

VA ACCOUNTABILITY FIRST ACT OF 2017

MARCH 10, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ROE of Tennessee, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1259]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1259) 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, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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## PURPOSE AND SUMMARY

H.R. 1259, the “VA Accountability First Act of 2017,” was introduced by Representative David P. Roe, M.D. of Tennessee, Chairman of the Committee on Veterans’ Affairs, on February 28, 2017. This bill would provide the Secretary of the Department of Veterans Affairs (VA) with the authority to expeditiously remove, demote, or suspend any VA employee, including Senior Executive Service (SES) employees, based on performance or misconduct. It would also: provide improved protections for whistleblowers; allow the Secretary to reduce an employee’s federal pension if he or she is convicted of a felony that influenced his or her job at VA; recoup a bonus provided to an employee who engaged in misconduct or poor performance prior to receiving the bonus; and allow the Secretary to recoup any relocation expenses that were authorized for a VA employee only through the employee’s ill-gotten means, such as fraud, waste, or malfeasance.

## BACKGROUND AND NEED FOR LEGISLATION

### *Section 1. Short title; Table of Contents*

This section provides the short title of the bill and the table of contents.

### *Section 2. References to Title 38, United States Code*

This Section provides that amendments and changes made to current law in this bill are to title 38, United States Code (U.S.C.), unless otherwise specified.

### *Section 3. Removal, demotion, and suspension of employees based on performance or misconduct*

On April 9, 2014, at a full Committee oversight hearing on patient safety, then-Full Committee Chairman, Representative Jeff Miller of Florida, stated that, based on information received by the Committee, forty patients at the Phoenix VA Health Care System may have died while awaiting medical care. It was also revealed that the Committee had evidence from whistleblowers that the Phoenix VA Health Care System kept multiple sets of records to conceal prolonged wait times for appointments.

The allegations of several whistleblowers, including Drs. Samuel Foote and Kathleen Mitchell from Phoenix, shed light on these issues and improper practices, which resulted in one of the largest scandals that VA has ever endured. Subsequently, on August 7, 2014, in part to address the problems related to the scandal exposed by the Committee, the Veterans Access, Choice and Accountability Act (“Choice Act”) was signed into law by President Barack Obama, which, among many other provisions, gave the Secretary the expedited authority to remove SES employees based on performance or misconduct.

Since the passage of the Choice Act, the Committee has continued to uncover many instances of mismanagement or misconduct by VA employees. Some of these instances include: allegations of

the manipulation of disability claims data at the Philadelphia Regional Benefit Office;<sup>1</sup> the continued construction failures of a new medical center in Aurora, Colorado that is now many years and a billion dollars over budget;<sup>2</sup> allegations of illegal use of government purchase cards resulting in the waste of billions of dollars annually;<sup>3</sup> allegations of a VA employee remaining in her job after participating in an armed robbery;<sup>4</sup> numerous instances of not properly disciplining employees involved with the theft of opioids or missing prescriptions;<sup>5</sup> and many other examples of poor performance or misconduct. Throughout all of these incidents, it has become clear that VA often does not hold individuals appropriately accountable for their actions.

A recent study done by the U.S. Government Accountability Office (GAO), found that, on average, it takes six months to a year, if not longer, to remove a permanent civil servant in the Federal Government.<sup>6</sup> This problem is epitomized by an example from 2014 where a VA peer-support specialist took a veteran, who was an inpatient at the substance abuse clinic of the Central Alabama Veterans Health Care System, to an off-campus location where he helped the veteran purchase illegal drugs and paid for the veteran to partake in other illicit behaviors.<sup>7</sup> It took VA over a year to even begin the removal process for this employee.<sup>8</sup> Furthermore, a recent study by Vanderbilt University's Center for the Study of Democratic Institutions found that when they surveyed non-management federal workers across the government and asked them how often under-performing, non-management employees are reassigned or dismissed, 70% said it "rarely or never happens."<sup>9</sup> The Committee believes that these are clear indications that VA employees, and the federal system at large, are trapped in a failed and antiquated civil service system that is in desperate need of reform.

Therefore, Section 3 would amend title 38, U.S.C., and create section 719, which would provide the VA Secretary with the authority to remove, demote, or suspend any title 5, hybrid title 38, or SES VA employee for performance or misconduct. Under this Section, the employee would be entitled to advance notice and the

<sup>1</sup>After 10-month probe, report slams Phila. VA, Philly.com, April 17, 2015 [http://articles.philly.com/2015-04-17/news/61222505\\_1\\_allison-hickey-veterans-affairs-benefits-office-diana-rubens](http://articles.philly.com/2015-04-17/news/61222505_1_allison-hickey-veterans-affairs-benefits-office-diana-rubens).

<sup>2</sup>Aurora VA official: No line-by-line account of where \$1 billion went, *The Denver Post*, July 1, 2015 [http://www.denverpost.com/news/ci\\_28415366/va-deputy-secretary-making-eighth-trip-denver-hospital](http://www.denverpost.com/news/ci_28415366/va-deputy-secretary-making-eighth-trip-denver-hospital).

<sup>3</sup>VA Put Vets at Risk by Spending Billions Unlawfully, Whistleblower Says, Government Executive, May 14, 2015 <http://www.govexec.com/contracting/2015/05/va-put-vets-risk-spending-billions-unlawfully-whistleblower-says/112828/>.

<sup>4</sup>VA Worker Gets Job Back Despite Armed Robbery Charge, *The Daily Caller News Foundation*, March 22, 2015 <http://dailycaller.com/2016/03/22/va-worker-gets-job-back-despite-armed-robbery-charge/>

<sup>5</sup>AP: VA data show low rate of discipline for drug loss, theft, February 27, 2017 <http://www.wfmj.com/story/34610739/ap-va-data-show-low-rate-of-discipline-for-drug-loss-theft>

<sup>6</sup>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>.

<sup>7</sup>Report: VA employee took recovering vet to crack house, *Montgomery Advertiser*, August 16, 2014. <http://www.montgomeryadvertiser.com/story/news/local/alabama/2014/08/17/report-va-employee-took-recovering-vet-crack-house/14190573/>.

<sup>8</sup>A VA employee, a crack house, and a lengthy firing process, *The Washington Post*, August 29, 2014. <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/08/29/a-va-employee-a-crack-house-and-a-lengthy-firing-process/>.

<sup>9</sup>The Fiscal Times, *Federal Employees: Can't Hire the Best, Can't Fire the Worst*, July 17, 2015. <http://www.thefiscaltimes.com/2015/07/17/Federal-Employees-Can-t-Hire-Best-Can-t-Fire-Worst>.

opportunity to respond to the charges, which cannot exceed ten business days altogether. The Secretary would then have five business days to make a final determination on the disciplinary action after reviewing the employee's response. Once this decision has been made, the employee would be entitled to appeal his or her removal, demotion, or suspension to the Merit Systems Protection Board (MSPB), as long as the appeal is made within 7 business days of receiving his or her final disciplinary action from the Secretary. An administrative judge from the MSPB would then have 45 days to complete an expedited appeal and render a decision. Beyond this level of appeal, the employee or the VA would be allowed to petition for further review by the full MSPB and both parties would be authorized to seek judicial review of the full MSPB's decision to the U.S. Court of Appeals for the Federal Circuit. If the administrative judge under the MSPB is unable to complete the first level of appeal within 45 days, the MSPB would have 14 days to submit a report to Congress explaining why it was unable to render a decision within the required timeframe. In reviewing this appeal, the MSPB, at both the administrative judge and full MSPB levels, must provide deference to the Secretary's level of punishment and would be required to uphold the decision, for both performance and misconduct charges, if the case is supported by substantial evidence.

To provide fairness for all employees and streamline the appeals process, the procedure set up by this Section to dispute a removal, demotion, or suspension for performance or misconduct, would supersede any title 5, U.S.C., requirements and any current collective bargaining agreements that VA has at both the national and local levels. The Committee understands this is a major shift, in not only VA's current policy but also across the entire civil service system, but believes that such a step is necessary to ensure that the expedited timeline created by this Section is not bypassed by current grievance procedures provided in collective bargaining agreements. For example, the Committee found that, if each procedural step is followed, VA's master agreement with the American Federation of Government Employees (AFGE) triggers a 349-day process, and this time period can be expanded.<sup>10</sup> The Committee believes that it would defy common sense to have the expedited provisions of this bill superseded by a process that can take 349 days or more. Some have contended that the arbitration process can take longer than a decision by the MSPB and ". . . arbitrators tend to be more open to reversing disciplinary cases in general."<sup>11</sup> The Committee finds this contrary to the goal of reforming the VA and providing the avenue to more expeditiously remove unacceptable employees.

To prevent retaliation, this Section would also protect whistleblowers by not allowing the Secretary to remove, demote, or suspend an employee if he or she has filed a complaint with the Office of Special Counsel (OSC) or under the whistleblower protections that were enacted into law as part of the "Continuing Appropriations and Military Construction, Veterans Affairs, and Related

<sup>10</sup> Master Agreement Between the American Federation of Government Employees and the U.S. Department of Veterans Affairs, March 2011. [https://www.va.gov/lmr/docs/agreements/afge/master\\_agreement\\_between\\_dva\\_and\\_afge-fin\\_march\\_2011.pdf](https://www.va.gov/lmr/docs/agreements/afge/master_agreement_between_dva_and_afge-fin_march_2011.pdf).

<sup>11</sup> Berry, John V. "MSBP vs. Arbitration—A Choice for Federal Employees" February 25, 2014. <http://www.msplawblog.com/2014/02/mspb-vs-arbitration-a-choice-for-federal-employees.html>.

Agencies Appropriations Act of 2017, and Zika Response and Preparedness Act,” (P.L. 114–223) until such complaints are resolved and/or finalized. The Committee believes that providing these protections is critically important, as whistleblowers are vital to this Committee’s oversight of VA. Further, the Committee believes that the new disciplinary process outlined by this Section would provide constitutionally adequate levels of due process for employees while still providing the Secretary with the authority to remove, demote, or suspend any VA employee for poor performance or misconduct.

*Section 4. Reduction of benefits for Department of Veterans Affairs employees convicted of certain crimes*

As a result of the wait list scandal referenced throughout this report, a new focus was placed on holding VA employees accountable. When the Department does take appropriate action, managers are often blocked from making real progress due to the length and complexity of current disciplinary procedures, which can allow an employee to elude punishment and an adverse record of conduct on the employee’s employment file by retiring in lieu of removal. The Committee believes that employees who are proposed for removal due to their misconduct or poor performance should not be able to retire or resign without any consequence and with their full federal pensions. Once employees file for retirement, irrespective of any proposed removal from federal service, current law does not permit actions that would reduce the employee’s federal pension and benefits except in rare and extreme circumstances, such as in cases of treason or terrorism.

In 1954, Congress enacted what is commonly known as the “Hiss Act,” which prohibited the distribution of any federal retirement pensions to Federal Government employees, as well as Members of Congress, who were convicted of offenses “relating to disloyalty, the national defense and national security, conflicts of interest, bribery and graft, or for federal offenses relating generally to the exercise of one’s ‘authority, influence, power, or privileges as an officer or employee of the Government.’”<sup>12</sup> In 1961, Congress amended the statute to narrow this authority, so that a federal employee’s pension could only be reduced for more serious offenses that could harm the protection of the United States such as treason and acts of terrorism.<sup>13</sup> While the Committee understands the congressional intent behind setting such a high bar for recouping an employee’s federal pension, the Committee believes the VA patient access scandal and VA’s demonstrated inability to hold employees accountable in a timely manner—therefore allowing individuals with the most egregious charges against them to retire in lieu of punishment—warrants a change in current civil service laws to ensure that VA employees do not personally benefit from felonious activity.

Therefore, Section 4 would amend chapter 7 of title 38, U.S.C., to allow the Secretary to reduce the retirement pay for any VA employee upon his or her conviction of a felony that influenced that employee’s performance at work. The Secretary would have the au-

<sup>12</sup>Congressional Research Service Report No. 96–530, Sept. 12, 2013, page 1, <https://www.fas.org-sgp-crs-misc/96-530.pdf> (citing P.L. 83–769, 68 Stat. 1142 (Sept. 1, 1954), see now 5 U.S.C. § 8311 et seq.).

<sup>13</sup>P.L. 87–299, 75 Stat. 640 (Sept. 26, 1961), see now 5 U.S.C. § 8312.

thority to reduce the accrued years of credible service counted towards an employee's pension by the number of years in which the employee was found to have committed acts involved in the felony conviction. Any contributions made by that employee toward his or her pension during this period would be returned to the employee in a lump sum. This Section would not, however, allow the Secretary to reduce any accrued federal health benefits. Before the reduction could take place, the employee would be entitled to notification of the reduction and an opportunity to respond as well as an appeal of the Secretary's final decision to the Director of the Office of Personnel Management. The Committee believes that providing the VA Secretary with this authority still affords protections to employees by targeting only instances of felonies that influence the employee's work performance while also providing a fair process for the employee to dispute such an action.

*Section 5. Authority to recoup bonuses or awards paid to employees of Department of Veterans Affairs*

The Committee's investigations into the wait list scandal have uncovered evidence that some VA employees and VA senior managers may have falsified data to improve their performance metrics to receive bonuses. Regardless of whether falsified data used to justify the receipt of bonus money was deliberately manipulated or not, bonuses should be awarded on the basis of actual, verified performance, and not on an inaccurate portrayal of one's work.

Following investigations by the Committee, the VA's Office of Inspector General (VAOIG), and outside media outlets that brought these VA scandals to light during previous Congresses, Committee Members questioned the large bonuses that were issued to many VA employees, especially many senior VA leaders who oversaw facilities where "secret" appointment wait-lists were used. Committee Members questioned VA at several Committee hearings from April 2014 to August 2014 on whether the Secretary would have the legal authority to recoup any performance awards or bonuses issued to VA employees if the Secretary deemed their performance, particularly performance based on manipulated or inaccurate data, merited the recoupment. On June 17, 2014, Committee staff was told at a briefing by Mr. Samuel Retherford, VA's then-Principal Deputy Assistant Secretary for Human Resources and Administration, that the Secretary had the authority to rescind any bonus or performance award from an SES employee within 12 months of it being awarded to the employee. Later, at a June 20, 2014, full Committee oversight hearing entitled, "A Review of Awarding Bonuses to Senior Executives at the Department of Veterans Affairs," the Honorable Gina Farrissee, VA's then-Assistant Secretary for Human Resources and Administration, informed Members of the Committee that the Secretary did not have the authority to rescind any bonus or performance award from any employee after the award had been issued.<sup>14</sup>

On July 15, 2014, following the conflicting statements made by VA employees as to whether the Secretary had the authority to rescind a performance award, then-Chairman Representative Jeff

<sup>14</sup>House Committee on Veterans' Affairs hearing, "A Review of Awarding Bonuses to Senior Executives at the Department of Veterans Affairs," June 20, 2014, <https://edit-republicans-veterans.house.gov/sites/republicans.veterans.house.gov/files/113-75.PDF>.

Miller of Florida sent then-Acting Secretary Sloan Gibson a letter explicitly inquiring whether VA had the authority to rescind a bonus already issued to an employee. Mr. Gibson replied via letter on August 19, 2014, that “the Department does not have the authority to rescind performance awards issued in accordance with policies and paid to employees for performance ratings that are final.”

The Committee believes that if a VA employee acts unbecoming of VA and its mission to veterans, as determined by the Secretary, then the Secretary should have the authority to rescind any bonus or performance award issued to that employee. This Section would authorize the recoupment of any bonus if the Secretary determines that the employee engaged in misconduct or poor performance and that the bonus would not have been paid to the employee had the Secretary been made aware of the misconduct or poor performance prior to the payment of the award. Under this Section, the employee would be provided pre-recoupment notice and an opportunity to respond to the Secretary’s recoupment order. This pre-recoupment step, the Secretary’s review of the employee’s response, and the final decision would have to be completed within 15 business days from the initial notice of the proposed recoupment. Following the Secretary’s decision, the employee would have seven days to appeal such decision to another Federal Government agency or department. The head of such agency or department would be required to make a final decision on this appeal within 30 days of the filing of the appeal. In congruence with the previous Section, the Committee believes that the new procedures set up in this Section would provide the appropriate level of expediency while still maintaining a fair process for employees to dispute the recoupment.

*Section 6. Authority to recoup relocation expenses paid to or on behalf of employees of Department of Veterans Affairs*

Relocation incentives and expenses have long been considered as a positive benefit to relocate VA employees to locations that they would not otherwise be inclined to, and a way to defray the costs associated with this change of duty station. In its final report, entitled “Inappropriate Use of Position and the Misuse of the Relocation Program and Incentives,” the VAOIG concluded that two SES employees from VA’s Veterans Benefit Administration (VBA), Ms. Diana Rubens and Ms. Kimberly Graves, “. . . inappropriately used their positions of authority for personal and financial benefit when they participated personally and substantially in creating opportunities for their own transfers to positions they were interested in filling.”<sup>15</sup> In doing so, the VAOIG concluded that they orchestrated and financially benefitted from their moves and that VA should examine whether a bill of collection should be issued to Ms. Rubens and Ms. Graves for the relocation expenses associated with their moves. The amount of money that the VAOIG recommended VA collect from Ms. Rubens and Ms. Graves was \$274,019 and \$129,468, respectively.

<sup>15</sup> Report no. 15-02997-526, VA Office of the Inspector General, “Administrative Investigation: Inappropriate Use of Position and Misuse of Relocation Program and Incentives,” September 28, 2015, <http://www.va.gov/oigtoubs/VAOIG-15-2997-526.pdf>.

In its written response to the report, VA concurred with the VAOIG's recommendation to determine whether bills of collection should be issued to recover unjustified relocation incentives paid to Ms. Rubens and Ms. Graves, but failed to take action to rescind any of the relocation expenses paid out to both of these SES employees. VA later claimed that there was never an attempt to recoup these funds, because, during the review process of potential disciplinary action against Ms. Rubens and Ms. Graves, then-VA Deputy Secretary Sloan Gibson concluded that he did not agree with the VAOIG's assessment that either employee had misused their authority to orchestrate their own transfers for financial gain.

During a December 9, 2015, Committee hearing entitled, "Fact Check: An End of Year Review of Accountability at the Department of Veterans Affairs," Mr. Gibson did not make it clear if VA had the explicit authority to recoup relocation expenses paid to VA employees if it was determined that they received these taxpayer-funded expenses through ill-gotten means.<sup>16</sup> The Committee received similarly vague and unclear statements from VA officials in subsequent follow-up requests for information and during questioning of a VA witness at an April 14, 2016, Subcommittee on Economic Opportunity legislative hearing in the 114th Congress on H.R. 4138, which contained language similar to that in this Section.<sup>17</sup>

To address VA's uncertainty of its authority to recoup relocation expenses issued to a VA employee, this Section was proposed to give the Secretary the clear authority to recoup any taxpayer funds associated with a VA employee's relocation when the Secretary deems it necessary. This Section would authorize the Secretary to recoup all, or a portion, of any funding provided for relocation expenses authorized under section 5724 or 5724a of title 5, U.S.C., if the Secretary determines that the expenses were not lawfully authorized or that the employee committed an act of fraud, waste, or malfeasance that influenced the authorization of such expenses. In a timeline that aligns with that provided for the recoupment of bonuses in Section 5 of this bill, employees would be entitled to notification of the proposed recoupment and an opportunity to respond to the Secretary's recoupment order. Following the Secretary's decision, the employee would have seven days to appeal such decision to another Federal Government agency or department. The head of such agency or department would be required to make a final decision on this appeal within 30 days of filing. The Committee believes that this Section would provide the Secretary with yet another needed tool to hold VA employees accountable while still providing appropriate levels of due process rights through the review by a third party entity to ensure that this authority is not abused.

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<sup>16</sup>House Committee on Veterans Affairs, "Fact Check: An End of Year Review of Accountability at the Department of Veterans Affairs," December 9, 2015.

<sup>17</sup>House Committee on Veterans Affairs Subcommittee on Economic Opportunity, "Legislative Hearing On: H.R. 748; H.R. 2551; H.R. 3286; H.R. 3419; H.R. 4138; And 4 Draft Bills," April 14, 2016.



*Section 7. Time period for response to notice of adverse actions against supervisory employees who commit prohibited personnel actions*

Essential to the Committee's oversight efforts, is the information it receives from veterans and VA employees who bring problems and concerns regarding the Department to the Committee's attention. Unfortunately, as a result of VA employees' anonymous or public allegations of wrongdoing, many individuals report retaliation at the hands of supervisors, senior managers, and other VA employees. This retaliation discourages employees from stepping forward to bring problems and concerns to light, leading to a pernicious and toxic environment where problems are disguised and not fully addressed. As a result, veterans suffer the consequences.

The "Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act" (P.L. 114-223) created section 733 of title 38, U.S.C., which authorized a new whistleblower process that provides an opportunity for whistleblowers to resolve issues at the lowest level but also prescribed a plan for swift resolution if lower-level attempts are not possible. As part of these new protections, language was inserted to provide for a swift accountability procedure for those who have retaliated against whistleblowers. This Section would amend section 733 of title 38, U.S.C., to match the pre-notification requirements and timelines with the pre-notification timelines that would be in place for discipline under Section 3 of this bill.

*Section 8. Direct hiring authority for medical center directors and VISN directors*

The Committee recognizes a need for stable, permanent leadership at VA medical centers (VAMCs), which have experienced high levels of turnover in recent years. For example, a March 2015 VA Fact Sheet claimed that, from June 2014 to March 2015, 91 percent of VA medical facilities had new leaders or leadership teams installed and an October 2015 CNN interview with then-VA Deputy Secretary, Sloan Gibson, claimed that more than half of Veterans Health Administration (VHA) senior leaders had turned over in the previous two years. Considering that VA continues to rank among the worst-performing large Federal agencies in terms of effective leadership and that approximately 60 percent of VA employees are over the age of 45, the Committee is concerned that VA lacks a dependable pipeline of emerging leaders and will continue to struggle to recruit high-performing employees to fill critical leadership roles.<sup>18 19</sup> Furthermore, VA's hiring and onboarding processes are notoriously slow, sometimes taking upwards of six months to bring on new hires, which can create and contribute to vacancies for VAMC and Veterans Integrated Service Network (VISN) director positions.<sup>20</sup> An equally important step to building strong leadership

<sup>18</sup> Partnership for Public Service, "Best Places to Work Large Agency Rankings," Accessed March 9, 2017. <http://bestplacestowork.org/BPTW/rankings/overall/large>.

<sup>19</sup> House Committee on Veterans Affairs Subcommittee on Health and Subcommittee on Economic Opportunity Hearing, "Legislative Hearing on draft legislation to improve the authority of the Secretary of Veterans Affairs to hire and retain physicians and other employees of the Department of Veterans Affairs," March 16, 2016.

<sup>20</sup> Ibid.

within the Department is to ensure that leaders are well-qualified. As of May 2016, only 16 of 140 VA medical center directors had clinical training.<sup>21</sup> Without experienced, well-qualified leaders at the helm, facility and VISN staffs lack proper guidance and oversight when making decisions regarding hospital management, clinical operations, and patient care. To address these issues, Section 8 of the bill would authorize VA to directly appoint individuals to VAMC and VISN Director positions if they have a demonstrated ability in the medical profession, health care administration, or health care fiscal management.

*Section 9. Time periods for review of adverse actions with respect to certain employees*

Title 38, U.S.C., authorizes special rules and regulations for hiring, paying, and disciplining certain medical professionals within VA. Section 7401(1) of title 38, U.S.C., specifies that these new rules apply to physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries. Current law requires that if any of these employees face a major adverse action, defined as a removal, suspension, or demotion, that is the result of a question of professional conduct or competence, that employee has the right to either dispute this action through grievance procedures provided through collective bargaining agreements or through VA's internal Disciplinary Appeals Board.

In the interest of providing an equal procedure for all adverse actions, this Section would amend sections 7461, 7462 and 7463 of title 38, U.S.C., to match the process for disputing adverse actions under these sections to the pre-notification and response procedures provided in Section 3 of this bill for non-title 38 employees. This would include a ten business day period prior to taking adverse action and a requirement that the Disciplinary Appeals Board complete its review of the employee's appeal within 45 business days of its filing. In conjunction with Section 3, this Section would also eliminate the ability for bargaining unit employees to use any current grievance procedures to dispute these actions. Additionally, this Section would subject all disciplinary actions for title 38 employees related to professional conduct or competence through this expedited procedure regardless of if they are considered major adverse actions. The Committee believes that the health and safety of veterans should be paramount and that it is appropriate to have an expedited process for actions related to actions that directly impact patient care through professional conduct or competence. This expedited process also provides greater fairness for employees who have been wrongly accused of an egregious action so that they can return to their service to veterans if they are absolved of any wrongdoing.

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<sup>21</sup> Ibid.

## HEARINGS

There were no Subcommittee or full Committee hearings held in relation to H.R. 1259.

## SUBCOMMITTEE CONSIDERATION

There was no Subcommittee consideration of H.R. 1259.

## COMMITTEE CONSIDERATION

On March 8, 2017, the full Committee met in open markup session, a quorum being present, and ordered H.R. 1259 be reported favorably to the House of Representatives by voice vote. During consideration of the bill, the following amendments were considered:

An amendment offered by Representative Tim Walz of Minnesota, Ranking Member of the Committee on Veterans' Affairs, that would have removed Sections 3 and 9 of the base text and replaced them with different and separate processes for removing both front line and SES employees. This process for SES employees would allow them to appeal any removal, reprimand, suspension, involuntary reassignment or demotion internally at VA but would not have a finite timeline on how long the individual has to respond to a proposed action and allows the Secretary to set up an internal grievance process for such disputes. Under this amendment, Secretary would have the authority to remove any other VA employee for performance or misconduct, but the performance would be limited to 2-year window of the proposed disciplinary action, and would maintain the higher evidentiary standard of preponderance of the evidence to sustain the disciplinary action upon appeal for misconduct charges. Further, the timelines for processing disputes under this process would be open-ended, the necessity for performance improvement plans would remain in place, and the grievance process through collective bargaining agreements would also remain intact. The amendment was defeated by voice vote.

An amendment in the nature of substitute, offered by Representative Ann McLane Kuster of New Hampshire, would have maintained the base text of the bill but would have reinserted the right to grieve any proposed actions through the collective bargaining agreements between VA and federal employee unions. The amendment would ensure that these grievance procedures would still be an option for collective bargaining unit employees to dispute removals, demotions, or suspensions. The amendment in the nature of a substitute was defeated by voice vote.

An amendment in the nature of a substitute, offered by Representative Mark Takano of California, that would replace the base text of the bill with a new procedure that would authorize the Secretary to suspend an employee, with a subsequent option for removal, for any performance or misconduct that is a threat to public health or safety. This would be an additional authority to other disciplinary authorities in title 38, U.S.C., and title 5, U.S.C. Under this amendment in the nature of a substitute, the Secretary would be authorized to suspend with-

out pay an employee who is determined to be a threat to public health or safety and then would allow the Secretary to remove the employee, only after an investigation is completed during his or her suspension, which leads the Secretary to determine they are a threat. The employee would be entitled to, after his or her suspension, 30-days' notice with the charges, and an additional 30 days to respond, which can be expanded if the charges are amended. There would be no timeline on the Secretary's review or any change to an appeal process. The amendment in the nature of a substitute was defeated by voice vote.

A motion by Representative Mike Coffman of Colorado to report H.R. 1259 favorably to the House of Representatives was agreed to by voice vote.

#### COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, no recorded votes were taken on amendments or in connection with ordering H.R. 1259 reported to the House.

REPUBLICANS  
DAVID P. ROE, TENNESSEE, CHAIRMAN

DEMOCRATS  
TIM WALZ, MINNESOTA, RANKING

COMMITTEE CORRESPONDENCE  
**U.S. House of Representatives**  
COMMITTEE ON VETERANS' AFFAIRS  
ONE HUNDRED FIFTEENTH CONGRESS  
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March 10, 2017

The Honorable Jason Chaffetz  
Chairman  
House Committee on Oversight and Government Reform  
2157 Rayburn House Office Building  
Washington, D.C. 20515

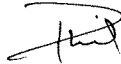
Dear Chairman Chaffetz:

In reference to your letter on March 10, 2017 I write to confirm our mutual understanding regarding H.R. 1259, the "VA Accountability First Act of 2017."

I appreciate the House Committee on Oversight and Government Reform's waiver of consideration of provisions under its jurisdiction and its subject matter as specified in your letter. I acknowledge that the waiver was granted only to expedite floor consideration of H.R. 1259, and does not in any way waive or diminish the House Committee on Oversight and Government Reform's jurisdictional interests over this legislation or similar legislation. I will support a request from the House Committee on Oversight and Government Reform for appointment to any House-Senate conference on H.R. 1259. Finally, I will also support your request to include a copy of our exchange of letters on this matter in the *Congressional Record* during floor consideration.

Again, thank you for your assistance with these matters.

Sincerely,



**David P. Roe M.D.**  
Chairman

cc: The Honorable Paul Ryan, Speaker of the House  
The Honorable Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform  
The Honorable Tim Walz, Ranking Member, Committee on Veterans' Affairs  
Mr. Thomas J. Wickham Jr., Parliamentarian

JASON CHAFFETZ, UTAH  
CHAIRMAN

ONE HUNDRED FIFTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND  
RANKING MINORITY MEMBER

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

MAJORITY (202) 305-5074  
MINORITY (202) 305-5051  
<http://oversight.house.gov>

March 10, 2017

The Honorable David P. Roe  
Chairman  
Committee on Veterans' Affairs  
335 Cannon House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman:

I write concerning H.R. 1259, "VA Accountability First Act of 2017." As you know, the Committee on Veterans' Affairs received an original referral and the Committee on Oversight and Government Reform a secondary referral when the bill was introduced on February 28, 2017. I recognize and appreciate your desire to bring this legislation before the House of Representatives in an expeditious manner, and accordingly, the Committee on Oversight and Government Reform will forego action on the bill.

The Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 1259 at this time we do not waive any jurisdiction over the subject matter contained in this or similar legislation. Further, I request your support for the appointment of conferees from the Committee on Oversight and Government Reform during any House-Senate conference convened on this or related legislation.

Finally, I would ask that a copy of our exchange of letters on this matter be included in the bill report filed by the Committee on Veterans' Affairs, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding.

Sincerely,



Jason Chaffetz  
Chairman

cc: The Honorable Paul D. Ryan, Speaker  
The Honorable Elijah E. Cummings, Ranking Minority Member, Committee on Oversight and Government Reform  
The Honorable Thomas J. Wickham, Parliamentarian

## COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are to provide new accountability procedures for employees at the Department of Veterans Affairs while maintaining their constitutional due process rights as Federal Government employees.

## EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 1259 does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

## COMMITTEE COST ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. The Committee has requested but not received a cost estimate for this bill from the Director of the Congressional Budget Office. The Committee believes that enactment of this bill would result in no additional direct spending over the 2018–2022 period. Assuming the appropriation of authorized amounts, the Committee estimates that the legislation would also have a discretionary cost of \$2 million over the 2018–2022 period.

## BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office. The Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

## FEDERAL MANDATES STATEMENT

With respect to the requirements of Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4), the Committee has requested but not received from the Director of the Congressional Budget Office a statement as to whether the provisions of the reported bill include unfunded mandates.

## ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act would be created by H.R. 1259.

## CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Article I, section 8 of the United States Constitution, H.R. 1259 is authorized by Congress' power to "provide for the common Defense and general Welfare of the United States."

## APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that H.R. 1259 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

## STATEMENT ON DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee finds that no provision of H.R. 1259 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

## DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, 115th Cong. (2017), H.R. 1259 would require the Secretary of the Department of Veterans Affairs, in consultation with the Office of Personnel Management, to prescribe regulations that may provide for the payment to the spouse or children of any individual whose federal annuity may be reduced by Section 4 of the bill.

## SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section I. Short title; Table of Contents*

Section 1 cites the short title of H.R. 1259, to be the "VA Accountability First Act of 2017" and provides the table of contents for the bill.

*Section 2. References to Title 38, United States Code*

Section 2 states that, except as otherwise expressly provided, whenever in this Act that there is an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 38, U.S.C.



*Section 3. Removal, demotion, or suspension of employees based on performance or misconduct*

Section 3(a) would amend subchapter I of chapter 7 of title 38, U.S.C., to create a new section 719 entitled, "Employees: removal, demotion, or suspension based on performance or misconduct."

Sec. 719(a) would provide the Secretary with the authority to remove, demote, or suspend any VA employee for poor performance or misconduct.

Sec. 719(b) would require that if an individual has been demoted under section 719(a), that his or her new annual rate of pay shall begin on the date of his or her demotion. The section would further require that if the individual appeals that demotion, he or she would not be allowed to remain on any category of paid leave during appeal.

Sec. 719(c) would require the Secretary, by no later than thirty days after removing, demoting, or suspending an individual under section 719(a) or under chapter 74 of title 38, U.S.C., who is a employed in a senior executive position, to submit a written notification of the removal, demotion, or suspension to the House and Senate Committees on Veterans' Affairs and to each Member of Congress representing a district in the State or territory where the facility in which the individual was employed immediately before being removed, demoted, or suspended. Sec. 719(c) would require that such notice include the job title of the individual, the location where the individual was employed immediately before being removed, demoted, or suspended, the proposed action, and the reason for such removal, demotion, or suspension. This section would also require that not later than 30 days after the last day of the fiscal year, that the Secretary submit a report to the House and Senate Committees on Veterans' Affairs listing all removals, demotions, and suspensions under this section or under section 74 of title 38, U.S.C., for all other VA employees.

Sec. 719(d) would require that the procedures set up by section 7513(b) and chapter 43 of title 5, U.S.C., shall apply to any removal, demotion, or suspension under this section, except that the period for notice and response, which includes the advance notice period and the response period of section 7513 of title 5, U.S.C., shall not exceed a total of 10 business days. Sec. 719(d) would also not apply procedures under section 7121 of title 5, U.S.C., in respect to any removal, demotion, or suspension under this section. This section would also require the Secretary to issue a final decision with respect to a removal, demotion, or suspension under this section not later than five business days after receiving the individual's response; or in the case of a proposed removal, demotion, or suspension to which the individual does not respond, not later than fifteen business days after the Secretary provides notice of such removal, demotion, or suspension authorized under this section. The procedures under chapter 43 of title 5, U.S.C., would not apply under this section. Sec. 719(d) would also authorize individuals to appeal their removal, demotion, or suspension to the MSPB under 7701(b)(1) of title 5, U.S.C., only if they file such appeal within seven days of their removal, demotion, or suspension.

Sec. 719(e) would set up an expedited process for reviewing appeals made by employees, who are removed, demoted, or suspended under subsection (d)(4)(a) of this section, to an administrative judge

of the MSPB. Under this procedure the administrative judge would have 45 days to issue a decision after an appeal has been filed. Notwithstanding section 7701(c)(1)(B) of title 5, U.S.C., the administrative judge shall uphold the decision of the Secretary to remove, demote, or suspend an employee if the decision is supported by substantial evidence. If the decision is supported by substantial evidence, the administrative judge would not be allowed to mitigate the penalty by the Secretary.

The decision of the administrative judge may be appealed to the MSPB, only if such an appeal is made not later than seven business days after the date of the decision of the administrative judge. In any case in which the administrative judge cannot issue a decision in accordance with the 45-day requirement, the MSPB shall, not later than fourteen business days after the expiration of the 45-day period, submit to the House and Senate Committees on Veterans' Affairs, a report that explains the reasons why a decision was not issued in accordance with the requirement. A decision of the MSPB may also be appealed to the United States Court of Appeals for the Federal Circuit pursuant to section 7703 of title 5, U.S.C. An appeal to the United States Court of Appeals for the Federal Circuit may only be made if such appeal is made not later than seven business days after the date of the decision of the MSPB.

Sec. 719(e) would also require any decision by the Court to be in compliance with section 7462(f)(2) of title 38, U.S.C., and would not allow the MSPB to stay any removal or demotion under this section. This subsection would also not allow any individual to receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits related to the employment of the individual by the Department from the beginning date of his or her appeal of removal from civil service through the date that the United States Court of Appeals for the Federal Circuit issues a final decision.

This subsection would also require the Secretary, to the maximum extent practicable, to provide the MSPB such information and assistance as may be necessary to ensure an appeal under this subsection is expedited and would require that the employee is entitled to back pay if the employee prevails on appeal.

Sec. 719(e) would also require that this subsection supersede any collective bargaining agreement to the extent that such an agreement conflicts with this subsection.

Sec. 719(f) would preclude VA from removing, demoting, or suspending an individual under this section if the individual is seeking corrective action from the Office of Special Counsel based on alleged prohibited personnel practices as described in section 2302(b) of title 5, U.S.C., without the approval of the Special Counsel under section 1214(f) of title 5, U.S.C. This subsection would also not allow the Secretary to remove, demote, or suspend any individual who has filed a whistleblower complaint, as is defined in section 731 of title 38, U.S.C., until a final decision with respect to the whistleblower complaint has been made.

Sec. 719(g) would, notwithstanding any other provision of law, authorize the Special Counsel to terminate an investigation of a prohibited personnel practices alleged by a VA employee or former VA employee once the Special Counsel provides a written state-

ment explaining the reasons for the termination of the investigation. Such written statement would not be admissible as evidence in any judicial or administrative proceeding without the consent of the employee or former employee.

Sec. 719(h) would require the Secretary, to the maximum extent feasible, to fill the vacancy arising as a result of such removal or demotion under subsection (a).

Sec. 719(i) would provide definitions of terms used in the new section 719.

Section 3(b) would repeal section 713 of title 38, U.S.C.

Section 3(c) would make clerical and conforming amendments.

Section 3(d) would provide a temporary exemption from certain limitations on initiation from removal from the Senior Executive Service. Section 3(d) would allow for, during the 120-day period beginning on the date of enactment of this Act, an action to remove an individual from the Senior Executive Service at the Department of Veterans of Affairs notwithstanding section 3592(b) of title 5, U.S.C.

*Section 4. Reduction of benefits for Department of Veterans Affairs employees convicted of certain crimes*

Section 4(a) would amend subchapter I of chapter 7 of title 38, U.S.C., to create a new section 721, entitled “Reduction of benefits of employees convicted of certain crimes.”

Sec. 721(a) would allow the Secretary to reduce any VA employee’s annuity if the employee is removed from his or her position for performance or misconduct, and the Secretary determines that the individual is convicted of a felony that influenced the individual’s performance while employed at VA. Before such order is made, the individual would be afforded a notice of the proposed order; an opportunity to respond to the proposed order not later than 10 business days following receipt of the notice; and an issuance of a final order by the Secretary not later than 5 business days after the Secretary receives the response of the individual. The individual would also have an opportunity to appeal the Secretary’s final order to the Director of the Office of Personnel Management within 7 days of the final issuance by the Secretary. The Director of the Office of Personnel Management would be required to make a final decision with respect to the appeal within 30 business days of receiving the appeal.

Sec. 721(b) would apply the same procedures as prescribed in subsection 721(a) for the reduction of a VA employee’s annuity upon conviction of certain crimes if the individual leaves or retires from employment at the Department prior to the issuance of a final decision with respect to a removal for performance of misconduct.

Sec. 721(c) would require the Director of the Office of Personnel Management to recalculate an individual’s annuity not later than 37 days after the Secretary issues a final order under subsections 721(a) or (b).

Sec. 721(d) would entitle an individual whose annuity is reduced under subsections 721(a) or (b) to be paid so much of the individual’s lump-sum credit as is attributable to the period of covered service.

Sec. 721(e) would require the Secretary, in consultation with the Office of Personnel Management, to prescribe regulations that may

provide for the payment to the spouse or children of any individual referred to in subsections 721(a) or (b) of any amounts that (but for this subsection) would otherwise have been non-payable by reason of such subsections.

Sec. 721(f) would prescribe definitions for this new section 721.

Section 4(b) would apply to any action of removal of an employee of the Department of Veterans Affairs under section 719 or 7461 of title 38, U.S.C., commencing on or after the date of enactment.

*Section 5. Authority to recoup bonuses or awards paid to employees of the Department of Veterans Affairs*

Section 5(a) would amend subchapter I of chapter 7 of title 38, U.S.C., to create a new section 723 entitled, "Recoupment of bonuses or awards paid to employees of Department."

Sec. 723(a) would allow the Secretary to issue an order directing a VA employee to repay the amount, or portion of the amount, of any award or bonus paid to the employee under title 5, U.S.C., including chapters 45 of 53 of such title, if the Secretary determines that the individual engaged in misconduct or poor performance prior to the payment of the award or bonus, and that such award or bonus would not have been paid, in whole or in part, had the misconduct or poor performance been known prior to payment of the award. Prior to repayment of the award, the employee would be afforded notice of the proposed order and an opportunity to respond not later than 10 business days after receiving the order. The Secretary would be required to issue a final decision not later than 5 business days after receiving the individual's response.

Sec. 723(b) would provide the individual with the opportunity to appeal the order to another department or agency of the Federal Government within 7 days of receiving the final issuance of the Secretary.

Sec. 723(c) would require the head of the applicable department or agency of the Federal Government to make a final decision with respect to the appeal within 30 business days after receiving the appeal.

Section 5(b) would make a clerical amendment to add this new section to the table of sections at the beginning of such chapter.

Section 5(c) would require that subsection 723 of title 38, U.S.C., as added by subsection (a), shall apply with respect to an award or bonus paid by the Secretary to an employee of the Department of Veterans Affairs on or after the date of enactment of this Act.

Section 5(d) would declare that nothing in this Act or the amendments made by this Act may be construed to modify the certification issued by the Office of Personnel Management and the Office of Management and Budget regarding the performance appraisal system of the Senior Executive Service of the Department of Veterans Affairs.

*Section 6. Authority to recoup relocation expenses paid to or on behalf of employees of Department of Veterans Affairs*

Section 6(a) would amend subchapter I of chapter 7 to create a new section 725 entitled, "Recoupment of Relocation Expenses Paid on Behalf of employees of Department."

Sec. 725(a) would allow the Secretary, notwithstanding any other provision of law, to issue an order directing an employee of the De-

partment to repay the amount, or portion of the amount, paid to or on behalf of the employee under title 5, U.S.C., for relocation expenses, including any expenses under section 5724 or 5724(A) of such title, if the Secretary determines that the relocation expenses were not lawfully authorized or that the employee committed an act of fraud, waste, or malfeasance that influenced the authorization of the relocation expenses. Prior to repayment of the award, the employee would be afforded notice of the proposed order and an opportunity to respond not later than 10 business days after receiving the order. The Secretary would be required to issue a final decision not later than 5 business days after receiving the individual's response.

Sec. 725(b) would provide the individual with the opportunity to appeal the order to another department or agency of the Federal Government within 7 days of receiving the final issuance of the Secretary.

Sec. 725(c) would require the head of the applicable department or agency of the Federal Government to make a final decision with respect to the appeal within 30 business days after receiving the appeal.

Section 6(b) would make a clerical amendment to add this new section to the table of sections at the beginning of such chapter.

Section 6(c) would require that subsection 725 of title 38, U.S.C., as added by subsection (a), shall apply with respect to an amount paid by the Secretary to or on behalf of an employee for relocation expenses on or after the date of enactment of this Act.

*Section 7. Time period for response to notice of adverse actions against supervisory employees who commit prohibited personnel actions*

Section 7 would amend section 733(a)(2)(B) of title 38, U.S.C., by striking "14 days" in clause (i) and inserting "10 days" and by striking "14-day period" in clause (ii) and inserting "10-day period."

*Section 8. Direct hiring authority for medical center director and VISN directors*

Section 8(a) would amend section 7401 of title 38, U.S.C., by adding at the end the following new paragraph: "Medical center directors and directors of Veterans Integrated Service Networks with demonstrated ability in the medical profession, in health care administration, or in health care fiscal management."

Section 8(b) would provide for a conforming amendment to amend section 7401(a)(1) of title 38, U.S.C., by inserting "and 7401(4)" after "7306."

*Section 9. Time periods for review of adverse actions with respect to certain employees*

Section 9(a) would amend section 7461(b)(2) of title 38, U.S.C., to read as follows: "(2) In any case other than a case described in paragraph (1) that involved or includes a question of professional conduct or competence in which a major adverse action was not taken, such an appeal shall be made through Department grievance procedures under section 7463 of title 38, U.S.C."

Section 9(b) would amend section 7462 of title 38, U.S.C., by striking "at least 30" and inserting "Ten business" in section

7462(b)(1)(A) of title 38, U.S.C.; and by striking “a reasonable time, but not less than seven days” and inserting “The opportunity, within the ten-day notice period” and by striking “orally and” in section 7462(b)(1)(B) of title 38, U.S.C. Section 9(b) would also amend 7462(b)(3)(A) by striking “(A) If a proposed adverse action covered by this section is not withdrawn” and inserting “After considering the employee’s answer, if any”; by striking “21 days” and inserting “5 business days”; by striking “answer. The decision shall include a statement of” and inserting “answer stating”; and by striking subparagraph (B). Section 9(b) would also amend section 7462(b)(4) of title 38, U.S.C., by striking “(A) The Secretary” and all that follows through “(B) The Secretary” and inserting “The Secretary”; and by striking “30 days” and inserting “7 business days”. Section 9(b) would also amend section 7462(c)(3) of title 38, U.S.C., by inserting “the hearing must be concluded not later than 30 business days after the date on which the appeal is filed, and” after “If such a hearing is held,” and would amend section 7462(c)(4) of title 38, U.S.C., by striking “45 days” and inserting “15 business days”; and by striking “120 days” and inserting “45 business days”. Section 9(b) would also amend section 7462(d)(1) of title 38, U.S.C., by striking “90 days” and inserting “15 business days”.

Section 9(c) would amend section 7463 of title 38, U.S.C., by striking subsection (b) and re-designating subsections (c) through (e) as subsection (b) through (d), respectively. Section 9(c) would also amend section 7462(b)(2) of title 38, U.S.C., as so re-designated, by striking “an advance” and inserting “ten business days” in subparagraph (A) and by striking “a reasonable time” and inserting “the opportunity, within the ten business day notice period,” in subparagraph (B) and by striking “orally and” in the same subparagraph.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, 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):

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, 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, and existing law in which no change is proposed is shown in roman):

### **TITLE 38, UNITED STATES CODE**

\* \* \* \* \*

### **PART I—GENERAL PROVISIONS**

\* \* \* \* \*

CHAPTER 7—EMPLOYEES

SUBCHAPTER I—GENERAL EMPLOYEE MATTERS

Sec.

701. Placement of employees in military installations.

\* \* \* \* \*

**[713. Senior executives: removal based on performance or misconduct.]**

715. Congressional testimony by employees: treatment as official duty.

717. Limitation on administrative leave.

*719. Employees: removal, demotion, or suspension based on performance or misconduct.*

*721. Reduction of benefits of employees convicted of certain crimes.*

*723. Recoupment of bonuses or awards paid to employees of Department.*

*725. Recoupment of relocation expenses paid to or on behalf of employees of Department.*

\* \* \* \* \*

SUBCHAPTER I—GENERAL EMPLOYEE MATTERS

\* \* \* \* \*

**[§ 713. Senior executives: removal based on performance or misconduct**

**[(a) IN GENERAL.—(1) The Secretary may remove an individual employed in a senior executive position at the Department of Veterans Affairs from the senior executive position if the Secretary determines the performance or misconduct of the individual warrants such removal. If the Secretary so removes such an individual, the Secretary may—**

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

**[(B) in the case of an individual described in paragraph (2), transfer the individual from the senior executive position to a General Schedule position at any grade of the General Schedule for which the individual is qualified and that the Secretary determines is appropriate.**

**[(2) An individual described in this paragraph is an individual who—**

**[(A) previously occupied a permanent position within the competitive service (as that term is defined in section 2102 of title 5);**

**[(B) previously occupied a permanent position within the excepted service (as that term is defined in section 2103 of title 5); or**

**[(C) prior to employment in a senior executive position at the Department of Veterans Affairs, did not occupy any position within the Federal Government.**

**[(b) PAY OF TRANSFERRED INDIVIDUAL.—(1) Notwithstanding any other provision of law, including the requirements of section 3594 of title 5, any individual transferred to a General Schedule position under subsection (a)(2) shall, beginning on the date of such transfer, receive the annual rate of pay applicable to such position.**

**[(2) An individual so transferred 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 indi-**

vidual so transferred 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 transferring an individual from a senior executive position 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 transfer and the reason for such removal or transfer.

[(d) PROCEDURE.—(1) The procedures under section 7543(b) of title 5 shall not apply to a removal or transfer under this section.

[(2)(A) Subject to subparagraph (B) and subsection (e), any removal or transfer 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 transfer may only be made if such appeal is made not later than seven days after the date of such removal or transfer.

[(e) EXPEDITED REVIEW BY ADMINISTRATIVE JUDGE.—(1) Upon receipt of an appeal under subsection (d)(2)(A), the Merit Systems Protection Board shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5. The administrative judge shall expedite any such appeal under such section and, in any such case, shall issue a decision not later than 21 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 21-day requirement under paragraph (1), the removal or transfer is final. In such a case, the Merit Systems Protection Board shall, within 14 days after the date that such removal or transfer 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 transfer 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 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) RELATION TO TITLE 5.—(1) The authority provided by this section is in addition to the authority provided by section 3592 or subchapter V of chapter 75 of title 5.

[(2) Section 3592(b)(1) of title 5 does not apply to an action to remove or transfer an individual under this section.

[(g) DEFINITIONS.—In this section:

[(1) The term "individual" means—



[(A) a career appointee (as that term is defined in section 3132(a)(4) of title 5); or

[(B) any individual who occupies an administrative or executive position and who was appointed under section 7306(a) or section 7401(1) of this title.

[(2) 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.

[(3) The term “senior executive position” means—

[(A) with respect to a career appointee (as that term is defined in section 3132(a)(4) of title 5), a Senior Executive Service position (as such term is defined in section 3132(a)(2) of title 5); and

[(B) with respect to an individual appointed under section 7306(a) or section 7401(1) of this title, an administrative or executive position.]

\* \* \* \* \*

**§ 719. Employees: removal, demotion, or suspension based on performance or misconduct**

(a) *IN GENERAL.*—*The Secretary may remove, demote, or suspend an individual who is an employee of the Department if the Secretary determines the performance or misconduct of the individual warrants such removal, demotion, or suspension. If the Secretary so removes, demotes, or suspends such an individual, the Secretary may—*

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

(2) *demote the individual by means of a reduction in grade for which the individual is qualified, that the Secretary determines is appropriate, and that reduces the annual rate of pay of the individual; or*

(3) *suspend the individual.*

(b) *PAY OF CERTAIN DEMOTED INDIVIDUALS.*—(1) *Notwithstanding any other provision of law, any individual subject to a demotion under subsection (a)(2) 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 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 or is approved to use accrued unused annual, sick, family medical, military, or court leave. If an individual so demoted does not report for duty or receive approval to use accrued unused leave, such individual shall not receive pay or other benefits pursuant to subsection (e)(5).*

(c) *NOTICE TO CONGRESS.*—(1) *Not later than 30 days after removing, demoting, or suspending an individual employed in a senior executive position under subsection (a) or after removing, demoting, or suspending an individual under chapter 74 of this title, the Secretary shall submit to the Committees on Veterans’ Affairs of the Senate and House of Representatives and to each Member of Congress representing a district in the State or territory where the facility where the individual was employed immediately before being removed, demoted, or suspended is located notice in writing of such removal, demotion, or suspension. Such notice shall include the job*

*title of the individual, the location where the individual was employed immediately before being removed, demoted, or suspended, the proposed action, and the reason for such removal, demotion, or suspension.*

*(2) Not later than 30 days after the last day of a fiscal year, the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report listing all removals, demotions, and suspensions under this section or under chapter 74 of this title during such fiscal year. Each such report shall include the job title of each individual removed, demoted, or suspended, the location where the individual was employed immediately before being so removed, demoted or suspended, the proposed action, and the reason for such removal, demotion, or suspension.*

*(3) In this subsection, the term "senior executive position" means, with respect to a career appointee (as that term is defined in section 3132(a)(4) of title 5), a Senior Executive Service position (as such term is defined in section 3132(a)(2) of title 5).*

*(d) PROCEDURE.—(1) Subsection (b) of section 7513 of title 5 shall apply with respect to a removal, demotion, or suspension under this section, except that the period for notice and response, which includes the advance notice period required by paragraph (1) of such subsection and the response period required by paragraph (2) of such subsection, shall not exceed a total of 10 business days. Subsection (c) of such section and section 7121 of such title shall not apply with respect to such a removal, demotion, or suspension.*

*(2) The Secretary shall issue a final decision with respect to a removal, demotion, or suspension under this section—*

*(A) in the case of a proposed removal, demotion, or suspension to which an individual responds under paragraph (1), not later than five business days after receiving the response of the individual; or*

*(B) in the case of a proposed removal, demotion, or suspension to which an individual does not respond, not later than 15 business days after the Secretary provides notice to the individual under paragraph (1).*

*(3) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section.*

*(4)(A) Subject to subparagraph (B) and subsection (e), any removal, demotion, or suspension under subsection (a) may be appealed to the Merit Systems Protection Board, which shall refer such appeal to an administrative judge pursuant to section 7701(b)(1) of title 5.*

*(B) An appeal under subparagraph (A) of a removal, demotion, or suspension may only be made if such appeal is made not later than 7 days after the date of such removal, demotion, or suspension.*

*(e) EXPEDITED REVIEW.—(1) Upon receipt of an appeal under subsection (d)(4)(A), the administrative judge shall expedite any such appeal under such section and, in any such case, shall issue a final and complete decision not later than 45 business days after the date of the appeal.*

*(2) Notwithstanding section 7701(c)(1)(B) of title 5, the administrative judge shall uphold the decision of the Secretary to remove, demote, or suspend an employee under subsection (a) if the decision is supported by substantial evidence. If the decision of the Secretary*

is supported by substantial evidence, the administrative judge shall not mitigate the penalty prescribed by the Secretary.

(3)(A) The decision of the administrative judge under paragraph (1) may be appealed to the Merit Systems Protection Board.

(B) An appeal under subparagraph (A) of a decision of an administrative judge may only be made if such appeal is made not later than 7 business days after the date of the decision of the administrative judge.

(4) In any case in which the administrative judge cannot issue a decision in accordance with the 45-day requirement under paragraph (1), the Merit Systems Protection Board shall, not later than 14 business days after the expiration of the 45-day period, submit to 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.

(5)(A) A decision of the Merit Systems Protection Board under paragraph (3) may be appealed to the United States Court of Appeals for the Federal Circuit pursuant to section 7703 of title 5.

(B) An appeal under subparagraph (A) of a decision of the Merit Systems Protection Board may only be made if such appeal is made not later than 7 business days after the date of the decision of the Board.

(C) Any decision by such Court shall be in compliance with section 7462(f)(2) of this title.

(6) The Merit Systems Protection Board may not stay any removal, demotion, under this section.

(7) 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 United States Court of Appeals for the Federal Circuit 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 related to the employment of the individual by the Department.

(8) To the maximum extent practicable, the Secretary shall provide to the Merit Systems Protection Board such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

(9) If an employee prevails on appeal under this section, the employee shall be entitled to backpay (as provided in section 5596 of title 5).

(10) This subsection shall supercede any collective bargaining agreement to the extent that such an agreement conflicts with this subsection.

(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, demote, or suspend such individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(2) In the case of an individual who has filed a whistleblower complaint, as such term is defined in section 731 of this title, the Secretary may not remove, demote, or suspend such individual

under subsection (a) until a final decision with respect to the whistleblower complaint has been made.

(g) **TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.**—Notwithstanding any other provision of law, the Special Counsel (established by section 1211 of title 5) may terminate an investigation of a prohibited personnel practice alleged by an employee or former employee of the Department after the Special Counsel provides to the employee or former employee a written statement of the reasons for the termination of the investigation. Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

(h) **VACANCIES.**—In the case of an individual who is removed or demoted under subsection (a), to the maximum extent feasible, the Secretary shall fill the vacancy arising as a result of such removal or demotion.

(i) **DEFINITIONS.**—In this section:

(1) The term “individual” means an individual occupying a position at the Department but does not include—

(A) an individual appointed pursuant to section 7306, 7401(1), or 7405 of this title;

(B) an individual who has not completed a probationary or trial period; or

(C) a political appointee.

(2) The term “suspend” means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for a period in excess of 14 days.

(3) The term “grade” has the meaning given such term in section 7511(a) of title 5.

(4) 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.

(5) 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.

**§ 721. Reduction of benefits of employees convicted of certain crimes**

(a) **REDUCTION OF ANNUITY FOR REMOVED EMPLOYEE.**—(1) The Secretary shall order that the covered service of an employee of the Department removed from a position for performance or misconduct under section 719 or 7461 of this title or any other provision of law shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—

(A) the Secretary determines that the individual is convicted of a felony that influenced the individual’s performance while employed in the position;

- (B) before such order is made, the individual is afforded—
- (i) notice of the proposed order; and
  - (ii) an opportunity to respond to the proposed order by not later than ten business days following receipt of such notice; and
- (C) the Secretary issues the order—
- (i) in the case of a proposed order to which an individual responds under subparagraph (B)(ii), not later than five business days after receiving the response of the individual; or
  - (ii) in the case of a proposed order to which an individual does not respond, not later than 15 business days after the Secretary provides notice to the individual under subparagraph (B)(i).

(2) Upon the issuance of an order by the Secretary under paragraph (1), the individual shall have an opportunity to appeal the order to the Director of the Office of Personnel Management before the date that is seven business days after the date of such issuance.

(3) The Director of the Office of Personnel Management shall make a final decision with respect to an appeal under paragraph (2) within 30 business days of receiving the appeal.

(b) **REDUCTION OF ANNUITY FOR RETIRED EMPLOYEE.**—(1) The Secretary may order that the covered service of an individual who is removed for performance or misconduct under section 719 or 7461 of this title or any other provision of law but who leaves employment at the Department prior to the issuance of a final decision with respect to such action shall not be taken into account for purposes of calculating an annuity with respect to such individual under chapter 83 or chapter 84 of title 5, if—

(A) the Secretary determines that the individual is convicted of a felony that influenced the individual's performance while employed in the position;

- (B) before such order is made, the individual is afforded—
- (i) notice of the proposed order; and
  - (ii) opportunity to respond to the proposed order by not later than ten business days following receipt of such notice; and

- (C) the Secretary issues the order—
- (i) in the case of a proposed order to which an individual responds under subparagraph (B)(ii), not later than five business days after receiving the response of the individual; or
  - (ii) in the case of a proposed order to which an individual does not respond, not later than 15 business days after the Secretary provides notice to the individual under subparagraph (B)(i).

(2) Upon the issuance of an order by the Secretary under paragraph (1), the individual shall have an opportunity to appeal the order to the Director of the Office of Personnel Management before the date that is seven business days after the date of such issuance.

(3) The Director of the Office of Personnel Management shall make a final decision with respect to an appeal under paragraph (2) within 30 business days of receiving the appeal.

(c) **ADMINISTRATIVE REQUIREMENTS.**—Not later than 37 business days after the Secretary issues a final order under subsection (a) or

(b), the Director of the Office of Personnel Management shall recalculate the annuity of the individual.

(d) **LUMP-SUM ANNUITY CREDIT.**—Any individual with respect to whom an annuity is reduced under subsection (a) or (b) shall be entitled to be paid so much of such individual's lump-sum credit as is attributable to the period of covered service.

(e) **SPOUSE OR CHILDREN EXCEPTION.**—The Secretary, in consultation with the Office of Personnel Management, shall prescribe regulations that may provide for the payment to the spouse or children of any individual referred to in subsection (a) or (b) of any amounts which (but for this subsection) would otherwise have been nonpayable by reason of such subsections. Any such regulations shall be consistent with the requirements of sections 8332(o)(5) and 8411(l)(5) of title 5, as the case may be.

(f) **DEFINITIONS.**—In this section:

(1) The term “covered service” means, with respect to an individual subject to a removal for performance or misconduct under section 719 or 7461 of this title or any other provision of law, the period of service beginning on the date that the Secretary determines under such applicable provision that the individual engaged in activity that gave rise to such action and ending on the date that the individual is removed from or leaves a position of employment at the Department prior to the issuance of a final decision with respect to such action.

(2) The term “lump-sum credit” has the meaning given such term in section 8331(8) or section 8401(19) of title 5, as the case may be.

(3) The term “service” has the meaning given such term in section 8331(12) or section 8401(26) of title 5, as the case may be.

### **§ 723. Recoupment of bonuses or awards paid to employees of Department**

(a) **IN GENERAL.**—Notwithstanding any other provision of law, the Secretary may issue an order directing an employee of the Department to repay the amount, or a portion of the amount, of any award or bonus paid to the employee under title 5, including under chapter 45 or 53 of such title, or this title if—

(1) the Secretary determines that the individual engaged in misconduct or poor performance prior to payment of the award or bonus, and that such award or bonus would not have been paid, in whole or in part, had the misconduct or poor performance been known prior to payment;

(2) before such repayment, the employee is afforded—

(A) notice of the proposed order; and

(B) an opportunity to respond to the proposed order by not later than ten business days after the receipt of such notice; and

(3) the Secretary issues the order—

(A) in the case of a proposed order to which an individual responds under paragraph (2)(B), not later than five business days after receiving the response of the individual; or

(B) in the case of a proposed order to which an individual does not respond, not later than 15 business days

after the Secretary provides notice to the individual under paragraph (2)(A).

(b) *APPEALS*.—Upon the issuance of an order by the Secretary under subsection (a), the individual shall have an opportunity to appeal the order to another department or agency of the Federal Government before the date that is seven business days after the date of such issuance.

(c) *FINAL DECISIONS*.—The head of the applicable department or agency of the Federal Government shall make a final decision with respect to an appeal under subsection (b) within 30 business days after receiving such appeal.

**§ 725. Recoupment of relocation expenses paid on behalf of employees of Department**

(a) *IN GENERAL*.—Notwithstanding any other provision of law, the Secretary may issue an order directing an employee of the Department to repay the amount, or a portion of the amount, paid to or on behalf of the employee under title 5 for relocation expenses, including any expenses under section 5724 or 5724a of such title, or this title if—

(1) the Secretary determines that relocation expenses were not lawfully authorized or that the employee committed an act of fraud, waste, or malfeasance that influenced the authorization of the relocation expenses;

(2) before such repayment, the employee is afforded—

(A) notice of the proposed order; and

(B) an opportunity to respond to the proposed order not later than ten business days following the receipt of such notice; and

(3) the Secretary issues the order—

(A) in the case of a proposed order to which an individual responds under paragraph (2)(B), not later than five business days after receiving the response of the individual; or

(B) in the case of a proposed order to which an individual does not respond, not later than 15 business days after the Secretary provides notice to the individual under paragraph (2)(A).

(b) *APPEALS*.—Upon the issuance of an order by the Secretary under subsection (a), the individual shall have an opportunity to appeal the order to another department or agency of the Federal Government before the date that is seven business days after the date of such issuance.

(c) *FINAL DECISIONS*.—The head of the applicable department or agency of the Federal Government shall make a final decision with respect to an appeal under subsection (b) within 30 days after receiving such appeal.

**SUBCHAPTER II—WHISTLEBLOWER COMPLAINTS**

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**§ 733. Adverse actions against supervisory employees who commit prohibited personnel actions relating to whistleblower complaints**

(a) IN GENERAL.—(1) In accordance with paragraph (2), the Secretary shall carry out the following adverse actions against supervisory employees (as defined in section 7103(a) of title 5) whom the Secretary, an administrative judge, the Merit Systems Protection Board, the Office of Special Counsel, an adjudicating body provided under a union contract, a Federal judge, or the Inspector General of the Department determines committed a prohibited personnel action described in subsection (c):

(A) With respect to the first offense, an adverse action that is not less than a 12-day suspension and not more than removal.

(B) With respect to the second offense, removal.

(2)(A) An employee against whom an adverse action under paragraph (1) is proposed is entitled to written notice.

(B)(i) An employee who is notified under subparagraph (A) of being the subject of a proposed adverse action under paragraph (1) is entitled to ~~14 days~~ *10 days* following such notification to answer and furnish evidence in support of the answer.

(ii) If the employee does not furnish any such evidence as described in clause (i) or if the Secretary determines that such evidence is not sufficient to reverse the determination to propose the adverse action, the Secretary shall carry out the adverse action following such ~~14-day period~~ *10-day period*.

(C) Paragraphs (1) and (2) of subsection (b) of section 7513 of title 5, subsection (c) of such section, paragraphs (1) and (2) of subsection (b) of section 7543 of such title, and subsection (c) of such section shall not apply with respect to an adverse action carried out under paragraph (1).

(b) LIMITATION ON OTHER ADVERSE ACTIONS.—With respect to a prohibited personnel action described in subsection (c), if the Secretary carries out an adverse action against a supervisory employee, the Secretary may carry out an additional adverse action under this section based on the same prohibited personnel action if the total severity of the adverse actions do not exceed the level specified in subsection (a).

(c) PROHIBITED PERSONNEL ACTION DESCRIBED.—A prohibited personnel action described in this subsection is any of the following actions:

(1) Taking or failing to take a personnel action in violation of section 2302 of title 5 against an employee relating to the employee—

(A) filing a whistleblower complaint in accordance with section 732 of this title;

(B) filing a whistleblower complaint with the Inspector General of the Department, the Special Counsel, or Congress;

(C) providing information or participating as a witness in an investigation of a whistleblower complaint in accordance with section 732 or with the Inspector General of the Department, the Special Counsel, or Congress;

(D) participating in an audit or investigation by the Comptroller General of the United States;



- (E) refusing to perform an action that is unlawful or prohibited by the Department; or
- (F) engaging in communications that are related to the duties of the position or are otherwise protected.
- (2) Preventing or restricting an employee from making an action described in any of subparagraphs (A) through (F) of paragraph (1).
- (3) Conducting a negative peer review or opening a retaliatory investigation because of an activity of an employee that is protected by section 2302 of title 5.
- (4) Requesting a contractor to carry out an action that is prohibited by section 4705(b) or section 4712(a)(1) of title 41, as the case may be.

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**PART V—BOARDS, ADMINISTRATIONS, AND SERVICES**

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**CHAPTER 74—VETERANS HEALTH ADMINISTRATION - PERSONNEL**

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**SUBCHAPTER I—APPOINTMENTS**

**§ 7401. Appointments in Veterans Health Administration**

There may be appointed by the Secretary such personnel as the Secretary may find necessary for the health care of veterans (in addition to those in the Office of the Under Secretary for Health appointed under section 7306 of this title), as follows:

- (1) Physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries.
- (2) Scientific and professional personnel, such as microbiologists, chemists, and biostatisticians.
- (3) Audiologists, licensed hearing aid specialists, speech pathologists, and audiologist-speech pathologists, biomedical engineers, certified or registered respiratory therapists, dietitians, licensed physical therapists, licensed practical or vocational nurses, nurse assistants, medical instrument technicians, medical records administrators or specialists, medical records technicians, medical technologists, dental hygienists, dental assistants, nuclear medicine technologists, occupational therapists, occupational therapy assistants, kinesiotherapists, orthotist-prosthetists, pharmacists, pharmacy technicians, physical therapy assistants, prosthetic representatives, psychologists, diagnostic radiologic technologists, therapeutic radiologic technologists, social workers, marriage and family therapists, licensed professional mental health counselors, blind rehabilitation specialists, blind rehabilitation outpatient specialists, and such other classes of health care occupations as the Secretary considers necessary for the recruitment and retention needs of the Department subject to the following requirements:

- (A) Such other classes of health care occupations—
  - (i) are not occupations relating to administrative, clerical, or physical plant maintenance and protective services;
  - (ii) would otherwise receive basic pay in accordance with the General Schedule under section 5332 of title 5;
  - (iii) provide, as determined by the Secretary, direct patient care services or services incident to direct patient services; and
  - (iv) would not otherwise be available to provide medical care or treatment for veterans.

(B) Not later than 45 days before the Secretary appoints any personnel for a class of health care occupations that is not specifically listed in this paragraph, the Secretary shall submit to the Committee on Veterans' Affairs of the Senate, the Committee on Veterans' Affairs of the House of Representatives, and the Office of Management and Budget notice of such appointment.

(C) Before submitting notice under subparagraph (B), the Secretary shall solicit comments from any labor organization representing employees in such class and include such comments in such notice.

*(4) Medical center directors and directors of Veterans Integrated Service Networks with demonstrated ability in the medical profession, in health care administration, or in health care fiscal management.*

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**§ 7404. Grades and pay scales**

(a)(1) The annual rates or ranges of rates of basic pay for positions provided in section 7306 and 7401(4) of this title shall be prescribed from time to time by Executive order as authorized by chapter 53 of title 5 or as otherwise authorized by law.

(b) The grades for positions provided for in paragraph (1) of section 7401 of this title shall be as follows. The annual ranges of rates of basic pay for those grades shall be prescribed from time to time by Executive order as authorized by chapter 53 of title 5 or as otherwise authorized by law:

**PHYSICIAN AND DENTIST SCHEDULE**

- Physician grade.
- Dentist grade.

**NURSE SCHEDULE**

- Nurse V.
- Nurse IV.
- Nurse III.
- Nurse II.
- Nurse I.

**CLINICAL PODIATRIST, CHIROPRACTOR, AND OPTOMETRIST SCHEDULE**

- Chief grade.
- Senior grade.
- Intermediate grade.
- Full grade.
- Associate grade.

(c) Notwithstanding the provisions of section 7425(a) of this title, a person appointed under section 7306 of this title who is not eligible for pay under subchapter III shall be deemed to be a career appointee for the purposes of sections 4507 and 5384 of title 5.

(d) Except as provided under subsection (e), subchapter III, and section 7457 of this title, pay for positions for which basic pay is paid under this section may not be paid at a rate in excess of the rate of basic pay authorized by section 5316 of title 5 for positions in Level V of the Executive Schedule.

(e) The position of Chief Nursing Officer, Office of Nursing Services, shall be exempt from the provisions of section 7451 of this title and shall be paid at a rate determined by the Secretary, not to exceed the maximum rate established for the Senior Executive Service under section 5382 of title 5.

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#### SUBCHAPTER V—DISCIPLINARY AND GRIEVANCE PROCEDURES

##### **§ 7461. Adverse actions: section 7401(1) employees**

(a) Whenever the Under Secretary for Health (or an official designated by the Under Secretary for Health) brings charges based on conduct or performance against a section 7401(1) employee and as a result of those charges an adverse personnel action is taken against the employee, the employee shall have the right to appeal the action.

(b)(1) If the case involves or includes a question of professional conduct or competence in which a major adverse action was taken, such an appeal shall be made to a Disciplinary Appeals Board under section 7462 of this title.

[(2) In any other case, such an appeal shall be made—

[(A) through Department grievance procedures under section 7463 of this title, in any case that involves or includes a question of professional conduct or competence in which a major adverse action was not taken or in any case of an employee who is not covered by a collective bargaining agreement under chapter 71 of title 5; or

[(B) through grievance procedures provided through collective bargaining under chapter 71 of title 5 or through Department grievance procedures under section 7463 of this title, as the employee elects, in the case of an employee covered by a collective bargaining agreement under chapter 71 of title 5 that does not involve or include a question of professional conduct or competence.]

*(2) In any case other than a case described in paragraph (1) that involves or includes a question of professional conduct or competence in which a major adverse action was not taken, such an appeal shall be made through Department grievance procedures under section 7463 of this title.*

(c) For purposes of this subchapter—

(1) Section 7401(1) employees are employees of the Department employed on a full-time basis under a permanent appointment in a position listed in section 7401(1) of this title (other than interns and residents appointed pursuant to section 7406 of this title).

(2) A major adverse action is an adverse action which includes any of the following:

- (A) Suspension.
- (B) Transfer.
- (C) Reduction in grade.
- (D) Reduction in basic pay.
- (E) Discharge.

(3) A question of professional conduct or competence is a question involving any of the following:

- (A) Direct patient care.
- (B) Clinical competence.

(d) An issue of whether a matter or question concerns, or arises out of, professional conduct or competence is not itself subject to any grievance procedure provided by law, regulation, or collective bargaining and may not be reviewed by any other agency.

(e) Whenever the Secretary proposes to prescribe regulations under this subchapter, the Secretary shall publish the proposed regulations in the Federal Register for notice-and-comment not less than 30 days before the day on which they take effect.

**§ 7462. Major adverse actions involving professional conduct or competence**

(a)(1) Disciplinary Appeals Boards appointed under section 7464 of this title shall have exclusive jurisdiction to review any case—

(A) which arises out of (or which includes) a question of professional conduct or competence of a section 7401(1) employee; and

(B) in which a major adverse action was taken.

(2) The board shall include in its record of decision in any mixed case a statement of the board's exclusive jurisdiction under this subsection and the basis for such exclusive jurisdiction.

(3) For purposes of paragraph (2), a mixed case is a case that includes both a major adverse action arising out of a question of professional conduct or competence and an adverse action which is not a major adverse action or which does not arise out of a question of professional conduct or competence.

(b)(1) In any case in which charges are brought against a section 7401(1) employee which arises out of, or includes, a question of professional conduct or competence which could result in a major adverse action, the employee is entitled to the following:

(A) **[At least 30]** *Ten business* days advance written notice from the Under Secretary for Health or other charging official specifically stating the basis for each charge, the adverse actions that could be taken if the charges are sustained, and a statement of any specific law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge, except that the requirement for notification in advance may be waived if there is reasonable cause to believe that the employee has committed a crime for which the employee may be imprisoned.

(B) **[A reasonable time, but not less than seven days]** *The opportunity, within the ten-day notice period,* to present an answer **[orally and]** in writing to the Under Secretary for Health or other deciding official, who shall be an official higher in

rank than the charging official, and to submit affidavits and other documentary evidence in support of the answer.

(2) In any case described in paragraph (1), the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

(3) **[(A) If a proposed adverse action covered by this section is not withdrawn] After considering the employee's answer, if any, the deciding official shall render a decision in writing within [21 days] 5 business days of receipt by the deciding official of the employee's [answer. The decision shall include a statement of] answer stating the specific reasons for the decision with respect to each charge. If a major adverse action is imposed, the decision shall state whether any of the charges sustained arose out of a question of professional conduct or competence. If any of the charges are sustained, the notice of the decision to the employee shall include notice of the employee's rights of appeal.**

**[(B) Notwithstanding the 21-day period specified in subparagraph (A), a proposed adverse action may be held in abeyance if the employee requests, and the deciding official agrees, that the employee shall seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973. Any such abeyance of a proposed action may not extend for more than one year.]**

(4) **[(A) The Secretary may require that any answer and submission under paragraph (1)(B) be submitted so as to be received within 30 days of the date of the written notice of the charges, except that the Secretary shall allow the granting of extensions for good cause shown.]**

**[(B) The Secretary] The Secretary shall require that any appeal to a Disciplinary Appeals Board from a decision to impose a major adverse action shall be received within [30 days] 7 business days after the date of service of the written decision on the employee.**

(c)(1) When a Disciplinary Appeals Board convenes to consider an appeal in a case under this section, the board, before proceeding to consider the merits of the appeal, shall determine whether the case is properly before it.

(2) Upon hearing such an appeal, the board shall, with respect to each charge appealed to the board, sustain the charge, dismiss the charge, or sustain the charge in part and dismiss the charge in part. If the deciding official is sustained (in whole or in part) with respect to any such charge, the board shall—

(A) approve the action as imposed;

(B) approve the action with modification, reduction, or exception; or

(C) reverse the action.

(3) A board shall afford an employee appealing an adverse action under this section an opportunity for an oral hearing. If such a hearing is held, *the hearing must be concluded not later than 30 business days after the date on which the appeal is filed, and* the board shall provide the employee with a transcript of the hearing.

(4) The board shall render a decision in any case within **[45 days] 15 business days** of completion of the hearing, if there is a hearing, and in any event no later than **[120 days] 45 business days** after the appeal commenced.

(d)(1) After resolving any question as to whether a matter involves professional conduct or competence, the Secretary shall

cause to be executed the decision of the Disciplinary Appeals Board in a timely manner and in any event in not more than **[90 days]** *15 business days* after the decision of the Board is received by the Secretary. Pursuant to the board's decision, the Secretary may order reinstatement, award back pay, and provide such other remedies as the board found appropriate relating directly to the proposed action, including expungement of records relating to the action.

(e) The Secretary may designate an employee of the Department to represent management in any case before a Disciplinary Appeals Board.

(f)(1) A section 7401(1) employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.

(2) In any case in which judicial review is sought under this subsection, the court shall review the record and hold unlawful and set aside any agency action, finding, or conclusion found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) obtained without procedures required by law, rule, or regulation having been followed; or

(C) unsupported by substantial evidence.

#### **§ 7463. Other adverse actions**

(a) The Secretary shall prescribe by regulation procedures for the consideration of grievances of section 7401(1) employees arising from adverse personnel actions in which each action taken either—

(1) is not a major adverse action; or

(2) does not arise out of a question of professional conduct or competence.

Disciplinary Appeals Boards shall not have jurisdiction to review such matters, other than as part of a mixed case (as defined in section 7462(a)(3) of this title).

**[(b)]** In the case of an employee who is a member of a collective bargaining unit under chapter 71 of title 5, the employee may seek review of an adverse action described in subsection (a) either under the grievance procedures provided through regulations prescribed under subsection (a) or through grievance procedures determined through collective bargaining, but not under both. The employee shall elect which grievance procedure to follow. Any such election may not be revoked.

**[(c)]** (b)(1) In any case in which charges are brought against a section 7401(1) employee which could result in a major adverse action and which do not involve professional conduct or competence, the employee is entitled to the same notice and opportunity to answer with respect to those charges as provided in subparagraphs (A) and (B) of section 7462(b)(1) of this title.

(2) In any other case in which charges are brought against a section 7401(1) employee, the employee is entitled to—

(A) **[an advance]** *ten business days* written notice stating the specific reason for the proposed action, and

(B) **[a reasonable time]** *the opportunity, within the ten business day notice period,* to answer **[orally and]** in writing and to furnish affidavits and other documentary evidence in support of the answer.

[(d)] (c) Grievance procedures prescribed under subsection (a) shall include the following:

(1) A right to formal review by an impartial examiner within the Department of Veterans Affairs, who, in the case of an adverse action arising from a question of professional conduct or competence, shall be selected from the panel designated under section 7464 of this title.

(2) A right to a prompt report of the findings and recommendations by the impartial examiner.

(3) A right to a prompt review of the examiner's findings and recommendations by an official of a higher level than the official who decided upon the action. That official may accept, modify, or reject the examiner's recommendations.

[(e)] (d) In any review of an adverse action under the grievance procedures prescribed under subsection (a), the employee is entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

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**TITLE 5, UNITED STATES CODE**

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**PART III—EMPLOYEES**

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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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**§ 4303. Actions based on unacceptable performance**

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to—

(A) 30 days' advance written notice of the proposed action which identifies—

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which—

- (i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and
  - (ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.
- (2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.
- (c) The decision to retain, reduce in grade, or remove an employee—
- (1) shall be made within 30 days after the date of expiration of the notice period, and
  - (2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee—
    - (A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and
    - (B) for which the notice and other requirements of this section are complied with.
  - (d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.
  - (e) Any employee who is—
    - (1) a preference eligible;
    - (2) in the competitive service; or
    - (3) in the excepted service and covered by subchapter II of chapter 75,
 and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under section 7701.
  - (f) This section does not apply to—
    - (1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,
    - (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 719 of title 38.

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## DISSENTING VIEWS

We have serious concerns over H.R. 1259, particularly sections 3 and 9. We believe this bill, although claiming to provide additional means of accountability to the Department of Veterans Affairs (VA) would, in practice, make it more difficult to achieve substantive accountability while exacerbating VA's culture of whistleblower retaliation and a toxic work environment that allows poorly performing managers to retaliate against frontline VA employees. Sections 3 and 9 would strip VA employees of some of their very basic protections under collective bargaining agreements that ensure all employees are treated fairly by management. This would allow for the disparate treatment of VA employees compared to other federal employees, aggravating VA's recruitment and retention challenge. Almost one third of VA employees are veterans, and it is unfair to treat them differently than other federal employees. With an employee shortage of over 47,000, the Committee's work should be focused on creating an environment that attracts talented, hard-working, employees passionate about delivering care and benefits to our veterans. In addition, we dissent over the failure of this Committee to consider this bill under regular order, and the rush to bring this bill to a full Committee markup with only 48 hours to review the legislation.

We strongly agree with the need for greater accountability at the VA, and VA's inability to follow its own laws and policies to discipline employees is unacceptable. If managers are making poor decisions or failing, they need to be held accountable instead of being able to shift blame to hard-working frontline employees. The VA employees we have subpoenaed before this Committee that VA has failed to hold accountable due to process-fouls were not assisted by unions or permitted to use collective bargaining grievance procedures.

Section 3 of H.R. 1259, covering VA employees under title 5 federal employment law, would remove employees' union-negotiated alternative dispute resolution mechanisms and grievance procedures with respect to removal, demotion or suspension greater than 14-days. It would only permit VA employees to use statutory procedures that would reduce the time period for an employee to respond to allegations of poor performance or misconduct, and reduce the time period to appeal a disciplinary action before the Merit Systems Protection Board. It would also supersede any collective bargaining agreement-negotiated grievance or review procedures provided for federal employees under the law—reducing employees' due process rights. In effect, without collective bargaining procedures to protect rank and file employees, bad managers would be emboldened to use these new statutory procedures as weapons against the employees who dare to speak up or blow the whistle, knowing that those employees would have few protections.

Section 9 would strip VA healthcare providers of the ability to elect collective bargaining-negotiated grievance procedures in all cases involving a question of professional conduct or competence—no matter how minor. Currently under VA’s own title 38 employment laws, healthcare providers are permitted to grieve disciplinary actions under collective bargaining procedures in minor cases, and in major cases subject to removal, demotion, or suspension if the case does not involve a question of professional conduct or competence. Section 9 would strip away these rights from the frontline providers charged with the vital mission of providing healthcare to veterans.

Furthermore, this bill was not considered through regular order, and rushed to a full Committee markup. The Majority missed a key opportunity to develop bipartisan legislation that will truly bring accountability to the VA. This legislation significantly departed from “accountability” legislation considered last congress. Committee members were given only 48 hours to review the legislation. It did not receive a legislative hearing. Without input from stakeholders and who would be responsible for implementing the procedures under this bill, we were denied an opportunity to understand some of the potentially unforeseen consequences of enacting such legislation into law.

This is why we supported three amendments during the full Committee markup that would have given us additional opportunities to hold poorly performing employees accountable and continue to protect frontline employees’ collective bargaining rights. One amendment would have given the VA an additional tool to hold employees accountable under bipartisan legislation vetted by Veteran Service Organizations, the VA, and other important stakeholders last congress. Another amendment would have restored key protections for frontline employees. The last amendment would have allowed the VA to immediately remove an employee from the workplace who threatens the public health and safety of veterans, allowing us more time to work together as a Committee to develop bipartisan accountability legislation. Unfortunately, the Majority rejected these common-sense, pragmatic proposals to increase accountability quickly at the VA. We remain committed to working together to ensure veterans come first.

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