



CONGRESSIONAL TESTIMONY

STATEMENT FOR THE RECORD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PROVIDED TO THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

HEARING ON

**“PROTECTING WHISTLEBLOWERS AND PROMOTING ACCOUNTABILITY: IS VA MAKING
PROGRESS?”**

MAY 19, 2021

Chairman Pappas, Ranking Member Mann, and Members of the Committee:

The American Federation of Government Employees, AFL-CIO (AFGE) and its National Veterans Affairs Council (NVAC) appreciate the opportunity to submit a statement for the record on today's hearing titled "Protecting Whistleblowers and Promoting Accountability: Is VA Making Progress?" AFGE represents more than 700,000 federal and District of Columbia government employees, 260,000 of whom are proud, dedicated Department of Veterans Affairs (VA) employees including over 100,000 veterans.

Background:

Over the past decade, AFGE members have been among the prominent VA whistleblowers who have risked their own jobs to protect veterans from harm by reporting incidents of gross mismanagement and unsafe conditions. In each case, AFGE had to step in when management retaliated against whistleblowers.

In 2014, at the Phoenix, Arizona VA Medical Center (VAMC), an emergency room physician and patient scheduler represented by AFGE reported severe short staffing and wait list gaming. The same year, at the Tomah, Wisconsin VAMC, the union's local president and a psychologist reported improper opiate prescribing practices. In 2012, when plumbers at the Pittsburgh, Pennsylvania VAMC were asked by management to cover up a deadly legionella outbreak, their AFGE local president testified before this committee and waged a long battle to ensure workplace and patient safety. The 2011 Senate testimony of a VA psychologist at the Wilmington, Delaware VAMC led to additional hiring of mental health professionals throughout the Veterans Health Administration.

Every day, other VA employees whose names may not appear in the press or the Congressional record take the brave step of speaking up for veterans by voicing concerns about mismanagement they witness on the front lines of VA hospitals and clinics, benefits offices, and other VA facilities. Most recently, VA front line employees have reached out to their AFGE representatives to report their observations about the adverse impact of the Mission Act including contracting out of entire service lines, laying off part-time physicians, refusals to fill vacancies and errors and backlogs in the consult process. What all these courageous VA employees have in common is their reliance on critical statutory and contractual rights that allow them to report mismanagement knowing that their union can help them fight back against unjustified terminations, demotions, suspensions, and other forms of retaliation. But right now, employee protections have been weakened to the point that they undermine the ability to report wrongdoing, mismanagement, and unsafe conditions.

Recommendations to Protect Whistleblowers:

The single biggest and most impactful step that The House Veterans' Affairs Committee and its Subcommittee on Oversight and Investigations can do to protect whistleblowers and would be whistleblowers is to strengthen collective bargaining rights and union protections. As the full House Veterans' Affairs Committee demonstrated this month by passing Chairman Takano's "VA Employee Fairness Act" out of committee, worker safeguards are essential to protect and maintain the VA workforce. The next logical step for this committee is to restore protections for VA employees when they report wrongdoing either before they claim whistleblower status or protect employees to the point that they do not need to claim whistleblower status.

Specifically, AFGE urges the committee to take up legislation to rectify two of the fundamental flaws of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act) that also created the VA Office of Whistleblower Protection. First, AFGE urges that the committee pass legislation to restore the standard of evidence required for taking action against an employee to a “preponderance of the evidence” standard. When the Accountability Act was enacted, it changed the evidentiary standard from a “preponderance of the evidence” standard, which requires the complainant to provide a majority of the evidence or 50% of the evidence, to the much lower “substantial evidence” standard. This has allowed the VA to use this law, not against the senior executives for whom the VA claimed it needed this disciplinary standard, but instead against rank-and-file employees who are identifying problems on the ground to protect veterans and employees. This conflicts with the Congress’ and the VA’s goal of protecting potential whistleblowers. This is evidenced by the fact that VA whistleblowers whose cases are accepted by the Office of Special Counsel (OSC) are protected by the “clear and convincing” evidentiary standard, which is higher than the “preponderance of the evidence” standard that existed to ensure employees had fair protections. By reinstating the “preponderance of the evidence” standard for employees, the committee would be restoring the integrity of the accountability process that never should have been taken away.

AFGE also calls on the committee restore the power of the Merit Systems Protection Board (MSPB) to mitigate the proposed discipline taken by employees, including potential whistleblowers. When the Accountability Act was enacted, it eliminated the ability of the MSPB to determine that the VA had proven that an employee deserved discipline, but that the VA had sought too harsh a punishment. The only options available to the MSPB are to accept or reject

the VA's argument and punishment decision in full. Because this regular disciplinary track does not present a fair course of action for VA employees, it results in many employees seeking whistleblower status even though the old disciplinary process prior to the enactment of the Accountability Act would have sufficed. By restoring the MSPB's ability to mitigate a punishment, Congress would protect employees and reduce the need for people to attempt to claim whistleblower status and reduce any backlogs that may exist.

As the committee considers legislation to reform the Office of Accountability and Whistleblower Protection, AFGE strongly urges you to also consider necessary reforms to the Accountability Act that will enhance the mission of the VA by protecting its workforce. We look forward to working with the committee in achieving this goal, and appreciate the committee's commitment to protecting the rights of the VA workforce.