

RESTORE DEPARTMENT OF VETERANS AFFAIRS
 ACCOUNTABILITY ACT OF 2023

MARCH 15, 2024.—Committed to the Committee of the Whole House on the State
 of the Union and ordered to be printed

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

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 4278]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 4278) to amend title 38, United States Code, to modify personnel action procedures with respect to employees of the Department of Veterans Affairs, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Restore Department of Veterans Affairs Accountability Act of 2023” or the “Restore VA Accountability Act of 2023”.

SEC. 2. SUPERVISORS: REMOVAL, DEMOTION, OR SUSPENSION BASED ON PERFORMANCE OR MISCONDUCT.

(a) DISCIPLINE OF SUPERVISORS.—

(1) IN GENERAL.—Title 38, United States Code, is amended by inserting after section 711 the following:

“§ 712. Supervisors: removal, demotion, or suspension based on performance or misconduct

“(a) IN GENERAL.—The Secretary may remove from civil service, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines by substantial evidence that the performance or misconduct of the covered individual warrants such action.

“(b) RIGHTS AND PROCEDURES.—(1)(A) When making an initial decision under subsection (a) with respect to determining whether a covered individual should be removed, demoted, or suspended, the deciding employee of the Department shall exclusively apply the following factors:

“(i) The nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

“(ii) The covered individual’s job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

“(B) The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.

“(2) A covered individual subject to an action under subsection (a) is entitled to—

“(A) advance notice of the action and a file containing all evidence in support of the proposed action;

“(B) be represented by an attorney or other representative of the covered individual’s choice; and

“(C) grieve the action in accordance with an internal grievance process that the Secretary, in consultation with the Assistant Secretary for Accountability and Whistleblower Protection, shall establish for purposes of this subsection.

“(3) A final decision by the Secretary under paragraph (1)(B) that is not grieved, and a grievance decision under paragraph (2)(C), shall be final and conclusive.

“(4) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section, and the Secretary may carry out such a removal, demotion, or suspension without first placing a covered individual on a performance improvement plan.

“(c) TIMING.—(A) The aggregate period for notice, response, and final decision by the Secretary of an action under this section may not exceed 15 business days.

“(B) The period for the response of a covered individual to a notice under subsection (b)(2)(A) shall be 7 business days.

“(C) The final decision by the Secretary under subsection (b)(1)(B) shall—

“(i) be issued not later than 15 business days after notice is provided under subsection (b)(2)(A); and

“(ii) be in writing and shall include the specific reasons for the decision.

“(D) The Secretary shall ensure that the grievance process established under paragraph (2)(C) takes fewer than 21 days after the final decision.

“(d) JUDICIAL REVIEW.—(1) A covered individual adversely affected by a final decision under this section that is not grieved, or by a grievance decision under subsection (b)(2)(C), may obtain judicial review of such decision.

“(2) Any removal, demotion, or suspension under this section is not appealable to the Merit Systems Protection Board, or to any administrative judge or other person appointed by the Merit Systems Protection Board.

“(3) In any case in which judicial review is sought under paragraph (1), the court shall review the record and may set aside any Department action found to be—

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

“(B) obtained without procedures required by a provision of law having been followed; or

“(C) unsupported by substantial evidence.

“(4) Except to the extent that an appeal under this subsection presents a constitutional issue, such court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.

“(e) DEMOTED INDIVIDUALS.—(1) A demotion under subsection (a) shall be carried out as a reduction in grade for which the covered individual is qualified, that the Secretary determines is appropriate, and that reduces the annual rate of pay of the covered individual.

“(2) Notwithstanding any other provision of law, any covered individual so demoted—

“(A) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade;

“(B) 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 covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave; and

“(C) who does not report for duty or receive approval to use accrued unused leave shall not receive pay or other benefits.

“(f) WHISTLEBLOWER PROTECTION.—(1) In the case of a covered 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 covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

“(2) In the case of a covered individual who has made a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) until—

“(A) in the case in which the Assistant Secretary determines to refer the whistleblower disclosure under section 323(c)(1)(D) of this title to an office or other investigative entity, a final decision with respect to the whistleblower disclosure has been made by such office or other investigative entity; or

“(B) in the case in which the Assistant Secretary determines not to refer the whistleblower disclosure under such section, the Assistant Secretary makes such determination.

“(g) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—(1) 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.

“(2) Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

“(h) APPLICATION.—This section shall apply to any performance or misconduct of a covered individual beginning on the date of enactment of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115–41).

“(i) DEFINITIONS.—In this section:

“(1) The term ‘civil service’ has the meaning given that term in section 2101 of title 5.

“(2) The term ‘covered individual’ means an employee of the Department who is a supervisor or management official as defined in section 7103(a) of title 5 occupying a position at the Department, including individuals appointed pursuant to this title, title 5, and hybrid employees appointed pursuant to section 7401 of this title, but does not include—

“(A) an individual occupying a senior executive position (as defined in section 713(d) of this title);

“(B) an individual appointed pursuant to section 7306, 7401(1), 7401(4), or 7405 of this title;

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

or

“(D) a political appointee.

“(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, Code of Federal Regulations, or successor regulation.

“(6) 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.

“(7) The term ‘whistleblower disclosure’ has the meaning given such term in section 323(g) of this title.”.

(2) CLERICAL AMENDMENT.—The table of contents for title 38, United States Code, is amended by inserting after the item relating to section 711 the following:

“712. Supervisors: removal, demotion, or suspension based on performance or misconduct.”.

SEC. 3. SENIOR EXECUTIVES: MODIFICATION OF PROCEDURES TO REMOVE, DEMOTE, OR SUSPEND BASED ON PERFORMANCE OR MISCONDUCT.

Section 713 of title 38, United States Code, is amended—

(1) in subsection (a)—

(A) by inserting “by substantial evidence”, after “determines”; and

(B) by adding at the end the following:

“(3) When making an initial decision under this subsection with respect to determining whether a covered individual should be reprimanded or suspended, involuntarily reassigned, demoted, or removed, the deciding employee of the Department shall exclusively apply the following factors:

“(A) The nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

“(B) The covered individual’s job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

“(4) The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.”;

(2) in subsection (b)—

(A) in paragraph (3), by inserting “after the final decision” after “21 days”; and

(B) by adding at the end the following:

“(7) Except to the extent that an appeal under this subsection presents a constitutional issue, such court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.”; and

(3) by inserting after subsection (c) the following (and redesignating subsection (d) as subsection (e)):

“(d) APPLICATION.—This section shall apply to any misconduct or performance of a covered individual beginning on the date of enactment of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115–41).”.

SEC. 4. MODIFICATION OF DISCIPLINARY PROCEDURES FOR EMPLOYEES OF THE DEPARTMENT OF VETERANS AFFAIRS.

(a) DEPARTMENT OF VETERANS AFFAIRS EMPLOYEE DISCIPLINE MODIFICATIONS.—Section 714 of title 38, United States Code, is amended—

(1) in subsection (a),

(A) in paragraph (1), by inserting “by substantial evidence” after “the Secretary determines”; and

(B) by adding at the end the following:

“(3)(A) When making an initial decision under this subsection with respect to determining whether a covered individual should be removed, demoted, or suspended, the deciding employee of the Department shall exclusively apply the following factors:

“(i) The nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

“(ii) The covered individual’s job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

“(iii) The covered individual’s past disciplinary record.

“(iv) The covered individual’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

“(v) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.

“(B) The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.”.

(2) in subsection (c)—

(A) by striking paragraph (1)(D); and

(B) in paragraph (3), by inserting before the period the following: “, and the Secretary may carry out such a removal, demotion, or suspension without first placing a covered individual on a performance improvement plan”;

(3) in subsection (d)—

(A) in paragraph (2), by adding at the end the following:

“(C) Except to the extent that an appeal under this subsection presents a constitutional issue, the administrative judge may not review a challenge to the penalty imposed against the covered individual.”;

(B) in paragraph (3), by adding at the end the following:

“(D) Except to the extent that an appeal under this subsection presents a constitutional issue, the Merit Systems Protection Board may not review a challenge to the penalty imposed against the covered individual.”;

(C) in paragraph (5), by adding at the end the following:

“(C) Except to the extent that an appeal under this subsection presents a constitutional issue, such Court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.”; and

(D) by striking paragraph (10);

(4) by redesignating subsection (h) as subsection (j);

(5) by inserting after subsection (g) the following:

“(h) COLLECTIVE BARGAINING AGREEMENTS.—The procedures in this section shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.

“(i) APPLICATION.—This section shall apply to any performance or misconduct of a covered individual beginning on the date of enactment of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115–41).”; and

(6) in paragraph (1) of subsection (j), as redesignated by paragraph (4)—

(A) by inserting “including individuals appointed pursuant to this title, title 5, and hybrid employees appointed pursuant to section 7401 of this title” after “Department”;

(B) in subparagraph (D), by striking the period and inserting “; or”; and

(C) by adding after subparagraph (D) the following:

“(E) a supervisor or management official as defined in section 7103(a) of title 5.”.

(b) VHA EMPLOYEE DISCIPLINE MODIFICATIONS.—Section 7403(f)(3) of such title is amended—

(1) by striking “Notwithstanding any other provision of this title or other law,” and inserting “(A) Notwithstanding any other provision of this title or other law, and consistent with subparagraph (B),”; and

(2) by adding at the end the following:

“(B) With respect to any covered individual (as that term is defined in section 712 or 714) appointed to such positions, such matters shall be resolved, at Secretary’s sole discretion, under—

“(i) section 712;

“(ii) section 714; or

“(iii) title 5 as though such individuals had been appointed under that title.”.

SEC. 5. INDEPENDENT STUDY REGARDING MANAGEMENT STRUCTURES OF DEPARTMENT OF VETERANS AFFAIRS.

(a) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Veterans Affairs shall seek to enter into an agreement with the National Academy of Public Administration (referred to in this section as the “Academy”) under which the Academy shall conduct a study and review of the oversight, accountability, and performance management structures of the Department of Veterans Affairs.

(b) CONSIDERATIONS.—In conducting a study and review under this section, the Academy shall—

(1) consult with the Secretary and outside stakeholders;

(2) take into account previous reports and recommendations pertaining to oversight, accountability, and performance management of the Department;

- (3) examine alternatives and develop recommendations for improving the oversight, accountability, and performance management of the Department; and
- (4) make recommendations to improve the oversight, accountability, and performance management of the Department.
- (c) SCOPE.—The scope of the study and review under this section shall include—
 - (1) the organizational structure of the Department;
 - (2) the employee performance management processes of the Department;
 - (3) training on performance management processes for employees, supervisors, senior executives, and human resources professionals of the Department;
 - (4) employee professional development programs of the Department; and
 - (5) leadership development programs of the Department.
- (d) BEST PRACTICES.—In conducting the study, the Academy shall review best practices of other Federal agencies to determine whether they are applicable to the Department.
- (e) REPORT OF THE ACADEMY.—Not later than 18 months after the date of the enactment of this Act, the Academy shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report that contains—
 - (1) the findings of the study and review conducted under this section; and
 - (2) any other recommendations that the Academy determines necessary and relevant to the study and review.
- (f) REPORT OF THE SECRETARY.—Not later than 90 days after the Academy submits the report under subsection (e), the Secretary shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report containing—
 - (1) the evaluation of the Secretary of the findings and recommendations made by the Academy;
 - (2) the determination of the Secretary whether to implement such recommendations and findings;
 - (3) a timeline for such implementation; and
 - (4) the determination of the Secretary whether such implementation requires legislation.

SEC. 6. COMPTROLLER GENERAL STUDY ON VETERANS HEALTH ADMINISTRATION OVERSIGHT FUNCTIONS.

- (a) STUDY.—The Comptroller General of the United States shall conduct a study of the oversight functions of the Veterans Health Administration. Such study shall include an examination of each of the following:
 - (1) How the Veterans Health Administration manages and coordinates its oversight functions.
 - (2) How the Veterans Health Administration determines the appropriate number and types of employees necessary to carry out such oversight functions.
 - (3) How the Veterans Health Administration prioritizes the work conducted pursuant to such oversight functions and the extent to which the findings generated through such functions are used to make system-wide improvements.
- (b) REPORT.—Not later than one year after the date of the enactment of this Act, the Comptroller General shall submit to the Committees on Veterans' Affairs of the Senate and House of Representatives a report on the results of the study required under subsection (a) and any recommendations of the Comptroller General with respect to such findings.

PURPOSE AND SUMMARY

H.R. 4278, the “Restore VA Accountability Act of 2023” was introduced by Rep. Mike Bost of Illinois on June 22, 2023. The bill as amended would amend Title 38 of the United States Code (U.S.C.) to modify personnel action procedures with respect to U.S. Department of Veterans Affairs (“VA”) employees. This bill would restore authorities Congress granted VA in 2017 through the *2017 VA Accountability and Whistleblower Protection Act (Pub. L. No 115–41)* ensuring VA has the authority it needs to hold its employees accountable and provide quality care and benefits to the veterans it serves.

BACKGROUND AND NEED FOR LEGISLATION

Section 1: Short title

This Act may be cited as the “*Restore Department of Veterans Affairs Accountability Act of 2023*” or the “*Restore VA Accountability Act of 2023*”.

Section 2. Supervisors: Removal, demotion, or suspension based on performance or misconduct

In 2014, Committee oversight found that as many as forty veterans at the Phoenix VA Health Care System died while awaiting medical care. Further, the evidence showed that Phoenix VA Health Care System employees concealed these long wait times. 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 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, found in 38 U.S.C. § 714, to remove Senior Executive Service employees for poor performance or misconduct.

After passage of the Choice Act, the Committee continued to uncover many instances of poor performance or misconduct by VA employees. Instances included allegations of the manipulation of disability claims data at the Philadelphia Regional Benefit Office;¹ construction failures of a new medical center in Aurora, Colorado that was many years delayed and a billion dollars over budget;² allegations of illegal use of government purchase cards resulting in the waste of billions of dollars annually;³ allegations of a VA employee remaining in her job after participating in an armed robbery;⁴ and numerous instances of not properly disciplining employees involved with the opioid theft or missing prescriptions.⁵ Throughout all of these incidents, it became clear that VA often did not hold individuals appropriately accountable for their actions, and additional legislation was needed to hold VA employees accountable.

To compound these issues, the Committee found that VA was often not effectively able to discipline its employees. 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

¹After 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-officediana-rubens.

²Aurora VA official: No line-by-line account of where \$1 billion went, The Denver Post, July 2015 http://www.denverpost.com/news/ci_28415366/va-deputy-secretary-making-eighth-tripdenver-hospital.

³VA 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-spendingbillions-unlawfully-whistleblower-says/112828/>.

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

⁵AP: VA data show low rate of discipline for drug loss, theft, February 27, 2017 <https://www.denverpost.com/2017/02/27/veterans-affairs-hospitals-opioid-theft/>.

civil servant in the Federal Government.⁶ 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.⁷ It took VA over a year to even begin the removal process for this employee.⁸ A 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."⁹ The Committee therefore concluded that VA employees were caught in a failed and antiquated bureaucracy in desperate need of reform.

In an attempt to reform the failed system, the Committee worked on a bipartisan basis to pass the *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017* ("Accountability Act"). On June 23, 2017, President Trump signed the Accountability Act into law.

The *Accountability Act* gave VA authorities that were needed to hold its employees accountable. The *Accountability Act*, in part, strengthened the authorities intended to keep it Senior Executives accountable, found in 38 U.S.C. § 713, and created 38 U.S.C. § 714 which was intended to create a more fair and efficient disciplinary process at VA for many of its supervisory and non-supervisory employees. 38 U.S.C. § 714 includes provisions intended by Congress to: (a) provide a substantial evidence (reasonableness) test to the VA Secretary's and MSPB's review of disciplinary proposals; (b) mandate an expedited timeline for disciplinary decisions and reviews; (c) prevent the Merit System Protections Board (MSPB) from mitigating the penalty VA imposed; (d) provide protections for employees in the disciplinary process who are also whistleblowers; and (e) allow VA to implement these provisions without coordination with federal unions.

Evidence examined shows that the *Accountability Act* gave VA the authority it needed to hold its employees accountable. Data provided by VA, excerpted below, shows that removal, suspension, and demotion disciplinary actions increased more than 50% the year after the *Accountability Act* was passed, compared with the year prior. Slowly, as portions of the *Accountability Act* were stripped of the law, disciplinary numbers returned to historical averages. Committee oversight suggests that these large changes in disciplinary actions, resulted directly from authorities included in the *VA Accountability and Whistleblower Protection Act*.

⁶U.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>.

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

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

⁹The 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>.

Count of Actions	Pre- or Post-Act							Grand Total
	1 Year Pre * (06/23/16– 06/22/17)	1st Year Post * (06/23/17– 06/22/18)	2nd Year Post * (06/23/18– 06/22/19)	3rd Year Post * (06/23/19– 06/22/20)	4th Year Post * (06/23/20– 06/22/21)	5th Year Post * (06/23/21– 06/22/22)	6th Year Post * (06/23/22– 06/22/23)	
REMOVAL								
Total	1,006	1,567	1,358	1,410	1,252	1,123	1,009	8,725
SUSPENSION								
More Than 14 Days								
Total	100	136	107	156	117	57	56	739
DEMOTION to Lower Grade, Level, or Band	69	88	98	81	56	57	63	512
<i>Grand Total</i>	1,175	1,791	1,563	1,647	1,425	1,247	1,128	9,976

Unfortunately, starting in 2018, decisions from the U.S. Court of Appeals for the Federal Circuit, the MSPB, and the Federal Labor Relations Authority (FLRA) significantly reduced the effectiveness of the authorities the *Accountability Act* gave VA in 38 U.S.C. § 714, leading to a slow decrease in removal, suspension, and demotion actions at VA.¹⁰ Due to these court decisions, as of April 30, 2021, VA stopped using 38 U.S.C. § 714 to take action against AFGE bargaining unit employees and on January 17, 2023, VA stopped using 38 U.S.C. § 714 to take action against many of its re-

¹⁰ A January 23, 2023 letter from the Secretary of Veterans Affairs Denis McDonough to Committee Chairman Mike Bost, provided the following descriptions of relevant court cases:

- *Sayers vs. VA*, 954 F.3d 1370 (Fed. Cir. 2020)—The Federal Circuit ruled that section 714 could not be applied retroactively to misconduct and performance predating VAAWPA. The Court further stated that the MSPB must review not only the evidence establishing the misconduct, but also the penalty to assess whether it is supported by substantial evidence. It acknowledged that the MSPB lacks authority to mitigate the penalty under the statute. See also *Brenner v. VA*, 990 F.3d 1313 (Fed. Cir. 2021).

- *Connor vs. VA*, 8 F.4th 1319 (Fed. Cir. 2021) and *Rodriguez vs. VA*, 8 F.4th 1290 (Fed. Cir. 2021)—The Federal Circuit ruled that section 714's reduction of the evidentiary standard to substantial evidence did not apply to VA's deciding official, who was required to use the higher preponderance of the evidence standard. The Court also ruled that VA must consider the relevant factors when assessing the appropriate penalty in section 714 actions.

- *Richardson vs. VA*, 2023 M.S.P.B 1 (MSPB 2023)—MSPB found that section 714's definition of covered individuals did not include title 38 hybrid employees, meaning they cannot be disciplined using the enhanced authority.

- Labor Decisions, VA has also faced labor challenges to its implementation of section 714 under its collective bargaining agreements (CBA), including but not limited to the following:

- *Performance Improvement Plans (PIP) in AFGE CBA*: In 2018, an arbitrator issued an award that was upheld by the FLRA in 2021, following VA's request for reconsideration. The FLRA found that VA violated the American Federation of Government Employees' (AFGE) CBA by failing to provide AFGE bargaining unit employees (BUE) performance improvement plans prior to taking a performance action under section 714. VA was required to resume the use of PIPs for AFGE BUEs and to rescind any actions that violated the CBA and to make all employees whole. VA is currently implementing this award.

- *Impact and Implementation Bargaining*: Under VA's CBA, AFGE filed a national grievance alleging VA failed to bargain regarding implementation of section 714. The arbitrator's initial decision in favor of VA was reversed by the FLRA which found that VA violated 5 U.S.C. § 7106(b)(3) by failing to bargain impact and implementation of section 714. Subsequent arbitration led to an order for VA to cease using section 714 against AFGE BUEs until retroactive impact and implementation bargaining was complete and to make impacted AFGE BUEs whole. AFGE has filed unfair labor practice (ULP) complaints with FLRA alleging VA failed to comply with this order. VA and AFGE are currently in confidential mediation to discuss the ULP complaint, the arbitration award, and a memorandum of understanding concerning impact and implementation of section 714 for AFGE BUEs.

maining employees, called “hybrid Title 38 employees.”¹¹ On April 3, 2023, VA wholesale stopped using 38 U.S.C. § 714, against employees who were still eligible for 38 U.S.C. § 714 disciplinary action, many of whom are supervisory employees.¹²

Simultaneous with VA’s decision to rollback use of 38 U.S.C. § 714, Committee oversight uncovered situations where VA still failed to keep its employees accountable. A recent Committee investigation uncovered a supervisor, who was the subject of three investigations, including an Administrative Investigation Board (AIB) report, which includes roughly 4,000 pages and 57 hours of incriminating evidence.¹³ The AIB found that the supervisory employee made racially charged statements, forced subordinates to give him meals and rides, lied to his subordinates, bribed his subordinates, retaliated against subordinates by giving them the worst work assignments, and consistently didn’t even do his job.¹⁴ Under traditional authorities VA believed they did not have enough evidence to appropriately discipline an obviously problematic employee. Because of VA’s policy decision to stop using 38 U.S.C. § 714, VA believes it does not have the authority to remove the individual.

As VA is unwilling or unable to use its 38 U.S.C. § 714 authority to discipline supervisors, this section would create a new disciplinary authority, 38 U.S.C. § 712, under which VA would have authority to discipline many of its supervisory personnel. Committee oversight has made clear a small proportion of VA’s middle managers cause disproportionate harm for their subordinates and the veterans they serve. Furthermore, unlike many of their subordinates, supervisors are often not held accountable for their misconduct and poor performance. 38 U.S.C. § 712 mirrors the legal authorities VA has available to keep its Senior Executives accountable in 38 U.S.C. § 713. Like Senior Executives, VA supervisors are non-union employees with great responsibility. Additionally, VA supervisors, like Senior Executives, are often not held accountable for their actions and therefore require more effective disciplinary procedures.

Like the preexisting 38 U.S.C. § 713, the proposed 38 U.S.C. § 712 would remove MSPB review of disciplinary cases against VA supervisors, preserving that review right for non-supervisory union VA employees. The section would create levels of VA review, in addition to judicial appeal rights, to ensure VA quality supervisors are not unfairly disciplined.

In addition to applying disciplinary procedures found in 38 U.S.C. § 713, to supervisors, 38 U.S.C. § 712 also specifies factors VA must consider when making disciplinary decisions. Court decisions have found that VA must apply a 12-step-test, called the Douglas Factors, when deciding to discipline an employee. The

¹¹ Statement of Ms. Tracey Therit, Chief Human Capital Officer Human Resources and Administration/ Operations, Security and Preparedness, Department of Veterans Affairs, “Accountability at VA: Leadership Decisions Impacting Its Employees And Veterans,” Subcommittee On Oversight and Investigations Subcommittee, Committee On Veterans’ Affairs, U.S. House Of Representatives, March 9, 2023 <https://docs.house.gov/meetings/VR/VR08/20230309/115445/HHRG-118-VR08-Wstate-TheritT-20230309.pdf>.

¹² VA no longer uses Trump-era law allowing officials to fire feds faster, The Washington Post, August 7, 2023, <https://www.washingtonpost.com/politics/2023/04/07/va-trump-rule-federal-employee-firings/>.

¹³ Letters sent to VA about the investigation include those referenced in the following: Chairman Bost, Rep. Obernolte Continue to Press VA on Lack of Accountability at Loma Linda, House Committee on Veterans’ Affairs, Press Release, August 3, 2023, <https://veterans.house.gov/news/documentsingle.aspx?DocumentID=6247>.

MSPB, an unelected body, created the Douglas Factors over 40 years ago. The factors are not stated in law and may provide employees unnecessary opportunities to dispute, and overturn, their discipline when all boxes aren't checked, rather than when leadership determines an employee is not providing veterans quality care and benefits. To streamline the VA discipline process, and provide transparency to VA employees, this section would codify the following two Douglas Factors: (A) The nature and seriousness of the offense, and its relation to the covered individual's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; and (B) The covered individual's job level and type of employment, including supervisory or fiduciary role, and prominence of the position. These factors simply ensure supervisors are held accountable for their actions, whether poor performance or misconduct, and ensure their actions are held against the standard expected of a VA employee of their seniority.

Unlike the factors which would apply to bargaining unit employees, under 38 U.S.C. § 714 (discussed below), 38 U.S.C. § 712 would not give supervisors the opportunity to argue their past good performance should give them a pass for their recent poor performance or misconduct. By removing Douglas Factors which enable lawyers to argue that their client deserves another chance, despite their client's poor performance or misconduct, the Committee believes VA leaders would be empowered to quickly discipline supervisors without the concern of never-ending legal challenges, allowing VA leaders and their subordinates to focus on serving veterans.

Importantly, this section would maintain the whistleblower protections, including those available for supervisors, included in the *Accountability Act*. These protections are designed to lessen the risk of VA and its leaders using discipline as retaliation against whistleblowers, helping to ensure VA whistleblowers will continue to come forward when they observe fraud and abuse at the Department.

Section 3. Senior Executives: Modification of procedures to remove, demote, or suspend based on performance or misconduct

Despite concerted efforts to hold VA senior leadership accountable for poor performance and misconduct, a disproportionately small number of VA's Senior Executives are removed, suspended, or demoted because of their failures. Since June 2016, data provided by VA shows that only four Senior Executives have been removed by VA because of poor performance or misconduct. Committee oversight suggests that many others are not properly held accountable.

This section would ensure that VA has the authority it needs to hold its Senior Executives accountable, primarily by making technical changes to 38 U.S.C. § 713 designed to make Congress's intent in the *Accountability Act* clear. Court decisions, referenced above, which have decreased the effectiveness of 38 U.S.C. § 714, have created the risk of legal challenges to 38 U.S.C. § 713, which provides VA the authorities it needs to hold Senior Executives accountable. The technical changes would make Congress's intent in the *Accountability Act* explicitly clear, reinforcing that a substantial evidence (reasonableness) test applies to the VA Secretary's re-

view of the discipline proposing authority's disciplinary recommendation, and that courts reviewing disciplinary appeals can review whether VA's disciplinary decision is appropriate, but not second guess the appropriate level of discipline, if the employee is guilty of misconduct or poor performance.

Additionally, 38 U.S.C. § 713, like in 38 U.S.C. § 712 (discussed above), specifies the two most important Douglas Factors (the same factors as 38 U.S.C. § 712), which must be exclusively considered when determining appropriate discipline for VA Senior Executives. Like supervisors, VA Senior Executives should not be able to explain away their misconduct or poor performance.

Section 4. Modification of disciplinary procedures for employees of the Department of Veterans Affairs

This Section would make technical changes designed to make Congress's intent in the *Accountability Act* clearer and make the disciplinary authorities in 38 U.S.C. § 714 usable so that VA can keep its employees accountable and provide veterans quality care and benefits.

The *Accountability Act* gave VA the authority it needed to hold its employees accountable. As discussed in section 2, removal, suspension, and demotion disciplinary actions increased more than 50% the year after the *Accountability Act* was passed, compared with the year prior. Slowly, as portions of the *Accountability Act* were stripped out of the law, disciplinary numbers returned to historical averages.

As discussed in section 2, the *Accountability Act* gave VA authorities it needed to hold its employees accountable. 38 U.S.C. § 714 includes provisions intended by Congress to: (a) provide a substantial evidence (reasonableness) test to the VA Secretary's and MSPB's review of disciplinary proposals; (b) mandate an expedited timeline for disciplinary decisions and reviews; (c) prevent MSPB from mitigating the penalty VA imposed; (d) provide protections for employees in the disciplinary process who are also whistleblowers; and (e) allow VA to implement these provisions without coordination with federal unions. The *Restore VA Accountability Act of 2023* would clarify these important provisions, so that going forwards 38 U.S.C. § 714 is not misinterpreted by an administration court, to strip away accountability authorities from VA leaders.

Further, this Bill would specify which of the aforementioned Douglas Factors apply to union employees. VA interpreted the *VA Accountability and Whistleblower Protection Act* to not require VA to apply the Douglas Factors when making disciplinary decisions. Subsequent court cases have reimposed the 12-factor test requirement. H.R. 4278 would state the five factors VA must consider when making disciplinary decisions for union employees.¹⁵ Unlike disciplining supervisory (under 38 U.S.C. § 712) and senior execu-

¹⁵The five factors VA must exclusively consider are: (A) The nature and seriousness of the offense, and its relation to the covered individual's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (B) The covered individual's job level and type of employment, including supervisory or fiduciary role, and prominence of the position; (C) The covered individual's past disciplinary record; (D) The covered individual's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; and (E) Mitigating circumstances surround the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.

tive (under 38 U.S.C. § 713) VA employees, which would require two factor consideration, disciplining non-supervisory, union, employees would require five factor consideration. Included in these five factors are the employees' past work record and mitigating factors that allow non-supervisory employees additional due process rights to prove they should remain VA employees even after poor performance or misconduct.

HEARINGS

On July 12, 2023, the Subcommittee on Oversight and Investigation held a legislative hearing on H.R. 4278 and other bills that were pending before the subcommittee.

The following witnesses testified:

- Mr. Lewis Ratchford, Chief Security Officer, U.S. Department of Veterans Affairs;
- Mr. Rony Waye, Executive Director, Human Capital Programs, U.S. Department of Veterans Affairs;
- Mr. Ray Tellez, Acting Deputy Under Secretary for Automated Benefits Delivery, U.S. Department of Veterans Affairs;
- Dr. Angela Billups, Executive Director, Office of Acquisition and Logistics, U.S. Department of Veterans Affairs;
- Mr. David Case, Deputy Inspector General, U.S. Department of Veterans Affairs;
- Mr. Joshua Hastings, Veterans Benefits Policy Analyst, The American Legion;
- Mr. Patrick Murray, Director, National Legislative Service, Veterans of Foreign Wars;
- Mr. Clint Romesha, SSG (ret.), Board of Director, Emeritus, America's Warrior Partnership;
- Ms. Terry Gerton, President and Chief Executive Officer, National Academy of Public Administration.

The following individuals and organizations submitted statements for the record:

- Concerned Veterans for America;
- National Federation of Federal Employees;
- Senior Executives Association;
- American Federation of Government Employees
- Partnership for Public Service;
- Dr. Donald F. Kettl;
- United Nurses Association of California/Union of Health Care Professionals;
- Service Employees International Union.

SUBCOMMITTEE CONSIDERATION

On July 19, 2023, the Subcommittee on Oversight and Investigations held a markup on the legislation included in the text of this bill. The bill was ordered favorably forwarded to the full Committee on Veterans Affairs by voice vote.

COMMITTEE CONSIDERATION

On July 26, 2023, the full Committee met in open markup session, a quorum being present, and ordered H.R. 4278, as amended, be reported favorably to the House of Representatives by a re-

corded vote with 14 yays and 11 nays. During the consideration of the bill, the following amendments were considered:

1. An amendment offered by Mr. Levin that would strike the “substantial” evidentiary standard and replace it with a “preponderance” for the review of the initial fact-finding. The amendment failed by a recorded vote of 11 yays and 14 nays.

2. An amendment offered by Mr. Takano that would require VA to consider all twelve Douglas Factors for disciplinary decisions under sections 712, 713, and 714. The amendment failed by voice vote.

3. An amendment offered by Mr. Landsman that would strike a provision that gives the Secretary the flexibility to forgo implementing a Performance Improvement Plan before initiating disciplinary action. The amendment failed by voice vote.

4. An amendment offered by Ms. Cherfilus-McCormick that would strike the provision eliminating MSPB review for non-union supervisors. This amendment would also strike the provision limiting MSPB review to appeals on the facts of the case, rather than the chosen penalty. The amendment failed by a recorded vote of 11 yays to 14 nays.

5. An amendment offered by Mr. Deluzio would strike the provision that allows the disciplinary authorities in this bill to be applied retroactively going back to the enactment of the 2017 Accountability Act. The amendment failed by a recorded vote of 11 yays to 14 nays.

6. An amendment offered by Mr. McGarvey that would strike Section 4 of the underlying bill text. The amendment failed by a recorded vote of 11 yays to 14 nays.

7. An amendment offered by Mrs. Budzinski that would require VA’s implementation of the Restore VA Accountability Act to be collectively bargained with its employee unions. The amendment failed by a recorded vote of 11 yays to 14 nays.

8. An amendment offered by Mr. Mrvan that would authorize an independent study performed by the National Academy of Public Administration regarding the management structures of the Department of Veterans Affairs. The amendment was approved by voice vote.

9. An amendment offered by Ms. Brownley that would authorize the Comptroller General to perform a study on Veterans Health Administration oversight functions. The amendment was approved by voice vote.

10. An amendment offered by Mr. Mrvan that would require the Secretary to report to Congress the Department’s costs related to the 2017 Accountability Act since its enactment and how much money has been spent on attorney’s representing the Department on appeals related to disciplinary actions taken under 38 U.S.C. § 713 and 714 authorities. The amendment failed by a recorded vote of 11 yays to 14 nays.

11. An amendment offered by Mr. Pappas that would require training for all employees that are covered under 38 U.S.C. § 712 and 713. The amendment would require the training be developed in consultation with at least three other federal agencies and require refresher training every two years. The amendment failed by a recorded vote of 12 yays to 13 nays.

A motion by Representative Bergman to report H.R. 4278, as amended, favorably to the House of Representatives was approved by a recorded vote of 14 yays to 11 nays.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, seven recorded votes were taken on amendments or in connection with ordering H.R. 4278, as amended, reported to the House.

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 of H.R. 4278, as amended, are to restore Congress's intent in the *VA Accountability and Whistleblower Protection Act of 2017* to give VA the authority it needs to quickly remove, demote, and suspend employees who are a disservice to veterans.

EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 4278 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

The Committee adopts as its own the cost estimate on H.R. 4278, as amended, prepared by the Director of the Congressional Budget Office.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate for H.R. 4278, as amended, provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

H.R. 4278, Restore Department of Veterans Affairs Accountability Act of 2023			
As ordered reported by the House Committee on Veterans' Affairs on July 26, 2023			
By Fiscal Year, Millions of Dollars	2023	2023-2028	2023-2033
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	0	2	not estimated
Increases <i>net direct spending</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Statutory pay-as-you-go procedures apply?	No
		Mandate Effects	
Increases <i>on-budget deficits</i> in any of the four consecutive 10-year periods beginning in 2034?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No

H.R. 4278 would make several changes to disciplinary policies for employees of the Department of Veterans Affairs (VA).

The bill would:

- Allow VA to more quickly remove, demote, or suspend employees;
- Truncate the grievance processes for employees affected by adverse disciplinary action; and
- Require two studies of VA's performance management processes and oversight.

Allowing VA to remove, demote, or suspend employees more quickly would change which people VA employs, but would not significantly affect the number of people who work for the department. Thus, those changes would have an insignificant effect on the budget.

The bill would require VA to contract with the National Academy of Public Administration to study the department's performance management systems. The bill also would require the Government Accountability Office to conduct a study of the oversight functions of the Veterans Health Administration. Based on the cost of similar studies, CBO estimates the studies required by H.R. 4278 would each cost \$1 million. In total, implementing H.R. 4278 would cost \$2 million over the 2023–2028 period; any spending would be subject to the availability of appropriated funds.

The CBO staff contact for this estimate is Logan Smith. The estimate was reviewed by Christina Hawley Anthony, Deputy Director of Budget Analysis.

PHILLIP L. SWAGEL,
Director, Congressional Budget Office.

FEDERAL MANDATES STATEMENT

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) is inapplicable to H.R. 4278, as amended.

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. 4278, as amended.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that H.R. 4278, as amended, 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. 4278, as amended, 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.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1: Short title

Section 1 would establish the short title of the bill as “Restore Department of Veterans Affairs Accountability Act of 2023 or the “Restore VA Accountability Act of 2023.”

Section 2: Supervisors: Removal, demotion, or suspension based on performance or misconduct

Section 2(a) would insert a new 38 U.S.C. § 712. This section would create a new disciplinary authority, 38 U.S.C. § 712, under which VA would have authority to discipline many of its supervisory personnel. The new disciplinary authority would mirror legal authorities VA has available to keep its Senior Executives Accountable in 38 U.S.C. § 713.

Section 712(a) would give the VA Secretary authority to discipline supervisors who they determine, as supported by substantial evidence, warrant such action because of misconduct or poor performance.

Section 712(b) details the rights and procedures that would apply to disciplining a VA supervisory employee. Importantly, the section would: codify two factors which must exclusively be considered when deciding whether to discipline a supervisor;¹⁶ specify that the VA Secretary should review a proposing disciplinary authority’s disciplinary decision, using a substantial evidence (reasonableness) test; specify that VA supervisors are entitled to advanced notice of disciplinary actions, and rep-

¹⁶The two factors are (1) the nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; and (2) the covered individual’s job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

resentation by an attorney; and would have a grievance process within VA to dispute proposed discipline.

Section 712(c) would mandate time limits for steps taken by the Secretary and the covered supervisor during the disciplinary process.

Section 712(d) would provide certain judicial review rights for VA supervisors, including the right to seek judicial review of a disciplinary decision, but would specify that VA supervisors may not appeal a disciplinary decision to the Merit System Protection Board.

Section 712(e) would specify the required process VA must follow when demoting a supervisor for disciplinary reasons.

Section 712(f) would create certain whistleblower protection procedures, including Office of Special Counsel investigations, which would create a process which would protect VA supervisors from whistleblower retaliation.

Section 712(g) would require the Office of Special Counsel to provide a written explanation before terminating an investigation into whistleblower retaliation.

Section 712(h) would specify that the authorities in 38 U.S.C. § 712 can be applied to actions taken by the covered supervisors starting on the date the Accountability Act became law.

Section 712(i) includes the definitions to be included in the section, and specifies that 38 U.S.C. § 712 applies to certain VA supervisors.

Section 3. Senior Executives: Modification of procedures to remove, demote, or suspend based on performance or misconduct

Section 3 ensures VA has authority it needs to hold Senior Executives accountable by making technical changes to 38 U.S.C. § 713 to make Congress's intent in the *VA Accountability and Whistleblower Protection Act* clear. Section 3 would make the following modifications to 38 U.S.C. § 713:

Section 713(a) would be modified by giving the VA Secretary authority to discipline covered senior executives who the Secretary determines, as supported by substantial evidence, warrant such action because of misconduct or poor performance; codifying two factors¹⁷ VA must exclusively consider when deciding whether to discipline senior executives; and specifying the VA Secretary shall review a proposing disciplinary authority's disciplinary decision using a substantial evidence test.

Section 713(b) would be modified by specifying the Secretary shall ensure the grievance process takes fewer than 21 days after a final disciplinary decision; and adding language specifying absent a constitutional issue, courts may not review a challenge to penalties imposed against covered individuals or mitigate such penalties.

¹⁷The two factors are (1) the nature and seriousness of the offense, and its relation to the covered individual's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; and (2) the covered individual's job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

Section 713(d) would be added specifying that the authorities in 38 U.S.C. § 713 apply to covered senior executives starting on the date the *Accountability Act* became law.

Subsection 713(d) would be redesignated as subsection 713(e).

Section 4: Modification of disciplinary procedures for employees of the Department of Veterans Affairs

Section 4(a) would make technical changes to 38 U.S.C. § 714 to make Congress's intent in the *Accountability Act* clearer and make the disciplinary authorities in 38 U.S.C. § 714 usable so VA can keep employees accountable. Section 4(a) would make the following modifications to 38 U.S.C. § 714:

Section 714(a) would be modified by giving the VA Secretary authority to discipline covered individuals who the Secretary determines, as supported by substantial evidence, warrant such action because of misconduct or poor performance; codifying five factors¹⁸ VA must exclusively consider when deciding whether to discipline covered individuals; and adding language specifying the VA Secretary must review a proposing disciplinary authority's disciplinary decision using a substantial evidence test.

Section 714(c) would be modified by striking paragraph (1)(D), which specifies Section 714(c) supersedes inconsistent collective bargaining agreements; and inserting language giving the Secretary the ability to remove, demote, or suspend a covered individual without first placing the individual on a performance improvement plan.

Section 714(d) would be modified by adding language preventing, absent a constitutional issue, administrative judges or the MSPB from reviewing challenges to penalties imposed against covered individuals; specifying courts, absent a constitutional issue, may not review challenges to penalties imposed against covered individuals or mitigate such penalties; and striking Section 714(d)(10), which states if employees subject to a collective bargaining agreement choose to grieve actions taken under Section 714(d) through procedures provided in the bargaining agreement, Section 714(c) and (d) procedures apply.

Section 714(h) would be redesignated as Section 714(j).

Section 714(i) would be added to specify Section 714 procedures supersede collective bargaining agreements if the agreements are inconsistent with Section 714 and Section 714(i), Application, specifying Section 714 can be applied to actions taken against covered individuals starting on the date the *Accountability Act* was enacted, would be added after Section 714(g).

¹⁸The five factors are (1) the nature and seriousness of the offense, and its relation to the covered individual's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; (2) the covered individual's job level and type of employment, including supervisory or fiduciary role, and prominence of the position; (3) the covered individual's past disciplinary record; (4) the covered individual's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; and (5) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.

Section 714(j), as redesignated by Section 4(a)(4), would be modified by making the following changes to the covered individual definition: specifying covered individuals include individuals appointed pursuant to Title 38, Title 5, and hybrid employees appointed pursuant to Title 38 § 7401; specifying a supervisors or management officials as defined in Title 5 7103(a) are not covered individuals.

Section 4(b) would amend Title 38 U.S.C. § 7403(f)(3) by adding a subsection (B) stating matters involving covered individuals, as defined in Section 712 or Section 714, will be resolved at the Secretary’s sole discretion under Section 712, Section 714, or Title 5 as though such individuals had been appointed under that title.

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 italics, 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 italics, 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.

* * * * *

712. *Supervisors: removal, demotion, or suspension based on performance or misconduct.*

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SUBCHAPTER I—GENERAL EMPLOYEE MATTERS

* * * * *

§ 712. Supervisors: removal, demotion, or suspension based on performance or misconduct

(a) *IN GENERAL.*—The Secretary may remove from civil service, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines by substantial evidence that

the performance or misconduct of the covered individual warrants such action.

(b) *RIGHTS AND PROCEDURES.*—(1)(A) When making an initial decision under subsection (a) with respect to determining whether a covered individual should be removed, demoted, or suspended, the deciding employee of the Department shall exclusively apply the following factors:

(i) The nature and seriousness of the offense, and its relation to the covered individual's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

(ii) The covered individual's job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

(B) The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.

(2) A covered individual subject to an action under subsection (a) is entitled to—

(A) advance notice of the action and a file containing all evidence in support of the proposed action;

(B) be represented by an attorney or other representative of the covered individual's choice; and

(C) grieve the action in accordance with an internal grievance process that the Secretary, in consultation with the Assistant Secretary for Accountability and Whistleblower Protection, shall establish for purposes of this subsection.

(3) A final decision by the Secretary under paragraph (1)(B) that is not grieved, and a grievance decision under paragraph (2)(C), shall be final and conclusive.

(4) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section, and the Secretary may carry out such a removal, demotion, or suspension without first placing a covered individual on a performance improvement plan.

(c) *TIMING.*—(A) The aggregate period for notice, response, and final decision by the Secretary of an action under this section may not exceed 15 business days.

(B) The period for the response of a covered individual to a notice under subsection (b)(2)(A) shall be 7 business days.

(C) The final decision by the Secretary under subsection (b)(1)(B) shall—

(i) be issued not later than 15 business days after notice is provided under subsection (b)(2)(A); and

(ii) be in writing and shall include the specific reasons for the decision.

(D) The Secretary shall ensure that the grievance process established under paragraph (2)(C) takes fewer than 21 days after the final decision.

(d) *JUDICIAL REVIEW.*—(1) A covered individual adversely affected by a final decision under this section that is not grieved, or by a grievance decision under subsection (b)(2)(C), may obtain judicial review of such decision.

(2) Any removal, demotion, or suspension under this section is not appealable to the Merit Systems Protection Board, or to any admin-

istrative judge or other person appointed by the Merit Systems Protection Board.

(3) In any case in which judicial review is sought under paragraph (1), the court shall review the record and may set aside any Department action found to be—

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

(B) obtained without procedures required by a provision of law having been followed; or

(C) unsupported by substantial evidence.

(4) Except to the extent that an appeal under this subsection presents a constitutional issue, such court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.

(e) DEMOTED INDIVIDUALS.—(1) A demotion under subsection (a) shall be carried out as a reduction in grade for which the covered individual is qualified, that the Secretary determines is appropriate, and that reduces the annual rate of pay of the covered individual.

(2) Notwithstanding any other provision of law, any covered individual so demoted—

(A) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade;

(B) 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 covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave; and

(C) who does not report for duty or receive approval to use accrued unused leave shall not receive pay or other benefits.

(f) WHISTLEBLOWER PROTECTION.—(1) In the case of a covered 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 covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(2) In the case of a covered individual who has made a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) until—

(A) in the case in which the Assistant Secretary determines to refer the whistleblower disclosure under section 323(c)(1)(D) of this title to an office or other investigative entity, a final decision with respect to the whistleblower disclosure has been made by such office or other investigative entity; or

(B) in the case in which the Assistant Secretary determines not to refer the whistleblower disclosure under such section, the Assistant Secretary makes such determination.

(g) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—(1) 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.

(2) *Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.*

(h) *APPLICATION.—This section shall apply to any performance or misconduct of a covered individual beginning on the date of enactment of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115–41).*

(i) *DEFINITIONS.—In this section:*

(1) *The term “civil service” has the meaning given that term in section 2101 of title 5.*

(2) *The term “covered individual” means an employee of the Department who is a supervisor or management official as defined in section 7103(a) of title 5 occupying a position at the Department, including individuals appointed pursuant to this title, title 5, and hybrid employees appointed pursuant to section 7401 of this title, but does not include—*

(A) *an individual occupying a senior executive position (as defined in section 713(d) of this title);*

(B) *an individual appointed pursuant to section 7306, 7401(1), 7401(4), or 7405 of this title;*

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

(D) *a political appointee.*

(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, Code of Federal Regulations, or successor regulation.*

(6) *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.*

(7) *The term “whistleblower disclosure” has the meaning given such term in section 323(g) of this title.*

* * * * *

§ 713. Senior executives: removal, demotion, or suspension based on performance or misconduct

(a) *AUTHORITY.—(1) The Secretary may, as provided in this section, reprimand or suspend, involuntarily reassign, demote, or remove a covered individual from a senior executive position at the Department if the Secretary determines by substantial evidence that the misconduct or performance of the covered individual warrants such action.*

(2) If the Secretary so removes such an individual, the Secretary may remove the individual from the civil service (as defined in section 2101 of title 5).

(3) *When making an initial decision under this subsection with respect to determining whether a covered individual should be reprimanded or suspended, involuntarily reassigned, demoted, or removed, the deciding employee of the Department shall exclusively apply the following factors:*

(A) *The nature and seriousness of the offense, and its relation to the covered individual's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.*

(B) *The covered individual's job level and type of employment, including supervisory or fiduciary role, and prominence of the position.*

(4) *The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.*

(b) RIGHTS AND PROCEDURES.—(1) A covered individual who is the subject of an action under subsection (a) is entitled to—

(A) advance notice of the action and a file containing all evidence in support of the proposed action;

(B) be represented by an attorney or other representative of the covered individual's choice; and

(C) grieve the action in accordance with an internal grievance process that the Secretary, in consultation with the Assistant Secretary for Accountability and Whistleblower Protection, shall establish for purposes of this subsection.

(2)(A) The aggregate period for notice, response, and decision on an action under subsection (a) may not exceed 15 business days.

(B) The period for the response of a covered individual to a notice under paragraph (1)(A) of an action under subsection (a) shall be 7 business days.

(C) A decision under this paragraph on an action under subsection (a) shall be issued not later than 15 business days after notice of the action is provided to the covered individual under paragraph (1)(A). The decision shall be in writing, and shall include the specific reasons therefor.

(3) The Secretary shall ensure that the grievance process established under paragraph (1)(C) takes fewer than 21 days *after the final decision*.

(4) A decision under paragraph (2) that is not grieved, and a grievance decision under paragraph (3), shall be final and conclusive.

(5) A covered individual adversely affected by a decision under paragraph (2) that is not grieved, or by a grievance decision under paragraph (3), may obtain judicial review of such decision.

(6) In any case in which judicial review is sought under paragraph (5), the court shall review the record and may set aside any Department action found to be—

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

(B) obtained without procedures required by a provision of law having been followed; or

(C) unsupported by substantial evidence.

(7) *Except to the extent that an appeal under this subsection presents a constitutional issue, such court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.*

(c) **RELATION TO OTHER PROVISIONS OF LAW.**—Section 3592(b)(1) of title 5 and the procedures under section 7543(b) of such title do not apply to an action under subsection (a).

(d) **APPLICATION.**—*This section shall apply to any misconduct or performance of a covered individual beginning on the date of enactment of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115–41).*

[(d)] (e) **DEFINITIONS.**—In this section:

(1) The term “covered 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), section 7401(1), or section 7401(4) 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) of title 5), a Senior Executive Service position (as such term is defined in such section); and

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

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

(a) **IN GENERAL.**—(1) The Secretary may remove, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines *by substantial evidence* the performance or misconduct of the covered individual warrants such removal, demotion, or suspension.

(2) If the Secretary so removes, demotes, or suspends such a covered individual, the Secretary may—

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

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

(C) suspend the covered individual.

(3)(A) *When making an initial decision under this subsection with respect to determining whether a covered individual should be removed, demoted, or suspended, the deciding employee of the Department shall exclusively apply the following factors:*

(i) *The nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.*

(ii) *The covered individual's job level and type of employment, including supervisory or fiduciary role, and prominence of the position.*

(iii) *The covered individual's past disciplinary record.*

(iv) *The covered individual's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.*

(v) *Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.*

(B) *The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.*

(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1) Notwithstanding any other provision of law, any covered 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)(A) A covered 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 covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave.

(B) If a covered individual so demoted does not report for duty or receive approval to use accrued unused leave, such covered individual shall not receive pay or other benefits pursuant to subsection (d)(5).

(c) PROCEDURE.—(1)(A) The aggregate period for notice, response, and final decision in a removal, demotion, or suspension under this section may not exceed 15 business days.

(B) The period for the response of a covered individual to a notice of a proposed removal, demotion, or suspension under this section shall be 7 business days.

(C) Paragraph (3) of subsection (b) of section 7513 of title 5 shall apply with respect to a removal, demotion, or suspension under this section.

[(D) The procedures in this subsection shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.]

(2) The Secretary shall issue a final decision with respect to a removal, demotion, or suspension under this section not later than 15 business days after the Secretary provides notice, including a file containing all the evidence in support of the proposed action, to the covered individual of the removal, demotion, or suspension. The decision shall be in writing and shall include the specific reasons therefor.

(3) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section, *and the Secretary may carry out such a removal, demotion, or suspension without first placing a covered individual on a performance improvement plan.*

(4)(A) Subject to subparagraph (B) and subsection (d), any removal or demotion under this section, and any suspension of more than 14 days under this section, 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 10 business days after the date of such removal, demotion, or suspension.

(d) EXPEDITED REVIEW.—(1) Upon receipt of an appeal under subsection (c)(4)(A), the administrative judge shall expedite any such appeal under section 7701(b)(1) of title 5 and, in any such case, shall issue a final and complete decision not later than 180 days after the date of the appeal.

(2)(A) 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.

(B) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the administrative judge shall not mitigate the penalty prescribed by the Secretary.

(C) *Except to the extent that an appeal under this subsection presents a constitutional issue, the administrative judge may not review a challenge to the penalty imposed against the covered individual.*

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

(B) Notwithstanding section 7701(c)(1)(B) of title 5, the Merit Systems Protection Board 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.

(C) Notwithstanding title 5 or any other provision of law, if the decision of the Secretary is supported by substantial evidence, the Merit Systems Protection Board shall not mitigate the penalty prescribed by the Secretary.

(D) *Except to the extent that an appeal under this subsection presents a constitutional issue, the Merit Systems Protection Board may not review a challenge to the penalty imposed against the covered individual.*

(4) In any case in which the administrative judge cannot issue a decision in accordance with the 180-day requirement under paragraph (1), the Merit Systems Protection Board shall, not later than 14 business days after the expiration of the 180-day period, submit to the Committee on Veterans' Affairs of the Senate and the Committee on Veterans' Affairs of the 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 or to any court of appeals of competent jurisdiction pursuant to subsection (b)(1)(B) of such section.

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

(C) *Except to the extent that an appeal under this subsection presents a constitutional issue, such Court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.*

(6) The Merit Systems Protection Board may not stay any removal or demotion under this section, except as provided in section 1214(b) of title 5.

(7) During the period beginning on the date on which a covered individual appeals a removal from the civil service under subsection (c) and ending on the date that the United States Court of Appeals for the Federal Circuit issues a final decision on such appeal, such covered 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) If an employee who is subject to a collective bargaining agreement chooses to grieve an action taken under this section through a grievance procedure provided under the collective bargaining agreement, the timelines and procedures set forth in subsection (c) and this subsection shall apply.]

(e) WHISTLEBLOWER PROTECTION.—(1) In the case of a covered 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 covered individual under subsection (a) without the approval of the Special Counsel under section 1214(f) of title 5.

(2) In the case of a covered individual who has made a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) until—

(A) in the case in which the Assistant Secretary determines to refer the whistleblower disclosure under section 323(c)(1)(D) of this title to an office or other investigative entity, a final decision with respect to the whistleblower disclosure has been made by such office or other investigative entity; or

(B) in the case in which the Assistant Secretary determines not to refer the whistleblower disclosure under such section, the Assistant Secretary makes such determination.

(f) TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.—(1) 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.

(2) Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

(g) VACANCIES.—In the case of a covered 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.

(h) COLLECTIVE BARGAINING AGREEMENTS.—The procedures in this section shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.

(i) APPLICATION.—This section shall apply to any performance or misconduct of a covered individual beginning on the date of enactment of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115–41).

[(h)] (j) DEFINITIONS.—In this section:

(1) The term “covered individual” means an individual occupying a position at the Department *including individuals appointed pursuant to this title, title 5, and hybrid employees appointed pursuant to section 7401 of this title*, but does not include—

(A) an individual occupying a senior executive position (as defined in section 713(d) of this title);

(B) an individual appointed pursuant to sections 7306, 7401(1), 7401(4), or 7405 of this title;

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

(D) a political appointee[.]; or

(E) a supervisor or management official as defined in section 7103(a) of title 5.

(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, Code of Federal Regulations, or successor regulation.

(6) The term “whistleblower disclosure” has the meaning given such term in section 323(g) of this title.

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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

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§ 7403. Period of appointments; promotions

(a)(1) Appointments under this chapter of health-care professionals to whom this section applies may be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Secretary, without regard to civil-service requirements.

(2) This section applies to the following persons appointed under this chapter:

- (A) Physicians.
- (B) Dentists.
- (C) Podiatrists.
- (D) Optometrists.
- (E) Nurses.
- (F) Physician assistants.
- (G) Expanded-function dental auxiliaries.
- (H) Chiropractors.

(b)(1) Except as otherwise provided in this subsection, appointments described in subsection (a) shall be for a probationary period of two years.

(2) With respect to the appointment of a registered nurse under this chapter, paragraph (1) shall apply with respect to such appointment regardless of whether such appointment is on a full-time basis or a part-time basis.

(3) An appointment described in subsection (a) on a part-time basis of a person who has previously served on a full-time basis for the probationary period for the position concerned shall be without a probationary period.

(4) The record of each person serving under such an appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Secretary. If such a board finds that such person is not fully qualified and satisfactory, such person shall be separated from the service.

(c) Promotions of persons to whom this section applies shall be made only after examination given in accordance with regulations prescribed by the Secretary. Advancement within grade may be made in increments of the minimum rate of basic pay of the grade in accordance with regulations prescribed by the Secretary.

(d) In determining eligibility for reinstatement in the Federal civil service of persons appointed to positions in the Administration under this chapter who at the time of appointment have a civil-service status, and whose employment in the Administration is terminated, the period of service performed in the Administration shall be included in computing the period of service under applicable civil-service rules and regulations.

(e) In accordance with regulations prescribed by the Secretary, the grade and annual rate of basic pay of a person to whom this

section applies whose level of assignment is changed from a level of assignment in which the grade level is based on both the nature of the assignment and personal qualifications may be adjusted to the grade and annual rate of basic pay otherwise appropriate.

(f)(1) Upon the recommendation of the Under Secretary for Health, the Secretary may—

(A) use the authority in subsection (a) to establish the qualifications for and (subject to paragraph (2)) to appoint individuals to positions listed in section 7401(3) of this title; and

(B) use the authority provided in subsection (c) for the promotion and advancement of Department employees serving in such positions.

(2) In using such authority to appoint individuals to such positions, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5.

(3) **[Notwithstanding any other provision of this title or other law,]** (A) *Notwithstanding any other provision of this title or other law, and consistent with subparagraph (B)*, all matters relating to adverse actions, reductions-in-force, the applicability of the principles of preference referred to in paragraph (2), rights of part-time employees, disciplinary actions, and grievance procedures involving individuals appointed to such positions, whether appointed under this section or section 7405(a)(1)(B) of this title (including similar actions and procedures involving an employee in a probationary status), shall be resolved under the provisions of title 5 as though such individuals had been appointed under that title.

(B) *With respect to any covered individual (as that term is defined in section 712 or 714) appointed to such positions, such matters shall be resolved, at Secretary's sole discretion, under—*

(i) *section 712;*

(ii) *section 714; or*

(iii) *title 5 as though such individuals had been appointed under that title.*

(g)(1) The Secretary may appoint in the competitive civil service without regard to the provisions of subchapter I of chapter 33 of title 5 (other than sections 3303 and 3328 of such title) an individual who—

(A) has a recognized degree or certificate from an accredited institution in a health-care profession or occupation; and

(B) has successfully completed a clinical education program affiliated with the Department.

(2) In using the authority provided by this subsection, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5.

(h)(1) If the Secretary uses the authority provided in subsection (c) for the promotion and advancement of an occupational category of employees described in section 7401(3) of this title, as authorized by subsection (f)(1)(B), the Secretary shall do so through one or more systems prescribed by the Secretary. Each such system shall be planned, developed, and implemented in collaboration with, and with the participation of, exclusive employee representatives of such occupational category of employees.

(2)(A) Before prescribing a system of promotion and advancement of an occupational category of employees under paragraph (1), the Secretary shall provide to exclusive employee representatives of such occupational category of employees a written description of the proposed system.

(B) Not later than 30 days after receipt of the description of a proposed system under subparagraph (A), exclusive employee representatives may submit to the Secretary the recommendations, if any, of such exclusive employee representatives with respect to the proposed system.

(C) The Secretary shall give full and fair consideration to any recommendations received under subparagraph (B) in deciding whether and how to proceed with a proposed system.

(3) The Secretary shall implement immediately any part of a system of promotion and advancement under paragraph (1) that is proposed under paragraph (2) for which the Secretary receives no recommendations from exclusive employee representatives under paragraph (2).

(4) If the Secretary receives recommendations under paragraph (2) from exclusive employee representatives on any part of a proposed system of promotion and advancement under that paragraph, the Secretary shall determine whether or not to accept the recommendations, either in whole or in part. If the Secretary determines not to accept all or part of the recommendations, the Secretary shall—

(A) notify the congressional veterans' affairs committees of the recommendations and of the portion of the recommendations that the Secretary has determined not to accept;

(B) meet and confer with such exclusive employee representatives, for a period not less than 30 days, for purposes of attempting to reach an agreement on whether and how to proceed with the portion of the recommendations that the Secretary has determined not to accept;

(C) at the election of the Secretary, or of a majority of such exclusive employee representatives who are participating in negotiations on such matter, employ the services of the Federal Mediation and Conciliation Service during the period referred to in subparagraph (B) for purposes of reaching such agreement; and

(D) if the Secretary determines that activities under subparagraph (B), (C), or both are unsuccessful at reaching such agreement and determines (in the sole and unreviewable discretion of the Secretary) that further meeting and conferral under subparagraph (B), mediation under subparagraph (C), or both are unlikely to reach such agreement—

(i) notify the congressional veterans' affairs committees of such determinations, identify for such committees the portions of the recommendations that the Secretary has determined not to accept, and provide such committees an explanation and justification for determining to implement the part of the system subject to such portions of the recommendations without regard to such portions of the recommendations; and

(ii) commencing not earlier than 30 days after notice under clause (i), implement the part of the system subject

to the recommendations that the Secretary has determined not to accept without regard to those recommendations.

(5) If the Secretary and exclusive employee representatives reach an agreement under paragraph (4) providing for the resolution of a disagreement on one or more portions of the recommendations that the Secretary had determined not to accept under that paragraph, the Secretary shall immediately implement such resolution.

(6) In implementing a system of promotion and advancement under this subsection, the Secretary shall—

(A) develop and implement mechanisms to permit exclusive employee representatives to participate in the periodic review and evaluation of the system, including peer review, and in any further planning or development required with respect to the system as a result of such review and evaluation; and

(B) provide exclusive employee representatives appropriate access to information to ensure that the participation of such exclusive employee representative in activities under subparagraph (A) is productive.

(7)(A) The Secretary may from time to time modify a system of promotion and advancement under this subsection.

(B) In modifying a system, the Secretary shall take into account any recommendations made by the exclusive employee representatives concerned.

(C) In modifying a system, the Secretary shall comply with paragraphs (2) through (5) and shall treat any proposal for the modification of a system as a proposal for a system for purposes of such paragraphs.

(D) The Secretary shall promptly submit to the congressional veterans' affairs committees a report on any modification of a system. Each report shall include—

(i) an explanation and justification of the modification; and

(ii) a description of any recommendations of exclusive employee representatives with respect to the modification and a statement whether or not the modification was revised in light of such recommendations.

(8) In the case of employees who are not within a unit with respect to which a labor organization is accorded exclusive recognition, the Secretary may develop procedures for input from representatives under this subsection from any appropriate organization that represents a substantial percentage of such employees or, if none, in such other manner as the Secretary considers appropriate, consistent with the purposes of this subsection.

(9) In this subsection, the term "congressional veterans' affairs committees" means the Committees on Veterans' Affairs of the Senate and the House of Representatives.

* * * * *

MINORITY VIEWS

This legislation presents significant due process issues and constitutional concerns. In its written testimony for the July 12, 2023, Oversight & Investigations Subcommittee legislative hearing, where H.R. 4278 was on the agenda, the Department of Veterans Affairs (VA) stated:

We are confident that the authorities currently available to the VA are sufficient to hold employees accountable for misconduct and poor performance. We do not believe any legislation is necessary right now to ensure accountability. VA has legal concerns regarding some of the language in the draft bill. Specifically, VA is concerned this language will continue to be the subject of extensive litigation and constitutional challenges, creating uncertainty and potentially leading to a continued pattern of overturned disciplinary actions.

If this legislation becomes law, it will be challenged in the courts, making VA no better off than it has been in its attempts to utilize the authorities provided under the VA Accountability and Whistleblower Protection Act of 2017 (P.L. 115–41). At the same time, VA—particularly, its healthcare system—is struggling with widespread post-pandemic understaffing, while rapidly trying to staff up to implement the landmark Honoring Our PACT Act (P.L. 117–168). Veterans would be much better served if the Committee instead focused on legislation that would help fill VA staff vacancies, rather than create more of them.

VA officials contend there is much better predictability and lower likelihood of disciplinary actions being mitigated or overturned when they exercise existing Title 5 disciplinary authorities, as there are decades of case law that stakeholders and the courts are familiar with. Furthermore, contrary to claims made by the Majority, H.R. 4278 would do very little to expedite processes for addressing employee misconduct at VA. Compared to existing authorities under Title 5 and Title 38, this bill does not make significant adjustments to the number of days allowed for each step of the process—from the point at which a disciplinary action is proposed by the deciding official until it is finalized. Properly and thoroughly investigating misconduct takes much longer than proposing and finalizing disciplinary actions.

Among the most problematic provisions of H.R. 4278 are those that would strip VA civil servants of due process rights that are afforded to all other federal employees and upend existing collective bargaining agreements. This legislation would have a chilling effect on VA recruitment and retention—especially for supervisors and senior executives, as H.R. 4278 is particularly harsh in its treatment of these two categories of employees. In addition, there is sig-

nificant risk that implementing this legislation will be quite costly, as it is likely to be challenged, leading to VA incurring costs related to litigation and the potential award of monetary damages. It is therefore concerning that Rep. Mrvan's amendment to examine the costs of implementing P.L. 115-41 was not adopted, as it would have provided the committee valuable insight about the potential cost of H.R. 4278.

It is also perplexing that all but one member of the Majority voted against the amendment offered by Rep. Pappas, which would have improved management training for VA supervisors, management officials, and senior executives and improved their understanding of the disciplinary options and procedures available to address poor performance and misconduct. Specifically, the amendment would have required VA to develop mandatory training focusing on areas such as developing and discussing relevant performance goals and objectives with employees; communicating and discussing employees' progress relative to the performance goals and objectives; conducting performance appraisals; mentoring and motivating employees; and effectively managing employees with unacceptable performance. Congress cannot simply strip away constitutional rights as a means of arriving at accountability. Rather, Congress must provide VA with the resources and tools to develop and support effective management.

MARK TAKANO,
Ranking Member.

