STATEMENT OF
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Opening Remarks

Good morning, Chairman Miller, Ranking Member Takano, and Members of the Committee. Thank you for the opportunity to discuss settlement agreements between the Department of Veterans Affairs (VA) and its employees.

Addressing employment disputes in the federal government, which manifest in complaints of discrimination, allegations of prohibited personnel practices such as whistleblower retaliation, and appeals of proposed adverse/disciplinary actions, is a particularly daunting challenge. At VA, managers at every level are required to do this in the most cost effective manner with the least amount of disruption to the effective functioning of the organization as it carries out its statutory obligations for our Nation's Veterans. Moreover, VA managers must resolve employment disputes consistent with the vital goal of building and sustaining high performing teams that will achieve excellent outcomes for Veterans at a good value to the taxpayers. Oftentimes the best course of action when addressing a personnel dispute is to litigate the matter all the way to judgment or final decision, understanding that this approach will require a substantial diversion of agency time, resources, and expertise away from core mission activities in order to achieve success in the relevant court or administrative board. VA is not reticent to litigate—indeed the presumption is that we will litigate most personnel disputes. But it is our obligation, and in the best interest of Veterans and the taxpayers, to consider the merits of settling an employment dispute on a case-by-case basis. In each and every case, there is a delicate balance that must be struck between expediting the resolution of an employment dispute and formal vindication of the agency's position in a federal court or administrative board.

Why settle?

Congress clearly intended that federal agencies have the authority to settle matters expeditiously without resorting to protracted litigation. In the 1990s, faced with litigation dockets clogging federal courts and administrative tribunals, Congress passed three statutes that were designed to reduce the cost and time required to litigate many disputes. For example, the Administrative Dispute Resolution Acts of 1990 and 1996 and the Alternative Dispute Resolution Act of 1998, collectively required each agency to adopt a policy encouraging the use of Alternative Dispute Resolution (ADR) in a broad range of decision making, and required the federal trial courts to make ADR programs available to litigants.

At its most basic, ADR is an efficient means of resolving disputes through various mechanisms including mediation and arbitration. Settlement reflects the successful result of ADR. Resolving cases through ADR often saves parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and productivity. VA's use of settlement agreements is not only proper, but critical to maintaining a positive workplace of high performing teams to carry out VA's mission of serving Veterans. This, we believe, is exactly the result Congress intended in passing the 1990's legislation.

The American Bar Association provided a roadmap for settlement in its Ethical Guidelines for Settlement Negotiation, published in August 2002, stating "Most litigation is resolved through settlement. Courts and court rules encourage settlement of disputes as a means of dealing with burgeoning caseloads, increasingly crowded dockets, and scarcity of judicial resources. Parties in litigation frequently recognize that settlement can achieve substantial costs savings and preserve relationships, and does provide certainty in results . . .".

VA, like a number of other Federal agencies, does not have a national policy specifically aimed at settling employment disputes; and considering the unique nature of every employment dispute, we do not see the need for such a policy. VA, however, has implemented an effective national policy on the use of ADR. Indeed, Secretary McDonald underscored the importance of ADR in the VA Equal Employment Opportunity (EEO), Diversity and Inclusion Policy, stating "Workplace conflict is often the result of miscommunication or creative tension in the organization. Properly managed, it can yield improvements in business processes and positive outcomes in the organizational climate. To maintain a respectful, productive, and effective work environment, it is VA's policy to address and resolve workplace disputes and EEO complaints at the earliest possible stage. VA offers ADR services such as mediation, facilitation, and conflict management coaching to assist parties in constructively resolving disputes. ADR involves a neutral third party working with the employee, supervisor, or group to engage in constructive communication, identify issues, and develop collaborative solutions." In our experience, some ADR attempts call for settlement—some monetary but many with non-monetary implications, e.g., reassignment, resignation, or alteration of workplace conditions.

VA does recognize, however, the need for tools that will help leaders identify negative trends at a particular facility to gauge an organizations workplace culture and have more granular information about the frequency of complaints, litigation, and settlements and how bad actors are held accountable. I'm pleased to report that our Office of Human Resources and Administration has developed an initiative, which will use data science techniques to analyze internal data and publicly available data to ascertain systemic personnel issues and root causes in order to measure facility risks for high value settlements and findings of discrimination. This information will be available to managers at every level to assist them in performing their oversight responsibilities in ensuring prudent use of the taxpayer's money. This initiative is essential to achieving sustainable accountability across the enterprise.

Settlement factors

VA strives to resolve employment disputes consistent with its goal of creating and sustaining a high performing workforce to carry out VA's mission of providing excellent services and timely benefits to our nation's Veterans. This important work must be done at the local level in our Medical Centers, Cemeteries, and Regional Offices across the country. It is imperative that local managers and supervisors have the flexibility to resolve employee complaints and appeals at the lowest possible level based on the individual circumstances at each facility, and the commitment to litigate cases when an appropriate settlement cannot or should not be obtained.

VA settlement officials consider a variety of factors before resolving an employee complaint through a monetary settlement, such factors include: the disruption the complaint creates for that facility's workforce; the historical relationships between employees, management, and labor representatives; and the challenges the facility is attempting to overcome, including Veteran access issues and accountability challenges. Settlement officials balance the monetary cost of settlement against the loss of productivity of the employees and managers if the dispute is not resolved. They also settle cases when it is determined an employee has been legitimately aggrieved and it is simply the right thing to do.

Furthermore, the primary judicial and administrative bodies that decide federal employment disputes have adopted policies and practices that encourage or require settlement negotiations. These bodies, the Equal Employment Opportunity Commission (EEOC), Merit Systems Protection Board appeals, Federal Labor Relations Authority, and Office of Special Counsel (OSC), with their own burgeoning caseloads, often strongly encourage all federal agencies to settle cases prior to engaging in discovery and hearing. Additionally, based on statutorily required bargaining procedures, VA has a number of labor contracts that include language that strongly encourages mediation and arbitration.

Another consideration in settling an employee complaint or appeal is the significant cost of litigation to the facility, including the administrative resources needed to investigate and process a complaint, loss of employee productivity during depositions and trial testimony, travel costs, deposition and transcript costs, payments of damages and attorney's fees, decreased morale and increased divisiveness in the work unit, and loss of focus on the mission. Unlike the Department of Justice, whose mission includes litigating cases for the government, VA's mission is providing excellent services and timely benefits to our nations Veterans. In our case, litigation often requires the dedication of significant time by doctors and nurses, claims adjudicators, and cemetery personnel that is not focused on their primary duty of serving Veterans. Moreover, protracted litigation requires the dedication of substantial resources from all parts of the Department, including human resources, contracting, Office of Information and Technology, and Office of General Counsel (OGC), delaying work on other critical initiatives such as hiring to fill critical vacancies. Given the substantial resource

requirements associated with personnel litigation, it is incumbent on every facility manager to factor these considerations into settlement. In this way, they are serving as prudent stewards of the taxpayers' money.

In cases where VA proposes a disciplinary action against an employee, VA must also consider the employee's response and defenses before taking such an action. This response and defense, while not obviating the need for discipline, might cause the settlement authority to reconsider the level of discipline required and, in order to resolve the matter quickly, without the need for prolonged litigation, may mean that VA and the employee enter into a settlement agreement.

In VA's experience the lion's share of employment disputes arise in the EEO forum. VA's Office of Resolution Management, which processes EEO complaints for VA, estimates that the cost to the organization in which an EEO complaint is filed is, at minimum, $35,000 to process and investigate the complaint from the time the complaint is initiated until it either goes to the EEOC for a hearing or to VA's Office of Discrimination Complaint Adjudication for a Final Agency Decision. This does not include the sunk cost in time the employee and managers spend during the investigation. In addition, should the complaint go forward to the EEOC for hearing, VA incurs additional costs in depositions and other discovery as well as travel costs for VA witnesses. Furthermore, in those cases in which VA does not prevail, VA would be liable for additional monetary costs such as back-pay, compensatory damages, interest, and attorney fees.

In addition to the costs issue, the ability of VA to successfully defend a personnel complaint is sometimes compromised by the unavailability of key witnesses needed for the VA's defense. For example, it is not unusual for an EEO complaint to take 18 to 24 months, from the start of the formal complaint, before a hearing is held by the EEOC. In that time, key witnesses may retire or leave federal service. Once a witness retires or leaves federal service, neither VA nor the EEOC can compel that witness to testify in connection with an EEO complaint even if that individual has been named as a responsible management official. Settlement of such cases often allows VA to avoid near certain defeat at hearing at a much higher cost.

To put this in context, VA received 2,347, 2,047, and 2,130 EEO complaints during Fiscal Years 2012, 2013, and 2014 respectively. VA is not resourced to litigate this volume of cases to final adjudication without significantly and detrimentally impacting its mission of serving Veterans. Importantly, according to the most recent data maintained by the EEOC, the percentage of formal EEO cases settled within VA is within 2% of the average percentage of formal EEO cases settled in both Cabinet Level Government Agencies and all Government Agencies. This clearly demonstrates that the incidence of settlement agreements in VA is in line with the rest of the federal government. We expect with our new data science initiative to have real-time visibility of the magnitude of the EEO settlements VA enters into going forward.

Prior to engaging in settlement discussions, settlement authorities are encouraged to consult with OGC, which advises management about the strengths and weaknesses of a case as well as the litigation risks posed by the matter. Based on this analysis, OGC may also recommend whether a matter should be settled. For example in accordance with its own internal written policy, OGC advises its clients to settle an EEO matter "when settlement is supported by (1) objective evidence of the claimed loss or suffering and (2) objective evidence that the loss or suffering was caused by the discriminatory acts alleged in the complaint." OGC also advises its clients on the legal restraints regarding proposed settlement terms, thereby avoiding illegal or unreasonable settlements, e.g., compensatory damages in excess of $300,000 in an EEO case or inappropriate entitlement to retirement benefits. Ultimately, however, the authority to settle a matter lies with a settlement authority who is in the best position to assess the impact and true cost of litigation to his or her organization.

The authority to resolve a matter derives from the Secretary of Veterans Affairs organic authority to manage the Department. Through his delegated authority, management officials resolve matters with their employees. Typically, in a Medical Center, the Director acts as the settlement authority and in a Regional Office, the Regional Office Director acts in this capacity. When settling cases, these senior leaders are naturally inclined to be frugal as they consider a proposed monetary settlement because the money paid in a settlement of employment cases comes directly from their administration's operating budget.

Settlement does not end the obligation of the Department. If a settlement agreement is reached with an employee who filed an EEO or whistleblower retaliation complaint, VA has a duty to determine whether there was any wrongdoing by another employee necessitating settlement and, if so, what disciplinary action should be taken against or training provided to the responsible management official or responsible employee(s). In most cases, VA conducts the investigation. In cases involving potential wrongdoing by senior leaders, VA's Office of Accountability Review conducts the investigation. However, with whistleblower retaliation, OSC may, in accordance with law, conduct such investigations and recommend proposed disciplinary action to VA. VA supervisors should hold employees accountable based on the results of such investigations, when it is appropriate to do so.

Conclusion

VA does not misuse its authority to enter into settlement agreements to resolve employment disputes. VA settles cases in appropriate circumstances after carefully considering the cost of litigation to include devoting critical resources to deposition and hearing preparation and weighing the strength of the evidence and the potential defenses. Settlements have helped VA successfully provide expedited corrective action to whistleblowers and employees who have experienced retaliation or discrimination. Settlements have also helped VA successfully remove employees without the delay and uncertainty that comes with litigation, including the risk that the employee will be returned to VA on appeal. Most importantly, settlements have helped VA keep its

doctors, nurses and other employees focused on direct patient care or other services to Veterans rather than litigation.

The ability to successfully settle employee complaints or actions taken against employees is an important management tool in employee-employer relations and helps ensure our workforce is focused on its mission of serving Veterans rather than on litigation. The use of this tool is not and has not been taken lightly and, in all instances, before entering into a settlement agreement with employees, settlement authorities weigh the benefit that an agreement will have on VA, Veterans, and taxpayers, against the agreement's costs. We also take seriously our obligation to hold employees accountable and, notwithstanding considerations that might favor settlement, we will not hesitate to litigate appropriate cases to reinforce our commitment to our Veterans.