

LEGISLATIVE HEARING ON  
H.R. 4278; H.R. 196; H.R. 4461;  
H.R. 3504; H.R. 2733; AND H.R. 4225

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT AND  
INVESTIGATIONS  
OF THE  
COMMITTEE ON VETERANS' AFFAIRS  
U.S. HOUSE OF REPRESENTATIVES  
ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

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WEDNESDAY, JULY 12, 2023

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**Serial No. 118-24**

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Printed for the use of the Committee on Veterans' Affairs



Available via <http://govinfo.gov>

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U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2024

53-083

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**WEDNESDAY, JULY 12, 2023**

U.S. HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
COMMITTEE ON VETERANS' AFFAIRS  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 2:33 p.m., in room 360, Cannon House Office Building, Hon. Jen Kiggans [chairwoman of the subcommittee] presiding.

Present: Representatives Kiggans, Bergman, Rosendale, Mrvan, and Pappas.

**OPENING STATEMENT OF JENNIFER A. KIGGANS,  
CHAIRWOMAN**

Ms. KIGGANS. Good afternoon. Thank you to our witnesses, first and foremost, for being here today. In today's hearing, we will examine a variety of bills impacting the VA's disciplinary authorities, disability claims processing, medical center security, acquisition process, and whistleblower training. I would like to thank Representative Pappas for sitting in for Ranking Member Mrvan, who will be joining us during the hearing.

I will begin with my bill, H.R. 3504, the VA Medical Center Security Report Act. My legislation requires the VA to survey each of their medical centers annually on the status of their police force and report that data to Congress. VA operates 144 police units at VA medical centers and has approximately 6,000 police officers, chiefs of police, deputy chiefs of police and physical security specialists nationwide.

Unfortunately, violent crime has been on the rise at VA medical centers. In Fiscal Year 2018, 3,141 violent crimes were committed. By Fiscal Year 2021, that number more than doubled to 6,505. Not only are VA medical centers becoming more dangerous for employees and veterans, but they are also becoming less safe for VA police officers. Medical centers across the country are experiencing high turnover and staffing shortages in their police departments. I understand that VA police have recently made large strides to fix some of these troubling issues. However, Congress still needs a better picture of the specific challenges that each medical center faces, as well as the broader issues plaguing VA policing so that we can determine if further congressional action is needed.

My bill will help Congress and the VA understand these challenges better by requiring the VA to gather information on the type and frequency of criminal activity at the medical center over the past 12 months, the number of vacant positions for department police officers at each medical facility, all identified security weaknesses, and much more.

While they are not here, I would like to thank the American Federation of Government Employees and its National Veterans Affairs Council, as well as the National Federation of Federal Employees for endorsing the VA Medical Security Report Act. I look forward to discussing my bill with the witnesses here today.

Now, I will turn to Chairman Bost's bill, H.R. 4278, the Restore VA Accountability Act, which I cosponsor. In 2017, the VA Accountability and Whistleblower Protection Act was signed into law by President Trump. The bill passed Congress with broad bipartisan support and was endorsed by over a dozen Veteran Service Organizations (VSOs). Two of which, the Veterans of Foreign Wars of the United States (VFW) and American Legion are testifying here today in support of the Restore VA Accountability Act. In the 2017 Accountability Act, Congress gave the VA Secretary authority to expedite the removal, demotion, or suspension of VA employees based on misconduct or substandard performance. Unfortunately, decisions from the Federal Circuit, the Federal Labor Relations Authority, and the Merit Systems Protection Board, defied congressional intent, rendering the authority provided in the 2017 Accountability Act unusable for most of the VA workforce. In April of this year, the VA stopped using this authority altogether, as courts have made it too weak and complex to be effective. The Restore VA Accountability Act would make sure the VA has the authorities it needs to remove poor performing employees and deliver the high-quality benefits and care that veterans deserve. After Representative Pappas's opening statement, I will recognize Chairman Bost to deliver some remarks about how his bill will restore accountability at the VA.

Next on the agenda is H.R. 196, the Expediting Temporary Ratings for Veterans Act, sponsored by Representative Rosendale. The Inspector General has documented widespread errors with the VA's temporary disability rating process. Veterans are often not receiving the ratings they are due, receiving them late, or being underpaid or overpaid. I am eager to hear more from representative Rosendale and our witnesses about how H.R. 196 can help eliminate errors and delays that harm veterans.

The next bill we will be considering today is H.R. 4461, the Modernizing Department of Veterans Affairs Disability Benefit Questionnaires Act, sponsored by Representative Luttrell. I am a proud cosponsor of this bill, which would improve disability benefit questionnaires, or DBQs, which are a critical part of the disability compensation claims process. Current practice does not require VA contractors who perform disability exams to submit DBQs in a format that can be easily processed by VA's claims automation software. This leads to backlogs and delays that could be avoided through standardization that allows the VA to process and adjudicate claims faster. As the VA moves forward with automation, A stand-

ardized DBQ process will be crucial to timing and accurate claims processing.

To close out our agenda, we will be considering H.R. 2733, the Department of Veterans Affairs Office of Inspector General Training Act, sponsored by Representative Underwood, and H.R. 4225, the VA Acquisition Review Board Act, sponsored by Ranking Member Mrvan.

I again want to thank our witnesses for being here today, and I look forward to our discussion. I now recognize Representative Pappas for his opening remarks.

**OPENING STATEMENT OF CHRIS PAPPAS, ACTING RANKING MEMBER**

Mr. PAPPAS. Thank you very much, Chairwoman Kiggans, and I am looking forward to the conversation today about a number of bills on the agenda, but I want to keep my remarks brief and just focused on one issue at the outset. One of my primary interests here is to better understand the potential effects of Chairman Bost's bill, H.R. 4278, the Restore VA Accountability Act.

Now, in 2017, Congress passed the Department of Veterans Affairs Accountability and Whistleblower Protection Act. It was based on well-publicized problems. At the time, Congress believed then that VA needed new authorities to hold bad actors accountable. Over the last 6 years, VA's implementation of the law has been repeatedly challenged in cases before the U.S. Court of Appeals for the Federal Circuit, the Merit Systems Protection Board, and the Federal Labor Relations Authority. I believe Chairman Bost's intent with H.R. 4278 is to address the issues that have caused the courts and Merit Systems Protection Board (MSPB) to overturn disciplinary actions.

However, based on VA's testimony and some of the statements for the record provided for this hearing today, I am not confident that H.R. 4278 will have the intended effect of reducing the number of disciplinary actions that are overturned or that it will lead to more timely disciplinary actions being taken when warranted.

Madam Chair, I would like to ask unanimous consent that statements from the Partnership for Public Service, the Senior Executives Association, the American Federation of Government Employees, the National Federation of Federal Employees, and Dr. Donald Kettl, as well, be entered into the record for today's hearing.

Ms. KIGGANS. Without objection.

Mr. PAPPAS. Thank you. VA, in its testimony, raises concerns that H.R. 4278, if implemented, would be subject to extensive litigation and constitutional due process challenges, making the Department no better off than it is now with the original 2017 law. As is suggested in the testimony from the National Academy for Public Administration, and in statements for the record from the Partnership for Public Service, the Senior Executives Association, and Professor Donald Kettl, here are many other facets to accountability and performance. For example, VA's overall performance and accountability may also be strengthened by better ensuring the right employee is hired for the right job. Improving performance management processes, growing professional development and

training programs for managers, rethinking the Department's organizational structure, and improving leadership stability.

I hope this hearing will shed light on these and other issues, so that this committee can ensure we are focusing our attention on the greatest areas of need and as we commit to working together in a bipartisan and bicameral manner, always with a focus on strengthening VA's accountability. I want to thank you again, Chairwoman Kiggans, for allowing me to sub-in here, and I look forward to engaging with the witnesses, and I yield back my time.

**OPENING STATEMENT OF MIKE BOST, CHAIRMAN, FULL  
COMMITTEE**

Ms. KIGGANS. Thank you, Mr. Pappas. I now recognize Chairman Bost to speak on his bill, the Restore VA Accountability Act.

Mr. BOST. Well, thank you, Chairwoman Kiggans. I appreciate you holding this legislative hearing and including my bill, the Restore the VA Accountability Act.

Now, I have been in Congress for not as long as some, but I have been around for a while. I have been here long enough to know that this town has a very, did I say very? Very short memory. In 2017, Congress made a very, very powerful statement when it passed the VA Accountability and Whistleblower Protection Act. Back then, Republicans had control of the House, Senate, and the White House. Before President Trump signed it into law, we passed that bill by voice vote in the Senate, and with 368 yay votes in the House.

Congress was united in this because veterans and the American people were fed up with bad VA employees not being held accountable. They demanded that Congress act, and we did. We gave the VA Secretary more power to remove, demote, and suspend any VA employee for poor performance or misconduct. You know what? The law started moving the needle. The 2017 Accountability Act led to a 50 percent increase in removal actions, which in part, led to veterans VA-wide trust scores increasing from an abysmal 59 percent in 2016, to an 80 percent in 2020. Veterans were at the core of VA's mission, not bureaucrats. Let me say it again. Veterans were at the core of the mission, not bureaucrats.

However, starting 2018, the administrative courts began chipping away at the law's effectiveness, ruling contrary to Congress's intent. Congress's intent was clear, I remember. I remember because I was there. VA agreed and appealed a number of these decisions, but the time that VA was spending in court to justify their use of disciplinary authorities in the 2017 Accountability Act was unworkable.

Earlier this year, VA announced that because of these legal headaches, they would stop using the authority in the 2017 Accountability Act altogether. Remember when I said that this town had a short memory. Now, we are right back where we were 6 years ago. We cannot afford to backslide and wait for the same tragedies that occurred in Phoenix VA hospital and drove the popular bipartisan support behind the 2017 Accountability Act to repeat themselves before we act.

Congress needs to restore the accountability at the VA. My bill will make changes and improvements to the 2017 law to make

Congress's intent even clearer. This will allow the Secretary to be able to remove the small percentage, and I say that, a small percentage of employees who are hurting veterans in weeks or months rather than years. We owe it to the hard-working VA employees and our veterans to hold those at the VA not doing the right thing accountable. I look forward to the discussion here on my bill today and listening to witnesses here today. With that, Madam Chair, I yield back.

Ms. KIGGANS. Thank you, Chairman Bost. I now recognize Representative Rosendale to speak on his bill, the Expediting Temporary Ratings for Veterans Act.

#### **OPENING STATEMENT OF MATTHEW M. ROSENDALE**

Mr. ROSENDALE. Thank you very much Chairwoman Kiggans for holding this hearing. My legislation H.R. 196, the Expediting Temporary Ratings for Veterans Act would directly help some of the sickest veterans who depend most on VA disability compensation benefits.

When a veteran is hospitalized for at least 21 days for a service-connected condition or illness, current law grants them a temporary increase in their disability rating to 100 percent. The problem is those rating increases may not be granted before the veteran leaves the hospital, or granted in the right amount, or granted at all. The Office of Inspector General (OIG) has documented widespread errors in a 2020 report. In their sample audit, 42 percent of eligible veterans had their benefits adjusted incorrectly or their claims improperly processed.

When the VA makes a mistake and overpays the veteran, that overpayment is sometimes collected as a debt. That is unacceptable. The VA should not be hassling ailing veterans for the VA's own errors. The good news is we have everything that we need to solve this problem. The VA already has all the medical records information it needs to determine who is hospitalized. That is in an existing Electronic Health Record (EHR) system that is functioning. It is called Vista.

The VA has been conducting a limited pilot program to automate these temporary total disability claims for certain veterans with cancer. My legislation would expand this successful pilot in 1 year to speed up claims processing for veterans hospitalized with all illnesses or conditions. Of all the VA benefits claims processes, I think this one is the best candidate for automation. Speed is critical, and the existing manual process tends to lag.

It is also a relatively simple eligibility criteria that a computer is capable of handling. I want to point out what it is not. It is not the machines taking over. VA employees will continue to make every eligibility determination. They will always decide whether to accept or reject what the automation software proposes. It is also not automation of every claim. There will still be situations where the available medical evidence is not sufficient or that information is not compatible. Employees will process those claims manually.

I think this is an idea whose time has come. We can use IT to make veterans' benefits more timely, accurate, and consistent. Thank you, Madam Chair, and I yield back.

Ms. KIGGANS. Thank you, Representative Rosendale. Before we get to testimony, I will introduce the witnesses on both panels. On the first panel, we have Mr. Lewis Ratchford, Chief Security Officer for the Office of Operations, Security and Preparedness at the Department of Veterans Affairs. He is accompanied by Mr. Rondy Waye, Executive Director for Human Capital Programs at the Office of the Chief Human Capital Officer. Mr. Ray Tellez, Acting Assistant Deputy Under Secretary for Automated Benefits Delivery, and Angela Billups, Executive Director for the Office of Acquisition and Logistics. Also on the first panel, we have Mr. David Case, Deputy Inspector General of the Department of Veterans Affairs.

On the second panel, we have Mr. Joshua Hastings, Veterans Benefits Policy Analyst for the American Legion, Mr. Patrick Murray, Director of the National Legislative Service for the Veterans of Foreign Wars, Mr. Clint Romesha, retired army staff sergeant, Medal of Honor recipient, an emeritus board member of America's Warrior's Partnership, and Ms. Terry Gerton, President and Chief Executive Officer of the National Academy of Public Administration.

I ask witnesses on the first panel to please stand and raise your right hand.

[Witnesses sworn]

Ms. KIGGANS. Thank you. You may be seated. Let the record reflect that all witnesses answered in the affirmative.

Mr. Ratchford, we will start with you. You are recognized for 5 minutes to provide your testimony.

#### **STATEMENT OF LEWIS RATCHFORD**

Mr. RATCHFORD. Good afternoon, Chairwoman Kiggans, Ranking Member of Mrvan, Mr. Pappas, and other members of the subcommittee. Thank you for inviting us here today to present our views on several bills that would affect VA programs and services. Joining me today are my—is Mr. Ray Tellez, Acting Deputy Under Secretary for Automated Benefits Delivery. Dr. Angela Billups, Executive Director, Office of Acquisition and Logistics, and Mr. Rondy Waye, Executive Director Human Capital Programs.

Bills on the agenda today include those on expediting temporary ratings for veterans with service-connected disability that requires hospital treatment or observation more than 21 days; mandatory awareness training for VA employees on reporting and cooperating with the Office of the Inspector General; and annual security report regarding medical center police services and personnel.

Additional bills on the agenda include the establishment of an acquisition review board for all major acquisition programs; amendments to Section 713 and 714 of Title 38 of the United States Code; and finally, a requirement that disability benefits questionnaires' results from non-VA clinicians are transmitted to VA in a machine-readable format.

First, as it relates to H.R. 196, Expediting Temporary Ratings for Veterans Act, VA cites concerns with this bill, as the current automated information technology framework does not support automation of ratings. Due to the significant level of human adjudicated discretion needed for this type of medical association, a programmatic determination with technology solutions could lead to

incorrect benefit determinations. Additionally, the bill requires modification to information technology solutions within 1 year of enactment. However, VA anticipates approximately 2 years to fully implement this act.

The second bill, H.R. 2733, Department of Veterans Affairs Office of the Inspector General Training Act of 2023, would require OIG to develop training for VA employees. While VA appreciates the support of these efforts to train and educate employees and reporting misconduct fraud, waste, and abuse, the proposed legislation is redundant to existing VA mandatory training currently provided to all VA employees.

Third, H.R. 3504, VA Medical Center Security Report Act of 2023 would require an annual security survey to be completed by medical center police personnel and a report provided to both committees that address multiple components of VA law enforcement and security programs, relationships with local law enforcement organizations, and efforts to address criminal activity at or near the medical centers. VA is committed to providing a safe and secure environment for our workforce, veterans, and all who engage with the VA in our facilities. As such, VA supports this bill, subject to necessary appropriations, as a measure to complement the current police inspection program.

Fourth, H.R. 4225, VA Acquisition Review Board Act of 2023, would amend 38 USC by directing VA to establish an acquisition review board for all major acquisition programs. The bill will establish a program management framework for all major acquisitions and non-major acquisitions at the discretion of the Deputy Secretary. VA supports this bill if amended and subject to appropriations.

Fifth, H.R. 4278, Restore Department of Veterans Affairs Accountability Act would amend Section 713 and 714 of Title 38 USC, codified, for the VA Accountability and Whistleblower's Protection Act of 2017. VA does not support this bill. A part of ensuring veterans have trust and confidence in the VA is holding employees accountable for misconduct and poor performance. We are confident that the authorities currently available to the VA are sufficient to hold employees accountable for misconduct and poor performance.

Last, Modernizing Department of Veterans Affairs Disability Benefit Questionnaires Act would require the transmission of Disability Benefit Questionnaires, results from non-VA clinicians to VA in a machine-readable format within 180 of enactment. VA supports this bill, if amended, and subject to the availability of appropriations. The bill will help further VA's automation initiatives, and it would enable VA to identify instances of fraud and ensure the completeness of the questionnaires.

Madam Chairwoman, thank you for the opportunity to present VA's views on the draft bills. This concludes my statement and I would be happy to answer any of your questions members of the committee may have.

[THE PREPARED STATEMENT OF LEWIS RATCHFORD APPEARS IN THE APPENDIX]

Ms. KIGGANS. The written statement of Mr. Ratchford will be entered into the hearing record. Mr. Case, you are now recognized for 5 minutes to provide your testimony.

**STATEMENT OF DAVID CASE**

Mr. CASE. Chairwoman Kiggans, Ranking Member Mrvan, and subcommittee members, thank you for the opportunity to discuss the need for H.R. 2733. This bill would greatly enhance OIG oversight by requiring new VA employees to receive training within 1 year that focuses on their responsibilities to promptly report crimes and serious wrongdoing to the OIG and to cooperatively engage with its staff. It also allows the Inspector General to send at least two messages annually through VA's email system to all personnel to enable direct communications.

We thank Representatives Underwood, Womack, Pappas, and Dave Joyce for introducing this very important bill. We also gratefully acknowledge that in September 2021, Secretary McDonough required current and incoming employees to complete one time OIG training within a year. An important step in improving VA's culture of accountability. The OIG has not always had this level of support and cooperation. That is why legislation is still needed to make certain the training mandate is institutionalized and not reliant on the decisions of future VA secretaries.

The OIG is aware that the Senate is considering changes to S1096, the Senate companion bill, and we do not object to the changes. Through the IG Act, Congress authorized the OIG to request any information or assistance from the Department necessary to carry out its duties which includes prompt access to employees, facilities, systems, and equipment. While the vast majority of the OIG's interactions with VA personnel are positive, some employees have been given direction contrary to the IG Act, such as being told that they cannot share information with OIG staff without first clearing it through supervisors.

In other instances, VA personnel have provided incomplete, significantly delayed, or misleading information. For example, on a project related to the efficacy of the user training on the new electronic health record system, the OIG team repeatedly asked for raw data but received summarized information that was incorrect. It was leaders' carelessness, though unintentional, that produced far more favorable statistics on training outcomes than was accurate. If not detected, may have been reported by the OIG to Congress and the public.

VA employees' prompt and accurate reporting of a suspected wrongdoing will save lives. For instance, a former Arkansas pathologist worked while impaired for years before a medical facility employee reported him to an OIG inspector onsite for a routine review. An intensive OIG criminal investigation led to the pathologist receiving a 20-year prison sentence for actions leading to the misdiagnosis of approximately 3,000 patients with three related deaths.

VA personnel at every level and in any position can identify and address the misuse and waste of millions of dollars each year by knowing how and what to report to the OIG. In one case, a purchasing agent uncovered a fraud scheme involving a medical facility chief steering a contract that resulted in more than half a million dollars in losses for VA. A senior VA leader thwarted a vendor trying to sell more than 800 million dollars of non-existent face



masks and ventilators to VA during the pandemic by reporting suspicions to the OIG.

There are more examples of missing opportunities to protect veterans and VA resources with one common denominator. Many VA personnel did not promptly report potential crimes or problems with systems that affect the quality of services and care to veterans because they lack information on when and how to do so. That can change. As of June 26, 2023, over 385,000 VA personnel have taken the OIG developed one time training that VA Secretary McDonough mandated. Only about 1.6 percent surveyed after the training disagreed or strongly disagreed that it was useful. That effort must continue as VA ramps up its hiring of new employees.

In closing, the OIG appreciates the support this committee, and the full House demonstrated in passing similar legislation in the 117th Congress. H.R. 2733 would educate all VA employees on the OIG, an independent oversight agency outside VA reporting lines. We strongly believe that this training will empower VA staff to contact the OIG when they encounter potential instances of fraud, waste, abuse, or gross mismanagement. Chairwoman Kiggans, I would be happy to answer any questions you or other members of the subcommittee may have.

[THE PREPARED STATEMENT OF DAVID CASE APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Mr. Case. The written statement of Mr. Case will be entered into the hearing record. We will now turn questions, and I would like to recognize Mr. Takano first for his remarks and questions for 5 minutes.

Mr. TAKANO. Thank you so much, Chair Kiggans, for your courtesy. Chairman Bost, it was a wonderful delight to spend some time with you over the break. My first question is for Mr. Waye. With the ongoing implementation of the Honoring our PACT Act, VA needs all the help it can get to fully staff its workforce. Are you concerned that H.R. 4278 by limiting civil service protections could deter applicants from seeking employment at VA or discourage qualified individuals from taking on supervisory or leadership roles within the Department?

Mr. WAYE. Good afternoon. Thank you for the question. Yes, I am. I specifically say that because the Act, Section 712, talks about applying to all supervisors. Sometimes when we talk about supervisors or leadership positions, we have a tendency to think that we are talking about senior executive service (SES) members, maybe GS-15s, GS-14s. In this case, we are talking about all supervisors. Within the VA, we have roughly 47,000 supervisors, approximately 35,000 or so would be covered by Section 712. Many of these supervisors we are talking about wage grade supervisors ranging from WS-1 to WS-16, and also supervisors in grades as low as GS-5, and obviously up to GS-15.

Number one, we are talking about accountability. We are talking about lower-level employees. One, I think this it would deter current employees from being interested in fleeting up to supervisory positions and also deter employees from outside the VA coming to the VA knowing that they have limited appeal rights.

Mr. TAKANO. Just to kind of clarify, I mean, a lot of members of the public do not understand, GS, this or that, but we can think

of people who are like majors, colonels, all up to general, and but we are talking about often case people who might be non-commissioned officers at the sergeant level, right? If you think of VA is not a uniformed service—

Mr. WAYE. That is correct.

Mr. TAKANO [continuing]. but to give some idea, then we talk about 40,000 supervisors out there, they are—sometimes are very. This legislation, help us understand the way in which it would disincentivize or discourage people, discourage qualified people, kind of unpack that a little more for me, just what—why would someone not want to step forward to be a supervisor under this proposed law?

Mr. WAYE. Well, I guess if you think about it like this, and first, you are absolutely right in in terms of your follow up. We would be talking about lower-level employees on the GS and civilian side, which would be equivalent to enlisted personnel, for example, E-4, E-5, E-6 in the military.

Specifically, what I am referring to here is essentially these employees would be treated very similar to the way senior executive service members are treated right now under the current act, which is 713, which basically means they would have, you know, limited appeal rights, inability go to the Merit System Protection Board, you know, et cetera. For them to look at that and say, hey, I am coming in, I am losing rights that maybe I would have right now or entitlements I would have in serving in another position at another location in the Federal Government, I would not have that, you know, were I to take a job with the Department of Veterans Affairs.

Mr. TAKANO. How many employees currently covered under Section 714 of Title 38 stand to see their civil service protections severely limited if H.R. 4278 is enacted? Do you have an idea, the numbers?

Mr. WAYE. Well, right now we are talking about for, if we do the carve out for their supervisors, we are talking about a number of let us say about 35,000 for a carve out of supervisors. Obviously the 714 overall, you know, applies to a larger group. 712, approximately 35,000 supervisors.

Mr. TAKANO. Well, essentially, they become at will almost because at will employees, fired at will, because they lack the protections that they currently have and that is kind of what we see at the senior executive level is people that are more easily dismissed. Is that correct?

Mr. WAYE. Well, certainly more easily in terms of one, there would be a lower level of evidence required, substantial versus—

Mr. TAKANO. All right, it is not quite at will, I mean, that would be—

Mr. WAYE. Right, right.

Mr. TAKANO. Yes.

Mr. WAYE. It would be a lower level of evidence required. We would go from preponderance of the evidence to substantial evidence. Then we are talking about limited appeal rights in terms of—so, we are talking about the overall due process would be different for them than other Federal employees.

Mr. TAKANO. Well, Mr. Waye, my time has run out. I certainly appreciate the chair's courtesy again and thank you.

Mr. WAYE. Thank you.

Mr. TAKANO. I yield.

Ms. KIGGANS. Thank you very much, Mr. Takano. Now I will yield 5 minutes to myself for questions. Mr. Ratchford, I am glad to hear that the VA supports the VA Medical Center Report Act. You, your team, and the VA police officers across the country are the ones keeping VA employees and veterans safe. My hope is that my bill will give Congress more insight into the unique situation at each medical center so we can help you and your team do your job. Can you explain to me the importance of understanding the recruiting, training, and security challenges that are unique to each medical center?

Mr. RATCHFORD. Thank you for that question. The men and women of the Department of Veterans Affairs protect our medical centers as special agents as police officers as inspectors, and canine handlers, work very hard every day. The challenges we have right now is across the portfolio when you look at law enforcement across the country, right now in this date and time, law enforcement across the United States, perhaps the globe, is facing very hard situations as far as retaining personnel and adapting to the new environment.

Just as our local medical centers are seeing increases in violence, so are the communities in which we belong to are also seeing these same increases in violence. Working with partners such as the Federal Bureau of Investigation (FBI), other international law enforcement organizations, advocate organizations, we are able to work together to share practices and share trends that we are identifying to create better recruitment models to identify what we need in the current environment to improve policing, and to make sure that we have the adequate number of personnel protecting our facilities, veterans, and all located on those grounds.

Ms. KIGGANS. Thank you. It sounds like your 3-year inspection cycle is focused on external evaluations, and my bill would require medical centers to self-report their security and police report status. Does your office currently collect and track self-reported data?

Mr. RATCHFORD. Yes, we do. Not in a formal process of a formal survey, such as this bill is suggesting, but we do collect data from individual officers informally throughout the reporting process.

Ms. KIGGANS. Just nothing formally.

Mr. RATCHFORD. That is correct, ma'am.

Ms. KIGGANS. A key component of my bill is reporting from the medical centers on police vacancies. Earlier this year, I visited the Hampton VA Medical Center and I was told at that time they did not have a chief or deputy chief of police. I understand that recruiting is difficult, but how often do medical centers have vacancies, especially in senior leadership positions?

Mr. RATCHFORD. It varies, ma'am. It varies from location to location. We currently have 139 police services across the United States, and they all are unique in their recruitment challenges as it pertains not only to their senior positions, but also to their junior ranks as well.

Ms. KIGGANS. Thank you. Mr. Tellez, what efforts is the VA currently taking to make the review of DBQs submitted by non-VA clinicians more efficient?

Mr. TELLEZ. Thank you, chairwoman, for your question. One of the things that we are doing to make them more efficient is we accepted them in paper. We are scanning them, digitizing them, and we are scraping the data looking for some of the data elements to track for anomalies, activities, for fraud, such as that. Connecting, you know, where a veteran lives to where they may have seen a provider. That is an area that we are focused on right now with that.

Ms. KIGGANS. Thank you. I now recognize Ranking Member Mrvan for his opening remarks and 5 minutes of questions.

**OPENING STATEMENT OF FRANK J. MRVAN, RANKING  
MEMBER**

Mr. MRVAN. Thank you, Chairwoman Kiggans. I am pleased the subcommittee is considering my legislation H.R. 4225, the VA Acquisition Review Board Act of 2023. This bill is based on numerous oversight hearings I chaired last Congress which focused on several struggling IT modernization projects at the VA. No matter the project, whether it is electronic health records, supply chain system, human resource system, or financial management system, VA has been trying unsuccessfully for decades to modernize key IT systems. The common thread between these projects and their lack of progress has been the lack of acquisition, accountability, and management.

As we discovered with the VA's recent decision to abandon the Defense Medical Logistics Standard Support (DMLSS) supply chain modernization project, all of the authority to pause or cancel a program that is not meeting requirements at VA lies solely with the Secretary. Programs have been allowed to flounder, go off task, lag in schedule, and result in cost overruns because there have been no formal checks and balances within the VA. This legislation will provide a structure for those checks and balances. It creates a formal acquisition review board chaired by the Deputy Secretary and will require meetings and decision points to determine whether the Department has considered the essential cost, schedule, and scope information to begin and proceed with each major acquisition.

The board will track the progress in major acquisitions and ensure that programs remain on time and on budget. If not, there will be the ability to pause, fix, or cancel a program. VA is currently undertaking billions of dollars in modernization efforts across the Department. This includes the Veteran Benefits Management System. We were able to achieve something historic last Congress with the passage of the PACT Act.

My bill H.R. 4225 will help ensure that IT modernization for delivery of those benefits is done effectively. Toxic exposed veterans do not have decades to wait for VA to figure out a solution to modernizing Veterans Benefits Management System (VBMS) and we should do everything in our power to ensure it is done right the first time. Veterans, employees, and taxpayers deserve better. Not only are these failures incredibly expensive, but we are doing vet-

erans a disservice by not providing them better access to care and benefits.

I know my colleagues across the aisle are just as interested as I am in efficient and effective government and providing better results to veterans. Knowing that VA has put the work in and has adequate justification for these acquisitions will give Congress confidence to make necessary investments because we must modernize our IT systems. This legislation is a good first step, and I hope my colleagues will support it. I, of course, look forward to discussing the other bills on today's agenda, including Chairman Bost's H.R. 4278, the Restore the VA Accountability Act, which seeks to clarify authorities to discipline VA employees that were originally established in 2017.

Since I was not yet serving in Congress when the original VA Accountability and Whistleblower Protection Act was enacted, I am glad Ranking Member Takano was able to join us today to share with his perspective on the Congress's intent with the original law. I understand VA and the stakeholders have raised a number of concerns about H.R. 4278, so I hope the subcommittee can fully consider those today. I know our union partners are very concerned about the impact a bill like this will have, not only on its supervisors, but in all VA employees, to include police officers. Before we advance legislation like this, I feel we need to fully understand how it will impact rank and file employees. The last thing VA needs is for Congress to create further barriers to recruiting and retaining highly qualified employees. With that Chairwoman Kiggans, I will yield back. I do.

Ms. Billups, I appreciate VA supporting the acquisition review board legislation, and appreciate the comments provided. Can you explain for the committee how this legislation will support your ongoing efforts to improve acquisition at VA? Specifically, can you speak to the work that you are already working on implementing?

Ms. BILLUPS. Thank you for the question and good afternoon, everyone. Yes, some of the things that we are working on at VA is actually building an acquisition life cycle framework and building that for the purposes of modernizing acquisition management at the VA. The acquisition life cycle framework, it starts from the budget and whoever the executive is that owns that vision for that new program or that mission area. Some of the things that we found that was missing, which was one of the reasons why we really appreciate this legislation, is because anytime you get ready to spend appropriated fund dollars for the purposes of a program, someone has to start that business case. Someone has to present that in a way so that the leadership, meaning the Deputy Secretary and the Secretary, really understands how these programs are going to impact VA and the overall VA mission.

For that reason, this piece of legislation is really filling a critical gap that we have right now. We do have the acquisition life cycle framework which started with the chief acquisition officer as the approver, and now this is moving back to the Secretary and the Deputy Secretary. That is something in my estimation that is needed. It is also something that was recommended by Government Accountability Office (GAO). GAO recently did a study on VA major acquisition programs and non-major acquisition programs, and

even though they said that the acquisition life cycle framework that we have developed, it is going well, but they did not feel like VA had enough structure there to support the acquisition lifecycle framework. With this legislation, I think we have a complete picture, it is something that we can start working on right away, and it will be something that will improve acquisition management throughout the entire Department.

Mr. MRVAN. Thank you. Can you let the committee know why this is an important initiative for your office, given the years of frustrating results, we have seen with large acquisitions at VA?

Ms. BILLUPS. I think it is really because this legislation from my perspective, it gets back to the heart of where these programs start and who is that real executive that is in charge. A lot of times, we go to Federal Acquisition Certified (FAC) certified program and project managers. Those individuals are not the ones that own the mission area. They are not the one that sets the vision for the mission area. They are not the one that set objectives for the mission areas. Those executives who own these mission areas, they need to be a part of that process and not just at the beginning, but throughout the process, because that is one of the reasons why the programs, and it is not just at VA, but this is one of the reasons why programs fail because a lot of times people say, you know, this person is a FAC certified program manager. Someone has to own this, someone has to know what happens in the program for suicide preventions when those objectives are not being met.

Someone has to be focusing on the big picture at all times with support from those individuals that are a part of the acquisition workforce with support from the Chief Financial Officer (CFO), the Chief Information Officer (CIO), and everyone that is a part of the programs. This particular legislation will allow us to build a structure that we are calling an enterprise program management structure that will be used for both major and non-major programs. Like I said, it will fill a critical gap. I know it would make a difference simply because we have examples now of how, where that executive who is in charge of these programs is not there at the table and the stakeholders are not understood, and that is another reason why some of these programs are failing.

Mr. MRVAN. I see that you have also emphasized the need for more resources to implement this bill, which I think are appropriate. Could you please explain how not fully resourcing this effort and the current acquisition reform efforts in your office will impact your ability to adequately monitor and oversee large acquisitions.

Ms. BILLUPS. One of the things that we have now, there are some skill gaps at the VA. One of the things that we are doing, we are assessing the current skills because what I found is that people are used to working the way that they have worked, but with the results that we are seeing, it is fully understood that some of the things that people have been doing is not working.

There are skills that are missing at the VA, and so that is one of the things that it will fill. We also need to look at, get training to the executives who own these missions, I call them non-acquisition professionals, but they are definitely part of the acquisition community simply because they are the ones that make the decisions about the programs. They have the funding. They make a de-

cision from a life cycle perspective. Are they going to use Federal employees to get the work done for the program? Are they going to do a grant? Or are they going to look at a sister agency for a shared service? Or are they going to go to industry, which is where the acquisition process really begins. It is many, many types of skill sets that we need as well as to train that community from an acquisition community perspective and not just the acquisition workforce.

Mr. MRVAN. Ms. Billups, I thank you very much. With that, I yield back.

Ms. KIGGANS. Thank you, Mr. Mrvan. Mr. Bost, you are now recognized for 5 minutes for questions.

Mr. BOST. Thank you, Madam Chair. Mr. Waye, what evidence do you have to prove that VA's current availability authorities are sufficient to hold employees accountable for misconduct or poor performance?

Mr. WAYE. Thank you for the question. When assessing the situation, we look at when we think of accountability, we look at a holistic approach in terms of actions taken across our entire population. From Fiscal Year 2016 to the present, we have taken approximately 39,000 actions against VA employees, roughly, you know, 4,900 to 5,000 a year on average. We have been consistent, you know, with that number prior to the Accountability Act and up until this point. Again, we believe we have the tools necessary to take action against employees.

Mr. BOST. Maybe you can explain since you gave those dates. Can you explain to me why there is such a huge hit dip in your disciplinary actions before the VA had passed the Accountability Act and now after they quit using it?

Mr. WAYE. Well—

Mr. BOST. I mean, the charts are clear.

Mr. WAYE. Okay. There was an initial uptick and again I am talking about an average overall during that period of time. There was an initial uptick with the Accountability Act and there was a significant focus during that time in terms of holding employees accountable. One, we think over time, we do a better job of bringing in high quality employees that do not require disciplinary action.

Mr. BOST. Yes.

Mr. WAYE. We only take action when it is necessary to address misconduct and/or poor performance.

Mr. BOST. Let me ask this. The VA's position then is that we do not need or want the authorities in Section 714, 38, right? You do not need or want them.

Mr. WAYE. No. What we are saying is, and keep in mind, we are saying we are satisfied with the authorities that we have tied to the Accountability Act. We are still using 713, as you know, but we do not need—

Mr. BOST. 714, 38.

Mr. WAYE. Right. That is correct.

Mr. BOST. When Representative Takano asked you about 714, 38, and that you used it, he said that you were using it, but you have not been using it for some time. Is that correct?

Mr. WAYE. 714?

Mr. BOST. 714.

Mr. WAYE. We paused 714, that is correct.

Mr. BOST. That is not using it. Correct.

Mr. WAYE. Right.

Mr. BOST. Yes.

Mr. WAYE. We paused that back in April, that is correct.

Mr. BOST. All right. Just so you know, I have been investigating a situation in Southern California where an incredibly problematic employee could not be removed, by the way he is a GS-7, under traditional authorities. I was informed by a senior VA official that that VA—that the VA should have used Section 714 to remove that individual. Do you agree with that?

Mr. WAYE. I would have to—a couple of things. One, I think, you know, every situation we look at on a case-by-case basis. Our position is this. You know, we know that there are cases from time to time that maybe are highlighted saying it takes too long to take action or remove an employee. Our position is, that is not due to lack of authority to take action. We have the full authorities that we need—

Mr. BOST. You are just choosing not to take action?

Mr. WAYE. No, sir. What I am saying is this is that most of the time that there appears to be a delay in taking action, is on the front end. In other words, typically when there is misconduct, we have to conduct an investigation. The more significant the charges are, the more egregious the case, typically, the longer the investigation takes. Certainly, I think all understand that it is necessary to do a thorough investigation in order to support any action that we take in the future. That delay on the front end would be there whether we are using 714, 713, or Title 5.

Mr. BOST. Because I am running out of time and I do not want to run out of time. I really do want to get to these questions.

Mr. WAYE. Sure.

Mr. BOST. The VA's written testimony had said that the VA is concerned about the bill defining which factors the Department could consider when deciding whether to discipline an employee. However, VA's testimony, it does not list a single additional factor that they would believe they should be considered. Now, I am always willing to listen, that is why we do this. Nobody has given me any suggestions of what you should add to the list, nor have you said that. You said, no, never mind, we do not want this. Now, what do you think that looks like to the veterans, and the people who know that there are people. Look, you have bad employees everywhere. That is just the way life is.

Mr. WAYE. Sure.

Mr. BOST. Okay? I am not anti-union, believe me I was a union firefighter. Something your agency then needs to get back to us so that we can help you straighten out the problems that exist in the VA that we hear about from our veterans, that we hear about from the employees that you just said, you said, oh, this goes all the way down to lower-level employees. Well, you know what, some of the people that are talking about this are the lower-level employees saying how frustrated with the VA not being able to discipline and get rid of bad employees. That is a problem. I would love to hear your suggestions.



Mr. WAYE. Well, a couple of things. As I said earlier, sir, whenever there is a delay, I can assure you it is not we do not have the authority to take action. Typically, again, it is an investigation. Once an investigation is completed, of course, we have to go through due process, which includes a proposal, an opportunity to respond, and then the deciding official assessing that information and making an appropriate determination. The outcome is not always removal. I mean, that is the purpose of due process is to, you know, look at the charges and the specifications, and for a deciding official to make an appropriate determination. That is obviously a fundamental part of due process.

What I can assure you is that, you know, when there are egregious actions and they warrant removal, we have the authorities to affect those actions and to successfully defend them as needed.

Mr. BOST. My time has run out, but I am going to say this.

Mr. WAYE. Sure.

Mr. BOST. I will always protect the veteran over a bureaucrat. Always know that. The frustration that we are feeling with the reports we are getting back is why we are pushing forward with this. I would love your input to say, Okay, maybe we should do this or do that. It was working. It was working for 2 years it worked very well, and then the others got involved. Thank you. I yield back.

Mr. WAYE. Thank you.

Ms. KIGGANS. Thank you, Chairman Bost. I now recognize Representative Pappas for 5 minutes.

Mr. PAPPAS. Thanks very much, Madam Chair. I appreciate the testimony of the panel here today, and Mr. Case, I wanted to start with you. I really appreciate the value that the Office of Inspector General adds and obviously plays a critical role in helping to identify waste, fraud, and abuse at VA.

I have heard from many VA employees in New Hampshire where I am from who are unaware of the role of the Inspector General. It is one of the reasons why I was proud to help reintroduce along with Representative Underwood, the VA OIG Training Act, which requires all VA employees to complete training developed by OIG that is focused on reporting to and cooperating with OIG. The requirements set forth in the bill go a long way to increasing awareness of VA's OIG Services. It reassures VA employees that they will be protected if they report wrongdoing. It returns that investment back to VA by protecting both our veterans and taxpayer dollars.

While VA issued a directive in 2021, which was a positive step forward that requires VA employees to complete training within their first year. Without the training requirement signed into law, it could easily be rolled back at some point in the future. Mr. Case, you alluded to this in your testimony, the need to memorialize this in law. I am just wondering if you could comment a little bit further on the bill, VA says that this is unnecessary and redundant. Do you see it that way? Could you speak to the importance of this training moving forward?

Mr. CASE. I would be happy to. First, let me again thank Secretary McDonough for his support of the training that is in existence now. We believe strongly that this legislation is necessary and critical so that the training can be institutionalized. Future secre-

taries who may have different priorities, different approaches cannot change the mandate. That is the critical reason for having this training.

As to its redundancy, VA employees who have taken the current training would not have to take it again. The provision in the training, 2F, that has caused some confusion simply underscores that the OIG's independence is impaired if its own training is not distinct from internal VA offices, such as Office of Accountability and Whistleblower Protection (OAWP).

Now, we will continue to work with the VA's education team to ensure the training is kept current and accounts for the survey responses of those who have taken the training and their feedback. We do not believe there is a redundancy here that in fact there is an importance to having the training memorialized so that VA leaders in the future who do have or may have different priorities do not alter the mandate.

Mr. PAPPAS. Thank you. I agree with that premise, which is why I have helped introduce this legislation and hope we can get a positive result in this Congress. I am wondering you mentioned the OAWP training for instance, there is a lot of training out there. Could you talk about how the OIG training differs from say the training by OAWP?

Mr. CASE. Again, I would be happy to. The OIG training that is in existence is specific to our independent oversight function. By having the separate training from internal VA offices like OAWP, it is clear to those taking the training that the OIG handles complaints outside the VA reporting lines. Moreover, the OIG has a broader mandate than OAWP and the other VA offices. The best example is that the OIG investigates potential crimes and has broader powers.

Our training references, as they currently exist, the VA offices where appropriate, but our training, the OIG training is complimentary not duplicative of that other training.

Mr. PAPPAS. Well, thanks for those comments. I am going to pivot to another issue. I want to thank Chairwoman Kiggans for her leadership in drafting the VA Medical Center Security Report Act, which I was happy to cosponsor. As a former chair of this subcommittee, I appreciate the intent of this bill, which is to ensure that our VA police officers have the resources they need to protect veterans at our VA facilities. The bill focuses on medical centers, and I know from my own district that we have got community-based outpatient clinics, a regional Veterans Benefits Administration (VBA) office. Mr. Ratchford, I am wondering if you could talk about just the security profile across VA facilities and whether it might be worthwhile expanding the scope of this legislation to fully capture the security needs that are out there among a variety of different VA facilities?

Mr. RATCHFORD. Thank you for that question. VA police officers are committed to not only protecting VA medical centers, are protecting all VA properties to include the national cemeteries, as well as our outpatient clinics. We have a protection scheme for all of our resources across all the administrations that fall within that category of VA property. We will welcome any support we can get to

beef up the ability we have to provide a security blanket, as well as the agility to respond quickly.

As you know, many facilities within VA are spread across vast numbers of miles from other facilities, where the medical center is the hub. That is where our police officers operate from. That is where our police stations are located. Often they have to drive a very long way to get to those other facilities that we are committed to protecting. Representative Pappas, anything that you can provide or suggest or the subcommittee could provide to help us and give us the agility and capability we need to be more efficient, we will welcome.

Mr. PAPPAS. Well, thank you. I believe the reporting in this bill is absolutely essential to move forward and appreciate those comments. I yield back my time.

Ms. KIGGANS. Thank you, Mr. Pappas. The chair now recognizes Representative Bergman for 5 minutes.

Mr. BERGMAN. Thank you Madam Chairwoman. I—number one, thanks to all of you for being here. When we have these kind of get togethers, sometimes we have to ask tough questions and we expect to get tough answers, because what we are talking about here is more than a little complex. As I look at all your name tags and your job description, if I was to boil it down, we got security, we got human capital, we got automated benefits delivery, acquisition, logistics, and IG represented. You all have uniquely different, you know, missions in what you have to accomplish.

Mr. Case, as the IG, nobody wants to hear from the IG. I can remember that from my military days. If the IG's calling you, it is usually not a good day. Even if they are calling you for a reference on one of the people under your command. How long does the disciplinary process for VA employees using your existing authorities take? I guess maybe if, you know, human capital plays a role in this too, but you have to do the investigation, you have to do all of that. Has that time pretty much stayed steady over time, or has it increased? What are your thoughts?

Mr. CASE. Yes, General, from the OIG perspective, we investigate fraud, waste, and abuse. In that process, we will sometimes find problematic employees. Our reports typically, when we find that, we will detail what the issues are, what the problems have been. We do not have the power to actually discipline ourselves. That is within the purview of the VA. We will provide those reports to the VA, typically with the recommendation that they consider the—

Mr. BERGMAN. Let me ask you a question, because we get—

Mr. BERGMAN [continuing]. would you like to see that process shortened and could it be done?

Mr. CASE. Well, our process we move as fast as we can.

Mr. BERGMAN. Yes.

Mr. CASE. How VA moves against employees or considers it—

Mr. BERGMAN. I am not trying to ask you to get into others—

Mr. BERGMAN [continuing]. but and you are good to go with how you do your piece of that pie.

Mr. CASE. We are.

Mr. BERGMAN. Okay. Then in that case, you know Dr. Billups, as human capital, do you believe that a disciplinary process that is plagued with delays—

Ms. BILLUPS. Human capital is Mr. Waye.

Mr. BERGMAN [continuing]. and non-action has any impact on recruiting? Did I get that right?

Ms. BILLUPS. Yes, human capital is Mr. Waye.

Mr. BERGMAN. Okay. Maybe I got my names wrong then. Let me see. Got it. No, no, no. Who is from—oh, I am sorry, you are right. You know another perfect day down the tube. I made it until what time, 3:30? Damn. Okay. Let me try this again.

Mr. Waye, same question. Do you believe that basically disciplinary process, because of the length of time, does it hurt—does it have an impact on recruiting and retention?

Mr. WAYE. Thank you for the question. Well, first, the timeframe, you know, when we think about the timeframe for disciplinary adverse action, they are actually quite similar under 714 and Chapter 75. For example—

Mr. BERGMAN. Yes.

Mr. WAYE [continuing]. 714—

Mr. BERGMAN. My question is, does as all the numbers you give me—

Mr. WAYE. Sure.

Mr. BERGMAN [continuing]. and all the processes, does it have an impact on recruiting and retention? Regardless of what numbers we are talking about, does it have an impact? Now that I think I have got your job title right—

Mr. WAYE. Correct.

Mr. BERGMAN [continuing]. you are the guy that tries to get good people hired.

Mr. WAYE. That is correct.

Mr. BERGMAN. Okay. Does it have an impact, because things take so long, on your ability to recruit and retain?

Mr. WAYE. Well—

Mr. BERGMAN. Yes or no? I mean, bottom line is could be no.

Mr. WAYE. I guess it could impact it. It could have an impact.

Mr. BERGMAN. Okay. Then, let me kind of transition here because my time is running out. You know, one of the goals of the Modernizing VA Disability Benefits Questionnaires Act, boy, we need to shorten that one is to shorten how long it takes a veteran to get disability benefits that they rate, you know, by facilitating the automatic processing of the DBOs. We will shorten that up. How do technical hurdles like DBOs that cannot be automatically processed as well as accidental errors, how does that contribute to the backlog?

Mr. WAYE. I am just trying to get to clarify the question, sir. The—

Mr. BERGMAN. I tell you what, I can give it to you and you can—

Mr. WAYE. How does discipline—

Mr. BERGMAN [continuing]. take it for the record. Bottom line is you are trying to—the Disability Benefits Questionnaires Act, we are trying to automate things.

Mr. RATCHFORD. I think that is a question for Ray.

Mr. WAYE. Yes, I believe that may be a question for—

Mr. RATCHFORD. Yes.

Mr. BERGMAN. Okay. Which one does that fall under?

Mr. WAYE. Automated benefits are Mr. Tellez.

Mr. BERGMAN. Of course. Okay. You know, could we simplify the—I see my time is up. I am not going to waste anybody's time. I am easily confused. It is hard enough to figure out and navigate what is going on at the VA. Think of the veteran, the average marine, which Mr. Bost and I, are, you know, we have all the challenges we can, so we are trying to figure out ways to help from this dais to get those veterans, the benefits, in the expeditious nature. With that, Madam Chair, I yield back.

Ms. KIGGANS. Thank you very much, Mr. Bergman. Representative Rosendale, you are now recognized for 5 minutes.

Mr. ROSENDALE. Thank you very much, Madam Chair. Mr. Ratchford, in your testimony, you stated that we are confident that the authorities are sufficient to hold employees accountable for misconduct and poor performance. We do not believe any legislation is necessary right now to ensure accountability. Then why is the VA not holding bad employees accountable quickly if you have the authority? I do not know if this is better for Mr. Waye or you, either.

Mr. WAYE. Yes, thank you for the question. We absolutely are holding bad employees accountable whenever misconduct occurs or there is poor performance. We are doing that using our existing authorities, including Title 5, Chapter 75 or and Chapter 43.

Mr. ROSENDALE. One of the things that I do not understand is if that, the existing process, I think it is 714 was the new Accountability Act that had been passed, does not give you any additional ability to hold poor performers accountable, then why everybody is pushing back so hard against it? Why are we just ignoring it? That is not—that is just a rhetorical question. I do not understand why we are pushing so hard against it if it does not have any impact, because I can tell you if something does not have any impact on me, I do not worry about it too much. It just seems awful strange.

As I hold a report here that was done on Fort Harrison just recently, what I will tell you is we have a tough time getting rid of bad apples. We really do. I am just going to read a couple of statements from this report because it has not been all put into the record yet and made public. Senior leadership, senior leadership decided to hire this employee despite multiple national provider data bank reports, medical license restrictions, and a significant malpractice settlement, which represents an error in judgment by multiple senior leaders. The former employee at Fort Harrison failed to meet standards of care on multiple occasions. Exceeded their clinical privileges and exceeded the scope of care, the scope of care provided at Ford Harrison. There was no ongoing professional practice evaluation for the former employee during their tenure at Fort Harrison. Then we have the statement that really concerns me, and I know that Fort Harrison is not unique to this experience. That is, we found violations of the VHA policy and a significant risk to public health and safety related to the previous employee practice and oversight of programs intended to ensure continued competence of credentialed and privileged providers.

Do not tell me that you are doing enough with the previous legislation. You are putting veterans' health at risk. We have got reports that say so. To try and turn back the clocks of time, and not give us the tools that are available to make sure that the veterans

get the benefits that they deserve, and the healthcare, the highest quality healthcare that they have earned, is absolutely appalling. It is appalling. It upsets everybody on this panel.

In 2017, the Accountability Act led to a 50 percent increase in removal actions, which contributed to veterans VA-wide trust scores increasing from 59 percent in 2016 to 80 percent in 2020. The Biden administration has decided to stop enforcing this bipartisan law.

I was very proud to cosponsor Chairman Bost's Restore the VA Accountability Act. I am very concerned that if we do not pass this bill, it will result in trust scores going down. Veterans support this legislation. Veterans support this legislation. That is what we are concerned with. We are here to protect the veterans, not the Veterans Administration. No offense intended. What concrete steps are you taking to ensure that the VA-wide trust scores do not decrease?

Mr. WAYE. Well, thank you for the question. A couple of things. One, we, regarding the action that the case that you spoke of earlier, again, I can assure you that if there is a situation that needs to be addressed, it can be addressed under existing laws, rules, and has the potential—

Mr. ROSENDALE. As Chairman Bost said, well then why are not you because it is not being taken care of.

Mr. WAYE. We are certainly happy to, you know, discuss offline in terms of the specific individual case, but overall, we do have the authorities that we need. I will say this, we used 714, really, as long as we could. As you know, our reason for pausing 714 is because of the ongoing case decisions that we received from the various administrative tribunals and the courts. You know, we got to a point where that it was really not usable for the majority of our workforce. It only applied to about 75,000. Our concern now is that if we go back and try to revise the legislation that we will spend the next few years addressing some of the same court cases.

Mr. ROSENDALE. Well, we will spend the next several years getting rid of the bad apples, and that is going to create a big backlog. Goodness gracious. Madam Chair, I see my time has expired, I would yield back.

Ms. KIGGANS. Thank you, Mr. Rosendale. Thank you again to our panel of witnesses, and you all are excused from the witness table. We welcome the second set of witnesses to come forward.

I would now like to welcome the witnesses on our second panel to the witness table, and I ask you all to please stand and raise your right hands.

[Witnesses sworn]

Thank you, you may be seated. Let the record reflect that all witnesses have answered in the affirmative. Mr. Hastings, you are now recognized for 5 minutes to provide your testimony.

#### **STATEMENT OF JOSHUA HASTINGS**

Mr. HASTINGS. Today, I come before you, a service-connected combat veteran, VA patient, and proud Legionnaire. I receive all of my care through the Department of Veterans Affairs, and I personally, like many others, experience frustrations obtaining an appointment, confusion navigating the system, and difficulty receiving appropriate care. Chairwoman Kiggans, Ranking Member

Mrvan, and distinguished members of the subcommittee, on behalf of our National Commander Vincent Troiola, and our more than 1.6 million dues paying members, we thank you for inviting the American Legion to testify today.

In 2017, Congress passed the VA Accountability and Whistleblower Protection Act to increase staff accountability and improve protection for whistleblowers. In August 2021, it was found that VA misinterpreted this Act by the United States Court of Appeals. One of the protections assumed in this legislation was to mitigate the involvement of the U.S. Merit Systems Protection Board in certain decisions surrounding the employee. However, there was nothing written in the law to do so. This lack of clarity has allowed courts to dilute the VA Secretary's authority to hold employees accountable, protect whistleblowers, and keep veterans safe. Veterans deserve a process that delivers swift accountability for frontline workers and middle managers and even senior executives. We must ensure VA leaders possess the tools necessary to hold bad actors accountable and protect those seeking a more productive and safer work environment.

The processing of temporary disability ratings has been identified as a backlog barrier for more than a decade. Processing issues have led to substantial financial errors and contributed to unreasonable delays. The time it takes VA to grant such ratings ranges from a couple weeks to a couple months. There is no consistency. Veterans should receive their benefits in a consistent and timely manner. The American Legion believes increased automation can help reduce the claims backlog and deliver these benefits more efficiently.

Regarding acquisitions, the VA has a crucial mandate to ensure that the procurement of goods and services is optimized to meet our Nation's veterans. A 2022 GAO report highlighted the VA's approach to acquisitions was varied and unstandardized, leading to oversight difficulties and subpar acquisition outcomes. Moreover, the VA's Electronic Health Record Modernization (EHRM) program mirrors this chaotic nature. In the wake of mismanagement and delayed problem resolutions, its deployment has been stalled since June 2022 with costs escalating to an exorbitant 59.12 billion dollars.

Creating a standardized and transparent framework for managing major VA acquisitions would heighten accountability and contribute to a more uniform acquisition process, boosting the efficiency of VA procurement, and ultimately enhancing the provision of care for veterans. This legislation would also help to facilitate VA's ongoing efforts to modernize EHRM system by ensuring the effective implementation of a single system across VA and bidirectional connectivity to the Department of Defense. The American Legion believes this is essential for reducing further delays and unnecessary expenditures.

The American Legion has also grown increasingly concerned that safety of our veterans, staff, and patients at VA facilities is in decline. A recent OIG report highlighted severe understaffing, a lack of proper training, and various security vulnerabilities. This includes an unsettling 33 percent average vacancy rate in officer positions across 70 medical facilities. In some cases, this rate soared

to over 60 percent. This has led to multiple serious incidents, including a bomb threat, and firearms being discharged.

The American Legion firmly supports legislation that ensures the safety of our veterans extends beyond providing quality medical care. We must do more to improve oversight of VA policing and set a foundation for enhanced safety protocols and more effective staffing strategies.

I would like to conclude by thanking Chairwoman Kiggans, Ranking Member Mrvan, and this subcommittee for your incredible leadership, and for always keeping veterans at the forefront of your mission. It is my privilege to represent the American Legion before the subcommittee, and I look forward to answering any questions you may have.

[THE PREPARED STATEMENT OF JOSHUA HASTINGS APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Mr. Hastings. The written statement of Mr. Hastings will be entered into the hearing record. Mr. Murray, you are now recognized for 5 minutes to provide your testimony.

#### **STATEMENT OF PATRICK MURRAY**

Mr. MURRAY. Chairwoman Kiggans, Ranking Member, Mrvan, and members of the subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States and its auxiliary, thank you for the opportunity to provide our remarks on legislation pending before this subcommittee.

The VFW supports H.R. 2733, Department of Veterans Affairs Office of Inspector General Training Act to require each Department employee to receive training developed by the VA Office of Inspector General for reporting of wrongdoing, responding to requests, and cooperating with the OIG.

The VFW believes the OIG performs a critical role in overseeing and investigating the practice of VA and a vital component of this role is employee input. Training the employees on the role, responsibilities, and legal authority of the Inspector General, and the duty of employees for engaging with OIG is important to accomplishing its mission. This training would also empower the employees to identify the circumstances and mechanisms for reporting fraud, waste, and abuse, including making confidential complaints. It would help protect the men and women who aid our service members, veterans, and families every single day.

The VFW also supports H.R. 4278, the Restore Department of Veterans Affairs Accountability Act, to streamline authorities to suspend, demote, or fire VA employees that have been determined to warrant such actions. The VFW, along with a broad bipartisan and bicameral group of legislators, supported the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, because the VFW and others had seen examples of VA's inability to hold certain employees accountable. The situation at that time was untenable, and broad agreement was something needed to be done.

Earlier this year, VA Secretary Dennis McDonough stated VA was no longer using the authority enacted in the 2017 law, as it was creating more administrative and legal problems than was ini-



tially known. Well intentioned laws that cannot be legally enforced, hinder VA's ability to perform its vital functions. This important bill includes strong accountability reform for VA employees who do not live up to the standards that veterans deserve. Almost 6 years after the passage of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, the Secretary of Veterans Affairs still lacks the proper authority to swiftly terminate workers who do not deserve to work at VA.

The Restore VA Accountability Act would improve the Secretary of Veterans Affairs Authority to discipline and remove employees who commit malfeasance. This proposal would restore the original intent of the law that had gaps and was not implemented effectively. The VFW believes that VA and Congress must ensure the Secretary has the authority to quickly hold employees accountable for wrongdoing that may endanger the lives of veterans. That is why we support this important legislation.

However, whenever we are discussing VA workforce issues, we feel it is also important to stay vigilant about VA hiring. We believe that it is just as important to make sure that we get rid of the bad apples as we refill those ranks as quickly as possible. We urge the committee to continue working with VA to provide them all the tools to also hire and retain high quality employees who serve our veterans every day.

Chairwoman Kiggans, this concludes my testimony. Again, the VFW, thanks you and Ranking Member Mrvan for the opportunity to testify on these important issues before this subcommittee. I am prepared to take any questions you or the subcommittee members may have.

[THE PREPARED STATEMENT OF PATRICK MURRAY APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Mr. Murray. The written statement of Mr. Murray will be entered into the hearing record. Mr. Romesha, you are recognized for 5 minutes to provide your testimony.

#### **STATEMENT OF CLINT ROMESHA**

Mr. ROMESHA. Chairwoman Kiggans, Ranking Member Mrvan, members of the subcommittee, thank you for the invitation to come speak and testify here today. I am here today on behalf of America's Warrior Partnership as an emeritus board member. However, I am really here to fulfill my duty. It is the same responsibility I had when I served in the military you look out for those you served with. For those on your left and right, I am here for them. For those who you served with in the military, you were given a great task. You are held accountable and responsible for things that are not done right, because in the future, you may need to be dependent upon to save your friends' lives. Lives are at stake.

The VA should be no different, period. Lives are at stake, and those working for the VA must have the trust, must be trusted and dependable. Yet everyone hears the horror stories on the news of the VA employees misbehaving or abusing their authority. The question is, why we cannot just get rid of these employees? Instead, it must be focused on what is happening in these workplaces to create an environment that allows these things to happen. When discipline is gone and a culture of responsibility and accountability

are not in force, standards and training disappear. This has a devastating ripple effect. First, on morale in the VA, and the great employees in the VA that sees what is happening around them. They either give up on trying to do their best or they move on and leave.

Next, it causes a loss of trust. For those who went to the VA for help, were not treated well, were not seen, and could not be heard, find the VA is no longer trustworthy or dependable. Finally, when you develop the reputation for a lack of discipline and accountability, you have a hard time bringing in new employees and talent. If bad employees are tough to discipline and nearly impossible to remove, how can the VA expect to change its culture?

Working for the Federal Government on behalf of the American people to help our veterans is an honor. It is also a privilege that should be removed for not meeting the standards and expectations. Thankfully, Congress has passed the VA Accountability Act and trust in the VA increased. Employee satisfaction with senior leaders' honesty and integrity increased from 45 percent in 2016 to 59 percent in 2020. Veterans' trust in the VA increased from 59 percent in 2016 to 80 percent in 2020.

However, despite the VA's Accountability Act being law, it is no longer being enforced. Putting aside how a Federal agency can unilaterally decide not to follow the law, or how a small employee protection board by Congress can claim to overrule popular law, why would anybody oppose this in the first—oppose this accountability bill in the first place?

The answer, sadly, is that money and jobs are at stake. Some in the VA—some see the VA as a major job provider, and a taxpayer funded cash machine with a soaring budget. The VA is not a jobs program. This must stop. The VA cannot focus on protecting jobs and focus on helping our veterans. The unions and the Merit System Protection Board and others must choose. The VA must only have one focus. I firmly believe the VA's sole mission and directive from this government is to take care of those who served our Nation.

All veterans feel the same way. In fact, Mission Roll Call did a recent poll of 16,000 veterans, and the poll simply asked the veterans do they believe the VA should continue to follow the accountability law? Eighty nine percent said yes and roughly 11 percent said no.

Accordingly, I am proud to fully support H.R. 4278, the Restore Department of Veterans Affairs Accounting Act. I am thankful for this committee's efforts and the efforts of your colleagues in the Senate. Importantly, this legislation empowers the VA to make a decision without worry to the MSPB interfering or collective bargaining agreements and will apply to supervisors and managers too. Just as they did with the SES employees previously. These employees are working for the veterans and the American people, not the other way around.

In short, oversight and reform at the VA is needed since the same issues are plaguing the VA, and they have been around for decades despite the diligent work of this committee. Things need to change and holding the VA accountable for a lack of progress is a good beginning. I thank you. I look forward to your questions, and I yield back my time.

[THE PREPARED STATEMENT OF CLINT ROMESHA APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Mr. Romesha. The written statement of Mr. Romesha will be entered into the hearing record. Ms. Gerton, you are recognized for 5 minutes to provide your testimony.

#### STATEMENT OF TERRY GERTON

Ms. GERTON. Chair Kiggans, Ranking Member Mrvan, and members of the committee, I appreciate the opportunity to testify today. I am a fellow of the National Academy of Public Administration and have served as its president since 2017. I am pleased to offer our perspective on the issues captured in the Restore VA Accountability Act of 2023 legislation before you today. Our congressional charter precludes the organization itself from taking an official position on proposed legislation. My testimony will reflect the Academy's history on these topics and our general recommendations. The Academy has deep expertise in Federal human resource management topics. Over 50 of our fellows have experience in Federal HR, and many of them were themselves Federal chief human capital officers.

Across our history, many Federal agencies have directly engaged the Academy and our fellows for assistance in addressing organizational and individual performance and accountability. The Academy has long held the position that a professional merit based civil service is essential to effective delivery of government programs. We also endorse an accurate and intentional deployment of the term accountability. In some recent policy debates, accountability has become a euphemism for making it easier to fire public employees.

The system surely needs more flexibility and poor performers should not be retained in public service positions, but accountability means much more than that. It is a time-honored principle that government should be responsible for serving the public interest. Although we certainly need greater accountability in public service, what we most need is system that holds administrators accountable for results. How well government employees accomplish the government's mission, and what principles are pursued in doing so are the key issues.

Over the past 5 years, we have worked with the National Oceanic and Atmospheric Administration, the Department of Homeland Security Office of the Inspector General, the U.S. Merchant Marine Academy, and the U.S. Coast Guard Academy on matters of organizational culture and performance. In 2017 and 2018, we completed two papers, No Time to Wait, Parts One and Two, outlining a fundamentally new vision for the Federal civil service that is mission focused, merit based, and publicly accountable. Taken together, these reports offer a roadmap for building an organization where a central focus on and understanding of mission drives performance at every level.

We find that four general principles emerge in successful organizations. First, organizational culture impacts employee performance. Second, strategic workforce planning that links performance to mission enables effective performance management. Third, clear communication and consistent application of performance standards are essential, and fourth, there is no substitute for effective

leadership. These principles in practice mean that across every branch, division, level, and rank, leaders clearly communicate and consistently enforce expectations. Systems are in place to compile and analyze data to inform workforce planning and management decisions so that decisions are evidence not anecdote based. Leaders are trained and tuned to manage a diverse workforce and provide clear guidance and feedback on performance expectations. The agency plans for and invests in training aligned to mission objectives, and employees feel valued and prepared for the critical missions to which they are assigned.

One other Academy study is particularly relevant to today's conversation. In 2021, we delivered our congressionally directed assessment of the Office of Personnel Management. As one of many findings in that report, the panel observed that the complex web of legislation and regulation that has accreted around the topic of Federal civilian personnel management makes it simultaneously challenging for managers and leaders to understand exactly what rules they are supposed to be following, easy to find loopholes that might be interpreted to permit otherwise unintended behavior, and simplest and safest to follow a path focused on compliance rather than innovation.

All of this brings us back to the central topics of performance and accountability. The system surely needs more flexibility and poor performers should not be retained in public service positions. At the VA particularly, our veterans deserve the highest quality, service, and care. As I highlighted earlier, viewing accountability through the narrow lens of firing employees does the debate and the country no good. The ability to fire individuals for poor performance is no substitute for good leadership, an elusive quality that is impossible to legislate. It is far better to build organizations where mission and performance are aligned from the beginning, where systems are designed and implemented to provide evidence that can inform consistent and strategic decisions and where investment in training provides a strong scaffold upon which to build individual competency. Then, an organization can be truly accountable to those who matter most, those they are created and funded to serve.

Chair Kiggans, that concludes my statement, and I would be pleased to answer any questions you or the committee members may have.

[THE PREPARED STATEMENT OF TERRY GERTON APPEARS IN THE APPENDIX]

Ms. KIGGANS. Thank you, Ms. Gerton. The written statement of Ms. Gerton will be entered into the hearing record. We will now turn to questions, and I yield myself 5 minutes.

I just wanted to briefly speak that the common theme in listening to you all speak about accountability, I mean, I could not agree with more and that it is kind of a dual sided problem, not just accountability for those who currently work for the VA, but how are we recruiting new providers, new employees in that process. We have heard that before. This is not the first time and we just spoke earlier about when are we going to—when is Congress going to act on those changes so that we can expedite that hiring process?

I certainly hear you, and it is a work in progress, but thank you for adding your comments as well.

Mr. Hastings, as an American Legion member myself in Virginia, I appreciate the American Legion's support for the VA Medical Center Report Act. Could you talk more about the safety concerns you are hearing from your membership?

Mr. HASTINGS. Absolutely. Thank you for the question. One of the main concerns of our membership is the lack of security officers and the vacancies in place. This is a safety issue that not only affects veterans but affects the VA staff. We need to ensure that there are people in those positions, and not only that, but we need to ensure that the people in those positions are adequately trained to deal with a veteran that may come in there with a mental health crisis or something of that nature.

Ms. KIGGANS. Mr. Murray, I appreciate the VFW's support for my bill as well. What sort of safety concerns are you hearing from your members when they visit the VA?

Mr. MURRAY. Thank you, ma'am. Oftentimes VA police are some of the first folks who interact with VA patients. We want to make sure that there are enough of them to be able to handle the job appropriately, and that they are trained effectively. Unfortunately, sometimes they are that first interaction with a veteran in crisis. We need to make sure that there are enough of them and they are properly trained to do so effectively.

Ms. KIGGANS. I would agree, and also on the civilian side, same issue with just supporting patients in our community that have similar interactions with law enforcement. Mr. Romesha, thank you for your thoughtful words on the importance of accountability at the VA, particularly, focused on creating an environment that fosters accountability. I know you have some experience with accountability and with leading organizations. Can you talk a little bit more about upholding standards within an organization and how that leads to better results?

Mr. ROMESHA. You know, it is that cultural mindset. When you hold accountability, you bring in the talent that wants to gravitate to that. That is like any leadership position. When it is not there, you continue to hear the same things when I talk to VA employees like the hardest thing to do in the VA is hire and fire. When you have that toxicity that continues to grow and be infested in there, it is easy for the talent to want to leave and go somewhere else.

As we continue to move forward, we have got to look at that, we have got to look at those things. It is not how do we just get rid of someone. How do we build a new culture that people want to come to? Veterans want to be part of, that do not want to continue to sit there and show up and be told, look, as a VA employee, I do not want to see you as a veteran. A veteran does not get the choice to say I had a bad incident with a VA employee. I cannot leave them, but they can kick me out.

This is a culture, the mindset, just as a general leadership as veterans that have served in all branches of the military, you get ingrained, that you must build that culture of trust accountability, responsibility, and hold to a standard and keep the standard. You cannot continue to lower it just to make numbers or just to employ

people because that feels good. The one purpose, the only purpose of the VA should be that veteran at the end of the day. That is the end user. That is who we are here for. That is what this country is built upon.

Ms. KIGGANS. Thank you. I know even Ms. Gerton spoke about, you know, we cannot legislate leadership and just that culture and the climate at the VA. We will continue to work on that. I hear you though.

Mr. Romesha, and then how does the lack of discipline in an accountability in an organization make it difficult to recruit and retain good people? I know you briefly spoke about it, but could you expand?

Mr. ROMESHA. When you have that lack of discipline and there is no accountability, it is hard to get good talent in there that wants to stay and be part of something. They are going to find better places to gravitate toward. When you continue to lower that standard, do not have that discipline, you are attracting less talented people that are just showing up to collect a paycheck instead of showing up to understand what it means to serve this country by serving our veterans.

Ms. KIGGANS. I believe I heard you say that the VA is not a jobs program. I thought that was an interesting comment. Mr. Hastings, your testimony mentions issues at medical centers uncovered through the Legion's System Worth Saving Program. Can you explain what these issues are and explain how you think increased accountability would have prevented them?

Mr. HASTINGS. Yes, thank you for the question. A recent System Worth Saving visit to Atlanta, Georgia highlighted numerous adverse patient safety events. This included weapons in the emergency department, medication mismanagement, both inpatient and outpatient, and surgical delays. It is not enough to say I am sorry when a veteran is hurt due to negligence or incompetence or even wilful disregard of the law. We need to ensure that the VA has the ability to remove poor actors immediately who are harming an otherwise excellent VA healthcare system.

Ms. KIGGANS. Thank you very much, and I will now recognize Mr. Mrvan for his 5 minutes.

Mr. MRVAN. Ms. Gerton, given your experience reporting on agencies across the Federal Government, are there best practices you have seen that would contribute to a culture of accountability and improved performance, which do not solely focus on firing or disciplining employees? Also, I share the concern expressed in your testimony about accountability having become code for making it easier to fire public employees. What are some other ways we can help VA perform better for veterans?

Ms. GERTON. Sir, thank you for the question, and your point is exactly right. We see these kinds of issues across Federal agencies and culture change takes time. I think there are a couple of conditions at the VA that I would highlight initially that make performance management even more challenging. The fact that they have tens of thousands of vacancies puts extraordinary stress on the current employees. Anytime that managers or employees are under stress, that opens the opportunity for bad behavior and it reduces the opportunity for intentional performance management. To Chair

Kiggan's earlier point, addressing hiring at the VA is crucial to improving overall performance and culture at the VA.

Second, the performance management systems are really complicated, and they are not designed to be personal, even though the impacts are personal. Managers are not trained on all the complexities of performance management. An investment in training for the senior leaders and managers across the organization in the current processes for performance management, for progressive discipline, and ultimately for taking decisive action to remove an employee can help managers address the fear factor that often prohibits or inhibits them from taking action to address employee misconduct. Just off the top, those couple of things would be critical, but more importantly clear and consistent administration of disciplinary processes is essential to building confidence and trust in the employees across the organization.

Mr. MRVAN. Ms. Gerton, in your testimony, you state that there is no substitute for effective leadership. Is it possible VA would benefit from a thorough, independent review of its leadership, culture, performance management systems, professional development, management, and leadership training programs, and so forth?

Ms. GERTON. That is certainly something that as a congressionally chartered organization you could address to the National Academy of Public Administration. As I mentioned in my testimony, we have fellows from across the Federal Government with extraordinary experience and expertise and we have worked with a number of Federal agencies, including the FBI, the Secret Service, the Department of Justice who have documented similar sorts of challenges in terms of leadership and performance management. We would be honored to bring that expertise to the VA if that would suit this committee's objectives.

Mr. MRVAN. For my own clarification, can you concisely and quickly define performance management so I have an understanding of it?

Ms. GERTON. I think of it as getting the best from your employees, ensuring that they are trained, that they are led, that they are assigned, that the tasks in front of them are clear. They understand and they are equipped to accomplish those tasks. Then managing their performance against clear and measurable performance objectives and communicating their feedback.

Mr. MRVAN. Okay, thank you. Mr. Murray, in your testimony, you state that in addition to empowering VA and to hold employees accountable for wrongdoing, it is also important to ensure VA can quickly fill vacancies and retain high quality employees. I am concerned that the certain provisions in H.R. 4278 would eliminate rank and file employees' rights to be put on performance plans and to bar VA from considering employees' past disciplinary records before firing or demoting employees. Do you have any concern about this, especially given that so many VA employees are veterans themselves? What specific provisions of H.R. 4278 would act as safeguards against the employees being removed for political, retaliatory, or discriminatory reasons?

Mr. MURRAY. Thank you, Mr. Mrvan. We believe the substantial threshold is what we think should be that first line to make sure that if an employee, you know, is deemed to cross that substantial

threshold, that should be enough that if either the Merit Systems Protection Board or a judge sees that they can overturn it if there is not a substantial level of evidence for the suspension, the firing, or the demotion.

I completely agree that building a culture is critical to making this good. I have been privileged to be a manager and a leader. You manage things, you lead people, and not only at the VFW, but also in my previous position at Turner Construction. Even with the best efforts, you still need a tool just in case something does not work to make sure that through the best efforts possible that VA can try to build that great culture, there is still some bad apples that should need to go. This is something that we believe is necessary as that fallback.

Mr. MRVAN. Thank you. With that I yield back.

Ms. KIGGANS. Thank you, Mr. Mrvan, the chair now recognizes Congressman Bergman for 5 minutes.

Mr. BERGMAN. Thank you, Madam Chairwoman. Mr. Romesha, thank you for your very committed military service and also, for traveling to be with us today. Can you discuss how the teams you have worked with have been a success?

Mr. ROMESHA. You know, the teams I have worked with found success is, again, by building that culture. To understand that you need to depend on each other. When you tell someone you are going to do something, you are going to do it. This should be a result driven idea that our mission is this, this is what we need to accomplish. The VA's mission is taking care of that veteran. If we put that first and foremost, everything else will fall in line.

If you look at the data that we have seen over the last few years, the trust in the VA increased when we had the VA Accountability Act implemented. It went up with employees and veterans. It has proven to work. There is the data right there and as your team you can see that. You can see where your investment pays off. That is that culture that we can get set in there and then implemented to show time and time again that it comes from that trust. I used to tell people, duty will get your guys to do their job, but when you build that loyalty and trust, they will charge into a hail of bullets for you. That is what I would like to see our VA become.

Mr. BERGMAN. I think I can then interpolate how you would answer, you know, do you think VA employees who care for veterans should be held to the highest of standards? I think that would be a simple yes. Lead by example, you know, as, you know, lead down manage up. You are always going to have the manure coming from on down on high that a good leader will deflect off their shoulders so it does not go on to those under their charge. That is what leaders do.

Mr. ROMESHA. When leadership takes blame and gives credit, that is when you got true leadership.

Mr. BERGMAN. Absolutely. Mr. Hastings, talk to me about the Modernizing VA Disability Benefits Questionnaires Act, which I said is too long an acronym before. Why is this standardization so important?

Mr. HASTINGS. Thank you so much for the question. It is very important to standardize our DBQs, our Disability Questionnaires. The process needs to be automated, because really what we are



seeing through our Regional Office Action Review (ROAR) visits and our System Worth Saving site visits is many of our VA claims raters are overwhelmed, especially with the passage of the PACT Act. There is a lot of new regulations, and it is kind of a perfect storm of an increasing workload with increasing confusion.

Anything that we can do to help automate processes, to help take some stuff off of their plate, to help with their work life balance, or even add time for necessary training to get up to speed on some of these issues, I think is absolutely necessary.

Mr. BERGMAN. How do the claims backlog and the overall, overly complicated process to obtain the disability benefits, how does that lead veterans to seek assistance through organizations such as the American Legion?

Mr. HASTINGS. Well, thank you for the question. I think the frustration of the backlog, I think is what drives people to us. One of the things that separates the American Legion, from other organizations that might do claims is we will take the claim from start to finish. We are not just throwing an initial claim out there. We will walk you through the initial claim, but then we are also right there next to you when you need an appeal or something like that. We take it all the way to the finish line.

Mr. BERGMAN. There are several organizations that do that around the country, VSOs, and, you know, being a life member of the VFW and long-time member of the American Legion and countless number of Marine Corps League detachments, all of those, which accept my dues gratefully. The point is, veterans are looking for solutions, and they, in the end, they are going to go to the best place, regardless. Some might be free, some may—whatever works for them. Is that the kind of environment we are trying to create?

Mr. HASTINGS. We want to make sure that veterans are being taken care of appropriately.

Mr. BERGMAN. Yes. There is no one entity that has the be all end all to serve to help veterans because different parts of the country, different capabilities, individual, and collectively, whatever it happens to be, but in the end, the VA has too complicated a system when it comes to that veteran just kind of navigating the waters themselves. Whatever we can do to make sure that veteran gets the benefits they rate, then that should be a suggested set of solutions. Fair enough?

Mr. HASTINGS. Absolutely.

Mr. BERGMAN. Okay. With that, Madam Chairwoman, I you back.

Ms. KIGGANS. Thank you, Mr. Bergman. The chair now recognizes Representative Rosendale for 5 minutes.

Mr. ROSENDALE. Thank you, Madam Chair. Mr. Romesha, I am sure that you heard earlier that the 2017 Accountability Act led to a 50 percent increase in removal actions, which contributed to Veterans VA-wide trust scores increasing from 59 percent in 2016 to up to 80 percent in 2020. We had a lot of discussion earlier about what the impact of that was since this we have had this pause on the Accountability Act. Do you believe that passage of 4278 will help us rebuild that team environment, that you are talking about and help rebuild that trust?

Mr. ROMESHA. I absolutely do. I think it will pull out some of the obstacles that are frustrating our VA and keeping those good employees motivated to continue to help the veteran. I think it is a no brainer. It has been proven in the past. Why are we sitting here today still talking about something that we have already seen work?

Mr. ROSENDALE. In your experience, have you seen that if you have got a bad employee that it does not just impact the productivity of that individual, that it actually impacts the productivity of the individuals that are working with or around that person as well?

Mr. ROMESHA. You know, in the military, when you would have that one soldier that would come up short, always be the guy in trouble, he was normally the one that would get put on Kitchen Patrol (KP) or stay back in the rear and never have to go on patrol. The guys that were always depended upon that could be counted on had to go out there and be the forefront. That mentality sometimes gets well, if I am doing the right thing all the time, why am I out here getting shot at when I could be less than ideal and setting in the talk in the air conditioning.

Mr. ROSENDALE. The expression iron sharpens iron?

Mr. ROMESHA. Yes.

Mr. ROSENDALE. The better you are, the better the team is, then everyone performs at a much higher level?

Mr. ROMESHA. Everybody elevates.

Mr. ROSENDALE. Would you say? Very good. I appreciate that. How does the result—how does this result in worse care for veterans when we have that type of a situation? Because we are not in the field, we cannot take an employee and hide them back in the kitchen necessarily?

Mr. ROMESHA. Well, it just spills over with what you see when you go there as a veteran. I mean, my first experience in the VA was my last year in the army I went to go get my medical records. I made sure everything I had all my ducks were in a row and the day I got out and I showed up for my first VA appointment, I realized I had to start over from day one because none of those records transferred over. Right there from day one it is a very frustrating thing to be a veteran in realize this is the system I am about to come into. It is hard and it is a battle of attrition. There is a lot of a lot of men and women that go through the VA have come to realize. Then you meet that employee that does not want to be there that day that has that less-than-ideal attitude just let me check the block. Let me get out of here. Let me just ask you a questionnaire and not let me get to know who Staff Sergeant Romesha was. You do not want to go back. There is many, many men and women that will have that first experience and will never go back. How many veterans do we not have in the VA system that has earned that right, just because of a bad experience with a bad employee.

Mr. ROSENDALE. Thank you very much. Mr. Hastings, thanks for testifying today. I appreciate the American Legion's support of my legislation. You mentioned that increased automation can help reduce the claims backlog and deliver benefits more efficiently. Can you expand on that just a bit?

Mr. HASTINGS. Well, absolutely. Absolutely. Thank you so much for the question. As I said earlier, you know, increasing the automation, not only are we improving the process by eliminating things to an extent like human error and things like that, but by improving the automation, we are taking things off of like I said the raters' plates and giving them more bandwidth to deal with claims and issues more appropriately, and really take their time. This is not a numbers game. It is not quantity over quality. We want to ensure that we are always pursuing quality and I think automating some of the processes is the best way to do that.

Mr. ROSENDALE. Very good. What are some of the real-life impacts, Okay? You are dealing with the veterans every day, they come into the legion. What are some of the real-life impacts of the delay or incorrect payments that the veterans are receiving because of this, because of this system?

Mr. HASTINGS. Well, I can tell you one of the most nerve-racking thing you could ever get from the VA is an overpayment. Really these claims when the VA comes after you for things like overpayments and things, it is extremely stressful and puts a lot of pressure on the veteran. It is hard enough getting the benefits that you deserve without having to worry about overpayments and things that are really on the VA's responsibility or errors.

Mr. ROSENDALE. Very good. Thank you very much and thank you all for coming out and testifying today.

Ms. KIGGANS. Thank you, Mr. Rosendale, and thank you again to our witnesses for being here. I think it is just the start of a longer discussion. I think some VAs out there are doing a great job. I would like to thank them on behalf, I am sure we all have positive stories we could share too. We are here to try to implement good change and meaningful change and everything from electronic charting, I mean, I hear you about walking in the door and understanding that frustration as I am a nurse practitioner by trade. That electronic charting piece, just understanding all components of healthcare when that person walks in the door so important.

You know, I remember when I was at my—I was a helicopter pilot in my squadron, I was a legal officer. I loved that job because one of the things I did was to apply to Uniform Code of Military Justice (UCMJ) and kick people out of the Navy, who—my Navy—who did not deserve to be there. It is kind of a similar story with the VA, especially in my second career field as a nurse practitioner, I just, you know, I want my veteran as a veteran, as a healthcare provider, them to receive the best quality of care they can. It frustrates me but I want to work super hard to do that same thing to people that will not take care of my veterans, you know, I do not need them on my team. That loyalty piece is so important to me in every single thing I do in life, as a Navy pilot, as a nurse practitioner, and as a Member of Congress.

I think we all share and just really wanting to again implement good change and meaningful change, so we really appreciate your time, the travel that you made to be here with us today, and your thoughts. Thank you so much.

I ask for unanimous consent that all members shall have 5 legislative days in which to revise and extend their remarks and in-

clude any extraneous material. Hearing no objection, so ordered,  
this hearing is now adjourned.  
[Whereupon, at 4:27 p.m., the subcommittee was adjourned.]

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**A P P E N D I X**

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## PREPARED STATEMENT OF WITNESSES

### Prepared Statement of Lewis Ratchford

Chairwoman Kiggans, Ranking Member Mrvan and other Members of the Subcommittee: thank you for inviting us here today to present our views on several bills that would affect VA programs and services. Joining me today are Mr. Ray Tellez, Acting Deputy Under Secretary for Automated Benefits Delivery (ABD), Veterans Benefits Administration (VBA); Dr. Angela Billups, Ph.D., Executive Director, Office of Acquisition and Logistics (OAL), Office of Acquisition, Logistics, and Construction (OALC); and Mr. Rondy Waye, Executive Director, Human Capital Programs, Office of the Chief Human Capital Officer, Office of Human Resources and Administration/Operations, Security, and Preparedness (HRA/OSP).

#### **H.R. 196 Expediting Temporary Ratings for Veterans Act**

This bill would require the Secretary of Veterans Affairs to modify the information technology systems of the Department to provide for the automatic processing of claims for temporary disability compensation ratings for Veterans with a service-connected disability that requires hospital treatment or observation in a VA or other approved hospital for a period in excess of 21 days.

#### **VA cites concerns with this bill.**

The current information technology framework does not support the automation of generating ratings – particularly because of the challenges associating the Veteran's treated diagnoses to service-connected disability(ies). This type of medical association often involves a significant level of human adjudicative discretion. The development of a programmatic determination removes the human adjudicative discretion and requires a technology solution that would most likely be dependent on natural language processing and machine learning capabilities that could incorrectly associate or disassociate the treated diagnoses and service-connected conditions, leading to incorrect benefit determinations.

The bill would require VA to modify its information technology systems to provide for the automatic processing of certain disability ratings within one year of enactment. However, VA anticipates it will take approximately two fiscal years to modify its information technology systems to fully implement this act. In the interim, VBA is working on automating certain temporary disability ratings, beginning with medical conditions that have defined parameters. For example, Veterans with a service-connected knee condition could be afforded a total temporary evaluation for one year following implantation of the prosthesis, regardless of the length of hospitalization.

Currently, VA is looking to accelerate its use of automation tools and processes to keep pace with its increased workload. As part of its five-year modernization plan as prescribed under section 701(b) of the PACT Act, VBA and the Office of Information Technology are piloting automation technology to expedite claims processing ensuring Veterans and their families receive their benefits in a timely manner. While VA appreciates the intent of this legislation, it may unintentionally delay planned functionality delivery contained within VA's current plan.

Based on the costs of the Modern Claims Processing Contract starting in FY 2023, five-year and ten-year General Operating Expense (GOE) costs for this bill are estimated at \$32.9 million. Additionally, based on OIT's initial exploratory work, it will require approximately \$3.5M in IT costs over two years to fully implement the bill. This funding will enable the establishment of an integration framework within VA's current claims processing system; OIT also anticipates approximately \$200k annually for future sustainment costs. No mandatory costs are associated with this bill.

#### **H.R. 2733 Department of Veterans Affairs Office of Inspector General Training Act of 2023**

The Department is confident that the current Office of Inspector General (OIG) mandatory training, required for all VA employees, provides sufficient training and

education on reporting wrongdoing and fraud, waste and abuse as well as responding to requests from and cooperating with the OIG.

Section 2(a) would require OIG to develop training for new VA employees on how to report wrongdoing to the OIG and how to respond to and cooperate with requests from the OIG. This requirement is duplicative of the mandatory training already provided to VA employees, which was developed, approved, and issued by OIG.

Section 2(b) would require that the training occur within one year of beginning VA employment. VA already requires that current OIG mandatory training be delivered upon entry on duty for all VA employees.

Section 2(c) would establish content elements for the training. The elements in this section are already included in the current annual training requirement.

Section 2(d) would require that the Inspector General design and update the training required by section 2(a). Subject matter experts within the Department developed the current training, which VA views as sufficient for educating VA employees on how to report wrongdoing and cooperate with OIG requests.

Section 2(e) would require that the training be delivered via VA's talent management system. OIG has issued approved mandatory training (Talent Management System Course #VA 39390, VA Office of Inspector General Training) that addresses the proposed requirements in the bill to all VA employees.

While VA appreciates the support of its efforts to train and educate employees in reporting misconduct, fraud, waste, and abuse, the proposed legislation is redundant to existing mandatory training practices and not necessary.

#### **H.R. 3504 VA Medical Center Security Report Act of 2023**

VA is committed to providing a safe and secure environment for our workforce, Veterans, and all who engage with VA in our facilities. The men and women who serve in various law enforcement roles serve as the foundation upon which VA establishes this safe and secure environment. This bill would require an annual security survey of covered medical center police service personnel. The survey would cover criminal activity, police unit vacancies, status of law enforcement equipment, law enforcement training, security weaknesses, analysis of the relationship with local law enforcement, efforts to address and reduce criminal activity at or near the medical center and recommendations to better address and reduce criminal activity at or near the medical centers. The bill would also require an annual report to the Veterans' Affairs Committees of the House and Senate, to include a VA-wide evaluation and analysis of the survey results as well as a plan of action to address identified security weaknesses. Additionally, the bill would require a list of vacant Chief and Deputy Chief of Police positions, including the number of days vacant. These efforts, coupled with ongoing work led by VA's law enforcement community, would further ensure our ability to maintain a safe and secure environment at our medical centers.

#### **VA supports this bill, subject to necessary appropriations.**

The Office of Security and Law Enforcement (OS&LE) oversees VA Police with written policy and police program inspections to ensure compliance with law, policy and guidelines established by the Department.

VA Police Services at each medical center are inspected on a three-year cycle. Late last year, unannounced site visits were implemented to obtain a snapshot of on-the-ground security conditions at VA facilities. The goal of the unannounced site visits is to identify deficiencies or weaknesses and give VA leaders an opportunity to correct issues before their scheduled police program comprehensive review. While onsite, Special Agents review a sampling of documents relating to training, firearms, evidence, operations, physical security and staffing. They also observe police patrol patterns, patrol presence, physical security measures in place, and general crime prevention and detection efforts. VA conducts predictive analysis of crime patterns, and takes appropriate action (e.g., adjust patrols or investigations capability) to prevent and respond more effectively to potential crimes.

Site inspections are conducted using a guide containing a comprehensive list of 169 policy requirements. The Inspection Guide is revised annually to reflect policy or regulatory changes or the need to address systemic issues that have been identified through the inspection process. Several of the items the Inspection Teams assess directly correlate with items from the VA Medical Center Report Act of 2023.

While onsite, OS&LE special agents evaluate staffing and duties assigned to VA Police. Sustaining a sufficient number of police officers on duty to maintain law and order and provide protection to persons and property is a key part of enhancing security.

Inspectors review the maintenance, accountability and wear of uniforms, ballistic vests, vehicles, and firearms. They also review officer training, training documenta-



tion, and training plans, to include ensuring adequate space is available for the various training requirements. Additionally, agents review and evaluate physical security surveys, alarm checks and vulnerability assessments conducted by VA Police at the facility.

Relationships with local authorities are inspected by ensuring the facility Chief of Police has current support agreements for responses to crimes, VA Police Officer-involved shootings, and crisis intervention training. Collaboration with Federal, State and local law enforcement entities enhance security at VA medical centers.

VA currently maintains a three-year inspection cycle. To survey and report annually as this bill proposes, VA would require minor modifications to our current processes. In order to meet resource requirements associated with current and future obligations VA would require an additional ten positions. These positions have been substantiated through an internal manpower study, as well as being a deficiency documented in the VA Office of the Inspector General report (22-03770-49) dated February 22, 2023. Out of the ten required positions, VA has already included five in the President's Fiscal Year (FY) 2024 budget request. The total estimated cost is \$1.205 million for FY 2024 and an additional \$1.178 million for FY 2025. The total ongoing cost for all ten positions to be added to our base budget would be \$2.383 million. This estimated cost is based on actual expenditures to date. Being fully resourced would allow us to fully implement this legislation in continued support of Veteran, staff and visitor safety.

#### **H.R. 4225 VA Acquisition Review Board Act of 2023**

This bill would amend 38 U.S. Code Chapter 81 by adding a new Subchapter VI, which directs the Department of Veterans Affairs to establish an Acquisition Review Board (ARB) for all major acquisition programs, defined as "...program[s] of the Department to acquire property, assets, supplies, services, or a combination thereof, with an estimated life-cycle cost of \$250,000,000 or more, as determined by the Secretary." Non-major acquisition programs would consist of programs similarly defined with an estimated life-cycle cost of less than \$250 million as determined by the Secretary.

The proposed bill mandates the composition of the Acquisition Review Board (including CAO, CFO, VEO, CIO, OEI, and other relevant officials within VHA, VBA and NCA). It also prescribes when ARBs should convene and the requirement to appoint a manager responsible for administering programs within 30 days of program establishment. Responsibilities of the manager include establishing a program baseline, defining acquisition phases and providing estimates of the cost, schedule and performance across the entire life cycle of the program. Other duties include assessing and managing risk and other common functions of a program manager such as establishing a workforce for the program that is qualified, ensuring adequate technology and production capacity and securing requisite funding.

#### **VA supports this bill, if amended, and subject to appropriations.**

The bill would establish a program management framework for all major acquisitions, and for non-major acquisitions at the discretion of the Deputy Secretary. The legislation is not specific on how the framework would apply to acquisition programs established prior to enactment. However, VA is currently planning an Enterprise Program Management (EPM) Structure – a collaboration between OEI, OIT, OALC and other VA entities as appropriate – that is consistent with the intent of the ARB bill. In addition, VA has already developed an Acquisition Lifecycle Framework, which includes criteria for acquisition program management and review that match the requirements described in the legislation.

VA will develop an Enterprise definition of program/project and identify major/non-major acquisition programs within one year.

In addition, VA recommends the dollar value for major acquisition programs be increased to \$1 billion in life-cycle costs to focus effort on VA's largest acquisition programs. Hiring and obtaining properly trained and certified program managers (PM) will present a challenge since the billet structure must be established once these programs are officially designated as "major acquisition programs." Once successfully implemented, this threshold can be reduced to the desired \$250 million to achieve the desired program management culture.

VA anticipates that implementation of this bill would require the establishment of at least ten GS-15 program manager billets in FY 2024 as well as additional billets for program support, which is currently staffed by contracted expertise or non-existent. VA estimates this bill would require \$25 million in FY 2024 to assure the proper training and hiring of employees who possess the requisite skills and competencies to ensure a quality and enabled Acquisition Community, which includes Mission Area Owners/Appointed Program Managers in the Administrations and VA

Central Offices as well as VA's Acquisition Workforce – i.e., Federal Acquisition Certified Program/Project Managers, contracting Professionals and Contracting Officer Representatives.

**H.R. 4278 Restore Department of Veterans Affairs Accountability Act**

While we appreciate the efforts of Committee staff to amend sections 713 and 714 of title 38 of the United States Code (U.S.C.), codified from the VA Accountability and Whistleblower Protection Act of 2017 (The Act).

**VA does not support this bill.**

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. VA's position is informed by the experience of utilizing these authorities over the past six years.

Section 2 would give VA another authority with its own set of procedures to remove, demote or suspend supervisors and management officials for performance or misconduct. This section would essentially require VA to treat all supervisors, regardless of grade and salary level, the same as members of the senior executive service when carrying out disciplinary and performance-based adverse actions. Under this authority, supervisors would not be entitled to review by the Merit Systems Protection Board (MSPB), and the statute sets limits on the information that agency officials may consider when selecting the penalty.

While VA appreciates the Committee's efforts, VA does not support this section, as the other authorities available to address performance and conduct deficiencies (e.g., 5 U.S.C. Chapters 43 and 75) are sufficient to take action against supervisory personnel when warranted. This includes being subject to mandatory proposed penalties for certain types of misconduct related to whistleblower retaliation or other prohibited personnel actions pursuant to 38 U.S.C. § 731 and 5 U.S.C. § 7515.

When such action is warranted, it is important that VA take action that withstands legal challenge. VA is equipped to successfully employ existing authorities to hold its supervisors accountable for their deficiencies. Having multiple authorities for taking action against employees, each with its own unique procedures and requirements for addressing performance and conduct deficiencies, has led to confusion regarding their administration and application and adds additional risk to taking legally defensible actions. Adding this new authority may create further confusion.

Furthermore, this new authority will likely deter talented individuals from seeking employment with VA in supervisory or managerial positions and may discourage current well-qualified VA employees from seeking upward mobility to supervisory or managerial positions due to their limited due process and appeal rights. Specifically, supervisors and managers will not be entitled to consideration of the same mitigating factors as other VA employees and employees in the same grade and salary level at other federal agencies. These employees will also not be entitled to appeal the action to the MSPB.

Section 3 would amend 38 U.S.C. § 713 to establish that the VA official's burden of proof when taking an action under this authority would be substantial evidence. This section also sets forth exclusive factors to be considered when determining the appropriate penalty. The amendments also limit the scope of judicial review of VA's chosen penalty such that a court cannot review the penalty except when a constitutional issue is presented. They also establish that the amendments would apply retroactively to the date of enactment of the Act.

VA identified significant legal concerns with portions of these legislative amendments related to meeting minimum constitutional due process requirements. Those specific concerns are as follows:

- Substantial evidence as the statutory standard of proof is at significant risk of being found unconstitutional, even with express statutory language, given the Federal Circuit's discussion of the inappropriateness of that standard for administrative decisions. The Court noted that there is no precedent for such a standard, citing Supreme Court jurisprudence.
- The limitations on the factors that VA officials can consider when determining a penalty will raise concerns regarding whether employees were provided a meaningful opportunity to respond to the action and invoke the discretion of the deciding official.

- The limitations on judicial review of the penalty (other than constitutional challenges) poses a lesser risk, but VA does not believe the limitation is necessary, as judicial review standards have not previously been an impediment to VA actions and such challenges are likely to be constitutional.
- The retroactivity clause is likely to face challenges both as to its scope or applicability and the constitutionality of the change. When such clauses impact substantive rights, which the Federal Circuit has already opined that section 714 does, they must further a legitimate legislative purpose furthered by rational means (and cannot be harsh/oppressive or arbitrary/irrational) to meet due process requirements.

Section 4(a) would amend 38 U.S.C. § 714 to address the limitations imposed by the U.S. Court of Appeals for the Federal Circuit, MSPB and the Federal Labor Relations Authority, which have significantly reduced the differences between section 714 and pre-existing title 5 disciplinary authorities. The amendments clarify that hybrid title 38 employees are covered by this authority, establish that the VA official's burden of proof when taking an action under this authority is substantial evidence and set forth exclusive factors to be considered when determining the appropriate penalty. The amendments establish that VA is not required to place a covered employee on a performance improvement plan (PIP) prior to carrying out a performance-based action under section 714. The amendments also limit the scope of judicial review of VA's chosen penalty to only constitutional challenges; state that the authorities, as amended, would apply retroactively to the date of initial enactment of the Act; and clarify that the procedures of the entire section, rather than subsection (c), supersede any collective bargaining agreement if it is inconsistent with the authority.

VA has the same legal concerns with section 4 as identified in section 3, relating to (1) the substantial evidence standard of proof; (2) limiting factors for VA officials to consider when determining the penalty; (3) precluding judicial review of the penalty except for constitutional challenges; and (4) retroactive application of the authorities, as amended. VA has other legal concerns as well, including the effectiveness of the proposed language superseding collective bargaining agreements.

In summary, while VA appreciates the support of its efforts to hold employees accountable, this bill is unnecessary. Moreover, it is potentially detrimental to VA in the form of legal risk, uncertainty and further litigation, potentially resulting in overturned adverse actions and substantial monetary damages, which VA experienced in its implementation of section 714. The enactment of 38 U.S.C. § 712 as well as the proposed amendments to 38 U.S.C. §§ 713 and 714 will likely face the same gamut of legal challenges. VA recommends that disciplinary action continue to be taken under applicable existing authorities, providing certainty and minimizing legal risk to VA.

#### **H.R. XXXX Modernizing Department of Veterans Affairs Disability Benefit Questionnaires Act**

This bill would require the transmission of disability benefits questionnaire (DBQ) results from non-VA clinicians to VA in a machine-readable format within 180 days of enactment. VA would be required to issue standards for such transmission within 90 days of enactment; to ensure that DBQ updates are made in a manner that allows for the data collected under the questionnaires to be in a machine-readable format; to notify examiners of any DBQ updates not later than 60 days before they go into effect; to submit a plan to Congress within 180 days of enactment for information technology system modifications necessary to support machine-readable DBQ data transmission; and to make publicly available on the VA website (i) the standards for DBQ data transmission and (ii) the IT system modification plan listed above.

#### **VA supports this bill, if amended, and subject to the availability of appropriations.**

The transmission of DBQ information in this type of standard structured format will enable non-VA clinicians to provide complete and thorough DBQs that can be used by VA claims processors to effectively evaluate the severity of claimed conditions in alignment with the VASRD. The bill would help further VA's automation initiatives, and it would enable VA to identify instances of fraud and ensure the completeness of DBQs. By enforcing a data-driven approach to non-VA DBQs, VA would be better equipped to identify trends and associate DBQ submissions with licensed clinicians. This will help to quickly identify unusual patterns of non-VA DBQ submissions.

However, VA notes the bill does not address what action VA should take if a non-machine readable DBQ is received after the passage of this bill. VA requests that Congress amend the bill to clarify what action should be taken if a Veteran or non-VA clinician submits a non-machine readable DBQ. Otherwise, there is a moderate litigation risk for VA from Veterans who submit non-VA DBQs that do not comply with the machine-readable format.

The bill requires VA to collect all DBQ data submitted from non-VA clinicians in a machine-readable format within 180 days after enactment of this bill. However, the 180-day timeline for implementation does not seem feasible. Publishing a machine-readable DBQ requires schema definition and integration into Information Exchange Packet Documentation for roughly 40 DBQs that do not currently have defined schemas. Moreover, a process needs to be created to support noncontract-examination, third party medical professionals submitting electronic data.

VA also has concerns with the language in Section 2(a)(3)(B) regarding a requirement for VA to notify the persons conducting medical disability examinations (or the entities employing such persons) described in such paragraph of such updates not later than 60 days before an update goes into effect. VA would oppose any such language directed to VA Contract Examination Vendors, as the contract already contains language which addresses DBQ updates, including the technical specifications. When DBQ changes are made due to VASRD regulatory changes, previewing or posting DBQ updates 60 days before a final would most often be impossible; VASRD final rules are generally posted only 30 days before they take effect. VA has previously been instructed not to publish VASRD-impacted DBQs until the final rule has become effective. Therefore, VA opposes this specific new language in the bill.

The General Operating Expense (GOE) cost estimate for this bill for FY 2023 is \$12 million. Five-year GOE costs are estimated at \$44.1 million and 10-year costs at \$63.2 million. These costs include managed services contract costs of approximately \$12 million dollars per year for three years to create and manage a web-based external-facing DBQ portal, ensuring that a scalable solution is created to securely deliver documents. Separately, OIT sustainment and maintenance of the managed services will rise from approximately \$3.6 million in FY 2026 to \$3.9 million by 2032. Additionally, OIT estimates roughly \$4.4 million in costs over two years followed by approximately \$200k annually for future sustainment costs to fully implement the publishing of a machine-readable DBQ, which includes creating a submission service, business validation, and a DBQ submission portal.

### **Conclusion**

This concludes my statement. We appreciate the Committee's continued support of programs that serve the Nation's Veterans and look forward to working together to further enhance the delivery of benefits and services to Veterans and their families.

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### **Prepared Statement of David Case**

Chairwoman Kiggans, Ranking Member Mrvan, and Subcommittee Members, thank you for the opportunity to appear before you today to discuss the need for H.R. 2733, which would require all new VA employees to receive training on their responsibilities to report crimes and serious wrongdoing to the Office of Inspector General (OIG) and cooperatively engage with its oversight staff. My statement provides an analysis of this measure and why it would help ensure VA employees properly and promptly report suspected wrongdoing; risks to patient safety; and misconduct affecting VA's programs, benefits, and services. By providing training on reporting wrongdoing and opportunities to improve, we believe that it will ultimately improve the quality and timing of services and benefits received by veterans, their families, caregivers, and survivors. The OIG thanks Representatives Underwood, Womack, Pappas, and Joyce (OH) for introducing H.R. 2733 in April.

### **H.R. 2733 – DEPARTMENT OF VETERANS AFFAIRS OFFICE OF INSPECTOR GENERAL TRAINING ACT OF 2023**

H.R. 2733 mandates that all new VA employees receive training during their first year of employment at VA on how to engage with the OIG. In addition, the bill would allow the inspector general to send at least two messages a year through VA's email system to all personnel in the VA directory on matters related to interacting with OIG personnel and how to report matters to its hotline. These matters not only involve potential crimes, patient safety concerns, waste of VA resources, and abuse of VA authority, but also issues that compromise the effectiveness and efficiency of VA programs and operations.

The OIG is grateful that Secretary McDonough mandated in September 2021 that all employees complete training within one year—an important step in improving VA’s culture of accountability. However, legislation mandating the training is still needed. Mandated training developed by VA’s independent oversight body should not be dependent on the individual serving as VA Secretary at any given time, or on the OIG’s ability to periodically communicate with all VA employees if needed to advance oversight efforts.

The Senate is considering some additions to the language of the bill introduced in the House. The additions reinforce that VA employees have a duty to cooperate with the OIG and should be fully informed of whistleblowers’ rights, including the right to report wrongdoing to Congress as well. The Senate language also reiterates the authority of the inspector general to subpoena the attendance and testimony of witnesses, including former VA employees, as needed to carry out the duties of the office.<sup>1</sup>

The OIG has no objections to these changes.

### **The OIG’s Right to All VA Records and Accurate Information**

While the vast majority of the OIG’s interactions with VA personnel are positive and appropriate, there have been instances in which the VA personnel have been told that they cannot share information with OIG staff without first clearing it through supervisors or leaders—contrary to the Inspector General Act of 1978 (the IG Act), as amended. Under that authority, VA employees at all levels have a duty to cooperate with OIG personnel, including providing information and assistance in a timely manner. The OIG must have prompt access to all requested VA records, reports, audits, reviews, recommendations, or other material available to the Department relating to its programs and operations. More broadly, the IG Act authorizes the OIG to request any information or assistance necessary to carry out its duties, which may include access to employees, facilities, systems, and equipment.

In several other instances, VA personnel have provided incomplete, significantly delayed, or potentially misleading information to the OIG. One example is the OIG’s healthcare inspection released in 2021 examining training that VA employees received on the new electronic health record system.<sup>2</sup> In that inspection, the then Office of Electronic Health Record Management’s Change Management group initially provided what appeared to be inaccurate and possibly misleading summaries of data instead of the underlying raw data the OIG had repeatedly requested. The OIG investigated the circumstances of VA’s response to the OIG’s information requests. The investigators determined that although Change Management leaders overseeing the training did not intentionally seek to mislead OIG staff, the leaders’ carelessness resulted in delayed and inaccurate information being submitted that impeded oversight efforts.<sup>3</sup> The training the OIG has developed and that would be required by H.R. 2733 might have prevented the issue by making VA employees acutely aware of their duties and responsibilities to provide timely, accurate, and complete information in response to OIG requests.

### **Examples of the Impact of Improving Reporting and Engagement**

Effective oversight depends on VA employees promptly reporting suspected wrongdoing to the OIG and cooperating with OIG staff. Early and effective reporting can save lives, recover or avoid waste of millions of dollars each year for VA, and help ensure veterans are receiving the benefits and services for which they are eligible.

As an example, hospital staff at a VA facility in Fayetteville, Arkansas, had concerns about potential substance abuse by the chief of pathology that were not heard and promptly acted on by local leadership, which allowed him to work while impaired for years.<sup>4</sup> He misdiagnosed about 3,000 patients, with errors resulting in death or serious harm, and is currently serving a 20-year prison sentence.<sup>5</sup> The OIG found a culture in which staff did not report serious concerns about the chief pathologist, in part, because they assumed that others had reported him, or they were con-

<sup>1</sup>This authority is pursuant to the provisions of section 312 of title 38 of the United States Code.

<sup>2</sup>VA OIG, *Training Deficiencies with VA’s New Electronic Health Record System at the Mann-Grandstaff VA Medical Center in Spokane*, Washington, July 8, 2021.

<sup>3</sup>VA OIG, *Senior Staff Gave Inaccurate Information to OIG Reviewers of Electronic Health Record Training*, July 14, 2022.

<sup>4</sup>VA OIG, *Pathology Oversight Failures at the Veterans Health Care System of the Ozarks in Fayetteville, Arkansas*, June 2, 2021.

<sup>5</sup>US Department of Justice, “Fayetteville Doctor Sentenced to 20 Years in federal Prison for Mail Fraud and Involuntary Manslaughter,” press release, January 22, 2021, <https://www.justice.gov/usao-wdar/pr/fayetteville-doctor-sentenced-20-years-federal-prison-mail-fraud-and-involuntary>.

cerned about reprisal. At the VA facility in Chillicothe, Ohio, a patient eloped from a community living center and was fatally struck by a car.<sup>6</sup> Staff had not properly managed the veteran's care, and they failed to report to facility safety staff numerous prior elopements. Facility safety staff also failed to take actions after other reported elopements by the same patient. Because indicators of a problem went unreported and then were unaddressed over an extended period of time after notifications were made, the consequences were devastating. Simply stated, early and honest reporting to the OIG can save lives and improve the quality of care provided to veterans.

Anyone can be key to reporting—whether it is the person cleaning a VA facility, checking in patients, or providing VA care and services. For example, a purchasing agent uncovered a fraud scheme that involved a chief at a medical facility steering a contract that resulted in more than a half-million dollars in losses for VA. Also, a member of the VA police department reported that VA Puget Sound Health Care System staff discovered that bronchoscopes valued at over \$100,000 were missing from the facility. Three ventilators valued at around \$30,000 each were also missing, and some of the items were found on a then-VA employee's eBay account. That individual was imprisoned for the thefts.<sup>7</sup>

In prior years, OIG staff have seen personnel in VA medical facilities stop reporting that inventory and other supply chain systems were not working.<sup>8</sup> In addition to wasting resources, these systems' failures can put patients at risk and make it difficult for staff to do their jobs. Failures in information technology systems and poorly executed modernization programs are also a persistent problem that can put veterans at risk of not receiving benefits, services, and health care. The OIG needs early notification of these issues to help VA instill a culture of accountability where employees feel empowered to effect change.

But the OIG has found that many VA personnel do not report serious misconduct, failed systems, and suspected crimes in a timely manner—in part because they lack a basic understanding of the OIG's authority and their duty to cooperate with the OIG. The OIG also wants to communicate with VA employees so they are comfortable reporting suspected wrongdoing and can be assured of their confidentiality when they do so. The OIG understands that some employees may have the misperception that the OIG routinely shares complainants' identities with VA. It does not. And there have also been instances when VA employees have mistakenly believed they need supervisors' approval to respond to requests for data from the OIG, or they have lacked candor or responsiveness when speaking with OIG staff. Training mandated by H.R. 2733 would help to dispel these misconceptions.

While VA employees have numerous training requirements, investing in OIG training is offset by the lives and the hundreds of millions of dollars potentially saved. For example, during the pandemic, discussions with a senior VA leader about reporting suspicious activity to the OIG resulted in the leader reporting concerns about a vendor seeking to sell more than \$800 million of nonexistent personal protective equipment to VA. The OIG stopped the criminal scheme before VA handed over any funds, and the vendor was sentenced to more than 20 years in prison for this scheme and an unrelated Ponzi scheme.<sup>9</sup>

H.R. 2733 will help ensure that VA employees know when and how to respond to OIG requests and report issues. The training

- details OIG legal authority to oversee all VA operations, services, and care;
- tests staffs' knowledge of what misconduct and potential crimes to report to the OIG and what to report to other VA entities like VA's Office of Accountability and Whistleblower Protection and non-VA entities, such as the Office of Special Counsel;
- advances Congress' commitment to holding VA employees accountable as well as protecting whistleblowers and other complainants;

<sup>6</sup>VA OIG, *Deficiencies in Community Living Center Practices and the Death of a Patient Following Elopement from the Chillicothe VA Medical Center in Ohio*, May 6, 2021.

<sup>7</sup>US Department of Justice, "Veterans Affairs Respiratory Therapist Sentenced to Prison for Stealing and Selling Medical Supplies," press release, January 11, 2021, <https://www.justice.gov/usao-wdwa/pr/veterans-affairs-respiratory-therapist-sentenced-prison-stealing-and-selling-medical>.

<sup>8</sup>VA OIG, *Critical Deficiencies at the Washington DC VA Medical Center*, March 7, 2018; *Equipment and Supply Mismanagement at the Hampton VA Medical Center, Virginia*, September 26, 2019.

<sup>9</sup>US Department of Justice, "Former Rochester Man Going to Prison for More than 20 Years for His Role in Ponzi and COVID-19 Fraud Schemes," press release, August 10, 2021, <https://www.justice.gov/usao-wdny/pr/former-rochester-man-going-prison-more-20-years-his-role-ponzi-and-covid-19-fraud>.

- proposes ways for VA staff and OIG personnel to work toward improving the effectiveness and efficiency of VA programs and services; and
- empowers VA staff to tell veterans, their families, and caregivers about when to contact the OIG.

The proposed additions by the Senate would also ensure VA employees are directed to information on the rights of federal whistleblowers to report to Congress and on the OIG's authority to compel testimony from former VA employees and contractors if certain criteria are followed.

Following the Secretary's September 2021 memorandum directing VA employees to take the training, over 385,000 VA personnel have taken it as of June 26, 2023. Post-training survey results indicate that more than 74 percent of employees agreed or strongly agreed the training was useful, appropriate, and met other measures of satisfaction. Another 24.4 percent provided neutral responses. Only about 1.6 percent of VA employees taking the training disagreed or strongly disagreed with its usefulness. The OIG is working with VA's Institute for Learning, Education, and Development staff to periodically review course survey information to help ensure continuous improvements.

#### **CONCLUSION**

The OIG appreciates the support that the Committee and full House demonstrated to the OIG in the 117th Congress with the passage of similar legislation to train VA employees on cooperating with and reporting to the OIG. The passage of H.R. 2733 would similarly empower VA employees to assist the OIG in improving VA's operations and using taxpayer dollars to the greatest effect; helping to protect patients and improving their care; and ensuring veterans and others receive services and benefits for which they are eligible. Chairwoman Kiggans, this concludes my statement. I would be happy to answer any questions you or other members of the Committee may have.

**Prepared Statement of Joshua Hastings**



TESTIMONY  
OF  
JOSHUA HASTINGS  
VETERANS BENEFITS POLICY ANALYST  
VETERANS AFFAIRS & REHABILITATION DIVISION  
THE AMERICAN LEGION  
BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS  
COMMITTEE ON VETERANS' AFFAIRS  
UNITED STATES HOUSE OF REPRESENTATIVES  
ON  
"PENDING AND DRAFT LEGISLATION"

JULY 12, 2023



**EXECUTIVE SUMMARY**

| <b>LEGISLATION</b>  | <b>POSITION</b>                |
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| H.R. 196 – Expedited Temporary Ratings for Veterans Act, <i>Pg. 1</i>                                     | <b>Support</b>                 |
| H.R. 2733 – Department of Veteran Affairs Office of Inspector General Training Act, <i>Pg. 2</i>          | <b>Support</b>                 |
| H.R. 3504 – VA Medical Center Security Report Act, <i>Pg. 3</i>   | <b>Support</b>                 |
| H.R. 4225 – VA Acquisition Review Board Act, <i>Pg. 4</i>   | <b>Support</b>                 |
| H.R. 4278 – Restore Department of Veterans Affairs Accountability Act, <i>Pg. 5</i>                       | <b>Support</b>                 |
| H.R. 4461– Modernizing Department of Veteran Affairs Disability Benefits Questionnaires Act, <i>Pg. 7</i> | <b>Support with amendments</b> |

**TESTIMONY OF  
JOSHUA HASTINGS  
VETERANS BENEFITS POLICY ANALYST  
VETERANS AFFAIRS & REHABILITATION DIVISION  
THE AMERICAN LEGION  
BEFORE THE  
SUBCOMMITTEE ON OVERSIGHT & INVESTIGATIONS  
HOUSE COMMITTEE ON VETERANS' AFFAIRS  
ON  
"PENDING AND DRAFT LEGISLATION"**

**JULY 12, 2023**

Chairwoman Kiggans, Ranking Member Mrvan, and distinguished members of the subcommittee, on behalf of National Commander Vincent J. "Jim" Troiola and more than 1.6 million dues-paying members of The American Legion, we thank you for the opportunity to testify on pending legislation considered before this Subcommittee.

The American Legion is directed by active Legionnaires who dedicate their time and resources to serve veterans and their families. As a resolution-based organization, our positions are guided by more than 104 years of advocacy and resolutions that originate at the grassroots level of our organization. Every time The American Legion testifies, we offer a direct voice from the veteran community to Congress.

**H.R. 196 – Expediting Temporary Ratings for Veterans Act**

*To direct the Secretary of Veterans Affairs to modify the information technology systems of the Department of Veterans Affairs to provide for the automatic processing of claims for certain temporary disability ratings, and for other purposes.*

This legislation would mandate the Secretary of Veterans Affairs to automatically process claims for temporary disability ratings no later than one year after the legislation's enactment. Unique inefficiencies impacting the Veterans Benefits Administration's (VBA) processing of temporary disability ratings have been identified as a backlog barrier for more than a decade. In February 2013, Department of Veteran Affairs (VA) Inspector General (IG) Linda Halliday reported that the Office of Inspector General (OIG) inspections at VA Regional Offices "have continued to report systemic problems in VBA's processing of temporary 100 percent disability ratings. We found inaccuracies in 66 percent of the cases we reviewed. These errors resulted in over \$15.5 million in overpayments and almost \$293,000 in underpayments."<sup>1</sup>

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<sup>1</sup> *The 100% Temporary Disability Rating: An Examination of Its Effective Use: Hearing before the Subcommittee on Disability Assistance and Memorial Affairs, of the House Committee on Veterans' Affairs*, 113<sup>th</sup> Cong. Linda Halliday (2013). <https://www.govinfo.gov/content/pkg/CHRG-113hhrg78764/html/CHRG-113hhrg78764.htm>

IG Halliday noted in her 2013 testimony that “VBA agreed to review temporary 100 percent evaluations to ensure proper controls existed to process these evaluations correctly; however, VBA’s efforts have not been aggressive enough to address this issue effectively.”<sup>2</sup> Processing problems caused substantial financial errors and contributed to unreasonable delays in processing and deciding such claims. According to VBA’s Office of Automated Benefit Delivery, the average wait time once stood at 1,000 days.<sup>3</sup>

The time it takes for VA to grant a temporary disability rating ranges from a couple of weeks to several months – there is no consistency. Veterans should receive their benefits in a consistent and timely manner. Increased automation can help to reduce the claims backlog and deliver benefits more efficiently. Additionally, automation could help reduce the variability in the time it takes to make rating decisions for temporary disability claims.

Through Resolution No. 123: *Increase the Transparency of the Veterans Benefits Administration’s Claim Processing*, The American Legion urges Congress to pass legislation requiring the VA to be held accountable for achieving an operational state of no claims over 125 days with an accuracy rate of 98% or higher.<sup>4</sup>

**The American Legion supports H.R. 196 as currently written.**

**H.R. 2733 – Department of Veteran Affairs Office of Inspector General Training Act**

*To require the Secretary of Veterans Affairs to require the employees of the Department of Veterans Affairs to receive training developed by the Inspector General of the Department on reporting wrongdoing to, responding to requests from, and cooperating with the Office of Inspector General of the Department, and for other purposes.*

According to the Office of Inspector General (OIG) within the Department of Veterans Affairs (VA), the whistleblower hotline recorded more than 14,000 contacts in the first half of the fiscal year 2021 and more than 28,000 contacts in the entirety of fiscal year 2020.<sup>5</sup> In spite of this growth, the OIG has identified a conspicuous lack of clear and consistent guidance and comprehensive policies and procedures within the Office of Accountability and Whistleblower Protection (OAWP). Inadequate staffing and training further complicate these issues. All these factors are crucial when considering the reputations at stake and the need for absolute protection of whistleblowers’ identities.

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<sup>2</sup> Ibid

<sup>3</sup> VBA Office of Automated Benefit Delivery (2022, March 11). Joint meeting with American Legion and Robert Reynolds and Paul Shute. Microsoft Teams Meeting.

<sup>4</sup> The American Legion Resolution No 123 (2016): *Increase the Transparency of the Veterans Benefits Administration’s Claim Processing*. <https://archive.legion.org/node/349>

<sup>5</sup> *Protecting Whistleblowers and Promoting Accountability: Is VA Making Progress?*, Hearing before Subcommittee on Oversight and Investigations, House Committee on Veteran Affairs. 117<sup>th</sup> Cong. Christopher Wilber. May 13, 2021. <https://www.va.gov/oig/pubs/statements/VAOIG-statement-20210519-wilber.pdf>

Currently, the VA offers a voluntary 45-minute training for whistleblowers. Unfortunately, many employees opt out of this program and hence may lack the ability to detect early fraud indicators and potential crimes.<sup>6</sup>

The American Legion is a staunch advocate for improving whistleblower education and protections and supports the *Department of Veterans Affairs Office of Inspector General Training Act of 2023* in its endeavor to ensure the protection of whistleblowers. Additionally, this legislation seeks to transform the optional training into a mandatory one-time event that would prepare employees to identify issues and protect themselves, thereby possibly reducing fraud and safeguarding taxpayer dollars. The legislation also removes the need for VA OIG to seek permission from the VA Secretary to contact employees, facilitating better communication.

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports legislation enhancing accountability at the VA and ensures that VA employees are empowered to report wrongdoings properly.<sup>7</sup>

**The American Legion supports H.R. 2733 as currently written.**

**H.R. 3504 – VA Medical Center Security Report Act**

*To direct the Secretary of Veterans Affairs to submit to each of the Committees on Veterans' Affairs of the Senate and the House of Representatives an annual report regarding security at medical centers of the Department of Veterans Affairs, and for other purposes.*

The American Legion has grown increasingly concerned that the safety of our veterans, staff, and patients at VA Medical facilities is waning. A 2022 report from the VA Office of the Inspector General highlighted severe understaffing, lack of proper training, and various security vulnerabilities within the police department. The report identified an alarming 33% average vacancy rate in officer positions across 70 medical facilities, and in some cases, this rate surged to over 60%.<sup>8</sup> This concerning state of affairs has led to multiple serious incidents, including a bomb threat and instances of firearms being discharged.<sup>9</sup>

Addressing these alarming deficiencies is the focus of *the VA Medical Center Security Report Act*, which mandates the VA Secretary to implement an annual survey over a five-year period. This survey will gather information on various facets of facility safety, including the number and type of criminal activity, staffing vacancies, the quality and availability of equipment and training resources, and existing security weaknesses.

<sup>6</sup> Department of Veterans Affairs Office of Inspector General. "Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017." VA OIG #18-04968-249 (2019). <https://www.va.gov/oig/pubs/VAOIG-18-04968-249.pdf>

<sup>7</sup> The American Legion Resolution No. 16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. <https://archive.legion.org/node/7908>

<sup>8</sup> Department of Veterans Affairs Office of Inspector General. "Security and Incident Preparedness at VA Medical Facilities." VA OIG #22-03770-49 (2023). <https://www.va.gov/oig/pubs/VAOIG-22-03770-49.pdf>

<sup>9</sup> "VA Police Shortages Leave Medical Center Patients, Staff Vulnerable, Watchdog Finds." February 23, 2023. Patricia Kime. Military.Com. <https://www.military.com/daily-news/2023/02/23/va-police-shortages-leave-medical-center-patients-staff-vulnerable-watchdog-finds.html>

Notably, the findings of this survey are to be compiled into an annual report, which includes an analysis of the results, a plan of action to address identified issues, and a list of vacancies. This report is then submitted to the Committees on Veterans' Affairs in the House and Senate. The enactment of this bill would provide the necessary oversight for policing at VA Medical Centers, setting a foundation for enhanced safety protocols and more effective staffing strategies.

The American Legion recognizes that ensuring the safety of our veterans extends beyond providing quality medical care, and we believe that enacting this bill would provide the necessary oversight for policing at VA Medical Centers, setting a foundation for enhanced safety protocols and more effective staffing strategies.

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports legislation urging VA to maintain oversight and implement accountability on all methods of care provided through the VA healthcare system to ensure the needs of the veterans are met in a supportive, safe, and accepting environment.<sup>10</sup>

**The American Legion supports H.R. 3504 as currently written.**

**H.R. 4225 – VA Acquisition Review Board Act**

*To amend title 38, United States Code, to establish the Acquisition Review Board of the Department of Veterans Affairs, and for other purposes.*

The Department of Veterans Affairs (VA) has a crucial mandate to ensure that the procurement of goods and services is optimized to meet the needs of our nation's veterans. A 2022 report from the Government Accountability Office (GAO) highlighted that the VA's acquisitions approach has been varied and unstandardized, leading to oversight difficulties and subpar acquisition outcomes.<sup>11</sup> This haphazard strategy undermines the VA's mission and discourages veteran-owned small businesses from seeking partnerships with the VA. These issues are further exemplified by the VA's flawed implementation of the Electronic Health Record Modernization (EHRM) program.<sup>12</sup>

A prime example of this inconsistency is the VA's Medical Surgical Prime Vendor Program (MSPV).<sup>13</sup> This critical program is designed to streamline the delivery of essential medical supplies to our veterans. However, a lack of a definitive implementation strategy has created uncertainty for veteran small business owners seeking to fulfill contracts under this program. Moreover, the VA's EHRM program, intended to replace the antiquated Veterans Health Information Systems and Technology Architecture program, mirrors the chaotic nature of previous

<sup>10</sup> The American Legion Resolution No.16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. <https://archive.legion.org/node/7908>

<sup>11</sup> U.S. Government Accountability Office. "VA Acquisition Management: Actions Needed to Improve Program Oversight and Acquisition Outcomes." GAO-22-106220 (2022). <https://www.gao.gov/products/gao-22-106220>

<sup>12</sup> U.S. Government Accountability Office. "Electronic Health Records: VA Needs to Address Management Challenges with New System." GAO-23-106731 (2022). <https://www.gao.gov/products/gao-22-103718>

<sup>13</sup> Ibid

acquisitions. In the wake of management missteps and delayed problem resolutions, its deployment has been stalled since June 2022, with the program costs escalating to an exorbitant \$59.12 billion.<sup>14</sup>

*The VA Acquisition Review Board Act* aims to address these issues by establishing an "Acquisition Review Board," creating a standardized and transparent framework for managing major VA acquisitions. Chaired by the VA Deputy Secretary, the Board would be charged with the approval and oversight of major acquisition programs.

The creation of this board would bring forth a two-fold benefit. First, it would heighten accountability and transparency, thereby helping to rectify the issues that led to the VA's GAO high-risk designation. Second, it would contribute to a more uniform acquisition process, boosting the efficiency of VA procurement and ultimately enhancing the provision of care to our veterans. Moreover, this legislation would facilitate the VA's ongoing efforts to modernize the electronic health record system. It would ensure the effective implementation of a single system across the VA and bidirectional connectivity to the Department of Defense, curbing further delays and unnecessary expenditures.

An additional advantage of this legislation is the impetus it would provide to veteran-owned small businesses. The legislation's transparent and predictable framework for VA acquisitions would enable these businesses to better cater to the VA's needs, fostering their growth and furthering their role in caring for our veterans.

The American Legion supports *the VA Acquisition Review Board Act* as it will foster transparency, consistency, and accountability in VA acquisitions. Further, it will serve as a crucial tool in ensuring our veterans receive top-quality supplies and services while providing veteran-owned businesses with a fair and predictable playing field in which to operate.

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports legislation urging the VA to maintain oversight and implement accountability on all methods of care provided through the VA healthcare system.<sup>15</sup>

**The American Legion supports H.R. 4225 as currently written.**

**H.R. 4278 – Restore Department of Veterans Affairs Accountability Act**

*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.*

In 2017, the 115<sup>th</sup> Congress passed the VA Accountability and Whistleblower Protection Act of 2017 (AWP Act of 2017) to assist the Department of Veterans Affairs (VA) protect veterans and

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<sup>14</sup> Ibid

<sup>15</sup> The American Legion Resolution No.16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. <https://archive.legion.org/node/7908>

employees by holding employees accountable and providing protection for whistleblowers.<sup>16</sup> In 2017 the VA Office of Accountability and Whistleblower Protection (OAWP) was established as a result of the new public law. Shortly thereafter, complaints were reported, identifying a possibility that VA was implementing the act improperly. As a result, the Office of Inspector General (OIG) conducted a review in 2018 that continued to 2019.<sup>17</sup> In this report, OIG identified 22 deficiencies, all of which VA concurred and planned to take action on.

During the peak of the COVID-19 pandemic, The American Legion supported the VA's decision to exercise its new authority granted under the AWP Act of 2017 against those found guilty of neglect and incompetence at State Veterans Homes.<sup>18</sup> Beyond this, data showed that AWP was working: in 12 months from June 2019-2020, the VA had initiated 1,410 adverse actions, a 40% increase from 2016-2017.

In August of 2021, it was found in court that VA misinterpreted the AWP Act of 2017 by the United States Court of Appeals for the Federal Circuit.<sup>19</sup> Though one of the protections assumed in the AWP Act of 2017 was to mitigate the involvement of the U.S. Merit Systems Protection Board in certain decisions surrounding an employee, there was nothing written in the law to do so. The lack of clarity and specific verbiage in the AWP Act of 2017 has given room for courts to dilute the Secretary of Veterans Affairs' authority in making decisions to hold employees accountable, protect whistleblowers, and keep veterans safe.

Having these newly granted disciplinary authorities intercepted by different interpretations of law and policy after the bipartisan-supported legislation was passed is difficult for veterans and families harmed by misconduct and wrongdoing to process. The American Legion's Systems Worth Savings program has previously uncovered numerous mistruths and wrongdoings at VA Medical Centers, and The Legion will continue to demand a process that delivers swift accountability for front-line workers, middle managers, supervisors, and even senior executives. In the adjacent perspective, the Legion also advocates for safe working environments to increase staff protection and decrease attrition rates.

Restoring confidence in the VA system necessitates ensuring VA leaders possess the tools to hold ill-intentioned actors accountable and to protect those trying to create a more productive and safer environment. This legislation clarifies and reinforces critical authorities initially granted in 2017 and introduces a supremacy clause to close the loopholes revealed in recent court rulings and labor union disputes, thereby reinstating the heightened accountability established by the bipartisan *Whistleblower Protection Act of 2017*.

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<sup>16</sup> Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, P.L. 115-41, 131 stat. 862 (June 23, 2017).

<sup>17</sup> Department of Veterans Affairs Office of Inspector General. "Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017." VA OIG 18-04968-249 (2019). <https://www.va.gov/oig/pubs/VAOIG-18-04968-249.pdf>

<sup>18</sup> The American Legion. (2015). "Pending, Legislation." <https://docs.house.gov/meetings/VR/VR08/20150319/103139/HHRG-114-VR08-20150319-SD002.pdf>

<sup>19</sup> Connor D. Dirks, "Federal Circuit Disputes VA's Interpretation of 2017 Accountability Law." FED Manager, Shaw Bransford & Roth P.C. August 17, 2021. <https://fedmanager.com/news/federal-circuit-knocks-vas-interpretation-of-2017-accountability-law>



There are some apprehensions about VA’s capacity to enforce the provisions of this bill that we would like to address. In a press conference this past March, Secretary McDonough expressed that Section 714 of the *VA Accountability and Whistleblower Protection Act* “wasn’t really helping us necessarily manage our workforce as much as it was getting us in front of federal judges and in front of administrative bodies.”<sup>20</sup> Every provision of the *Restore Department of Veterans Affairs Accountability Act* has been written not to expand the scope of the 2017 law, but rather to address the technical legal challenges the Secretary alluded to. VA’s track record of enforcing AWP in the initial years after its passage demonstrated a good faith effort to address systemic workforce challenges that have plagued the VA for decades; The American Legion expects the VA to resume this effort with passage of the *Restore Department of Veterans Affairs Accountability Act*.

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports legislation urging the VA to hold any employee or VA-contracted vendor found guilty of misconduct or wrongdoing fully accountable.<sup>21</sup>

**The American Legion supports H.R. 4278 as currently written.**

**H.R. 4461 – Modernizing Department of Veteran Affairs Disability Benefits Questionnaires Act**

*To require the Secretary of Veterans Affairs to make certain improvements relating to the transmission of disability benefits questionnaire data to the Department of Veterans Affairs, and for other purposes.*

Disability Benefits Questionnaires (DBQs) provide clinicians with a standardized form to perform disability examinations and Compensation and Pension (C&P) exams. This discussion draft would require VA-contracted healthcare providers to transmit DBQ data in machine-readable format to ensure the compatibility of their documents with Veterans Benefits Administration (VBA) systems. Documents commonly scanned and sent in a PDF (Portable Document Format) cannot be “read” by machines and present compatibility, analytics, and data extraction challenges.

To leverage the utility of machine-readable documents, uniformity and standardization in data formats and processing are needed.<sup>22</sup> Requiring VA-contracted healthcare providers to transmit DBQ data in machine-readable format would ensure the compatibility of their documents with VBA systems. VA contractors’ use of machine-readable documents should help improve the quality and timeliness of C&P exams and contribute to an overall reduction in the claims backlog.

The American Legion applauds the subcommittee’s focus on automating VBA processes but encourages a deeper technical review of this discussion draft’s language. To accommodate all VA contracted clinicians, The American Legion recommends adding “assigned to or” before

<sup>20</sup> VA Secretary Press Conference. March 23, 2023. <https://news.va.gov/press-room/va-secretary-press-conference-march-3-2023>

<sup>21</sup> The American Legion Resolution No.16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. <https://archive.legion.org/node/7908>

<sup>22</sup> U.S. General Services Administration. “A Primer on Machine Readability for Online Documents and Data.” September 24, 2012. <https://data.gov/developers/blog/primer-machine-readability-online-documents-and-data/>



“selected” on Page 3, Line 2. In most cases, veterans are assigned to VA-contracted medical staff for C&P exams.

Through Resolution No. 14: *Quality Assurance for Department of Veterans Affairs (VA)*, The American Legion urges Congress to pass legislation that will ensure the quality and timeliness of C&P examinations performed by VA contractors and provide veterans with professional, high-quality service.<sup>23</sup>

**The American Legion supports H.R. 4461 with amendments.**

### **Conclusion**

Chairwoman Kiggans, Ranking Member Mrvan, and distinguished members of the subcommittee; The American Legion thanks you for your leadership and for allowing us the opportunity to explain the positions of our 1.6 million members on the importance of these pieces of proposed legislation. Questions concerning this testimony can be directed to Legislative Associate Matthew Brennan at 202-221-8105, or [mbrennan@legion.org](mailto:mbrennan@legion.org).

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<sup>23</sup> The American Legion Resolution No. 14 (2021): *Quality Assurance for Department of Veterans Affairs*. <https://archive.legion.org/node/3595>

### Prepared Statement of Patrick Murray

Chairwoman Kiggans, Ranking Member Mrvan, and members of the subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to provide our remarks on legislation pending before this subcommittee.

#### **H.R. 196, Expediting Temporary Ratings for Veterans Act**

The VFW supports this legislation that would require the Secretary of Veterans Affairs to modify Veterans Benefits Administration (VBA) technology systems and create a process to automate temporary disability ratings for eligible veterans. The ability to extend temporary ratings is critical, especially for veterans who are hospitalized, and as the demands on VBA increase due to the enactment of the PACT Act.

#### **H.R. 2733, Department of Veterans Affairs Office of Inspector General Training Act of 2023**

The VFW supports this proposal to require each Department of Veterans Affairs (VA) employee to receive training developed by the VA Office of Inspector General (OIG) for the reporting of wrongdoing, responding to requests, and cooperating with the OIG. The VFW believes the OIG performs a critical role in overseeing and investigating the practices of VA, and a vital component of this role is employee input. Training employees on the role, responsibilities, and legal authority of the inspector general, and the duty of employees for engaging with the OIG is important to accomplishing its mission.

This training would also empower the employees to identify the circumstances and mechanisms for reporting fraud, waste, and abuse, including making confidential complaints. It would protect the men and women who help our service members, veterans, and their families every single day.

#### **H.R. 3504, VA Medical Center Security Report Act of 2023**

The VFW supports this common-sense proposal to study and review the security posture of VA facilities. The men and women who earned care at VA have also earned the right to seek that care in a safe and secure environment. We believe the outcomes of these studies and reports would also positively affect the dedicated employees who work diligently at VA facilities and deserve the same level of safety and support as the veterans they treat.

#### **H.R. 4225, VA Acquisition Review Board Act of 2023**

The VFW supports this proposal to update and oversee VA's acquisition programs. VA needs to properly vet acquisitions in order to fully accomplish its critical mission. The men and women who serve our Nation's veterans at VA facilities need the best tools and systems available to properly perform their jobs. Additional review of these systems is beneficial, and the VFW hopes this proposal is a step toward ensuring efficient and effective acquisitions for the entire Department.

#### **H.R. 4278, Restore Department of Veterans Affairs Accountability Act**

The VFW supports this legislation to streamline authorities to suspend, demote, or fire VA employees who have been determined to warrant such action. We supported the *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017* (Public Law 115-41) because the VFW had seen examples of VA's inability to hold certain employees accountable. This proposal would restore the original intent of the law that had technical gaps and was not implemented effectively.

This important bill includes strong accountability reform for VA employees who do not meet the standards that veterans deserve. Almost six years after the passage of the VA Whistleblower Protection Act, the Secretary of VA still lacks the proper authority to swiftly terminate workers who should not be working at VA. This proposed legislation would improve VA's authority to discipline and remove employees who commit malfeasance. Earlier this year, VA Secretary Denis McDonough stated that VA was no longer using the authority enacted in the 2017 law as it was creating more administrative and legal problems than were initially known. Well-intentioned laws that cannot be legally enforced hinder VA's ability to perform its vital functions.

The VFW believes that VA and Congress must ensure the Secretary of Veterans Affairs has the authority to quickly hold employees accountable for wrongdoing that may endanger the lives of veterans. That is why we support this important legislation. However, we also believe it is as important to ensure VA can quickly fill vacan-

cies within its workforce that are created by removing bad actors. We urge the committee to continue working with VA to provide it with all the tools to hire and retain high-quality employees to serve our veterans each and every day.

**H.R. XXX, Modernizing Department of Veteran Affairs Disability Benefit Questionnaires Act**

This bill requires VA to modify the necessary technology systems to allow Disability Benefit Questionnaires (DBQ) data to be received by VA in a machine-readable format. The VFW supports the goal of this legislation, but believes the language of the phrase “by persons other than employees of the Department of Veterans Affairs under section 504 of the Veterans Benefits Improvement Act of 1996 (Public Law 104–275; 38 U.S.C. 5101 note)” needs to be clarified so that private medical providers and individual veterans could continue to submit DBQs in the same way they are today.

As VBA moves forward with automation, the nuance of the VA rating schedule, not the format of DBQs, is the most substantial issue. VA is in the process of updating the Veteran Affairs Schedule for Rating Disabilities (VASRD) with the stated intent of ensuring examination information can be transmitted in a manner consistent with principles of automation. The greater concern is whether the changes to the VASRD will accurately reflect the associated disabilities.

Chairwoman Kiggans, this concludes my testimony. Again, the VFW thanks you and Ranking Member Mrvan for the opportunity to testify on these important issues before this subcommittee. I am prepared to take any questions you or the subcommittee members may have.

**Information Required by Rule XI2(g)(4) of the House of Representatives**

Pursuant to Rule XI2(g)(4) of the House of Representatives, the VFW has not received any federal grants in Fiscal Year 2023, nor has it received any federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or the preceding two calendar years.

**Prepared Statement of Clint Romesha**

Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee – thank you for the invitation to testify before you today.

I’m here today on behalf of America’s Warrior Partnership, where I am serving as an Emeritus Member of the Board. And while that may be my official position, I am really here to fulfill my duty. It’s the same responsibility I had when I served in the military – and that is to look out for those who I served with. Those who are on your right and left. While our Nation has a sacred obligation to help those 18 million veterans who serve, that same small cohort of the nation’s warrior class has a special bond to each other. And I am here for them.

For those who served in the military, you are given tasks and held responsible for completing them. And you are held responsible and accountable if things are not done right. The reason is simple – discipline means lives. You are trained to do the right thing, the right way – because lives depend on it. And you are held accountable, because in the future you may need to be depended upon when your friend’s lives are at stake.

The VA should be no different. Period.

Every single person at the VA needs to be trained to an exact standard. And be held responsible when things are not going right. Discipline is important. Because lives are at stake. And those working at the VA must be depended upon – and not risk the lives of veterans.

This has not been the case. There are countless stories and problems.

- Whether it was wait-lists in Phoenix in 2014 – where senior management collected bonuses and veterans died while waiting for care –
- Or the Atlanta VA employee who punched an elderly veteran in the face
- Or the West Virginia VA employee who murdered her patients

These are only a few examples. The question for these isn't "why can't we just get rid of these employees?" Instead, it must focus on "What happened in these workplaces to create an environment that allows these things to happen?"

When discipline is gone, and a culture of responsibility and accountability is not enforced, training standards disappear. Then problems happen.

This has a devastating ripple effect. First, on morale in the VA. The great employees in the VA see what is happening around them, and either give up on trying to do their best – or leave the system. The brain drain on talent can crush an organization. Next – it causes a loss of trust for our nation's veterans. For those who went to the VA for help and weren't treated well, or weren't seen, or couldn't be heard – they find that the VA is no longer dependable. And we are seeing the results of that – as the community care program grows exponentially with veterans fleeing the ailing system.

And finally, when you develop a reputation for a lack of discipline and accountability – you have a hard time bringing in good people to replace those that are leaving. I've spoken with many individuals at the VA, and they all say the same thing: "The hardest things to do at the VA is hire and fire." They cannot find good talent to join the system. And when they do, they are mired in paperwork for months, sometimes losing the qualified applicant. Conversely, it is nearly impossible to fire bad employees.

If bad employees are tough to discipline and nearly impossible to remove, how can the VA expect to change its culture?

Working for the federal government, on behalf of the American people, to help our veterans is an honor. And it is also a privilege that should be revoked for not meeting standards or expectations.

Thankfully, Congress has acted in the past, and passed the VA Accountability Act. It was the hope of many veterans, and a bipartisan groundswell of support in Congress – that the measure could help fix some of the many issues about holding federal VA employees accountable.

In fact, following the passage of the VA Accountability Act, trust in the VA increased:

- Employee satisfaction with senior leaders' honesty and integrity increased from 45 percent in 2016 to 59 percent in 2020.
- Veterans' VA-Wide trust scores increased from 59 percent in 2016 to 80 percent in 2020.

However, despite clearly putting forward the intent of Congress and the executive branch into law – the VA has misused, misapplied, and now discarded the law.

Putting aside how a federal agency can unilaterally decide to not follow the law, or how a small employee protection board created by Congress can claim to overrule a popular bill signed by the President, why would anyone be opposed to an accountability bill in the first place?

The answer, sadly, is that money and jobs are at stake. Some see the VA as a major job provider and taxpayer-funded cash machine – with a budget that continues to soar. And those same individuals are most concerned with ensuring that the VA is a jobs-program, rather than an agency that is tasked with helping our nation's veterans.

This must stop. The VA cannot focus on protecting jobs AND focus on helping veterans. And the unions and Merit System Protection Board (MSPB) and others must choose. The VA must focus on one, and I firmly believe the VA's sole mission and directive from this government is to take care of those who served our nation.

Accordingly, I am thankful for this Committee's efforts, and the efforts of your colleagues in the Senate, to strengthen the VA Accountability Act. I am proud to fully support H.R. 4278, the Restore Department of Veterans Affairs Accountability Act.

Importantly, this legislation empowers the VA to make a decision without worry of the MSPB interfering. It also makes it clear that these actions are supreme over any collective bargaining agreement. These employees are working for veterans and the American people, not the other way around. Accordingly, the accountability sections will also now apply to supervisors and managers, just as they did with the SES employees previously.

In fact, Mission Roll Call did a recent poll of veterans, with nearly 16,000 respondents. The poll asked about the VA discontinuing the VA Accountability Act, and if veterans thought the VA should continue to follow the law. The results:

- Over 14,200 (89 percent) said YES, the VA should continue to follow the law and use the VA Accountability Act authorities.
- Roughly 1,700 (11 percent) said NO, the VA should scrap the law and wait for Congress.

In March of this year, I co-authored an article that highlighted the need for oversight and reform at the VA, since the same issues plaguing the VA have been around for decades. This Committee has been working diligently to help the VA, only to have employee accountability, wait for health care, VA claims backlog, etc – continue to be persistent problems. Things need to change, and holding VA to account for the lack of progress is a good beginning.

This legislation passed by wide margins previously and is still the law of the land. It is my hope that all Members of this Committee and this Congress can support these common-sense fixes and send this to the President for his signature soon.

Again, thank you to everyone on the Committee for your invaluable work. We look forward to working with you all and stand by to assist. Thank you, and I look forward to your questions.

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### Prepared Statement of Terry Gerton

Chair Kiggans, Ranking Member Mrvan, and members of the Committee, I appreciate the opportunity to testify today. I am a Fellow of the National Academy of Public Administration (the Academy) and have served as its President and Chief Executive Officer since January 2017. In addition to my experience leading the Academy, I spent three and a half years as a Deputy Assistant Secretary in the U.S. Department of Labor and eight and a half years as a Senior Executive in the Department of Defense. I am also a Veteran with 20 years of active Army service, so I have personal experience with many of the topics of today's hearing. I have been a hiring manager, a Subject Matter Expert reviewer of applicant files, a member of Senior Executive hiring and interview panels, and a member of the Army's Senior Executive policy board. While serving as the Executive Deputy to the Commanding General of Army Materiel Command, I was responsible for the strategic management of over 80 Senior Executives, one-third of the Army's total allocation, along with the oversight of nearly 70,000 civilians in nearly every career field stationed around the world. I know how challenging it can be to make the federal personnel processes work, especially when it comes to holding federal employees to performance standards.

The Academy also has deep expertise in federal human resource management topics. Established in 1967 and chartered by Congress in 1984, the Academy is an independent, non-profit, non-partisan organization dedicated to helping government leaders address today's most critical and complex challenges. The Academy has a robust organizational assessment capacity; a thorough grasp of cutting-edge needs and solutions across federal, state, and local governments; and unmatched independence, credibility, and expertise. Our organization consists of over 950 Fellows—including former cabinet officers, Members of Congress, Governors, mayors, and State legislators, as well as distinguished scholars, career public administrators, and business executives. The Academy has a proven record of improving the quality, performance, and accountability of government at all levels.

Over 50 of our Fellows have experience in federal HR, and of those, many were themselves federal Chief Human Capital Officers. These Fellows and others join together in the Academy's Standing Panel on the Public Service, meeting regularly to research, discuss, and propose actions to improve HR practices at the federal level. They also contribute their expertise as members of Academy Study Panels, ensuring that all of our work includes consideration of strategic human capital implications. Across our history, many federal agencies have directly engaged the Academy and our Fellows for support in managing and modernizing their own HR systems. Supported agencies include the FBI, NASA, DOD, FAA, CDC, USAID, the Patent and Trademark Office, the U.S. Secret Service, and the U.S. Department of Transportation.

I am pleased to offer our perspective on some of the issues captured in the proposed legislation before you today to support the mission effectiveness of the Department of Veterans Affairs, specifically the *Restore VA Accountability Act of 2023*. Our Congressional charter precludes the organization itself from taking an official position on legislation, and so my testimony today will reflect the Academy's history on these topics and our general recommendations.

#### **THE ACADEMY'S PERSPECTIVES ON CIVIL SERVICE ACCOUNTABILITY PROVISIONS AND PRACTICES**

The Academy has long held the position that a professional, merit-based civil service is essential to effective delivery of government programs. Earlier this year, our Fellows who comprise our Standing Panel on the Public Service wrote that the

merit system should be at the core of any reforms agencies make to adapt to fast-changing workplace dynamics:

Hiring based on merit and skill, workforce management, and implementing laws in nonpartisan ways, provide for continuity to deliver key services to the people across presidential administrations. The merit system builds on basic principles: hiring based on what applicants know, not who they know; promotion based on demonstrated competence, not favoritism; stable tenure in office, not mass turnover with each election; access to effective education and training; providing fair and equitable pay; and accountability to the U.S. Constitution, laws, and duly authorized officials, not to political pressure. These principles have stood at the core of American government since enactment of the first laws establishing the civil service 140 years ago, and they have had strong support over the decades from presidents of both political parties.

We also endorse an accurate and intentional deployment of the term “accountability.” As a Panel of Academy Fellows wrote in a 2017 paper with a vision for a modernized federal service, *No Time To Wait*:

In some recent policy debates, “accountability” has become a euphemism for making it easier to fire public employees. The system surely needs more flexibility, and poor performers should not be retained in public service positions. But “accountability” means much more than that. It is a time-honored principle that government should be responsible for serving the public interest. Moreover, we believe that public servants should not be viewed as symbols of big government or as problems that need to be eliminated whenever possible. The nation needs to follow the central lesson taught by its leading private corporations: the best managed companies see their employees as their biggest assets, and government should too. Government employees are fundamentally important assets in pursuing government’s goals. Although we certainly need greater accountability in public service, what we most need is a system that holds administrators accountable for results. How well government employees accomplish government’s mission and what principles are pursued in doing so are the key issues. *Viewing “accountability” through the narrow lens of “firing employees” does the debate and the country no good service.* Instead, the focus should be on the creation of a federal human capital system that (1) focuses on how best to achieve the government’s mission, (2) fits the core principles of merit to meet the government’s new challenges, and (3) redefines accountability through strategies and tactics that meet citizens’ needs. What the country does not need is a system preoccupied by—and mired in—process.

#### **RECENT ACADEMY STUDIES THAT INCLUDE RECOMMENDATIONS RELATED TO CIVIL SERVICE ACCOUNTABILITY PROVISIONS AND PRACTICES**

The Academy has been engaged by several federal agencies over the past few years to help them address issues of employee accountability.

#### **Independent Assessment of Allegations of Scientific Misconduct Filed Under The National Oceanic and Atmospheric Administration Scientific Integrity Policy**

In September 2019, NOAA’s Scientific Integrity Officer (SIO) received four complaints of alleged violations of scientific integrity filed under the NOAA Scientific Integrity Policy (NOAA Administrative Order 202–735D: Scientific Integrity). The allegations related to a specific NOAA public statement issued on September 6, 2019 regarding a tweet previously issued by the National Weather Service (NWS) Weather Forecast Office (WFO) in Birmingham, Alabama, on September 1, 2019. NOAA’s SIO engaged the Academy to conduct an independent assessment of those allegations.

The Academy was charged to determine, based on a preponderance of the evidence, whether individuals within NOAA had violated NOAA’s Scientific Integrity Policy. The report lays out the specific findings and supporting analysis, for action by senior NOAA officials. This engagement not only demonstrated the willingness of NOAA leaders to discipline subordinate employees if the evidence indicated misconduct. In turning to the Academy for an independent, objective assessment of the facts, NOAA leaders also demonstrated a willingness to hold themselves and the organization accountable to the public in a transparent and trustworthy way. Perhaps as important, however, were the recommendations to safeguard against future viola-

tions of scientific integrity, many of which were included in the President’s Scientific Integrity Task Force report released in January 2022.

**U.S. Department of Homeland Security Office of Inspector General: Advancing Change Management Processes**

Between September 2020 and July 2022, the DHS OIG engaged the Academy in a multi-phase project to assist with advancing multiple change management efforts.

**Phase One: Strategic Planning**

The Academy worked closely with OIG leaders and senior staff to map a comprehensive approach to developing a Strategic Plan for 2022–2026. The Strategic Plan set high-level strategic goals and objectives for the OIG and identified performance indicators to provide measures of progress toward these goals and objectives. The Academy supported the development of the Strategic plan by facilitating planning and visioning sessions with OIG leaders that identified the agency’s values and desired organizational outcomes and solicited wider OIG staff feedback on proposed goals, objectives, and strategies through a survey and focus groups.

**Phase Two: GAO Action Plan and Strategic Workforce Plan**

Following the draft strategic plan submission, the DHS OIG contracted the Academy to help develop an implementation plan as well as an action plan in response to the Government Accountability Office’s (GAO) 21–316 report recommendations. Additionally, the Academy worked with DHS OIG to develop a Strategic Workforce Plan to address GAO’s human capital related recommendations.

**Phase Three: Human Capital Gap Assessment**

In March 2022, the DHS OIG contracted with the Academy to analyze the current state of the DHS OIG’s workforce, identify factors that contributed to the current State, and provide recommendations for the DHS OIG to achieve its desired future state.

Issues of performance accountability were addressed in both the strategic planning and human capital strategic planning phases of the work. The Academy provided specific recommendations to the DHS OIG on matters of performance management, workforce planning, recruiting and retaining talent, and forecasting future workforce requirements.

This work also demonstrated the power of the Federal Employee Viewpoint Survey as both an indicator of organizational culture challenges and a measure of the impact of actions taken to better engage employees and address accountability concerns.

**Comprehensive Assessment of the U.S. Merchant Marine Academy**

Section 3513 of the National Defense Authorization Act (NDAA) for Fiscal Year 2020 directed the Secretary of Transportation to enter into an agreement with the Academy to conduct an independent study to examine a series of matters related to the USMMA.

Overall, this report includes 67 actionable recommendations in chapters 3 through 10. Collectively, the recommendations, if implemented, provide a course of action for USMMA and its oversight agencies to meet the challenges USMMA presently faces. They also provide a tool through which Congress, the Secretary of Transportation, and the Maritime Administration can demonstrate accountability to the public for the well-being of the young cadets entrusted to their care. These challenges span education and training, facilities and infrastructure, diversity, institutional culture, Sexual Assault/Sexual Harassment response, planning for the future, stakeholder relations, institutional-level governance and management, and external governance, oversight, and accountability.

**An Assessment of Cultural Competence at the United States Coast Guard Academy**

Section 8272 of the Coast Guard Academy Improvement Act, part of the National Defense Authorization Act for FY 2021, required the Secretary of Homeland Security to contract with the Academy to conduct two discrete one-year studies focusing on the USCGA. The first study was an assessment of the cultural competency of the USCGA.

Cultural competence is a congruent set of behaviors, attitudes, and policies that enable a system, agency, or professionals to work effectively in cross-cultural situations. “Culture” refers to the integrated patterns of human behavior that include language, thoughts, communications, actions, customs, beliefs, values, and institutions of racial, ethnic, religious, and social groups. “Competence” implies having the

capacity to function effectively as individuals and as an organization. (Source: Terry L. Cross, Barbara J. Bazron, Karl W. Dennis, and Mareasa R. Isaacs, "Toward a Culturally Competent System of Care," 1989)

This Academy study included:

- A comprehensive assessment of the current cultural competency and diversity, equity, and inclusion resources and capabilities of the USCGA.
- Analysis of institutional practices, policies, and structures, and any other areas of focus deemed appropriate in assessing the USCGA's cultural competence.
- Recommendations to enhance USCGA cultural competence, which may include outreach and recruitment; modifying structures and practices to foster a more diverse cadet corps body, faculty, and staff workforce; and modifying policies to foster retention of cadets, faculty, and staff.

The Panel found that at the Coast Guard Academy, more can be done to build an infrastructure of coordinated policies, procedures, and structures to drive desired outcomes. The USCG subsequently released to Congress a comprehensive action memorandum specifying its plan to implement the recommendations in the study. This plan includes a Line of Effort to hold leaders accountable for Diversity and Inclusion performance and progress at the unit level, and a commitment to accountability for advancing cultural competence throughout the institution.

#### **United States Office of Personnel Management Independent Assessment**

In Section 1112(b) of the Fiscal Year 2020 National Defense Authorization (NDAA) Act, Congress directed the Office of Personnel Management (OPM) to contract with the Academy to conduct a comprehensive, independent study that would address a series of specific issues surrounding OPM's responsibilities. These included:

- the statutory and non-statutory functions assigned to OPM and the challenges associated with executing those mandates;
- the means, options, and recommended course of actions for addressing the challenges identified, including feasibility, costs, and benefits;
- a timetable for the implementation of identified options and recommendations;
- the statutory or regulatory changes needed to execute the recommendations;
- the methods for engaging with other Federal entities potentially affected by recommendations involving changes to OPM's structure, functions, responsibilities, and authorities; and
- the views of identified stakeholders, including federal and non-federal entities or organizations representing customers and beneficiaries.

After a year of work, the Academy's Panel of Fellows provided its report in March 2021. In conducting this study, the Panel identified several cross-cutting challenges affecting OPM's ability to effectively deliver on its mission to lead federal human capital management.

These include various authorities governing federal human capital; lack of sustained leadership and priorities given the recurrent turnover of directors and deputy directors; limited use of data and data analytics to inform policy; outdated information technology engendering enterprise and operational risks; and constrained financial and staffing resources affecting staff capacity and supporting technology and tools.

Of particular relevance to your discussion today is the study's observation that the complex web of legislation and regulation that has accreted around the topic of federal civilian personnel management makes it simultaneously challenging for managers and leaders to understand exactly what rules they are supposed to be following, easy to find loopholes that might be interpreted to permit otherwise unintended behavior, and simplest and safest to follow a path focused on compliance rather than innovation.

#### **LESSONS LEARNED ABOUT ORGANIZATIONAL AND INDIVIDUAL ACCOUNTABILITY FROM THE ACADEMY'S WORK**

While the recommendations from each of these studies are particular to their subject agencies, general principles for effective employee accountability and performance management certainly emerge.

##### **1. Organizational Culture Impacts Employee Performance**



- a. Cultivate an institutional culture in which every community member is respected, valued, and can fulfill her or his maximum potential as a leader of exemplary character.
  - b. Remediate breakdowns in governance clearly and publicly, replacing compliance-focused processes with processes that are strategy- and performance-based, to build confidence and trust with employees for the future.
  - c. Place greater emphasis across all departments on cultural competence, especially in the processes for hiring and developing senior leaders, including a longer-term human capital strategic plan.
2. Strategic Workforce Planning That Links Performance to Mission Enables Effective Performance Management
- a. Strategic workforce planning enhances an organization's ability to understand and manage attrition, align skills to mission and invest in appropriate training, set and manage performance standards, and provide guidance and oversight.
  - b. Enterprise HRIT systems are essential to provide organizations with the data to manage their workforce (including performance management) effectively and consistently.
  - c. Employee viewpoint surveys offer crucial insight into organizational culture and climate issues that may affect or arise from performance issues and provide an important starting point for any strategy of increased employee engagement and accountability.
3. Clear Communication and Consistent Application of Performance Standards is Essential
- a. Develop and communicate clear guidelines, standards, and policies on expected performance standards for all personnel. Provide examples and scenarios to support understanding.
  - b. Require staff-wide training on standards and policies, including signed statements of understanding at completion.
  - c. Establish and communicate clear standards and protocols for investigations of performance failures or misconduct. Specify variations in the protocols, if any, based on rank, position, or political appointment.
4. There Is No Substitute for Effective Leadership
- a. Cultural competence and DEIA should be essential parts of leader and staff performance standards; low evaluations should have consequences.
  - b. Clearly defining roles, formalizing procedures, and assigning ownership for critical function areas reduce ad hoc decision making and allows leaders to set organization-wide priorities. These steps also streamline operations and improve organizational efficiency, potentially easing pressure on managers.

Taken together, these findings offer a roadmap for building an organization where a central focus on and understanding of mission drives performance at every level. Across every branch, division, level, and rank, expectations are clearly communicated and consistently enforced. Systems are in place to compile and analyze data to inform workforce planning and management decisions. Leaders are trained and tuned to manage a diverse workforce and provide clear guidance and feedback on performance expectations. The agency plans for and invests in training aligned to mission objectives. And, employees feel valued and prepared for the critical missions to which they are assigned.

All of this brings us back to the central topics of performance and accountability. The system surely needs more flexibility, and poor performers should not be retained in public service positions. At the VA particularly, our Veterans deserve the highest quality service and care. But, as I highlighted earlier, viewing "accountability" through the narrow lens of "firing employees" does the debate and the country no good—the ability to fire individuals for poor performance is no substitute for good leadership. It is far better to build organizations where mission and performance are aligned from the beginning, where systems are designed and implemented to provide evidence that can inform consistent and strategic decisions, and where investments in training provide a strong scaffold upon which to build individual competency. Then, an organization can be truly accountable to those who matter most...those they are created and funded to serve.

Since its establishment in 1967, the Academy has responded to requests for assistance from a wide range of agencies and organizations and has undertaken numerous studies on issues of interest to Congress and the executive branch. With its network of distinguished Fellows and an experienced, multi-dimensional professional staff, the Academy is uniquely qualified and trusted to provide objective advice and practical solutions that help government leaders overcome complex challenges and produce positive change.

Each Academy project is directed and overseen by an expert Panel or Expert Advisory Group (EAG) that consists primarily of Fellows. These Panels or EAGs provide high-level expertise and knowledge of current and emerging best practices. They are supported by a professional Study Team of highly qualified project directors, analysts, and researchers that ensure our Panels have all the information required to develop their recommendations and provide meaningful advice to our client organizations.

I would reiterate that the Academy has many Fellows with deep recent experience in federal human capital management. We convene them regularly through our Standing Panel on the Public Service and can engage them on specific topics as required. We would welcome the opportunity to partner with this Committee to develop and evaluate options that could lead to a stronger and more effective Department of Veterans Affairs.

Chair Kiggans, that concludes my written statement. I would be pleased to answer any questions you or the Committee members may have.

## STATEMENTS FOR THE RECORD

### **Prepared Statement of American Federation of Government Employees, AFL-CIO**

Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee:

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 legislative hearing on "Pending Legislation." AFGE represents more than 750,000 federal and District of Columbia government employees, 291,000 of whom are proud, dedicated Department of Veterans Affairs (VA) employees. These include front-line providers at the Veterans Health Administration (VHA) who provide exemplary specialized medical and mental health care to veterans, the Veterans Benefits Administration (VBA) workforce responsible for the processing veterans' claims, the Board of Veterans' Appeals (Board) employees who shepherd veterans' appeals, and the National Cemetery Administration Employees (NCA) who honor the memory of the nation's fallen veterans every day.

With this firsthand and front-line perspective, we offer our observations on the following bills being considered at today's hearing:

#### **H.R. 4278, the "Restore Department of Veterans Affairs Accountability Act"**

AFGE strongly opposes H.R. 4278, the "Restore Department of Veterans Affairs Accountability Act." As AFGE wrote in its statement for the record at this subcommittee's March 9, 2023, oversight hearing titled "Accountability at VA: Leadership Decisions Impacting its Employees and Veterans," AFGE strongly objected to the design and implementation of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017. Specifically, AFGE has long objected to the VA's use of the disciplinary authority in 38 U.S.C. 714 (§ 714) of the law and how it has harmed hardworking and dedicated employees. Additionally, through this experience AFGE is also aware of the failure of VA leadership to hold managers accountable under other provisions of the law. AFGE has supported efforts to amend the law to restore fairness to VA employees, including the bi-partisan "Protecting VA Employees Act" (H.R. 6682 in the 117th Congress), introduced last Congress.

Contrary to this, H.R. 4278, the "Restore Department of Veterans Affairs Accountability Act" will again counterproductively diminish the due process and collective bargaining rights of VA employees compared federal employees in other agencies, including those in the Department of Defense who take care of the nation's active-duty military. In particular, the bill's proposed abrogation of collective bargaining agreements, reinforcing the use of the "Substantial Evidence Standard," restating the prohibition on the Merit Systems Protection Board to mitigate penalties, limiting the use of the "Douglas Factors," and using this bill retroactively go out of their way to treat VA employees like second class federal workers, despite their noble mission. AFGE strongly opposes the bill.

#### **Background**

Public Law 115-41, the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act or Act), was signed into law on June 23, 2017. At the time of its passage, supporters claimed the Act was intended to simplify and expedite the disciplinary process at VA so that it could better hold bad employees accountable. The Act is divided into two parts, Title I, which established the Office of Accountability and Whistleblower Protections (OAWP) and Title II, which governs Accountability and Adverse Actions for Senior Executives, VA Employees, and Supervisors disciplinary procedures. Within Title II, the bill enacted 38 U.S.C. § 714 which changed the following disciplinary procedures for bargaining unit employees (38 U.S.C. § 713 is for managers in the Senior Executive Service):

- Required management to make a final decision within 15 business days of proposing an adverse action (i.e., suspension of more than 14 days, demotion, or removal);
- Reduced the time period for an employee to respond to a proposed adverse action to 7 business days;
- Reduced the time period for an employee to appeal the final adverse action to 10 business days;
- Lowered the standard of proof necessary to sustain an adverse action before a third party, such as arbitrators and the Merit Systems Protection Board (MSPB), from preponderance of the evidence to substantial evidence;
- Prevented third part adjudicators from mitigating unreasonable penalties assigned by VA.

### Oversight

Since the Act's enactment, there has been robust oversight over the Act's implementation, and its effect on the workforce in multiple venues:

#### Congressional Oversight

The House Veterans' Affairs Committee held an oversight hearing in July 2018 before the Committee on Veterans' Affairs entitled "*The VA Accountability and Whistleblower Protection Act: One Year Later.*"<sup>1</sup> The committee's goal was to address problems caused by the VA's implementation of the Act. In his opening statement, then-Ranking Member Mark Takano addressed the VA's penchant to use the Act to disproportionately discipline rank and file employees as opposed to supervisors and other management officials stating:<sup>2</sup>

"[Of] the 1,086 removals during the first 5 months of 2018, the majority of those fired were housekeeping aides...I also find it hard to believe that there are large numbers of housekeeping aides whose performance is so poor that it cannot be addressed. If that is truly the case, then it stands to reason that there are also management issues behind their poor performance. But of those 1,096 removals, only fifteen were supervisors which is less than 1.4 percent. Firing rank and file employees does nothing to resolve persistent management issues." He continued "it is not possible to fire your way to excellence."

AFGE also testified at this hearing citing how the law disproportionately harmed lower paid federal workers and not the managers who supervised them, and also further explained many of the structural problems with the law that continue to exist today.<sup>3</sup> AFGE has also commented on the Accountability Act at other House Veterans' Affairs Committee hearings including before this subcommittee on May 19, 2021 at hearing titled "*Protecting Whistleblowers and Promoting Accountability: is VA Making Progress?*"<sup>4</sup> citing the problems with the current law and the need to pass reforms.

#### Inspector General Investigation

In response to requests for an investigation from multiple legislators, the Office of Inspector General (OIG) highlighted VA's failure to properly implement the portion of the Act pertaining to whistleblower protection. The OIG issued a report, which explained, "in many instances, [OAWP] focused only on finding evidence sufficient to substantiate the allegations without attempting to find exculpatory or contradictory evidence."

Further, while VA front-line employees were being disciplined more often and more harshly under § 714 of the Accountability Act, the OIG report found that VA "struggled with implementing the Act's authority to hold executives accountable." OIG explained that despite statements from then-Secretary Shulkin, as of May 22,

<sup>1</sup>*The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018), <https://republicans-veterans.house.gov/calendar/eventsingle.aspx?EventID=2212>.

<sup>2</sup>*The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018) (statement of Mark Takano, ranking member), <https://republicans-veterans.house.gov/calendar/eventsingle.aspx?EventID=2212>.

<sup>3</sup>*The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018) (statement of then-AFGE National President J. David Cox), <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=108516>.

<sup>4</sup>*Protecting Whistleblowers and Promoting Accountability: is VA Making Progress? Before the H. Comm. On Veterans Affairs Subcommittee on Oversight and Investigations*, 117th Congr. (2021) (AFGE Statement for the Record).

2019, VA had only removed one covered senior executive employee under 38 U.S.C. 713. Further, of thirty-five cases involving senior executives, VA deciding officials mitigated the discipline of thirty-two before issuing a final decision.

The OIG investigation revealed unlawful whistleblower retaliation by OAWP itself, noting that after an OAWP employee made a whistleblower complaint, Executive Director O'Rourke instructed a subordinate to remove the employee. Finally, the OIG found that the VA did not comply with reporting and training requirements of the Act and failed to adequately report to Congress regarding the outcomes of disciplinary actions.

#### **Freedom of Information Act**

In an attempt to learn more about the VA's use of its authorities under the Accountability Act, on May 31, 2022, AFGE submitted a Freedom of Information Act (FOIA) Request to the VA. This request asked the VA to share, without violating the privacy of employees, the VA's use of Section 204 of the Veterans Affairs Accountability and Whistleblower Protection Act of 2017, 38 U.S.C. § 721, which authorizes the Secretary to issue an order, under certain circumstances, directing an employee to repay an award or bonus paid to the employee. This request covered the period from June 23, 2017, through May 31, 2022. In response to the AFGE's request, the VA responded on June 2, 2022, and stated that "This is a recently enacted VA policy and there are no responsive records." This is evidence that the VA has not utilized all of the tools at its disposal to hold employees accountable, and that the VA does not need additional tools for accountability. Instead, for the last six years, VA abused its authority under 38 U.S.C. § 714 to remove thousands of front-line employees and service-connected veterans while failing to hold senior executives and management officials to the same standard.

#### **Challenges in Federal Court**

Since the enactment of the Accountability Act, several parts of the law have been successfully challenged in federal courts, resulting in multiple rebukes from the United States Court of Appeals for the Federal Circuit (Federal Circuit or Court) finding that VA violated the law and fundamental civil service protections through its abuse of 38 U.S.C. § 714. One line of cases is related to the restrictions on the MSPB or third party adjudicators to consider the reasonableness of a penalty or to mitigate that penalty. In *Sayers v. Dep't of Veterans Affairs*, the Federal Circuit determined that, contrary to VA's contentions, the MSPB was permitted to review the reasonableness of the penalty imposed by deciding officials in light of the facts of a particular case under § 714. The Court explained that "[d]eciding that an employee stole a paper clip is not the same as deciding that the theft of a paper clip warranted the employee's removal." It is clear that prior to *Sayers*, the Agency promoted a limited review and harshly disciplined employees under § 714, often for similarly trivial acts.

The perceived inability to consider the reasonableness of VA's chosen penalty led judges to affirm decisions where even a single charge was proven by substantial evidence. Where the harshest available penalty, removal, was used liberally, this led to a loss of employee resources for relatively minor infractions. VA's rush to remove employees was clear in performance cases as well. As Administrative Judges believed they could not consider the reasonableness of the penalty in those instances, employees were removed for easily remedied performance failures.<sup>5</sup>

Another key element of the law examined by the courts is the VA's mistaken claim that the Accountability Act eliminated the preponderance of the evidence standard at the administrative level and replaced it with the new substantial evidence standard that applies to third party review. In *Rodriguez v. Dep't of Veterans Affairs*, the Court held that the "preponderance of the evidence, rather than substantial evidence was the correct standard for management to apply at the administrative level in conduct cases under [§ 714]."<sup>6</sup> The Court explained that when determining whether conduct justified discipline under § 714, preponderance of the evidence was the correct evidentiary burden, and the MSPB's standard of review should be substantial evidence. Consequently, the Court found that VA had applied the wrong evidentiary standard in its § 714 conduct cases. The Court held in August 2021 that VA and MSPB must apply the *Douglas Factors* in deciding and reviewing the imposed penalty.<sup>7</sup>

By subjecting management's decisions to additional scrutiny, the Court demonstrated VA's overreach in its use of the Accountability Act. The use of § 714 has

<sup>5</sup> *Brenner v. Dep't of Veterans Affairs*, 990 F.3d 1313, (Fed. Cir. 2021)

<sup>6</sup> *Ariel Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290 (Fed. Cir.) (2021).

<sup>7</sup> *Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).

proven to have had its greatest impact on lower-level employees, many of whom are veterans themselves, compounding a chronic staffing crisis while doing little to address systemic problems such as inadequate training and hostile managers. Thus, while the reviewing arbitrators, Administrative Law Judges, and Federal Circuit Judges have done much to curtail VA's broad interpretation of the law, the law itself must be amended if it is to accomplish its stated goal of improving systemic flaws in the Agency.

Furthermore, in the recent case *Richardson v. Department of Veterans Affairs*, the MSPB further limited the applicability of the law.<sup>8</sup> In *Richardson*, the MSPB ruled that an employee appointed under 38 U.S.C. 7401(3), a "hybrid" Title 38/Title 5 employee, could not be terminated under § 714 as the text of 38 U.S.C. 7403(f)(3) dictated its reliance on "the procedures" of chapter 75 of Title 5.<sup>9</sup>

As a result of these and other legal rulings and determinations, the VA announced on March 5, 2023, that the VA will prospectively "cease using the provisions of 38 U.S.C. § 714 to propose new adverse actions against employees of the Department of Veterans Affairs (VA), effective April 3, 2023."<sup>5</sup>

### **Specific Objections to the "Restore Department of Veterans Affairs Accountability Act"**

In response to the court rulings since the enactment of the Accountability Act, H.R. 4278 the "Restore Department of Veterans Affairs Accountability Act" was introduced to reverse these decisions and expand the powers of the original Accountability Act. AFGE strongly objects to several provisions in the bill that will infringe upon the rights of VA employees, and harm recruitment and retention:

#### **Abrogation of the Collective Bargaining Agreement**

On Page 14, line 22 of the legislation, the bill states "[t]he procedure in this section shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures." The VA workforce is second largest workforce in the federal government, second only to the Department of Defense. AFGE is proud to represent more than 291,000 bargaining unit employees, making the union contract that is scheduled to be signed by AFGE and Secretary McDonough on August 8, 2023, the largest collective bargaining agreement in the government. To say that any procedures that were meticulously negotiated at the bargaining table in this and prior contracts are now out the window is grossly unfair, as both parties compromised to arrive at this agreement given the state of the law at the time. This would also provide the VA the opportunity to cease using Performance Improvement Plans (PIPs) prior to disciplining an employee for performance, which is a common practice within the federal workforce. Additionally, while members of both parties proudly support rank and file union members at other agencies and in the private sector, including law enforcement officers, firefighters, electricians, and plumbers, the choice to hold these employees at the VA to a standard not used for similarly situated employees at other departments is unnecessary, and only serves to dissuade potential employees from working at the VA when they could similar if not identical jobs with better protections at another agency.

#### **Reinforcing the Use of the "Substantial Evidence Standard"**

38 U.S.C. § 714 established by the Accountability Act mandates that the MSPB uphold management's decision to remove, demote, or suspend an employee if the decision is supported by substantial evidence. While not defined in the law, management guidance defined substantial evidence as "relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree, or evidence that a reasonable mind would accept as adequate to support a conclusion."

As discussed in *Rodriguez v. Dep't of Veterans Affairs*, VA improperly read § 714 to mean that its burden of proof at the administrative level in justifying discipline was lowered to the substantial evidence standard. The Federal Circuit disagreed with the Agency's position, finding that the Agency conflated burden of proof and standard of review. Consequently, the Court found that the VA still had to meet the preponderance of the evidence burden of proof in its decision to discipline for conduct.

With the proposed text on Page 12, lines four through 10, the bill is plainly trying to overturn *Rodriguez v. Dep't of Veterans Affairs*, and force the VA, even in cases where the balance of evidence favors the employee, the opportunity if not obligation

<sup>8</sup>*Richardson v. Department of Veterans Affairs*, Docket No. AT-0714-21-0109-I-1 (MSPB) (2023).

<sup>9</sup> *Id.*

to dismiss the employee. This is especially prevalent in “he said, she said” cases based on allegations of misconduct. For example, if 10 individuals were witnesses to an incident and seven sided with the employee’s story, but three sided with the VA’s, the VA would meet its burden under “Substantial Evidence” and could dismiss the employee. This is unfair and deprives VA employees of the same protections enjoyed in other departments in the federal government.

#### **Restating the MSPB’s Inability to Mitigate Unreasonable Penalties**

Under current statute established by the Accountability Act, the law provides that where the Agency’s decision is supported by substantial evidence, the MSPB or an arbitrator may not mitigate the penalty. Thus, the MSPB or an arbitrator could only reverse an Agency decision it determined was unreasonable. MSPB had an extremely high rate of affirming Agency decisions even before the enactment of the Accountability Act. MSPB’s affirmance rate of VA decisions was 83.7 percent, of the years recorded since, 2019 was the highest rate of affirmance at 89.44 percent. Few cases were mitigated prior to 2017, however, mitigation was available to reviewing entities, saving the time of sending back a case, causing needless delay.

The text on page 14, lines seven through 10 of the legislation is a doubling down on a bad policy of letting the MSPB or a third-party arbitrator from righting obvious abuses by the VA. Not only should this provision be stricken, but the ability to mitigate a penalty should be restored to the MSPB. This change would ensure fair determinations and restore basic notions of due process and fairness to the workforce by treating similarly situated employees in a consistent manner.

#### **Limiting the Use of the Douglas Factors**

*Connor v. Department of Veterans Affairs*, spoke to the issue of mitigation. In that case, on appeal, the MSPB sustained only one of the 27 charges against the employee. On appeal to the Federal Circuit, the Agency argued it need not consider the *Douglas Factors* in § 714 proceedings.<sup>10</sup> In its ruling, the Court ruled that the “[t]here is no basis for the government’s argument that the statutory ban on penalty mitigation by the Board eliminated the obligation to consider and apply the Douglas factors.”<sup>11</sup> In response to this, the “Restore Department of Veterans Affairs Accountability Act” would require that only five of the Douglas Factors be considered when determining the reasonability of discipline, but goes out of its way to actively exclude the other seven Douglas Factors. This is counter to the opinion in *Connor*, where the court referenced *Douglas v. Veterans Administration* and wrote while citing to *Douglas* “While not all of the factors will be pertinent to every case, the Board in *Douglas* explained that the agency must ‘consider the relevant factors’ and ‘strike a responsible balance’ in selecting a penalty.”<sup>12</sup> In turn, by excluding seven “Douglas Factors” the legislation goes out of its way to exclude reasonable reasons why an employee should have a penalty reduced, including the sixth Douglas Factor which considers “consistency of the penalty with those imposed upon other employees for the same or similar offenses.”<sup>13</sup> AFGE urges that every deciding official and third party adjudicator have the obligation to consider all 12 Douglas Factors that may be relevant, not just the five which the bill considers important. Not only should the agency be required to use the Douglas factors, but appellate bodies should be able to review the agency’s appropriate consideration of these factors governing the severity of discipline.

#### **Retroactive Application of the Bill**

Beyond each of the individual policy objections AFGE has with the bill, the text proposed on page 15, lines one through five stating that “[t]his 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).” Considering the significant discipline and litigation that has occurred over the past six years, the idea that old disciplinary actions, including the possibility of those already resolved could now be subject to new rules after the fact only creates more tumult for a workforce that has had its fill. Retroactivity is not only unjust but creates chaos and should be stricken.

#### **H.R. 3504, VA Medical Center Security Report Act**

<sup>10</sup>*Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).

<sup>11</sup>*Id.*

<sup>12</sup>*Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021); *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981) at 332–33.

<sup>13</sup>*Id.*

AFGE supports H.R. 3504, the “VA Medical Center Security Report Act” and thanks Subcommittee Chairwoman Kiggans (R-VA), Subcommittee Ranking Member Pappas (D-NH), and Representative Lee (D-NV) for its bi-partisan introduction. If enacted, this bill would require an annual survey to collect information related to the security of VA Medical Centers. Among the many components that are required by this prospective survey, AFGE particularly supports the disclosing of “the type and frequency of criminal activity experienced at the medical center during the 12 months prior to the date the covered employee completes the survey,” “the number of vacant positions for Department police officers at the medical center, and the number of days each vacant position has been vacant,” and “the availability and adequacy of covered equipment.” The data gathered here will demonstrate to both the VA and the committee on the need to focus on the recruitment and retention of VA Police Officers, and the serious, and often time dangerous, nature of their job. The results of this report will further underscore the need to give VA Police Officers full Law Enforcement Officer retirement as would be created with the enactment of H.R. 1322, the “Law Enforcement Officers Equity Act,” which is co-sponsored by nine members of the House Veterans Affairs Committee, including Chairman Bost (R-IL) and Ranking Member Takano (D-CA), and is endorsed by the VA.

The only technical amendment AFGE would suggest on this legislation is to expand its coverage to all VA facilities. AFGE is proud to represent employees who work at Community Based Outpatient Clinics, Veterans Benefits Administration Regional Offices, National Cemetery Administration Facilities, The Board of Veterans Appeals, and other VA facilities. This change would better capture the complete operations of VA Police work at all VA facilities.

#### **Conclusion**

AFGE thanks the House Veterans’ Affairs Committee for the opportunity to submit a Statement for the Record for today’s hearing. AFGE stands ready to work with the committee and the VA to address the workforce issues currently facing the department and find solutions that will enable VA employees to better serve our Nation’s veterans.



**Prepared Statement of Concerned Veterans for America**

**Statement of Russ Duerstine  
Executive Director, Concerned Veterans for America**

**On**

**H.R. 4278: The Restore Department of Veterans Affairs Accountability Act**

**House Veterans' Affairs Subcommittee on Oversight and Investigations  
Legislative Hearing**

**July 12<sup>th</sup>, 2023**

Thank you to Chairwoman Kiggans, Ranking Member Mrvan, and the Members of the Subcommittee for the opportunity to submit this statement on behalf of Concerned Veterans for America (CVA). CVA is a grassroots network of thousands of veterans, family members, and patriotic citizens that advocates for and defends policies to preserve freedom and prosperity for all Americans. Our organization is driven to organize and amplify the American veteran's unique perspective to both the American people and to our leaders in Washington.

**CVA's History in Veterans' Health Care Oversight: Why Accountability Matters**

As a leading advocate for reform and accountability at the Department of Veterans Affairs and for increased health care choices for our veterans since 2012, CVA appreciates the opportunity to support key legislation before the subcommittee today. Throughout our ten-year history, CVA has worked on the leading edge of the effort to improve veterans' health care outcomes and hold the VA accountable when it falls short.

As systemic failures came to light in 2014 after the Phoenix VA scandal, CVA activists were on the front lines from the beginning demanding change, contributing to the passage of three major pieces of veterans' health care legislation, one of which is improved upon by legislation before the committee today. Following the Phoenix scandal, CVA fought for the Veterans Access, Choice, and Accountability Act of 2014, which established the first iteration of a choice program for veterans to seek care outside the VA.

CVA also supported the VA Accountability and Whistleblower Protection Act of 2017, which gave the VA greater freedom to terminate poorly performing employees while shielding whistleblowers from retaliation. While these efforts laid an early foundation to change incentives at the VA and improve outcomes for veterans, more work was needed to improve veterans' care experiences. Unfortunately, a flood of litigation and administrative decisions rendered most of this law unenforceable, and the VA announced it would stop following it this very March.<sup>1</sup> Fortunately, legislation before the subcommittee today would help restore Congress' original intent as expressed in this law.

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<sup>1</sup> Eric Katz, "VA Will No Longer Use Its Marquee Civil Service Reform Law to Punish Employees," *Government Executive*, March 24, 2023. <https://www.govexec.com/pay-benefits/2023/03/va-will-no-longer-use-its-marquee-civil-service-reform-law-punish-employees/384419/>

Lastly, CVA was a key supporter of the passage of the VA MISSION Act in 2018, which passed with overwhelming bipartisan support. This legislation incorporated many of the recommendations of the bipartisan 2015 Fixing Veterans' Health Care Task Force convened by CVA, namely by creating the Veterans Community Care Program (VCCP).<sup>2</sup> By consolidating existing choice programs and simplifying access standards, the VA MISSION Act offered greater health care choice to millions of veterans, enabling far more to access care where and when they needed it.

Ensuring the full implementation of the VA MISSION Act and holding the VA accountable for failures to do so have been consistent priorities of CVA's since the legislation passed and remains a core oversight priority for this subcommittee. During the height of the COVID-19 pandemic, the VA admitted to cancelling or delaying 20 million appointments, often without evidence of follow-up.<sup>3</sup> This failure makes access to alternative treatment outside the Veterans Health Administration (VHA) essential.

Unfortunately, the VA's reluctance to honor its regulatory and statutory obligations since the VA MISSION Act's passage has limited millions of veterans' health care choices, too often resulting in delayed and denied care. Reports have emerged of VA administrative staff overruling doctors' assessments of patients' best medical interests to overturn community care referrals, even though the validity of these clinical referrals are established in the VA MISSION Act text.<sup>4</sup>

The VA's apparent reluctance to facilitate access to community care was also made clear when it quietly shut down [MissionAct.va.gov](https://missionact.va.gov) in 2021, the dedicated website educating veterans on community care options. To address this educational gap, CVA's sister organization, Concerned Veterans for America Foundation (CVAF), created [VAMissionAct.com](https://vamiissionact.com), replicating the previous community care resources for the fifth anniversary of the MISSION Act's passage.<sup>5</sup> These efforts by CVAF should not be needed, but an organizational culture within the VA that is content to actively disregard the will of Congress as expressed in the MISSION Act makes such outreach necessary.

As part of its efforts to support the MISSION Act's implementation and improve VA oversight, CVA has amplified the findings of a Freedom of Information Act (FOIA) lawsuit from the Americans for Prosperity Foundation filed against the VA. The FOIA suit, which is still pending, reveals that the VA systematically manipulates wait times by using outdated guidance contrary to its own regulations, making public wait times appear shorter than what veterans truly experience. Because access to community care is based in part on VHA wait times, manipulating these statistics cuts off swathes of veterans off from access to the treatment options they are legally entitled to.<sup>6</sup> AFPP's FOIA suit

<sup>2</sup> "Fixing Veterans Health Care: A Bipartisan Policy Task Force," *Concerned Veterans for America*. 2015.

<https://cv4a.org/wp-content/uploads/2016/01/Fixing-Veterans-Healthcare.pdf>

<sup>3</sup> "Secretary McDonough's remarks to Veterans Service Organizations regarding the American Rescue Plan," VA News, Department of Veterans Affairs. February 12, 2021. <https://news.va.gov/84721/secretary-mcdonoughs-remarks-veterans-service-organizations-regarding-american-rescue-plan/>

<sup>4</sup> Jill Castellano, "The Mission Act is supposed to help US veterans get health care outside the VA. For some, it's not working," *USA Today*, November 1, 2021. <https://www.usatoday.com/in-depth/news/investigations/2021/11/01/mission-act-aid-veterans-healthcare-va-isnt-letting-it/8561618002/>

<sup>5</sup> "Increasing Veterans' Access to Health Care: The VA MISSION Act," *Concerned Veterans for America Foundation*, June 2023. <https://vamiissionact.com>

<sup>6</sup> For a detailed explanation of VA wait time manipulation practices, see: "Delayed and Denied Care: Transparency and Oversight Needed for VA Wait Times," *Concerned Veterans for America*, February 22, 2022. [https://cv4a.org/wp-content/uploads/2022/02/22\\_298900\\_VAPolicyBriefingHandout.pdf](https://cv4a.org/wp-content/uploads/2022/02/22_298900_VAPolicyBriefingHandout.pdf)

further revealed that internal VA guidance directs schedulers to attempt to persuade veterans to use VHA facilities instead when they request community care access.<sup>7</sup> That this information had to be produced via FOIA litigation underscores the VA's efforts to keep its efforts to thwart MISSION Act implementation from the public and Congress, despite the efforts of Members in both Houses and parties to pressure the agency to carry out the law.<sup>8</sup>

Even if additional treatment choices like community care are protected, it is clear that poor VA personnel incentives institutionalizing a lack of accountability will continue to create obstacles for veterans unless addressed. VA administrative decisions and an employee culture all too hostile to helping veterans pursue the treatment that best meets their needs must be confronted.

**H.R. 4278: The Restore Department of Veterans Affairs Accountability Act**

CVA endorses H.R. 4278, the Restore Department of Veterans Affairs Accountability Act, brought by Chairman Bost. The Restore VA Accountability Act would carry out the will of Congress as expressed in the overwhelmingly supported VA Accountability and Whistleblower Protection Act of 2017. CVA supported this 2017 legislation, along with a majority of legacy Veteran Service Organizations. When fully in place, this law gave the VA Secretary the authority to discipline, suspend, demote, or remove employees that were poorly performing or had committed misconduct, expediting procedures to do so and requiring a greater burden of proof for these decisions to be overturned. Unfortunately, as discussed, litigation and administrative rulings rendered the 2017 accountability hollow.

In any organization, personnel incentives can make or break a culture. Protecting those who do not take their responsibility to our nation's veterans seriously demoralizes quality VA employees who want to help those who have served to the best of their abilities. On its staff, CVA has multiple former VA employees who were passionate about caring for veterans at the VA. They became disillusioned with an organizational culture that tolerated failure and too often did not reward or even discouraged employees from going above and beyond to provide quality care.<sup>9</sup>

The consequences of the status quo are clearest at the Loma Linda VA Medical Center (VAMC) in California. At this facility, a supervisor accused of creating a toxic working environment remains employed despite three internal investigations in as many years, 36 witnesses, and 4,000 pages of evidence.<sup>10</sup> Two of the three investigations have recommended this individual's removal, yet inexplicably, this person remains entrusted to supervise those caring for our nation's veterans. The

<sup>7</sup> "Standard Mission Act Guidance: Patient Eligibility and Scheduling Sheet," *Department of Veterans Affairs*, October 28, 2020. <https://americansforprosperity.org/wp-content/uploads/2021/09/03-Mission-Act-Guidance-Oct-2020.pdf>

<sup>8</sup> For examples of previous Congressional letters to the VA over its failures to implement the MISSION Act, see: "Chairman Bost Fights For Veteran Community Care Access, Pushes Back on Biden Administration," *House Committee on Veterans Affairs*, June 6, 2023.

[https://veterans.house.gov/uploadedfiles/final\\_2023\\_05\\_31\\_letter\\_to\\_va\\_re\\_veteran\\_community\\_care.pdf](https://veterans.house.gov/uploadedfiles/final_2023_05_31_letter_to_va_re_veteran_community_care.pdf);

"Daines, Colleagues Demand VA Do A Better Job Of Providing Community Care To Veterans," *Office of Senator Steve Daines*, July 18, 2022. <https://www.daines.senate.gov/wp-content/uploads/imo/media/doc/VA-%20Community%20Care-%20FINAL%207.14.2022.pdf>;

"Clark Leads Delegation Letter Calling on VA Secretary McDonough to Address Veterans Care Concerns, Mission Act," *Office of Rep. Katherine Clark*, February 25, 2021. <https://katherineclark.house.gov/2021/2/clark-leads-delegation-letter-calling-on-va-secretary-mcdonough-to-address-veterans-care-concerns-mission-act>

<sup>9</sup> "My VA Story: Former VA Employee Sheds Light On A Dream Job Turned Into A Nightmare," *Concerned Veterans for America*, April 10, 2023. <https://cv4a.org/the-overwatch/my-va-story-former-va-employee-sheds-light-on-a-dream-job-turned-nightmare/>

<sup>10</sup> "Rep. Obernolte, Chairman Bost demand answers from VA on Loma Linda employee misconduct case," *Office of Rep. Jay Obernolte*, April 13, 2023. <https://obernolte.house.gov/media/press-releases/rep-obernolte-chairman-bost-demand-answers-va-loma-linda-employee-misconduct>

Loma Linda VAMC leadership has been unable to terminate this supervisor due to existing legal constraints, leaving employees with the choice to either tolerate a toxic environment or leave.

As this subcommittee is aware, many VA employees choose to vote with their feet. According to reporting required by the MISSION Act, the VA lists over 78,000 employee vacancies as of the second quarter of 2023.<sup>11</sup> Though a more critical discussion of the rate of increase of authorized FTEs at the VA is in order—the veteran population has been steadily declining over the past several decades—retention of existing employees should be a priority. A demoralizing work culture wrought by poor personnel incentives undermines the VA's ability to hire and retain talented staff.

The Restore VA Accountability Act would revive the Congressional intent denuded by the actions taken against the 2017 VA Accountability law. H.R. 4278 would provide a comprehensive follow-on. The bill would empower the VA Secretary with the disciplinary tools necessary to have on hand to maintain a constructive, motivating employee culture. The legislation would combat frivolous appeals that would delay an otherwise warranted personnel decision by ensuring that those supported by substantial evidence are upheld. It would also streamline the disciplinary process by eliminating the requirement for a personnel improvement plan (PIP) prior to disciplinary action being taken. At their worst, PIPs can allow employees, like the Loma Linda supervisor discussed above, to linger when it is clear to supervisors that they are holding back their team's operations.

Most importantly, the Restore VA Accountability Act would more widely apply accountability across the VA workforce. It would allow for expedited disciplinary processes to be employed not just on Senior Executives, but on supervisors and employees as well. The bill would also require supervisors and Senior Executives to appeal decisions directly to the VA Secretary rather than through the Merit Systems Protection Board. This step would give the Secretary greater control over the leadership standards he or she seeks to ensure are modeled for the rest of the Department.

**Conclusion:**

The VA's failures to fully implement the MISSION Act are well-known and affect millions of veterans in every Congressional district around the country. The Restore VA Accountability Act takes necessary steps to protect community care options by codifying current access standards. It adds further protections to community care scheduling to thwart bureaucratic restrictions on veterans' access to the full range of care they have earned. For these reasons, I strongly urge the subcommittee to support H.R. 4278, the Restore VA Accountability Act.

Respectfully Submitted,



Russ Duerstine  
Executive Director  
Concerned Veterans for America

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<sup>11</sup> "VA MISSION Act Section 505 Data - FY 2023 Quarter 2," *Department of Veterans Affairs*, June 9, 2023.  
<https://www.va.gov/employee/va-mission-act-section-505-data/>

### Prepared Statement of Donald Kettl

Thank you for this opportunity to present a statement on H.R. 4278, “Restore VA Accountability Act of 2023.”

I am Professor Emeritus and Former Dean of the University of Maryland School of Public Policy, and a Fellow of the National Academy of Public Administration. However, in submitting this statement, I am speaking only for myself.

#### Summary

This proposed legislation is, I believe, a serious mistake that would harm the Department of Veterans Affairs and injure the nation’s effort to care for those who have given so much to it. In summary, here’s why:

- The legislation misunderstands what accountability means.
- It assumes that we ought to run government more like a business. That’s precisely what we should do—but we should manage government the way the best-managed businesses are led. The proposed legislation would not do that.
- The legislation argues that performance in the VA would improve by firing poor performers. However, there’s no evidence that the VA’s rate of firing poor performers is lower than in the private sector. In fact, it’s probably significantly higher.
- The health industry is struggling with a manpower crisis—and no expert thinks that the best way to address the problem is to hire more employees.
- The act would destabilize the VA, which would only erode its performance.
- Good management is impossible to legislate. It’s a people process. The proposed legislation attempts to mandate good management instead of creating the foundation for doing so.
- There are better alternatives to improving the VA’s performance.

Let me explore each of these issues in more detail.

#### We must understand what accountability really means

Accountability describes many relationships, and it’s often used in a fuzzy way. In fact, it’s often used interchangeably to describe the responsiveness of career officials to the policy goals of political appointees; the resistance of these career officials to policy direction; *and* the challenge of dealing with poor performers.

These approaches are not—and should not be considered—interchangeable. Rather, accountability needs to be understood as a relationship: who is accountable to whom, for what? Good management needs to begin by specifying this relationship. Focusing on firing employees misunderstands how accountability ought to work.

#### We should manage government like a business—according to the best business practices

We often begin the debate about government reform by arguing that it ought to be run more like a business. That’s an excellent idea—but it requires actually running the government according to the practices of the best-run private companies. H.R. 4278 does not bring to the government what these best-run companies actually do. No effective 21st-century company would focus on firing poor performers to improve its results.

The broader debate has been going on for a very long time. For example, consider this assertion:

I seek to run [the government] as any honest man attempts to run his business and to live within my revenue.

The statement came from a progressive, not a conservative. It came 85 years ago. And it came from New York Mayor Fiorello La Guardia.<sup>1</sup>

Much of the criticism of the government contends that government would be better if it were run more like a business, that it brought more accountability to employees, and that the key to improving accountability is to make it easier to fire poor performers. As Rep. Mike Bost has said in support of this legislation, “In order to best serve veterans, the VA Secretary must have the authority to quickly and

<sup>1</sup> Quoted by Philip Bump, “Trump’s idea to run the government like a business is an old one in American politics,” *Washington Post* (March 27, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/03/27/trumps-idea-to-run-the-government-like-a-business-is-an-old-one-in-american-politics/>

fairly remove, demote, or suspend bad employees who are undermining the quality of services that our veterans have earned.”<sup>2</sup>

This, however, is not how the best managers manage in the private sector. For example, Paul Zak in the *Harvard Business Review* concluded, based on extensive research, that the keys to effective management are “setting a clear direction, giving people what they need to see it through, and then getting out of their way. In short, to boost engagement, treat people like responsible adults.”<sup>3</sup>

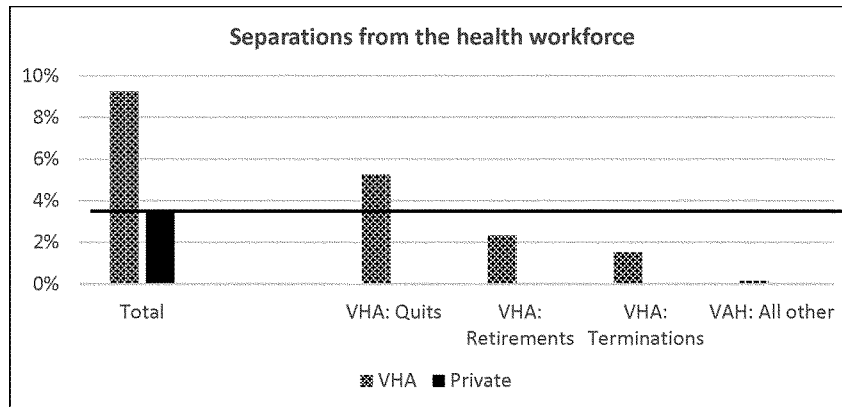
Moreover, if a manager is concerned about the performance of a subordinate, Rebecca Knight wrote in the *Harvard Business Review* that it is essential to consider the root cause of an employee’s problems, seek input from trusted employees, be transparent with the employee and provide an opportunity to improve, consult closely with the human resources team, and focus on three or four areas an employee needs to work on.<sup>4</sup> There is no basic guide to good business management that elevates firing employees to the first level of action.

Firing is a symptom of bad hiring.

**There’s no evidence that the rate of firing in the VA is lower than in the private sector—in fact, it’s probably significantly higher**

The underlying assumption of H.R. 4278 is that the VA needs to operate more like the private sector and that the key to doing so is firing poor performers. But how do the VA’s personnel practices compare with the private health industry?

A precise comparison across the federal and private sectors is impossible because the U.S. Bureau of Labor Statistics does not tabulate its statistics in that way. However, the following figure provides a very useful comparison, based on BLS data (for the private sector) and the U.S. Office of Personnel Management’s FedScope (for the VA’s Veterans Health Administration).



Source: U.S. Bureau of Labor Statistics, Economic News Release: *Table 3—Total Separations Levels and Rates by Industry* (May 31, 2023), <https://www.bls.gov/news.release/jolts.t03.htm>; and U.S. Office of Personnel Management, *FedScope*, <http://bit.ly/444DGdo>

The comparison between the Veterans Health Administration and the entire healthcare industry shows that:

- Separations from the VHA are *2.6 times higher* than in the healthcare industry overall.
- The rate of employees who quit the VHA is *1.5 times higher than the total separation rate* in the healthcare industry overall.

<sup>2</sup>Quoted by Ripon Advance News Service, “Bost, Moran unveil Restore Department of Veterans Affairs Accountability Act,” *The Ripon Advantage* (July 7, 2023), <https://riponadvance.com/stories/bost-moran-unveil-restore-department-of-veterans-affairs-accountability-act/>

<sup>3</sup>Paul J. Zak, “The Neuroscience of Trust,” *Harvard Business Review* (January-February 2017), <https://hbr.org/2017/01/the-neuroscience-of-trust>

<sup>4</sup>Rebecca Knight, “How to Decide Whether to Fire Someone,” *Harvard Business Review* (January 28, 2019), <https://hbr.org/2019/01/how-to-decide-whether-to-fire-someone>

- The rate of terminations for cause in the VHA is 43 percent of the total separation rate in the entire healthcare industry. We don't know the rate of firing for cause in the private sector. But especially given the severe personnel shortages in the overall healthcare industry, it is certain that private healthcare employers are seeing a very large turnover rate as well. It's a very good bet that nearly half of the separations in the private industry are *not* firings for poor performance.

**The health industry is struggling with a manpower crisis—and no expert thinks that the best way to address the problem is to fire more employees**

In a March analysis of the industry, Margaret Lindquist at Oracle found, “Staffing tops the list of healthcare industry challenges” in 2023. She continued, “Workers retired due to burnout or went to work for organizations offering higher pay or better work-life balance.” The result was “substandard patient care” and “lower morale.”<sup>5</sup>

To solve the problem, “organizations must first improve employee well-being.” Five steps, Oracle concluded, show the way:

1. Be intentional when hiring
2. Offer flexible work schedules
3. Prioritize onboarding and training
4. Provide career development and continuing education
5. Improve technology

A thorough analysis of the situation led to a clear conclusion: organizations “need to do all they can to keep people engaged and happy in their working lives.”<sup>6</sup>

In a global study of performance challenges in the healthcare industry, McKinsey, the international consulting firm, found that a toxic workplace culture was the biggest single predictor of turnover during the “Great Attrition” in the early 2020s—ten times more important, in fact, than compensation.<sup>7</sup>

McKinsey pointed to the importance of “solving the right problem.” That is not what H.R. 4278 does.

The single-minded focus on firing in the “VA Accountability and Whistleblower Protection Act of 2017” set the department down the wrong road, as the VA’s Office of Inspector General found. In fact, the office charged with implementing the act “leaders made avoidable mistakes early in its development that created an office culture that was sometimes alienating to the very individuals it was meant to protect.”<sup>8</sup> The VA stumbled in the act’s implementation because it misinterpreted its statutory authority, pursued inconsistent and biased reviews, and failed to follow policies that produced sound decisions.

The VA is struggling with many of the same human capital issues as the rest of the healthcare industry although, as the figure above shows, the problems in the VA are larger, especially with a high rate of turnover. McKinsey has this recommendation:

Employers can and should view high rates of burnout as a powerful warning sign that the organization—not the individuals in the workforce—needs to undergo meaningful systematic change.<sup>9</sup>

The implications for the VA are powerfully clear. If there is a problem of high turnover—and the VHA’s turnover is far higher than in the rest of the healthcare industry—performance problems are inevitable. The key to solving these problems is to lead fundamental strategies for systemic change. Focusing on firing individuals aims at the wrong problem and is sure to make things worse. The evidence, from experts in the US and around the world, simply could not be clearer on this point.

<sup>5</sup> Margaret Lindquist, “The Real Costs of Healthcare Staff Turnover,” Oracle (March 22, 2023), <https://www.oracle.com/human-capital-management/cost-employee-turnover-healthcare#:~:text=In%20This%20Article&text=It's%20no%20wonder%3A%20Hospital%20staff,burden%20on%20finances%20and%20resources>.

<sup>6</sup> *Ibid.*

<sup>7</sup> McKinsey & Company, “Addressing employee burnout: Are you solving the right problem?” (May 27, 2022), <https://www.mckinsey.com/mhi/our-insights/addressing-employee-burnout-are-you-solving-the-right-problem>

<sup>8</sup> Office of Inspector General, U.S. Department of Veterans Affairs, *Office of Accountability and Whistleblower Protection: Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017*, Report #18-04968-249 (October 24, 2019), ii, <https://www.va.gov/oig/pubs/VAOIG-18-04968-249.pdf>.

<sup>9</sup> McKinsey, “Addressing Employee Burnout.”

### **The act would destabilize the VA, which would only erode its performance**

There was a time in the 1990's when experts hailed the VA as one of the most-improved agencies in the entire Federal Government.<sup>10</sup> In 2014, however, efforts to hide long wait times for VA appointments produced a national scandal. The department has been struggling for nearly a decade to find its footing.

No organization can right itself when it's whipsawed by a shifting legal foundation. That, sadly, is just what happened with the hurried implementation of the "VA Accountability and Whistleblower Protection Act of 2017." The proposed legislation would create even more instability.

The VA's Inspector General in 2019 found:

. . . in its first two years of operation, the OAWP [Office of Accountability and Whistleblower Protection] acted in ways that were inconsistent with its statutory authority while it simultaneously foundered in its mission to protect whistleblowers. Even recognizing that organizing the operations of any new office is challenging, OAWP leaders made avoidable mistakes early in its development that created an office culture that was sometimes alienating to the very individuals it was meant to protect. Those leadership failures distracted the OAWP from its core mission and likely diminished the desired confidence of whistleblowers and other potential complainants in the operations of the office.<sup>11</sup>

Creating yet more instability, especially through the process envisioned in H.R. 4278, would only disrupt the ongoing effort to improve the VA's management and pull the department's strategy further out of sync with best management practices.

Moreover, the VA doesn't actually need more authority to fire poor performers. As FactCheck.org found in 2018, "it was already possible for workers to be relieved of their duties" before the legislation passed in 2017.<sup>12</sup> What the VA does need is a steady platform on which to manage the department in the interest of the veterans—and managers with the strategy and support to manage well.

Anyone who has ever tried to navigate a boat rolling in heavy seas knows just how hard it is to move effectively if the deck is constantly shifting underneath.

### **Good management is impossible to legislate—it's a people process**

For at least the last forty years, governments around the world have developed a laser-sharp focus on how best to improve their performance. Two conclusions come from this effort.

First, no government anywhere has made firing employees any significant part of its strategy.

Second, no government anywhere has been successful in legislating good management. For example, New Zealand's government management reforms focused on "making the managers manage." The noted public management expert Tom Christensen found instead that "the country has got the worst of both worlds—i.e., poor management and too little political control."<sup>13</sup> To correct those problems, New Zealand shifted its management strategy to provide managers with more flexibility and to focus on achieving outcomes.

Management in general—and the management of people in particular—is an intricate process that requires deft interpersonal skills and strong political support. The proposed legislation erodes them both, in the quest for strategies that either have been rejected elsewhere or that have been tried but failed.

### **There are better alternatives for improving the VA's performance**

The National Academy of Public Administration has developed a game plan for improving the government's performance by improving its people systems. (This is an effort to which I've contributed.) The strategies and tactics laid out in its recommendations suggest a far better approach.<sup>14</sup>

<sup>10</sup> Charles S. Clark, "Reinventing Government—Two Decades Later," GovExec.com (April 26, 2013), <https://www.govexec.com/management/2013/04/what-reinvention-wrought/62836/>

<sup>11</sup> Office of Inspector General, Office of Accountability and Whistleblower Protection, ii.

<sup>12</sup> D'Angelo Gore, "VA Could Fire Workers Before Trump Signed Law," FactCheck.org (July 27, 2018), <https://www.factcheck.org/2018/07/va-could-fire-workers-before-trump-signed-law/>

<sup>13</sup> Tom Christensen, "Administrative Reform: Changing Leadership Roles?" *Governance* 14:4 (October 2001), 473.

<sup>14</sup> National Academy of Public Administration, *No Time To Wait: Building a Public Service for the 21st Century*, Parts 1 and 2 (July 2017 and September 2018), <https://napawash.org/academy-studies/no-time-to-wait-part-2-building-a-public-service-for-the-21st-century>; and "From Academy Fellows: Proposals to Modernize and Revitalize the Federal Civil Service" (February 27, 2023), <https://napawash.org/standing-panel-blog/no-time-to-wait-3-the-challenge-of-modernizing-the-civil-service-2>



- *Make mission matter most.* The foundation of the VA, as is the case for all government agencies, is its mission. The VA's motto puts it clearly: "To fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors."
- *Move from a culture of compliance to performance.* Process, especially the process of firing employees, should not overtake a commitment to results.
- *Focus on employees' competencies, not pigeon-holed siloes.* The changing nature of work calls on smart leaders to build teams of effective managers who use their tools to produce strong outcomes.
- *Focus on fit.* Many issues that appear to be matters of poor performance are often the product of a poor fit of an employee with the job. Improving both human capital planning—to understand the needs of a position—and hiring—to match prospective employees with that position—are far more important than concentrating on firing "poor performers."
- *Accountability builds on performance.* An effective twenty-first-century government needs to shift its model of accountability to discovering how best to accomplish its mission.
- *Be flexible, test results, and adopt what works.* Government management needs to provide managers with the flexibility to manage—but to assess carefully what that flexibility produces, discard what doesn't, and do more of what works. This, in fact, ought to be the new driver of accountability.
- *Focus more attention on hiring, not firing.* The key to developing the most effective workforce lies in hiring well, by identifying the skills that the agency needs to accomplish its mission and working aggressively to find the employees who best fit the bill.
- *Address poor performance problems during the probationary period.* Allowing new employees to drift through the probationary period without guidance and then concluding later that they are performing poorly is bad management. Accountability comes from addressing performance early and not firing later.
- *Create more flexible off-ramps.* It is far better to help employees who aren't a good match for an organization to find better opportunities rather than to fire them precipitously. A focus on firing creates morale problems percolating throughout an organization. Managing government more like a business means creating the authority to use private-sector tools like providing severance packages. That's the approach of leading private companies, where their human resource managers agree that it's better—for everyone—to encourage poor performers to resign rather than to fire them.<sup>15</sup>

## Conclusion

An expedited removal, demotion, or suspension authority neither fits the best practices for accomplishing the VA's mission nor serves the needs of the nation's veterans. The nation's overall healthcare environment is experiencing the biggest challenges in a generation. The federal government's policymakers have an inescapable imperative to help the VA tackle these challenges "to care for those who have served."

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<sup>15</sup>Paul Bergeron, "Resign or Be Fired: Which Is Best?" (Society for Human Resource Management, July 14, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/organizational-and-employee-development/pages/resign-or-be-fired-which-is-best.aspx>

**Prepared Statement of National Federation of Federal Employees**

Statement for the Record  
*from the*  
National Federation of Federal Employees, IAMAW  
*for the*  
Subcommittee on Oversight and Investigations  
Committee on Veterans Affairs  
U.S. House of Representatives  
*Hearing on Pending Legislation*

July 12, 2023

Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee:

The National Federation of Federal Employees (NFFE), America's oldest federal employee union, appreciates the opportunity to submit this statement for the record regarding pending legislation before the Committee at today's hearing. NFFE represents a diverse population of employees at the U.S. Department of Veterans Affairs (VA), to include the Veterans Health Administration (VHA), that includes medical and health care professionals, and additional staff to include administrative, technical, support, and public safety personnel.

Many VA employees are veterans themselves who view their service to helping veterans at the VA and VHA as a continuation of their own service, now dedicated to fulfilling a promise to care for those who spent their lives defending and protecting the United States. The business of the Committee today will impact the lives and livelihoods of these veteran employees, and it will impact the ability of all VA/VHA staff to provide the best care possible for our nation's veterans.

**The Failed VA Accountability and Whistleblower Protection Act of 2017**

In 2017, Congress passed the *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017* (herein referred to as "the Act") that, ironically, gutted federal workforce systematic protections and regulations that guard against poor management, political overreach, and unfair labor practices. The Act also created the notoriously corrupt Office of Accountability and Whistleblower Protections (OAWP) that was investigated by both the VA Office of Inspector

General (VA OIG) and the Government Accountability Office (GAO). Findings from those investigations ranged from the consistent ineffectiveness of OAWP staff and leaders to perform their jobs properly, to OAWP staff and leaders committing regular and blatant violations of the laws and regulations that govern unbiased due process, ultimately causing failures of OAWP to act against claims of retaliation and improper actions by VA managers.

The momentous findings by the VA OIG (Report #18-04968-249) and the GAO (Report #GAO-18-137) investigations were further confirmed through federal court and independent agency decisions that invalidated many of the provisions of the original bill. These decisions were grounded in reasoning that ranged from unsound legal concepts within the law, to violations of case law and merit principles that protect the VA workforce and its veteran-patients from improper or inept practices and internal policies. Now, with the introduction of H.R. 4278, the “Restore VA Accountability Act,” it seems that all lessons learned are lost, as proponents of the bill try again to create an environment of fear and clouded transparency at all levels of staff and employees at the VA and VHA, including personnel with no direct contact with patients.

**Why VA Accountability and Whistleblower Protection Act of 2017 Failed, and Why the Restore VA Accountability Act will also Fail**

There are a variety of reasons why the VA Accountability and Whistleblower Protection Act failed, and why the Restore the Accountability Act will also fail, but a few in particular are the clearest. First, this Act lowered the burden of proof for misconduct from “preponderance of the evidence” to “substantial evidence”. To put this in perspective, the evidence may show that there is a less than 1% chance that a worker did what they are being disciplined for, yet the Act could still be upheld.

Ridiculous by its very nature, this flagrant violation of the most basic legal principles opens the door to biased actions from managers and executives who seek retaliation or retribution against doctors, nurses, and other professionals and staff for questioning the policies and procedures that directly affect the success of veteran care. It continues to astound NFFE and the whistleblower community in general that such an unsophisticated requirement for adverse action is operational

anywhere in government, especially for positions that directly affect the lives and wellness of veterans.

This Act also erodes collective bargaining rights by arbitrarily shortening the timelines for grievances, allowing a restricted and often unrealistic amount of time to prepare for such proceedings. Like the lowering of the evidentiary standard, this artificial requirement also invites management impropriety under adverse actions against innocent employees.

The Act continues to violate commonly accepted legal practices by illogically shortening the timelines for appeals to the Merit Systems Protection Board (MSPB). For a lack of any legitimate reason, the purpose of the shortened timeline can only serve to obstruct generally accepted practices for legal discovery and preparation. The argument offered by the Act's proponents that this is a necessary step to speed the firing or discipline of employees is unfounded within legal academia.

Furthermore, the assault on legitimate due process continues more by eliminating the ability of an MSPB administrative judge to mitigate a penalty proposed by the agency, placing a bizarre and unparalleled restriction on the authority of an independent oversight agency to intervene and ensure that management and leadership do not act inappropriately nor, in the case of the VA and VHA, take any action that can contribute to the endangerment or deterioration of veteran care.

Most notoriously, the Act created an internal review board for disciplinary actions headed by a political appointee without any required expertise in the adjudication or evaluation of the appeals process within the federal workforce, or basic knowledge of the law. The relaxed requirement for such a position is telling, and the design of the office and its self-generated appraisal of its own virtue is a thinly veiled attempt to dilute legitimate due process and diminish the laws, regulations, and rules that keep government transparent, efficient, and effective.

**Time to Consider Disbanding the Failed VA Office of Accountability and Whistleblower Protections (OAWP)**

The office has a history of failings that wrongfully allowed the termination of dedicated, honest VA and VHA staff, and caused the voluntary resignations of highly trained professional staff who lost faith a system that left them vulnerable to irreparable damage to their professional reputations and careers. These separations come at a time when thousands of VA positions remain vacant, and at a time when VA/VHA care is rated at or higher than care provided in the private sector. Consider the following:

- **VA OIG Report #18-04968-249.** An overall lack of training, guidance, and rules has contributed to OAWP falling short in many ways. VA OIG conducted an investigation into these shortcomings and found that within the first two years of operation, OAWP was incredibly inconsistent both with executing proper authority and protecting whistleblowers. The investigation states that, “OAWP leaders made avoidable mistakes early in its development that created an office culture that was sometimes alienating to the very individuals it was meant to protect.” The investigation continued on to say that these failures likely contributed to whistleblowers feeling comfortable with coming forward and a general hesitation to file a complaint within the office.

The lack of guidance given to OAWP early on continues to have negative effects on those involved. From the beginning, this office was staffed with Human Resources Specialists who were inadequately trained for the job, and therefore were unaware of the proper procedures when interviewing witnesses or conducting other parts of an investigation. Even taking into consideration the trials and errors that may come with the induction of a new office, the VA OIG report states that, “Failure to put in place key systems and quality controls has resulted in OAWP conducting investigations that were not always thorough, objective, and unbiased—undermining OAWP’s credibility among some VA employees.”

- **GAO Report #GAO-18-13.** Although OAWP was intended to track misconduct and disciplinary actions against VA employees, the introduction of the office may have caused the opposite to occur. A 2019 report from the Government Accountability Office (GAO) states that OAWP has a habit of disregarding appropriate investigation procedures. For example, they have allowed VA employees at the receiving end of allegations from

whistleblowers to participate in investigations. Not only is this a conflict of interest, but it can cause confusion and bring discomfort upon the whistleblower. Additionally, OAWP stated that there is a process to ensure the safety of whistleblower protections, however, the process was not revealed.

OAWP failures are consistent because of the flawed law that originally authorized the office into existence, and no evidence exists to suggest that the “fix” bill—the Restore the VA Accountability Act—will provide any relief from the mismanagement, corruption, and political overreach provided by OAWP over the years. There is no substitute for the independent oversight provided by the MSPB, the Office of Special Counsel (OSC), the Federal Labor Relations Authority (FLRA), and the Equal Employment Opportunity Commission (EEOC). It is critical that VA employees have direct access to these anti-corruption, anti-impropriety tribunals established within the federal government to promote a fair, efficient, and effective government.

#### **VA/VHA Employees are Disciplined and Terminated at Rates Comparable to the Rest of Government and the Private Sector**

A common falsehood often told by some on Capitol Hill is that federal employees are “impossible” to fire. Each year, approximately 10,000 Federal employees are terminated for cause (conduct or poor performance)<sup>i</sup>. This equates to approximately 40 involuntary terminations for cause per workday. The federal employee termination rate for cause is the same as the private sector. The involuntary separations (terminations) rate in the private sector is 1% annually<sup>ii</sup>. Of that 1%, about one-third are terminations for cause and two-thirds are layoffs<sup>iii</sup>. This means that the termination rate for cause in the private sector is .3%. The Federal government’s termination rate for cause is also .3%.<sup>iv</sup>

Detractors claim that Merit System Principles and the federal oversight agencies (MSPB, FLRA, OSC, EEOC) hinder the firing of poor performers or conduct. They claim federal unions do the same. Clearly this is false. Merit System Principles buttress accountability throughout the government by deterring political overreach, corruption, poor management, and unfair practices. Federal employees prevail only 18% of the time at the MSPB and only 3% of the time upon appeal

to the full board. Management prevails 60% of the time against unions at the FLRA. Cases involving VA/VHA employees are no different.

The oversight agencies external to the VA do not interfere with the timeliness or ability to discipline or terminate for performance or conduct. However, they are an extremely important part of the systematic protections that guard against corruption and malfeasance within government, as demonstrated by the investigations against OAWP. Given this, there is no legitimate reason to create and retain an internal tribunal within the VA to handle employee appeals for poor performance or conduct. This is especially true when the internal office of review, as is the OAWP, has the proven record of failings that cast a negative impact on VA/VHA operations and veteran care. This will worsen under the proposed Restore VA Accountability Act as it aims to reduce further basic legal principles, such as the proposal to eliminate seven of the twelve Douglass Factors that serve to maintain consistency and honesty in deliberations. There is no better proof of corrupt intent than this.

#### **Support for HR 3504, VA Medical Center Security Report Act of 2023**

The National Federation of Federal Employees thanks Chairman Kiggans (R-VA) and Representative Pappas (D-NH) for introducing the VA Medical Security Report Act of 2023 to call attention to a growing safety and security crisis within the VA. For too long, our VA police officers have been treated like second-class law enforcement officers, constantly asked to do more with less while continually losing talent to area police departments who leave for better opportunities. More can be done to help our VA police officers identify and manage the unique challenges of providing a safe and secure environment in which to care for our veterans. This legislation will provide a foundation for that to happen. NFFE recommends that the Committee consider expanding the purview of the report to include other components of the VA, including outpatient clinics, regional offices, National Cemetery Administration facilities, and other executive function VA and VHA offices.

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<sup>i</sup> Office, U. S. G. A. (n.d.), *Federal employee misconduct: Actions needed to ensure agencies have tools to effectively address misconduct*. Federal Employee Misconduct: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct | U.S. GAO. <https://www.gao.gov/products/gao-18-48>

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<sup>ii</sup> U.S. Bureau of Labor Statistics. (2023, May 31). *Table 5. layoffs and discharges levels and rates by industry and region, seasonally adjusted - 2023 M04 results*. U.S. Bureau of Labor Statistics. <https://www.bls.gov/news.release/jolts.t05.htm>

<sup>iii</sup> Trevor, C., & Piyanontalee, R. (n.d.). *Discharges, poor-performer quits, and layoffs as valued exits: Is it ...* Annual Reviews. <https://www.annualreviews.org/doi/10.1146/annurev-orgpsych-012119-045343>



**Prepared Statement of Partnership or Public Service**



**Max Stier  
President and CEO  
Partnership for Public Service**

Written statement for the record prepared for

**The House Veterans Affairs Committee  
Subcommittee on Oversight and Investigations**

**Hearing on Pending Legislation**

July 12<sup>th</sup>, 2023

Chairwoman Kiggans, Ranking Member Mrvan, and members of the House Committee on Veterans' Affairs, Subcommittee on Oversight and Investigations, thank you for the opportunity to share the Partnership for Public Service's views on H.R. 4278, the Restore VA Accountability Act.

The Partnership for Public Service is a nonpartisan, nonprofit organization that works to revitalize our federal government by helping it attract mission-critical talent, engage employees, modernize its management systems, develop effective leaders, and deliver a high-performing and accountable government.

Over the years I have had the privilege of addressing this committee on issues surrounding leadership development, recruiting and retaining a worldclass workforce, and modernizing talent and performance management to ensure an accountable, effective system at the Department of Veterans Affairs (VA). I commend the subcommittee for continuing to identify ways to help VA best meet its mission and deliver strong services to veterans and their families.

The VA has made great strides in strengthening management practices since the department was rocked by several scandals roughly a decade ago, yet there is more work to be done. While the Partnership had concerns about the procedures for removal included in the VA Accountability and Whistleblower Protection Act, we also worked on a bipartisan basis with the House and Senate Veterans Affairs committees to help enact strong management provisions in that law as well as in the VA Choice and Quality Employment Act. New tools that the Partnership championed included direct hire authority for medical center and Veterans Integrated Service Network (VISN) directors, a VA Executive Management Fellowship Program, required performance plans for political appointees, a provision allowing for easier hiring of former employees, and training for VA human resource professionals. The extent to which these tools have been implemented and evaluated for outcomes is unclear, though. I encourage the committee to work with VA to ensure that these laws are put into practice and that additional barriers to strong management and leadership are addressed.

I understand the committee's continued focus on dealing with poor performers, and it is imperative that they are held accountable and that necessary actions are taken. One of the merit principles – the core values of the civil service which are enshrined in law – is that employees who cannot or will not improve their performance to meet standards should be separated.<sup>1</sup> In this statement I will describe some options the committee should consider for dealing with poor performers and other ideas for creating strong employee performance, which is crucial to providing effective service for veterans. I encourage the committee to focus on the entirety of employee accountability – from skills-based hiring, to developing employees and training managers, to modernizing the systems that allow employees to effectively work across the enterprise. These elements are critical to a high-performing organization and are all critical parts of accountability.

The VA has an important mission – to provide benefits and support to veterans and their families. I am encouraged by the work the agency has done to improve veterans' experiences with the services VA provides. This focus by VA on the customer experience is meaningful, and the committee should identify and promote ways to accelerate and scale the customer experience work across the VA to streamline processes and make it easier for employees to serve veterans. Improving the VA's customer experience

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<sup>1</sup> 5 U.S.C. § 2301(b)(6).

infrastructure, including defining expectations of federal employees, will help drive accountability and outcomes across the agency.

**Perspective on H.R. 4278 and the current employee accountability system.**

There are several possible reforms that could improve the balance between efficiency and due process in VA removal actions. However, in its pursuit of greater efficiency, H.R. 4278 builds upon the same approach from the 2017 VA Accountability and Whistleblower Protection Act with which the Partnership expressed concern at the time. Specifically, H.R. 4278 continues to erode and eliminate the role of third-party, independent executive review by the Merit Systems Protection Board (MSPB). This approach unnecessarily compromises due process for line employees while *reducing* accountability for senior executives and political leaders during removal proceedings. The Partnership also believes that the bill's removal of 10 of the 12 so-called Douglas factors (which are factors laid out by MSPB that must be considered when determining employee punishment) is unnecessary. Additionally, the bill's provisions providing for retroactivity of the new procedures are likely to tie the VA up in extensive litigation, diverting resources and attention from other urgent needs of the department.

Independent review of removal decisions from outside the agency helps hold leadership accountable for overseeing their workforce effectively and for avoiding prohibited personnel practices. Survey data available from the MSPB shows that, throughout the government, supervisors themselves overwhelmingly agree that employees deserve protection from managers who make mistakes or act in bad faith during removal proceedings.<sup>2</sup> MSPB appeal rights provide such independent protections. Moreover, MSPB review also provides deterrence against unmerited removal proceedings, as indicated by the fact that agency removal decisions are upheld in the vast majority of cases.

H.R. 4278 moves away from this procedural accountability by removing MSPB review and vesting final decision-making authority on adverse personnel actions with the Secretary. Elsewhere, this approach has not been successful in increasing accountability throughout an agency. For example, the Transportation Security Administration (TSA) initially used a completely internal removal process with no third-party review. However, a Government Accountability Office report from 2013 found that the TSA investigations and adjudications process had procedural weaknesses that were impairing transparency and potentially compromising uniformity,<sup>3</sup> leading some to believe that the TSA was administering arbitrary punishments.<sup>4</sup> The TSA has moved away from the completely internal approach, and recently granted appeal rights at the MSPB to all Transportation Security Officers.<sup>5</sup>

<sup>2</sup> Off. of Pol'y & Evaluation, *Addressing Misconduct in the Federal Service: Management Perspectives*, U.S. Merit Sys. Prot. Bd. 3 (Dec. 2016), [https://www.mspb.gov/studies/researchbriefs/Addressing\\_Misconduct\\_in\\_the\\_Federal\\_Civil\\_Service\\_Management\\_Perspectives\\_1363799.pdf](https://www.mspb.gov/studies/researchbriefs/Addressing_Misconduct_in_the_Federal_Civil_Service_Management_Perspectives_1363799.pdf).

<sup>3</sup> U.S. Gov't Accountability Off., GAO-13-624, *Transportation Security: TSA Could Strengthen Monitoring of Allegations of Employee Misconduct* 22 (2013).

<sup>4</sup> *TSA Integrity Challenges: Examining Misconduct by Airport Security Personnel: Joint Hearing Before the Subcomm. on Oversight and Mgmt. Efficiency and the Subcomm. on Transp. Security of the H. Comm. on Homeland Sec.*, 113th Cong. 11 (2013) (statement of Rep. Cedric L. Richmond, Ranking Member, Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec.) (available at <https://www.govinfo.gov/content/pkg/CHRG-113hhrg86032/html/CHRG-113hhrg86032.htm>).

<sup>5</sup> James P. Garay Heelan, *TSA Gives Screening Personnel MSPB Appeal Rights*, Fed Manager (Oct. 5, 2021), <https://fedmanager.com/news/tsa-gives-screening-personnel-mspb-appeal-rights>.

While H.R. 4278 does allow employees to appeal adverse removal decisions in federal court, that option can be costly and time-consuming for both employees and agencies. Obtaining MSPB review is a straightforward process for employees, and since 2018, the average appeal processing time has consistently been between three and three and a half months.<sup>6</sup> On the other hand, obtaining an attorney for federal court can be prohibitively expensive for some federal employees, and federal court cases can drag on for long periods of time.

There are certainly ways to continue reforming due process procedures to streamline removal proceedings and the Partnership looks forward to working with you to identify these changes. Moreover, we must work to overcome other major barriers to removal – namely agency cultures where it is assumed that it is difficult to fire employees and a lack of adequate training and resources for managers and supervisors on how to discipline or fire an employee.<sup>7</sup>

**VA data trends highlight strides to greater management accountability and employee engagement along with improved veterans experience.**

Over the past decade, and across administrations of both parties, the VA has increased expectations for its leaders and employees at all levels to focus on customer experience to drive improved services for veterans. I encourage the committee, and the agency, to focus on increasing tools to further this work, and ensuring that the employee accountability process supports, rather than unintentionally hinders, forward progress.

Data from the Partnership's the [Best Places to Work in the Federal Government rankings](#),<sup>8</sup> based on the Office of Personnel Management's [Federal Employee Viewpoint Survey \(FEVS\)](#) and other agency-administered surveys, highlights workforce trends across the government.<sup>9</sup> Since 2018, the VA has administered its own employee survey, the VA All Employee Survey, to collect data. We utilize data from the VA's internal survey when analyzing trends for the Department. The trends for most of the survey data are headed in the right direction, meaning the employee experience is improving overall at the VA. The Department of Veterans Affairs [ranked fifth this year](#) out of all large agencies for the overall Best Places to Work rankings.<sup>10</sup> By contrast, in 2014, VA's index score was 54.6 out of 100, its lowest level since the Partnership began the rankings in 2003, and VA ranked 18 out of 19 large agencies in employee satisfaction.<sup>11</sup>

<sup>6</sup> *Annual Performance Report (APR) for Fiscal Year (FY) 2022 and Annual Performance Plan (APP) for FY 2023 (Final) & FY 2024 (Proposed)*, U.S. Merit Sys. Protection Bd., [https://www.mspb.gov/about/annual\\_reports/MSPB\\_APR\\_APP\\_for\\_FY\\_2022\\_2024\\_2010982.pdf](https://www.mspb.gov/about/annual_reports/MSPB_APR_APP_for_FY_2022_2024_2010982.pdf).

<sup>7</sup> Off. of Pol'y & Evaluation, *Remedying Unacceptable Employee Performance in the Federal Civil Service*, U.S. Merit Sys. Prot. Bd. 15 (June 18, 2019), [https://www.mspb.gov/studies/researchbriefs/Remedying\\_Unacceptable\\_Employee\\_Performance\\_in\\_the\\_Federal\\_Civil\\_Service\\_1627610.pdf](https://www.mspb.gov/studies/researchbriefs/Remedying_Unacceptable_Employee_Performance_in_the_Federal_Civil_Service_1627610.pdf).

<sup>8</sup> *2022 Best Places to Work in the Federal Government*, P'ship for Pub. Serv., <https://bestplacestowork.org/>.

<sup>9</sup> Off. of Pers. Mgmt., *Federal Employee Viewpoint Survey Results (2022)*, <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2022/2022-governmentwide-management-report.pdf>.

<sup>10</sup> *2022 Best Places to Work in the Federal Government*, P'ship for Pub. Serv., <https://bestplacestowork.org/>.

<sup>11</sup> *Ibid.*

This improvement is important because an engaged workforce is more productive and provides better customer service.

The following are additional points of data, both from OPM's FEVS and the VA's own condensed survey, [the VA All Employee Survey](#), that provide an encouraging picture of management changes at the agency.<sup>12</sup>

- In response to the question, "I can disclose a suspected violation of any law, rule or regulation without fear of reprisal," the number of positive responses ("good" or "very good") has steadily increased every year, with 68% of employees affirming the question in 2020, 69% in 2021, and 70% in 2022.<sup>13</sup>
- For the question, "Overall, how good a job do you feel is being done by your immediate supervisor?," 76% responded affirmatively in 2020, 78% in 2021, and 78% in 2022.<sup>14</sup>
- With the question, "In my work unit, differences in performance are recognized in a meaningful way," 53% of respondents answered affirmatively in 2020, 54% in 2021, and 55% in 2022.<sup>15</sup>
- The VA is also trending higher in some areas than the government as a whole. In the question, "Considering everything, how satisfied are you with your job?," the VA-specific affirmative response was 69%,<sup>16</sup> while the government-wide affirmative response to this question in 2022 was just 66%.<sup>17</sup>

We also recommend that the committee engage the secretary and the department's staff to recognize the innovative work the VA civil servants are doing, and how those lessons learned from their success can be applied across the department. The Partnership's [Samuel J. Heyman Service to America Medals \(Sammies\) program has recognized many VA employees for their groundbreaking work](#).<sup>18</sup> From using virtual reality and immersive technologies to treat veterans for medical issues such as anxiety and depression, to building a customer-oriented culture of service delivery that is responsive to the needs of veterans and their families, the stories from our Sammies finalists and winners demonstrate that the VA's employees are driving results across the organization.

One area where the VA has been particularly effective is in the work to improve customer experience (CX) for veterans and their families. Our [research](#) has shown that positive employee experiences in the federal government lead to better customer experience.<sup>19</sup> The Partnership has released several reports

<sup>12</sup> *VA All Employee Survey*, U.S. Dep't of Veterans Affs., <https://www.datahub.va.gov/stories/s/VA-All-Employee-Survey-AES-r32e-i4vj>.

<sup>13</sup> *Ibid.* (AES-FEVS Percents Public Data Reports for years 2020, 2021, and 2022).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Off. of Pers. Mgmt., *Federal Employee Viewpoint Survey Results 20 (2022)*, <https://www.opm.gov/fevs/reports/governmentwide-reports/governmentwide-reports/governmentwide-management-report/2022/2022-governmentwide-management-report.pdf>.

<sup>18</sup> *Samuel J. Heyman Service to America Medals: Honorees*, P'ship for Pub. Serv., [https://servicetoamericamedals.org/honorees/?\\_agency=department-of-veterans-affairs](https://servicetoamericamedals.org/honorees/?_agency=department-of-veterans-affairs) (filtered for honorees from the Department of Veterans Affairs).

<sup>19</sup> *A Prescription for Better Performance: Engaging Employees at VA Medical Centers*, P'ship for Pub. Serv. & Bos. Consulting Grp. 1 (Mar. 2019), [https://ourpublicservice.org/wp-content/uploads/2019/03/BPTW18\\_VA-issue-brief.pdf](https://ourpublicservice.org/wp-content/uploads/2019/03/BPTW18_VA-issue-brief.pdf).

over the years that examine this relationship, as well as the overall health of the VA's workforce and CX infrastructure.

The VA [addressed](#) low employee engagement at several health centers by creating leadership development and training opportunities, using employee feedback to connect employees to the mission, and recognizing high performers.<sup>20</sup> These low cost, talent-focused efforts [led](#) to improved patient satisfaction, a decline in turnover of registered nurses, and increased call center answer speed.<sup>21</sup>

The VA's dedicated workforce has also improved its ability to provide a wide array of services for veterans and their families through modernization efforts. During the pandemic, the Veterans Benefits Administration [made it easier for veterans to receive information](#) about their eligibility and benefits by using texts and other mobile device applications.<sup>22</sup> By collecting and learning from [customer feedback](#), the Veteran Health Administration identified various pain points when veterans navigated VHA services, allowing the VHA to understand and decrease specific barriers customers faced when accessing VHA services.<sup>23</sup>

In addition to highlighting success, our reports also recommend a variety of actions the department and Congress can take to ensure the VA continues to meet its mission. Adopting these recommendations would help the VA continue to build a user-centric mindset and establish accountability across every function. Some of these recommendations include:

- Congress and the VA should work together to promote the use of [human-centered designs](#) by making it easier for the agency to collect, learn from and incorporate veteran experiences in service and program designs, which would improve customer experiences.<sup>24</sup>
- Congress should [support the VA's workforce health](#) by streamlining hiring and recruitment for CX-focused talent, prioritizing positions that execute CX projects, such as public-engagement specialists and digital service designers, and data managers, which will increase the VA's ability to serve veterans effectively.<sup>25</sup>
- The VA should [create opportunities for professional development](#), such as CX training, promoting cross-government rotations, and other opportunities to develop skills, which can help improve employee engagement.<sup>26</sup>

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<sup>20</sup> *Ibid.* at 3.

<sup>21</sup> *Ibid.* at 1-2.

<sup>22</sup> *Veterans Education and Training Benefits*, P'ship for Pub. Serv. (2021), <https://ourpublicservice.org/our-solutions/customer-experience/v2021/veterans-education-and-training-benefits/>.

<sup>23</sup> *Outpatient Health Care Services for Veterans*, P'ship for Pub. Serv. (2021), <https://ourpublicservice.org/our-solutions/customer-experience/v2021/outpatient-health-care-services-for-veterans/>.

<sup>24</sup> Paul Pietsch & Anthony Vetrano, *The Good Government Connection: Linking the Federal Employee and Customer Experiences*, P'ship for Pub. Serv. (May 18, 2023), <https://ourpublicservice.org/publications/the-good-government-connection/>.

<sup>25</sup> Nadzeya Shutava, Loren DeJonge Schulman, & Sarah Hughes, *Designing a Government for the People: Collaborative Approaches to Federal Customer Experience*, P'ship for Pub. Serv. (Dec. 6, 2022), <https://ourpublicservice.org/publications/designing-a-government-for-the-people/>.

<sup>26</sup> *Ibid.*

- Congress should [support the VA's data and information management](#) by investing in a secure and transparent environment that will reduce administrative burden and ensure the unique needs of all veterans are met.<sup>27</sup>

As recommended in my 2018 letter to the full committee on the state of the VA,<sup>28</sup> the committee should continue to engage with the secretary and the department's staff to understand the conditions that allowed these civil servants to innovate and solve problems, and how those lessons can be applied across the department. As the stories above demonstrate, the VA's employees are a significant asset. Focusing on talent management and enabling strong performance is crucial to building a culture of excellence.

**The scope of accountability must encompass the entire lifecycle of talent management to drive outcomes for veterans.**

Driving reform at the VA must, as a matter of necessity, be a sustained and long-term effort. The VA's work is taking place against a backdrop of an aging population and medical and technical professional shortages across the whole of society, not just VA alone. As noted above, the VA has achieved important successes and made notable improvements strengthening the workforce. While this work is clearly still not complete, we urge the committee to focus on long-term investment and expanded adoption of best practices and approaches that have already been proven to foster meaningful change at the VA.

The culture of accountability and service delivery begins with the people who work at the agency. It is critical to strengthen and streamline the front end of the process – including recruitment and hiring, employee development, data collection, and supervisor training. In 2018, I submitted a written statement to the committee citing several recommendations that remain relevant today.<sup>29</sup> The following derive from the 2018 list and include the areas that continue to be critical to stronger management.

- *Develop and strengthen an enterprise-wide approach to workforce management.* Agency leaders should be responsible for ensuring their agency identifies strategic workforce needs and has a plan in place to meet current and future needs. Executives, along with supervisors and managers, should be held accountable in their performance plans for hiring and developing the next generation of talent. VA also needs to ensure that HR staff and hiring managers are trained in the use of the hiring tools available to them.

The decentralized nature of the organization means data is often not aggregated to provide a complete picture of the state of the organization. Better data about the composition of the workforce and more sophisticated dashboards that offer real-time views of the critical information that enables better management decisions would greatly enhance the department's talent management and use of workforce flexibilities.

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<sup>27</sup> *Ibid.*

<sup>28</sup> *The State of the VA: A 60-Day Report: Hearing Before the S. Comm. on Veterans' Affs.*, 115th Cong. 73 (2018) (statement of Max Stier, President and Chief Executive Officer, Partnership for Public Service) (available at <https://www.veterans.senate.gov/services/files/37C27E61-4069-4CAB-A2DC-DFA9254293E4>).

<sup>29</sup> *More than Just Filling Vacancies: A Closer Look at VA Hiring Authorities, Recruiting, and Retention Before the Subcomm. on Health of the H. Comm. on Veterans' Affs.*, 115th Cong. Appendix (2018) (statement of Max Stier, President and Chief Executive Officer, Partnership for Public Service) (available at <https://docs.house.gov/meetings/VR/VR03/20180621/108430/HRG-115-VR03-Wstate-StierM-20180621.pdf>).

- *Encourage and resource sustained hiring efforts and innovations.* These efforts should include developing, collecting and reporting more comprehensive measures of hiring effectiveness as well as supporting HR in developing robust capacity to recruit, hire and retain employees. The Partnership has previously advocated for expanded collection and reporting requirements for aggregated applicant and hiring data. Given the ongoing concerns about shortages of workforce data raised by GAO and others, the Partnership believes this recommendation remains relevant. Beyond simply looking at vacancies in specific clinical or non-clinical positions, these data would also examine applicant pools, recruiting efforts and manager satisfaction with candidates. The Federal Hiring Process Improvement Act of 2010, introduced by former Senators Daniel Akaka and George Voinovich, includes several measures of hiring effectiveness that could be instructive, as well the data being collected in the hiring assessments and selections dashboard<sup>30</sup> that could be further expanded by the agency and utilized to make strategic hiring decisions. Such data driven planning would allow VA to examine its early career talent needs, including the use of interns and entry-level positions, which the Partnership strongly recommends as a means of building a robust talent pipeline. Providing such detailed information and analysis would make it easier for the committee to target further reforms to the talent management process.

In addition, the work being done currently through OPM to identify qualified candidates through the use of skills-based hiring, technical assessments and pooled hiring can be instructive to VA's efforts. In work spanning the previous and current administrations, OPM has learned valuable lessons that can now start to be scaled. Building on those lessons, bipartisan, bicameral legislation, the Chance to Compete Act (H.R. 159 and S. 59), would encourage the use of high-quality, skills-based assessments in federal hiring, among other improvements. There is potential to increase applicant and hiring manager satisfaction, develop pools of qualified candidates, and potentially lower hiring times. However, the Chance to Compete Act currently being considered by Congress only applies to Title 5 employees. More work is needed to determine whether these hiring innovations might also be appropriate for Title 38 employees as well as to ensure that the HR functions work together across the agency and have appropriate funding to develop assessments.

- *Identify additional areas to streamline employee performance and accountability.* While supervisor development, training and leadership attention are critical to holding employees accountable for performance and outcome delivery, there are other areas the committee should consider when streamlining the process. An initial step is to strengthen the probationary period for new supervisors. Many supervisors in government are selected for their technical expertise, rather than their leadership skills, and have little incentive to manage effectively. To fix this, managers at VA should be required to make an affirmative decision to pass a new supervisor through their probationary period – the period during which the individual must demonstrate successful performance as a supervisor – only if the employee has exhibited the necessary management capabilities, in addition to possessing technical qualifications. Managers should also be held accountable in their performance plans for providing feedback to new supervisors throughout the probationary period and for making a decision whether the supervisor should continue on after the probationary period has ended.

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<sup>30</sup> *Hiring Assessment and Selection Outcome Dashboard*, Gen. Serv. Admin., <https://d2d.gsa.gov/report/hiring-assessment-and-selection-outcome-dashboard>.



Moreover, requiring affirmative decisions at the end of the probationary period for *all* employees is a good use of the tool. This provides a concrete opportunity for managers to ensure that the employee has the necessary skills to be successful in the job, identify additional training and development, or even let the employee go before further investing in them. This change will require robust supervisor training as well as improved HR data and tracking of the probationary status of each new hire.

Changes made through these efforts can be tracked by amending questions in the VA's employee survey to explicitly ask about employee accountability. It is the Partnership's understanding that the FEVS question about whether or not steps are taken to deal with poor performers in their work units has been removed from the VA survey. Adding this question back would allow employee views on performance management to be tracked over time.

- *Move toward a unified personnel system.*<sup>31</sup> Currently the VA has a complex mix of employee personnel systems through Title 38, Title 5 and hybrid. Anecdotally we have heard that this makes it challenging for human resources to create streamlined efforts to recruit and retain employees. Beyond small-bore changes to the department's current personnel operating authorities the Partnership strongly encourages the committee to work with the administration to move towards a unified personnel system for the department that will allow the agency to fully address its hiring, classification, pay and accountability issues. The system should be the product of strong leadership across the branches, employee buy-in, and investment in agency HR and other implementation functions, and should reflect a commitment to the Merit System Principles that serve as the bedrock of the civil service system.

### **Conclusion**

While dealing with poor performers is a process every organization needs to be prepared for, it is impossible to fire one's way to success. As this subcommittee has shown through its oversight, accountability means tracking and improving outcomes over the entirety of an employee's time at the agency, as well as investing in the workforce population as a whole – from hiring to professional development and growth, to strategic workforce and succession planning – and streamlining the systems and tools they need to work effectively.

We appreciate your continued work on management reforms, increasing the use of data, and technology modernization efforts. The Partnership looks forward to working with you to build out proposals, provide data and stories, and ensure that the VA has a strong, accountable workforce delivering results for veterans and their families.

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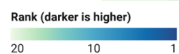
<sup>31</sup> *Ibid.* at 10.

I. Appendix I

With our Best Places to Work in the Federal Government Rankings, we have provided data visualizations with some key takeaways from data trends for not only the Department of Veterans Affairs, but also how the VA ranks in comparison to the government-wide trends.

**VA Effective Leadership Rankings Among Large Agencies; 2012-2022**

| Effective Leadership | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|----------------------|------|------|------|------|------|------|------|------|------|------|------|
| Overall              | 18   | 18   | 18   | 18   | 17   | 17   | -    | -    | 11   | 6    | 7    |
| Senior Leaders       | 17   | 16   | 18   | 18   | 17   | 17   | -    | -    | 11   | 6    | 6    |
| Supervisor           | 19   | 18   | 18   | 18   | 17   | 18   | -    | -    | 14   | 13   | 12   |



2018-2019 gap due to Veteran Affairs' transition from the Federal Employee Viewpoint Survey to the VA All Employee Survey.  
Table: Partnership for Public Service • Source: Best Place to Work in the Federal Government Workplace Categories • Created with Datawrapper

**Veterans Affairs BPTW Ranking Among Large Agencies; 2012-2022**

| BPTW Rank                      | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 |
|--------------------------------|------|------|------|------|------|------|------|------|------|------|------|
| Department of Veterans Affairs | 18   | 13   | 18   | 18   | 17   | 17   | 6    | 6    | 8    | 5    | 5    |

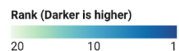


Table: Partnership for Public Service • Source: Best Places to Work in the Federal Government • Created with Datawrapper

**I can disclose a suspected violation of any law, rule, or regulation without fear of reprisal.**

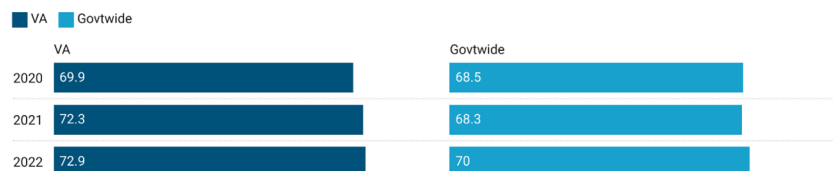


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

**Considering everything, how satisfied are you with your job?**

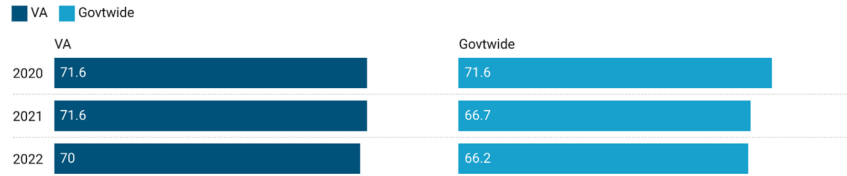


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

**How satisfied are you with the recognition you receive for doing a good job?**

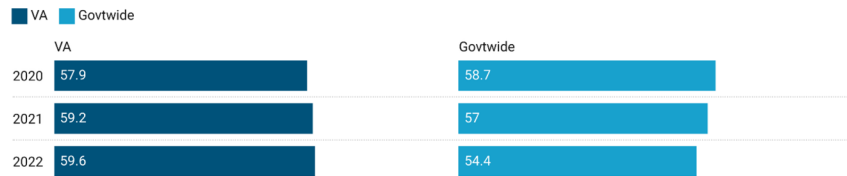


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

**In my work unit, differences in performance are recognized in a meaningful way.**

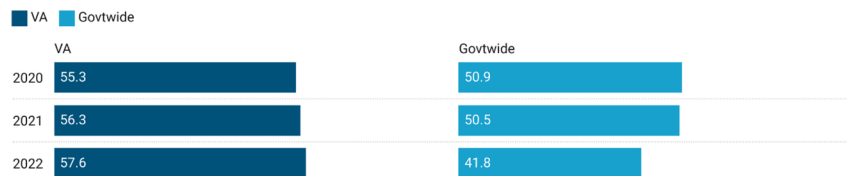


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

**My organization's senior leaders maintain high standards of honesty and integrity**

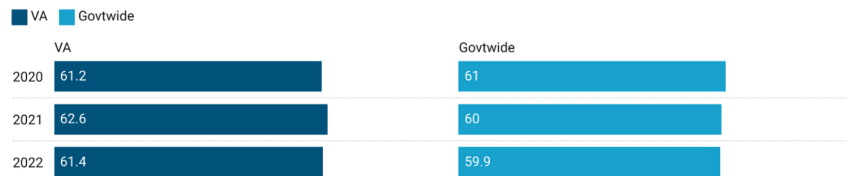


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

### Overall, how good a job do you feel is being done by your immediate supervisor?

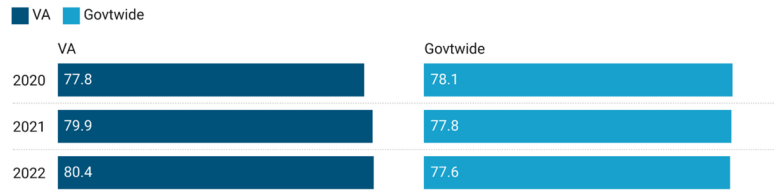


Chart: Partnership for Public Service • Source: VA All Employee Survey and OPM Federal Employee Viewpoint Survey • Created with Datawrapper

## II. Appendix II

### Department of Veterans Affairs Samuel J. Heyman Service to America Medals Winners and Finalists Since 2017

Every year, the nonpartisan, nonprofit Partnership for Public Service recognizes federal employees for excellence in public service with the Samuel J. Heyman Service to America Medals (Sammies). Referred to as the Oscars of Public Service, the Sammies is the premier awards program for career federal employees. These awards spotlight remarkable accomplishments that benefit the nation, build trust in our government and inspire more people to consider careers in public service. Every year, hundreds of federal employees across the government are nominated for the Sammies, but only forty nominations become finalists, and seven are recognized as winners. The categories include: Federal Employee of the Year, Paul A. Volcker Career Achievement, Emerging Leaders, Safety, Security and International Affairs, Management Excellence, Science, Technology and Environment and the People's Choice Award. Please read below for a complete list of every VA finalist and winner over the past six years.

#### 2023

[Anne Lord Bailey, Caitlin Rawlins and the VA Immersive Team](#) – Anne, the Director of Clinical Tech Innovation and Immersive Technology Lead worked with Caitlin, Deputy Director of Clinical Tech and Innovation and Veterans Health Administration Extended Reality Network Lead, to build a cutting-edge nationwide immersive technology network to empower front-line staff and enable the treatment of veterans for a wide range of medical issues such as anxiety, depression, pain management, spinal cord injuries and more (**Awards to be given on Oct. 17, 2023**)

#### 2022

[Barbara C. Morton](#) – Barbara, Deputy Chief Veterans Experience Officer, built trust and a customer-oriented culture among veterans and their families seeking services and benefits from the Department of Veterans Affairs by listening and responding to their needs – **Winner, Management Excellence**

#### 2021

[Mary Frances Matthews](#) – Mary, an Operations Senior Management and Program Analyst, reduced the lengthy backlog of disability appeals for veterans by 87% in two years, providing long-awaited decisions on benefits to thousands of individuals

#### 2020

[Beth Ripley, M.D., Ph.D.](#) – Beth, National Director for VHA 3D Printing Network, created an interconnected, hospital-based 3D printing network that assists health care providers with medical procedures, reducing unnecessary surgeries to help improve quality of life for veterans – **Winner, Science, Technology and Environment**

[Neil C. Evans, M.D., Kathleen L. Frisbee, Ph.D. and Kevin Galpin, M.D.](#) – Neil, Chief Officer, Office of Connected Care, Kathleen, Executive Director, Connected Health Office and Kevin, Executive Director, Telehealth Services, developed vital telehealth options, mobile apps and digital services for veterans to receive health care virtually, while removing barriers to implementation through policy, regulatory and administrative changes – **Winner, Management Excellence**

**2019**

[Victoria Brahm](#) – Victoria, the Medical Center Director for Tomah VA Medical Center, restored the quality and safety of a broken health care center for veterans that had become notorious for unsafe medical practices, excessive opioid use and a toxic work environment – **Winner, Federal Employee of the Year**

[Anne McKee, M.D.](#) – Anne, Chief of Neuropathology at the VA Boston Healthcare System, revolutionized scientific research and our understanding of the long-term effects of concussions, including chronic traumatic encephalopathy, in veterans and athletes – **Winner, Paul A. Volcker Career Achievement**

[Paul Shute, Christopher Aragao and David Enright](#) – Paul, Chief of Operational Innovation, Christopher, Supervisory Veterans Service Representative and David, a Management Analyst, dramatically cut the time and manpower needed to make decisions on service-related mental health claims for veterans, helping tens of thousands of individuals each year receive their benefits faster

**2018**

[Marcella Jacobs and the VA Digital Service Team](#) – Marcella, Executive Director of Digital Service, created online digital tools for veterans to more easily access benefits and services, delivering a high-quality and seamless user experience – **Winner, Management Excellence**

[Jordan T. Manos](#) – Jordan, as the Director of Operations at the Acquisition Academy, improved the system used to assess flood damage from hurricanes and other major storms, helping residents receive aid more quickly and saving the government millions of dollars in appraisal costs

**2017**

[Rory A. Cooper](#) – Rory, the Director of Human Engineering Research, designed innovative wheelchairs and other assistive technology equipment that has greatly improved the mobility and quality of life for hundreds of thousands of disabled veterans and other Americans – **Winner, Science, Technology and Environment**

**Prepared Statement of Senior Executives Association**

SENIOR  
EXECUTIVES  
ASSOCIATION

*The voice of career federal executives since 1980*

July 10, 2023

The Honorable Jen Kiggans  
Chairwoman  
Subcommittee on Oversight and Investigations  
Committee on Veterans' Affairs  
Washington, DC 20515

The Honorable Frank Mrvan  
Ranking Member  
Subcomm. on Oversight and Investigations  
Committee on Veterans' Affairs  
Washington, DC 20515

**RE: H.R. 4278, Restore Department of Veterans Affairs Accountability Act**

Dear Chairwoman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee:

On behalf of the Senior Executives Association (SEA) – which represents the interests of career federal executives in the Senior Executive Service (SES), those in Senior Level (SL), Scientific and Professional (ST) and equivalent positions and other senior career federal leaders, including our members at the Department of Veterans Affairs (VA) – I write to provide SEA's comments on H.R. 4278 which will be considered during the subcommittee's July 12 legislative hearing.

It is our view that some members of Congress are using veterans as political pawns to erode the VA's capacity and the American people's trust in its workforce. While accountability issues exist at the VA and across the federal workforce, H.R. 4278 is not the answer. SEA views this proposed legislation as completely unnecessary for holding career VA employees accountable. In fact, it is very likely this legislation will have a significant adverse effect on the VA's ability to attract, recruit, and retain quality supervisors, managers, and executives, as have the 2014 and 2017 laws.

There are real accountability issues across the federal workforce, but talking-point reforms based on cherry picked VA anecdotes will not solve them. This proposed legislation selectively picks anecdotes that admittedly look, sound, and seem bad, such as the situation at the Loma Linda VA Medical Center, but uses them as justification for extraordinary broad and far-reaching policy proposals such as this overreaching legislation.

Over the last decade, Congress has twice passed VA Accountability reform measures, in 2014 and 2017. In both instances, the VA Secretary solicited Congress for more authority to manage the workforce; the same is not true today. SEA had the foresight and resolve to oppose those earlier efforts because it was clear the proposals were constitutionally suspect, and thus unworkable in promoting greater accountability to those who have sacrificed so much for our country.

Our concerns were validated as the VA Office of Inspector General, the U.S. Merit Systems Protection Board (MSPB), the U.S. Office of Special Counsel (OSC), the Federal Labor Relations Authority (FLRA), and federal courts found repeated abuses of power and authority by the VA in implementing these laws. The result was perverse—personnel actions were overturned and employees who were fired were reinstated, with back pay.

While opposing those bills, SEA never disagreed with the bipartisan recognition that managing the federal workforce is entirely too complex and cumbersome; indeed, SEA has championed civil service reforms for the Association's entire 40+ year history.

Sadly, some of the rhetoric surrounding this bill irresponsibly foments distrust of the other co-equal branches of government, including the federal judiciary and executive administrative agencies including the MSPB and FLRA.

Our American system of government is a system of checks and balances, a genius design of our nation's founders. Recent decisions by federal courts and administrative agencies that have [disrupted elements of the Accountability law](#) are proof that this constitutional system of checks and balances work—a system of rule of law that servicemembers and veterans have fought and died to protect. While it may be frustrating to some members of Congress that the courts have acted, it is equally important for Congress to respect the rule of law and learn lessons from these episodes. Congress must listen to the VA about what it says are the barriers and opportunities to managing a workforce of over 425,000 employees and an ever-expanding mandate to provide benefits and services to veterans.

For a decade, SEA has consistently expressed to Congress that the VA cannot fire its way to excellence. The association has never shied away from assisting agencies, congress, and administrations explore constitutional, good government solutions to enhance agencies' effectiveness.

Recent actions by Congress to positively support and strengthen the VA workforce, for example through passage of the PACT Act, this committee's advancing of the Veterans Health Administration Leadership Transformation Act (H.R. 1256), and bipartisan consideration of the VA Clinician Appreciation, Recruitment, Education, Expansion, and Retention Support (CAREERS) Act of 2023, are notable, as is the positive rhetoric that has come with them. These actions address real impediments. The VA workforce is the key to achieving consistent, mission excellence that Congress, the VA, and veterans expect. The ability to attract, recruit, and retain exceptional talent are paramount to this effort.

Congress must take action to ensure VA is an attractive and welcoming employer for supervisors, managers, and executives who are critical to its operations, rather than constantly denigrating these dedicated professionals.

SEA continues to hear concern from our members, both at the VA and other agencies, that Punitive accountability laws do not work. They harm the ability of the VA to attract, recruit, and retain talent. This challenge is particularly acute for the VA's Senior Executive Service (SES) employees, who Congress excluded from having any whistleblower protections whatsoever (38



U.S.C. § 713). Members of Congress persisting to push legislation to address a false accountability narrative will continue to discourage excellent leaders from considering VA employment.

As the past decade has demonstrated, agency-specific reforms such as “VA Accountability” that do not address root causes, adopt lessons learned, and engage the expertise of committees of primary jurisdiction—in this case the Oversight Committee’s expertise on federal personnel laws—are simply a recipe for mediocrity and wasting taxpayer money.

SEA strongly believes that the current processes for managing the federal workforce are too cumbersome and time consuming and need to be streamlined. SEA is eager to work with Congress to enact civil service modernization for all of the federal government that is constitutional, backed by empirical evidence, and responsive to the American people. Advancing punitive talking point legislation that fails to address agency needs will not benefit VA, its workforce, nor veterans.

Politically motivated, under the auspices of better serving veterans, this proposed legislation represents a solution in search of a problem. SEA encourages members to **oppose H.R. 4278**, the Restore Department of Veterans Affairs Accountability Act, which is an unnecessary distraction.

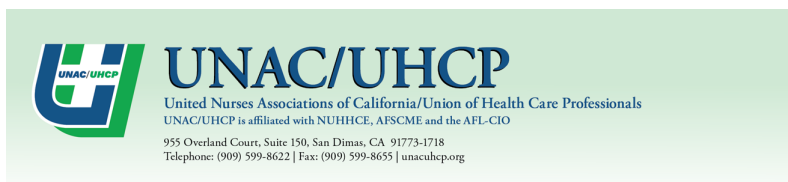
If you wish to further discuss SEA’s views, please contact SEA Director of Policy & Outreach Jason Briefel at [Jason.Briefel@seniorexecs.org](mailto:Jason.Briefel@seniorexecs.org).

Sincerely,

A handwritten signature in black ink, appearing to read "M. L. Hill", written in a cursive style.

Marcus L. Hill  
President

**Prepared Statement of United Nurses Associations of California/Union of Health Care Professionals**



July 11, 2023

The Honorable Jen Kiggans, Chairwoman  
The Honorable Frank Mrvan, Ranking Member  
Subcommittee on Oversight and Investigations  
Committee on Veterans' Affairs  
U.S. House of Representatives  
Washington, D.C. 20515

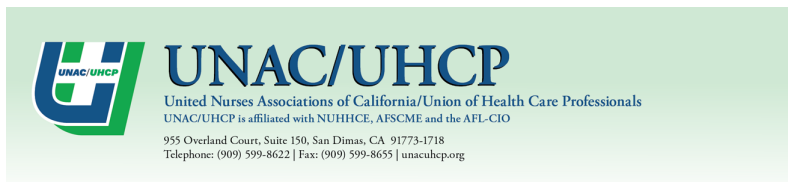
Dear Chairwoman Kiggans and Ranking Member Mrvan:

On behalf of the 32,000 members of the United Nurses Associations of California/Union of Health Care Professionals (UNAC/UHCP), which is part of the National Union of Hospital and Health Care Employees (NUHHCE) and is affiliated with the American Federation of State County and Municipal Employees (AFSCME), I request this letter be included in the record for the July 12 hearing on pending legislation.

UNAC/UHCP is proud of our nurses who care for veterans and military personnel at the Jerry L. Pettis Memorial VA Medical Center in Loma Linda, CA and the Naval Medical Center in Balboa Park, CA. All of these nurses have been on the front lines fighting COVID and subject to the elevated risk to their own physical and mental health. The VA must focus on recruiting and retaining staff to significantly increase its capacity to provide veterans exposed to burn pits, Agent Orange, and other toxic substances the specialized care they have earned under the PACT Act.

The challenges of adequate staffing at VA facilities are real. Our report, [The True Cost of Being A Hero](#) (2021), documents the mental health strains in nursing and health care. An overwhelming majority of Registered Nurses (RNs) and other crucial health care professionals are stressed out, burned out, anxious, exhausted, depressed, traumatized, and unable to get a good night's sleep. Despite years of investments in education and certification, these workers have found themselves forced to think about leaving the professions they love for their self-preservation.

Our report on [The Dangerous Impact of the National Nursing Shortage](#) (2022), discusses the looming exodus of nurses – one-third of the 3 million registered nurses in the United States will depart the bedside in the coming decade, and not enough new nurses are coming in to meet the growing demand for care – unless we make immediate changes to how we recruit, retain and respect these essential front-line caregivers.



**We oppose the “Restore Department of Veterans Affairs Accountability Act” (H.R. 4278) because it will undermine the rights of registered nurses and others at the VA to advocate for their patients and profession.** The bill subjects nurses and other VA workers to political whims and potential scapegoating in terms of disciplinary action which will only serve to demoralize the workforce and undercut the VA’s ability to retain and recruit nurses. Specifically, we oppose H.R. 4278 because it would:

- Override carefully negotiated Collective Bargaining Agreements.
- Reduce the level of evidence needed to terminate an employee to “substantial evidence” from the “preponderance of evidence” standard, so that an employee could be fired for misconduct even if the majority of evidence favors the employee.
- Apply retroactively to employees for any infraction committed since the original enactment of the Accountability Act in 2017.
- Strip away established and settled court law since 1981, requiring agencies to consider key mitigating factors when determining the reasonableness of a disciplinary penalty for a federal employee.

In conclusion, we urge Congress to support VA nurses and other workers in having a say on their job. Nurses deserve to be able to collectively bargain for fair treatment and due process, as well as to know that they will be protected from being blamed for system-wide failures beyond their control or when they speak out for their patients and their profession. We urge you to oppose H.R. 4278.

Sincerely,

Charmaine S. Morales, RN  
 UNAC/UHCP President