H. R. ______

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 THE HOUSE OF REPRESENTATIVES

Mr. ______ introduced the following bill; which was referred to the Committee on ________________

A BILL

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Restore Department of Veterans Affairs Accountability Act of 2023” or the “Restore VA Accountability Act of 2023”.

(Original Signature of Member)
SEC. 2. SUPERVISORS: REMOVAL, DEMOTION, OR SUSPENSION BASED ON PERFORMANCE OR MISCONDUCT.

(a) DISCIPLINE OF SUPERVISORS.—

(1) IN GENERAL.—Title 38, United States Code, is amended by inserting after section 711 the following:

"§ 712. Supervisors: removal, demotion, or suspension based on performance or misconduct

"(a) IN GENERAL.—The Secretary may remove from civil service, demote, or suspend a covered individual who is an employee of the Department if the Secretary determines by substantial evidence that the performance or misconduct of the covered individual warrants such action.

"(b) RIGHTS AND PROCEDURES.—(1)(A) When making an initial decision under subsection (a) with respect to determining whether a covered individual should be removed, demoted, or suspended, the deciding employee of the Department shall exclusively apply the following factors:

"(i) The nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
“(ii) The covered individual’s job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

“(B) The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.

“(2) A covered individual subject to an action under subsection (a) is entitled to—

“(A) advance notice of the action and a file containing all evidence in support of the proposed action;

“(B) be represented by an attorney or other representative of the covered individual’s choice; and

“(C) grieve the action in accordance with an internal grievance process that the Secretary, in consultation with the Assistant Secretary for Accountability and Whistleblower Protection, shall establish for purposes of this subsection.

“(3) A final decision by the Secretary under paragraph (1)(B) that is not grieved, and a grievance decision under paragraph (2)(C), shall be final and conclusive.

“(4) The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section, and the Secretary may carry out such a removal,
demotion, or suspension without first placing a covered individual on a performance improvement plan.

“(c) TIMING.—(1)(A) The aggregate period for notice, response, and final decision by the Secretary of an action under this section may not exceed 15 business days.

“(B) The period for the response of a covered individual to a notice under subsection (b)(2)(A) shall be 7 business days.

“(C) The final decision by the Secretary under subsection (b)(1)(B) shall—

“(i) be issued not later than 15 business days after notice is provided under subsection (b)(2)(A); and

“(ii) be in writing and shall include the specific reasons for the decision.

“(D) The Secretary shall ensure that the grievance process established under paragraph (2)(C) takes fewer than 21 days after the final decision.

“(d) JUDICIAL REVIEW.—(1) A covered individual adversely affected by a final decision under this section that is not grieved, or by a grievance decision under subsection (b)(2)(C), may obtain judicial review of such decision.

“(2) Any removal, demotion, or suspension under this section is not appealable to the Merit Systems Protection
Board, or to any administrative judge or other person appointed by the Merit Systems Protection Board.

“(3) In any case in which judicial review is sought under paragraph (1), the court shall review the record and may set aside any Department action found to be—

“(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with a provision of law;

“(B) obtained without procedures required by a provision of law having been followed; or

“(C) unsupported by substantial evidence.

“(4) Except to the extent that an appeal under this subsection presents a constitutional issue, such court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.

“(e) DEMOTED INDIVIDUALS.—(1) A demotion under subsection (a) shall be carried out as a reduction in grade for which the covered individual is qualified, that the Secretary determines is appropriate, and that reduces the annual rate of pay of the covered individual.

“(2) Notwithstanding any other provision of law, any covered individual so demoted—

“(A) shall, beginning on the date of such demotion, receive the annual rate of pay applicable to such grade;
“(B) may not be placed on administrative leave during the period during which an appeal (if any) under this section is ongoing, and may only receive pay if the covered individual reports for duty or is approved to use accrued unused annual, sick, family medical, military, or court leave; and

“(C) who does not report for duty or receive approval to use accrued unused leave shall not receive pay or other benefits.

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

“(2) In the case of a covered individual who has made a whistleblower disclosure to the Assistant Secretary for Accountability and Whistleblower Protection, the Secretary may not remove, demote, or suspend such covered individual under subsection (a) until—

“(A) in the case in which the Assistant Secretary determines to refer the whistleblower disclo-
sure under section 323(c)(1)(D) of this title to an office or other investigative entity, a final decision with respect to the whistleblower disclosure has been made by such office or other investigative entity; or

“(B) in the case in which the Assistant Secretary determines not to refer the whistleblower disclosure under such section, the Assistant Secretary makes such determination.

“(g) **TERMINATION OF INVESTIGATIONS BY OFFICE OF SPECIAL COUNSEL.**—(1) Notwithstanding any other provision of law, the Special Counsel (established by section 1211 of title 5) may terminate an investigation of a prohibited personnel practice alleged by an employee or former employee of the Department after the Special Counsel provides to the employee or former employee a written statement of the reasons for the termination of the investigation.

“(2) Such statement may not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

“(h) **APPLICATION.**—This 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).
“(i) DEFINITIONS.—In this section:

“(1) The term ‘civil service’ has the meaning given that term in section 2101 of title 5.

“(2) The term ‘covered individual’ means an employee of the Department who is a supervisor or management official as defined in section 7103(a) of title 5 occupying a position at the Department, including individuals appointed pursuant to this title, title 5, and hybrid employees appointed pursuant to section 7401 of this title, but does not include—

“(A) an individual occupying a senior executive position (as defined in section 713(d) of this title);

“(B) an individual appointed pursuant to sections 7306, 7401(1), 7401(4), or 7405 of this title;

“(C) an individual who has not completed a probationary or trial period; or

“(D) a political appointee.

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

“(4) The term ‘misconduct’ includes neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.
“(5) The term ‘political appointee’ means an individual who is—

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

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

“(C) employed in a position of a confidential or policy-determining character under schedule C of subpart C of part 213 of title 5, Code of Federal Regulations, or successor regulation.

“(6) The term ‘suspend’ means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay for a period in excess of 14 days.

“(7) The term ‘whistleblower disclosure’ has the meaning given such term in section 323(g) of this title.”.

(2) CLERICAL AMENDMENT.—The table of contents for title 38, United States Code, is amended
by inserting after the item relating to section 711 the following:

“712. Supervisors: removal, demotion, or suspension based on performance or misconduct.”

SEC. 3. SENIOR EXECUTIVES: MODIFICATION OF PROCEDURES TO REMOVE, DEMOTE, OR SUSPEND BASED ON PERFORMANCE OR MISCONDUCT.

Section 713 of title 38, United States Code, is amended—

(1) in subsection (a)—

(A) after “determines”, insert “by substantial evidence”; and

(B) by adding at the end the following:

“(3) When making an initial decision under this subsection with respect to determining whether a covered individual should be reprimanded or suspended, involuntarily reassigned, demoted, or removed, the deciding employee of the Department shall exclusively apply the following factors:

“(A) The nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
“(B) The covered individual’s job level and type of employment, including supervisory or fiduciary role, and prominence of the position.

“(4) The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.”;

(2) in subsection (b)—

(A) in paragraph (3), by inserting “after the final decision” after “21 days”; and

(B) by adding at the end the following:

“(7) Except to the extent that an appeal under this subsection presents a constitutional issue, such court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.”; and

(3) insert after subsection (e) the following (and redesignate subsection (d) as subsection (e)):

“(d) APPLICATION.—This section shall apply to any misconduct or performance 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).”.
SEC. 4. MODIFICATION OF DISCIPLINARY PROCEDURES
FOR EMPLOYEES OF THE DEPARTMENT OF
VETERANS AFFAIRS.

(a) DEPARTMENT OF VETERANS AFFAIRS EMPLOYEE DISCIPLINE MODIFICATIONS.—Section 714 of title 38, United States Code, is amended—

(1) in subsection (a),

(A) in paragraph (1), by inserting “by substantial evidence” after “the Secretary determines”; and

(B) by adding at the end the following:

“(3)(A) When making an initial decision under this subsection with respect to determining whether a covered individual should be removed, demoted, or suspended, the deciding employee of the Department shall exclusively apply the following factors:

“(i) The nature and seriousness of the offense, and its relation to the covered individual’s duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

“(ii) The covered individual’s job level and type of employment, including supervisory or fiduciary role, and prominence of the position.
“(iii) The covered individual’s past disciplinary record.

“(iv) The covered individual’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

“(v) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.

“(B) The Secretary shall review the initial decision and uphold such decision if it is supported by substantial evidence.”.

(2) in subsection (c)—

(A) by striking paragraph (1)(D); and

(B) in paragraph (3), by inserting before the period the following: “, and the Secretary may carry out such a removal, demotion, or suspension without first placing a covered individual on a performance improvement plan”;

(3) in subsection (d)—

(A) in paragraph (2), by adding at the end the following:
“(C) Except to the extent that an appeal under this subsection presents a constitutional issue, the administrative judge may not review a challenge to the penalty imposed against the covered individual.”;

(B) in paragraph (3), by adding at the end the following:

“(D) Except to the extent that an appeal under this subsection presents a constitutional issue, the Merit Systems Protection Board may not review a challenge to the penalty imposed against the covered individual.”;

(C) in paragraph (5), by adding at the end the following:

“(C) Except to the extent that an appeal under this subsection presents a constitutional issue, such Court may not review a challenge to the penalty imposed against the covered individual or mitigate such penalty.”; and

(D) by striking paragraph (10);

(4) by redesignating subsection (h) as subsection (j);

(5) by inserting after subsection (g) the following:

“(h) COLLECTIVE BARGAINING AGREEMENTS.—The procedures in this section shall supersede any collective bargaining agreement to the extent that such agreement is inconsistent with such procedures.
“(i) APPLICATION.—This 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).”; and

(6) in paragraph (1) of subsection (j), as redesignated by paragraph (4)—

(A) by inserting “including individuals appointed pursuant to this title, title 5, and hybrid employees appointed pursuant to section 7401 of this title” after “Department”;”;

(B) in subparagraph (D), by striking the period and inserting “; or”; and

(C) by adding after subparagraph (D) the following:

“(E) a supervisor or management official as defined in section 7103(a) of title 5.”.

(b) VHA EMPLOYEE DISCIPLINE MODIFICATIONS.—

Section 7403(f)(3) of such title is amended—

(1) by striking “Notwithstanding any other provision of this title or other law,” and inserting “(A) Notwithstanding any other provision of this title or other law, and consistent with subparagraph (B),”;

and

(2) by adding at the end the following:
“(B) With respect to any covered individual (as that term is defined in section 712 or 714) appointed to such positions, such matters shall be resolved, at Secretary’s sole discretion, under—

“(i) section 712;

“(ii) section 714; or

“(iii) title 5 as though such individuals had been appointed under that title.”.