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DEPARTMENT OF VETERANS AFFAIRS**

**“ACCOUNTABILITY AT VA: LEADERSHIP DECISIONS IMPACTING ITS  
EMPLOYEES AND VETERANS”**

**SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
COMMITTEE ON VETERANS’ AFFAIRS  
U.S. HOUSE OF REPRESENTATIVES**

**MARCH 9, 2023**

Good afternoon, Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee. Thank you for inviting me here today to discuss VA’s efforts to address accountability within the department.

The Department of Veterans Affairs Accountability and Whistleblower Protection Act (the Act) was enacted on June 23, 2017. The Act amended Title 38 of the United States Code by adding several new statutes that, among other things, established the Office of Accountability and Whistleblower Protection (OAWP) and added protections for whistleblowers, provided the Department of Veterans Affairs (VA) with an additional authority to take disciplinary action against senior executives and other covered employees based on poor performance and misconduct, and provided VA with the authority to recoup relocation expenses, bonuses, and awards based on poor performance and misconduct. In accordance with the Act, VA promptly stood up OAWP and implemented new policies and procedures to carry out each of the authorities identified above.

**Accountability**

The Act provided VA with an additional authority to take disciplinary action against senior executives pursuant to 38 U.S.C. § 713 (Section 713). This authority set forth a streamlined procedure for disciplining senior executives and outlined the process by which senior executives can challenge such an action. Upon enactment, VA quickly developed and implemented policy to carry out actions under Section 713. As reflected in the tables below, Section 713 has and continues to be used to address poor performance and misconduct of VA senior executives. Personnel actions taken against senior executives to date show that Section 713 is being used to hold senior executives accountable.

Furthermore, the Act provided VA with additional authority to take adverse actions against certain VA employees at 38 U.S.C. § 714 (Section 714). This authority sets forth a streamlined procedure for disciplining certain VA employees identified by statute, including Title 5 employees, some of whom are covered by a collective

bargaining agreement. Upon enactment, VA quickly developed and implemented policy to carry out adverse actions under Section 714.

## **Impact of Court and Administrative Decisions on VA's Use of Section 714**

### **Labor**

While VA did not bargain impact and implementation with its labor organizations prior to its implementation of Section 714, it did notify and provide an opportunity to bargain in within weeks of enactment, including to the American Federation of Government Employees (AFGE). While VA met its bargaining obligations with all other labor organizations, AFGE challenged VA's use of Section 714 without first completing impact and implementation bargaining. AFGE argued before an arbitrator and the Federal Labor Relations Authority (FLRA) that the Department did not meet its obligation to bargain the impact and implementation of the law before using it to discipline AFGE bargaining unit employees for acts of misconduct or performance. Additionally, AFGE argued that VA did not follow AFGE's collective bargaining agreement related to the issuance of a performance improvement plan (PIP) prior to taking a performance-based action. The FLRA agreed with AFGE and in accordance with these decisions and an arbitration order, VA is no longer using Section 714 for actions taken against AFGE bargaining unit employees until VA and AFGE complete impact and implementation bargaining of the procedures for use of Section 714.

VA is complying with the FLRA and arbitration decisions. VA and AFGE reached a settlement on the decisions related to PIPs involving approximately 400 employees. Impacted employees have either elected not to be reinstated and received a cash settlement or opted for reinstatement and are going through the PIP process if applicable. Any reinstated employee who does not successfully complete the PIP period may be subject to the appropriate adverse action under Title 5 procedures.

Following the arbitration decision cited above, VA engaged in retroactive bargaining with AFGE, and is currently in mediation with AFGE concerning approximately 4000 employees who received an adverse action under Section 714 prior to the FLRA and arbitration decisions.

## **Merit Systems Protection Board and U.S Court of Appeals for the Federal Circuit**

In some instances, employees, against whom the Department took an adverse action under Section 714, filed appeals with the Merit Systems Protection Board (MSPB) and the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) resulting in decisions that greatly limit VA's use of Section 714. Specifically, through a number of separate decisions, the Federal Circuit ruled that VA could not use Section 714 for performance or misconduct that occurred prior to the enactment of the Act; the MSPB must review VA's selection of penalty in both misconduct and poor performance cases when reviewing an action taken under Section 714; VA must use the preponderance of the evidence standard of proof when taking an adverse action under Section 714; VA must consider all relevant *Douglas* Factors when determining a reasonable penalty; and

the MSPB must consider the *Douglas* Factors when reviewing the penalty selected by VA.

Recently, the MSPB, in an interlocutory order, held that VA was prohibited from using Section 714 to remove, demote, or suspend employees of the Veterans Health Administration appointed into a hybrid Title 38 position. While this interlocutory order is not yet final, it effectively prevents VA from using Section 714 for actions taken against hybrid Title 38 employees. When the decision becomes final, VA and/or OPM will have the ability to appeal the decision to the MSPB. Further, OPM/DOJ has the discretion to subsequently appeal the MSPB's decision to the Federal Circuit. VA is communicating with both agencies regarding appeal options.

These decisions have significantly reduced the differences between Section 714 and pre-existing Title 5 disciplinary authorities. If the MSPB's recent decision becomes final, only a small portion of VA's workforce, approximately 75,000 employees or 17%, remain covered by Section 714. On April 30, 2021, VA stopped using Section 714 to take action against AFGE bargaining unit employees and on January 17, 2023, VA stopped using Section 714 to take action against hybrid Title 38 employees. Taking these steps mitigated harm to accountability as the decisions cited above required VA to reinstate and compensate employees affected by the decisions..

### **Use of Pre-Existing Title 5 Disciplinary Authority**

The limitations set forth by the decisions highlighted above will not prevent VA from taking appropriate accountability actions when warranted by poor performance or misconduct. For adverse actions that VA would have issued under Section 714, VA is returning to use of Title 5 disciplinary authorities that pre-existed Section 714 and which are used by all other applicable Federal agencies. VA can still demote, suspend and remove employees when the evidence supports the proposed action. Data comparing actions taken under Section 714 with actions taken under Title 5 reflects no significant change in the number of adverse actions taken. VA will continue to use Title 5 authorities to propose and issue disciplinary and adverse actions for performance and misconduct until such time as an agreement has been reached with AFGE on the future use of Section 714 and the litigation is concluded in the most recent MSPB decision.

A review of adverse action data indicates VA has consistently used all available authorities to hold employees accountable, as such, the VA has demonstrated its ability to hold employees accountable without the use of Section 714. See Table 1 below.

**Table 1: Adverse Actions**

	FY16*	FY17	FY18	FY19	FY20	FY21	FY22	FY23**	Grand Total
<b>Total Adverse Actions<sup>1</sup></b>	<b>4,530</b>	<b>5,314</b>	<b>5,952</b>	<b>5,653</b>	<b>5,694</b>	<b>4,673</b>	<b>4,068</b>	<b>941</b>	<b>36,825</b>

\*FY16 count is incomplete as HR-Smart did not fully deploy until 06/12/2016.

\*\*FY23 includes actions processed on/before 01/19/2023.

VA intends to use and has not suspended use of any other authorities from the Act beyond Section 714. For example, the VA continues to use Section 713 concerning senior executives; 38 U.S.C. § 721 and 723 concerning recoupment of relocation expenses, bonuses, and awards; and the statutory amendments to the time periods for adverse actions against Title 38 employees remain applicable.

### **Disciplinary Recommendations Made by OAWP**

Under 38 U.S.C. § 323(c)(1)(I), OAWP makes recommendations for disciplinary action after substantiating any allegations of misconduct or poor performance by a VA Senior Leader, or whistleblower retaliation by a VA supervisor. These recommendations go directly to the appropriate VA official who would serve as the proposing official in any potential disciplinary action.

Under 38 U.S.C. § 323(f)(2), the VA must provide a detailed justification to the Senate and House Committees on Veterans Affairs if the recommended disciplinary action is not initiated or taken within 60 days of receipt of the recommendation. VA instituted a process to carry out this requirement, which requires the VA official who received the recommended disciplinary action to provide a detailed justification to OAWP if the recommended disciplinary action is not taken. OAWP then develops a report that is sent to the committees that includes a summary and detailed description of the VA official's rationale for not taking the recommended disciplinary action. Prior to calendar year 2022, VA transmitted a number of ad hoc reports with justifications as they were received. In calendar year 2022, VA modified its reporting method by transmitting four quarterly reports which it found to be more efficient.

Tables 2 & 3 below illustrates how OAWP recommendations were treated in calendar years 2021 and 2022:

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<sup>1</sup> Adverse actions are personnel actions coded in VA's Human Resources System of Records as a removal, termination, suspension, change to lower grade or resignation/retirement in lieu of involuntary action.

**Table 2: Calendar Year 2021**

Recommendation Implemented	SLM	SL/WBR	WBR	Total
Fully Implemented	9	2	1	12 (21%)
Mitigated/Modified*	12	2	3	17 (30%)
Not Implemented	11	4	7	22 (39%)
Not Implemented/ Left VA	2	1	2	5 (9%)
<b>Total</b>	<b>34</b>	<b>9</b>	<b>13</b>	<b>56 (99%)*</b>

\*Some disciplinary action taken.

\*\*SLM refers to Senior Leader Misconduct/Poor Performance; SL/WBR refers to Senior Leader Whistleblower Retaliation; and WBR refers to Whistleblower Retaliation.

**Table 3: Calendar Year 2022**

Recommendation Implemented	SLM	SL/WBR	WBR	Total
Fully Implemented	8	0	4	12 (38%)
Mitigated/Modified*	9	1	1	11 (34%)
Not Implemented	4	1	1	6 (19%)
Not Implemented/ Left VA	2	1	0	3 (9%)
<b>Total</b>	<b>23</b>	<b>3</b>	<b>6</b>	<b>32 (100%)</b>

\*Some disciplinary action taken.

\*\*SLM refers to Senior Leader Misconduct/Poor Performance; SL/WBR refers to Senior Leader Whistleblower Retaliation; and WBR refers to Whistleblower Retaliation.

Each case in which OAWP issued a recommendation and the responsive justification is factually unique. A review of the detailed justifications from calendar year 2022 show that the most common rationales for not initiating or taking the

recommended disciplinary actions are:

- The individual's performance between the investigated incident and the recommendation was exceptional or outstanding;
- The individual did not have any prior disciplinary history;
- The individual sought guidance from leadership, HR, and/or OGC prior to the investigated incident; and
- Lengthy period of time between the investigated incident and the recommendation.

This is not an exhaustive list of rationales provided, but the most common. Also, each justification consisted of multiple rationales rather than one single rationale. These rationales are consistent with a management official's responsibility to consider the relevant *Douglas* Factors and other mitigating factors when proposing and deciding whether to take a disciplinary action. The *Douglas* Factors consist of the following considerations:

- Nature and seriousness of the offense;
- Employee's job level and type of employment;
- Past disciplinary record;
- Past work record;
- Ability to perform in the future;
- Consistency with other penalties;
- Consistency with the table of penalties;
- Notoriety and impact of the offense;
- Clarity with which the individual was on notice of the offense;
- Potential for rehabilitation;
- Other mitigating circumstances; and
- Availability of alternative sanctions.

Due to the significant individual privacy interests in these matters, if there are any particular cases that the subcommittee wishes to discuss, VA is willing to privately brief members or staff. We are happy to respond to any questions you may have.