

Calendar No. 272114TH CONGRESS
1ST SESSION**S. 1082**

To amend title 38, United States Code, to provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 23, 2015

Mr. RUBIO (for himself, Mr. VITTER, Mr. BARRASSO, Mr. TOOMEY, Mr. CASIDY, Mr. FLAKE, Mr. CORNYN, Mr. HATCH, Mr. JOHNSON, Mr. MCCAIN, Mr. BURR, Mr. KIRK, Mr. MORAN, Mr. TILLIS, and Ms. AYOTTE) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

OCTOBER 19, 2015

Reported by Mr. ISAKSON, with amendments

[Omit the part struck through and insert the part printed in *italic*]

A BILL

To amend title 38, United States Code, to provide for the removal or demotion of employees of the Department of Veterans Affairs based on performance or misconduct, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Department of Vet-
3 erans Affairs Accountability Act of 2015”.

4 **SEC. 2. REMOVAL OR DEMOTION OF EMPLOYEES BASED ON**
5 **PERFORMANCE OR MISCONDUCT.**

6 (a) **IN GENERAL.**—Chapter 7 of title 38, United
7 States Code, is amended by adding at the end the fol-
8 lowing new section:

9 **“§ 714. Employees: removal or demotion based on**
10 **performance or misconduct**

11 ~~“(a) IN GENERAL.—The Secretary may remove or~~
12 ~~demote an individual who is an employee of the Depart-~~
13 ~~ment if the Secretary determines the performance or mis-~~
14 ~~conduct of the individual warrants such removal or demo-~~
15 ~~tion. If the Secretary so removes or demotes such an indi-~~
16 ~~vidual, the Secretary may—~~

17 ~~“(1) remove the individual from the civil service~~
18 ~~(as defined in section 2101 of title 5); or~~

19 ~~“(2) demote the individual by means of—~~

20 ~~“(A) a reduction in grade for which the in-~~
21 ~~dividual is qualified and that the Secretary de-~~
22 ~~termines is appropriate; or~~

23 ~~“(B) a reduction in annual rate of pay~~
24 ~~that the Secretary determines is appropriate.~~

25 ~~“(a) IN GENERAL.—(1) The Secretary may remove or~~
26 ~~demote an individual who is an employee of the Depart-~~

1 *ment if the Secretary determines the performance or mis-*
2 *conduct of the individual warrants such removal or demo-*
3 *tion.*

4 “(2) *A determination under paragraph (1) that the*
5 *performance or misconduct of an individual warrants re-*
6 *moval or demotion may consist of a determination of any*
7 *of the following:*

8 “(A) *The individual neglected a duty of the posi-*
9 *tion in which the individual was employed.*

10 “(B) *The individual engaged in malfeasance.*

11 “(C) *The individual failed to accept a directed*
12 *reassignment or to accompany a position in a trans-*
13 *fer of function.*

14 “(D) *The individual violated a policy of the De-*
15 *partment.*

16 “(E) *The individual violated a provision of law.*

17 “(F) *The individual engaged in insubordination.*

18 “(G) *The individual over prescribed medication.*

19 “(H) *The individual contributed to the purpose-*
20 *ful omission of the name of one or more veterans*
21 *waiting for health care from an electronic wait list*
22 *for a medical facility of the Department.*

23 “(I) *The individual was the supervisor of an em-*
24 *ployee of the Department, or was a supervisor of the*
25 *supervisor, at any level, who contributed to a pur-*

1 *poseful omission as described in subparagraph (H)*
 2 *and knew, or reasonably should have known, that the*
 3 *employee contributed to such purposeful omission.*

4 *“(J) Such other performance or misconduct as*
 5 *the Secretary determines warrants the removal or de-*
 6 *motion of the individual under paragraph (1).*

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

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

11 *“(B) demote the individual by means of—*

12 *“(i) a reduction in grade for which the in-*
 13 *dividual is qualified and that the Secretary de-*
 14 *termines is appropriate; or*

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

17 *“(b) PAY OF CERTAIN DEMOTED INDIVIDUALS.—(1)*

18 *Notwithstanding any other provision of law, any individual*
 19 *subject to a demotion under subsection ~~(a)(2)(A)~~*
 20 *(a)(3)(B)(i) shall, beginning on the date of such demotion,*
 21 *receive the annual rate of pay applicable to such grade.*

22 *“(2) An individual so demoted may not be placed on*
 23 *administrative leave or any other category of paid leave*
 24 *during the period during which an appeal (if any) under*
 25 *this section is ongoing, and may only receive pay if the*

1 individual reports for duty. If an individual so demoted
2 does not report for duty, such individual shall not receive
3 pay or other benefits pursuant to subsection (e)(5).

4 “(c) NOTICE TO CONGRESS.—Not later than 30 days
5 after removing or demoting an individual under subsection
6 (a), the Secretary shall submit to the Committees on Vet-
7 erans’ Affairs of the Senate and House of Representatives
8 notice in writing of such removal or demotion and the rea-
9 son for such removal or demotion.

10 “(d) PROCEDURE.—(1) The procedures under section
11 7513(b) of title 5 and chapter 43 of such title shall not
12 apply to a removal or demotion under this section.

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

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

21 “(e) EXPEDITED REVIEW BY ADMINISTRATIVE LAW
22 JUDGE.—(1) Upon receipt of an appeal under subsection
23 (d)(2)(A), the Merit Systems Protection Board shall refer
24 such appeal to an administrative law judge pursuant to
25 section 7701(b)(1) of title 5. The administrative law judge

1 shall expedite any such appeal under such section and, in
2 any such case, shall issue a decision not later than 45 days
3 after the date of the appeal.

4 “(2) Notwithstanding any other provision of law, in-
5 cluding section 7703 of title 5, the decision of an adminis-
6 trative judge under paragraph (1) shall be final and shall
7 not be subject to any further appeal.

8 “(3) In any case in which the administrative judge
9 cannot issue a decision in accordance with the 45-day re-
10 quirement under paragraph (1), the removal or demotion
11 is final. In such a case, the Merit Systems Protection
12 Board shall, within 14 days after the date that such re-
13 moval or demotion is final, submit to Congress and the
14 Committees on Veterans’ Affairs of the Senate and House
15 of Representatives a report that explains the reasons why
16 a decision was not issued in accordance with such require-
17 ment.

18 “(4) The Merit Systems Protection Board or admin-
19 istrative judge may not stay any removal or demotion
20 under this section.

21 “(5) During the period beginning on the date on
22 which an individual appeals a removal from the civil serv-
23 ice under subsection (d) and ending on the date that the
24 administrative judge issues a final decision on such appeal,
25 such individual may not receive any pay, awards, bonuses,

1 incentives, allowances, differentials, student loan repay-
2 ments, special payments, or benefits.

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

9 “(f) *WHISTLEBLOWER PROTECTION.—(1) In the case*
10 *of an individual seeking corrective action (or on behalf of*
11 *whom corrective action is sought) from the Office of Special*
12 *Counsel based on an alleged prohibited personnel practice*
13 *described in section 2302(b) of title 5, the Secretary may*
14 *not remove or demote such individual under subsection (a)*
15 *without the approval of the Special Counsel under section*
16 *1214(f) of title 5.*

17 “(2) *The Office of Special Counsel shall establish—*

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

20 “(B) *a standard for the approval under para-*
21 *graph (1) of removal or demotion under subsection*
22 *(a), which may include a determination as to whether*
23 *the removal or demotion is a prohibited personnel ac-*
24 *tion.*

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

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

12 “~~(f) LIMITATION ON REMOVAL OR DEMOTION.—In~~
 13 ~~the case of an individual seeking corrective action (or on~~
 14 ~~behalf of whom corrective action is sought) from the Office~~
 15 ~~of Special Counsel based on an alleged prohibited per-~~
 16 ~~sonnel practice described in section 2302(b) of title 5, the~~
 17 ~~Secretary may not remove or demote such individual~~
 18 ~~under subsection (a) without the approval of the Special~~
 19 ~~Counsel under section 1214(f) of title 5.~~

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

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

1 “(h) DEFINITIONS.—In this section:

2 “(1) The term ‘individual’ means an individual
3 occupying a position at the Department of Veterans
4 Affairs but does not include—

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

7 “(B) a political appointee.

8 “(2) The term ‘grade’ has the meaning given
9 such term in section 7511(a) of title 5.

10 “(3) The term ‘misconduct’ includes neglect of
11 duty, malfeasance, or failure to accept a directed re-
12 assignment or to accompany a position in a transfer
13 of function.

14 “(4) The term ‘political appointee’ means an in-
15 dividual who is—

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

19 “(B) ~~is~~ a limited term appointee, limited
20 emergency appointee, or noncareer appointee in
21 the Senior Executive Service, as defined under
22 paragraphs (5), (6), and (7), respectively, of
23 section 3132(a) of title 5; or

24 “(C) ~~is~~ employed in a position of a con-
25 fidential or policy-determining character under

1 schedule C of subpart C of part 213 of title 5
2 of the Code of Federal Regulations.”.

3 (b) CLERICAL AND CONFORMING AMENDMENTS.—

4 (1) CLERICAL.—The table of sections at the be-
5 ginning of such chapter is amended by adding at the
6 end the following new item:

“714. Employees: removal or demotion based on performance or misconduct.”.

7 (2) CONFORMING.—Section 4303(f) of title 5,
8 United States Code, is amended—

9 (A) by striking “or” at the end of para-
10 graph (2);

11 (B) by striking the period at the end of
12 paragraph (3) and inserting “, or”; and

13 (C) by adding at the end the following:

14 “(4) any removal or demotion under section
15 714 of title 38.”.

16 **SEC. 3. REQUIRED PROBATIONARY PERIOD FOR NEW EM-**
17 **PLLOYEES OF DEPARTMENT OF VETERANS AF-**
18 **FAIRS.**

19 (a) IN GENERAL.—Chapter 7 of title 38, United
20 States Code, as amended by section 2, is further amended
21 by adding at the end the following new section:

22 **“§ 715. Probationary period for employees**

23 “(a) IN GENERAL.—Notwithstanding sections 3321
24 and 3393(d) of title 5, the appointment of a covered em-
25 ployee shall become final only after such employee has

1 served a probationary period of 540 days. The Secretary
2 may extend a probationary period under this subsection
3 at the discretion of the Secretary.

4 “(b) COVERED EMPLOYEE.—In this section, the term
5 ‘covered employee’—

6 “(1) means any individual—

7 “(A) appointed to a permanent position
8 within the competitive service at the Depart-
9 ment; or

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

14 “(2) does not include any individual with a pro-
15 bationary period prescribed by section 7403 of this
16 title.

17 “(c) PERMANENT HIRES.—Upon the expiration of a
18 covered employee’s probationary period under subsection
19 (a), the supervisor of the employee shall determine wheth-
20 er the appointment becomes final based on regulations
21 prescribed for such purpose by the Secretary.”.

22 (b) APPLICATION.—The amendment made by sub-
23 section (a) shall apply to any covered employee (as that
24 term is defined in section 715 of title 38, United States

1 Code, as added by such subsection) appointed after the
2 date of enactment of this section.

3 (c) CLERICAL AND CONFORMING AMENDMENTS.—

4 (1) CLERICAL.—The table of sections at the be-
5 ginning of such chapter, as amended by section 2,
6 is further amended by adding at the end the fol-
7 lowing new item:

“715. Probationary period for employees.”.

8 (2) CONFORMING.—Title 5, United States
9 Code, is amended—

10 (A) in section 3321(e), by—

11 (i) striking “Service or” and inserting
12 “Service,”; and

13 (ii) inserting at the end before the pe-
14 riod the following: “, or any individual cov-
15 ered by section 715 of title 38”; and

16 (B) in section 3393(d), by adding at the
17 end after the period the following: “The pre-
18 ceding sentence shall not apply to any indi-
19 vidual covered by section 715 of title 38.”.

20 **SEC. 4. COMPTROLLER GENERAL STUDY OF DEPARTMENT**
21 **TIME AND SPACE USED FOR LABOR ORGANI-**
22 **ZATION ACTIVITY.**

23 (a) STUDY REQUIRED.—Not later than 180 days
24 after the date of the enactment of this Act, the Comp-
25 troller General of the United States shall conduct a study

1 on the amount of time spent by Department of Veterans
2 Affairs employees carrying out organizing activities relat-
3 ing to labor organizations and the amount of space in De-
4 partment facilities used for such activities. The study shall
5 include a cost-benefit analysis of the use of such time and
6 space for such activities.

7 (b) REPORT TO CONGRESS.—Not later than 90 days
8 after the completion of the study required under sub-
9 section (a), the Comptroller General shall submit to the
10 Committee on Veterans' Affairs of the Senate and the
11 Committee on Veterans' Affairs of the House of Rep-
12 resentatives a report on the results of the study.

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