsection (a), which may include a determination as to whether the removal or demotion is a prohibited personnel action.

(3)(A) Notwithstanding any other provision of law, the Special Counsel may terminate an investigation of a prohibited personnel practice alleged by an individual in connection with a removal or demotion of the individual under subsection (a) only after the Special Counsel provides to the individual a written statement of the reasons for the termination of the investigation.

(B) The written statement provided to the individual under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding without the consent of such individual.

(g) RELATION TO OTHER PROVISIONS OF LAW.—(1) The authority provided by this section is in addition to the authority provided by subchapter V of chapter 75 of title 5 and chapter 43 of such title.

(2) Subchapter V of chapter 74 of this title shall not apply to any action under this section.

(h) DEFINITIONS.—In this section:

(1) The term "individual" means an individual occupying a position at the Department of Veterans Affairs but does not include—

(A) an individual, as that term is defined in section 713(g)(1); or

(B) a political appointee.

(2) The term "grade" has the meaning given such term in section 7511(a) of title 5.

(3) The term "misconduct" includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

(4) The term "political appointee" means an individual who is—

(A) employed in a position described under sections 5312 through 5316 of title 5, (relating to the Executive Schedule);

(B) a limited term appointee, limited emergency appointee, or noncareer appointee in the Senior Executive Service, as defined under paragraphs (5), (6), and (7), respectively, of section 3132(a) of title 5; or

(C) employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5 of the Code of Federal Regulations.

SEC. 715. PROBATIONARY PERIOD FOR EMPLOYEES

(a) IN GENERAL.—Notwithstanding sections 3321 and 3393(d) of title 5, the appointment of a covered employee shall become final only after such employee has served a probationary period of 540 days. The Secretary may extend a probationary period under this subsection at the discretion of the Secretary.

(b) COVERED EMPLOYEE.—In this section, the term "covered employee"—

(1) means any individual—

(A) appointed to a permanent position within the competitive service at the Department; or

(B) appointed as a career appointee (as that term is defined in section 3132(a)(4) of title 5) within the Senior Executive Service at the Department; and

(2) does not include any individual with a probationary period prescribed by section 7403 of this title.

(c) PERMANENT HIRES.—Upon the expiration of a covered employee's probationary period under subsection (a), the supervisor of the employee shall determine whether the appointment becomes final based on regulations prescribed for such purpose by the Secretary.

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