CONGRESSIONAL TESTIMONY

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PROVIDED TO THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

HEARING ON

"PENDING LEGISLATION"

JULY 12, 2023

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*."[1] 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:[2]

> "[Of] the 1,086 removals during the first five 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

[1] *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.
[2] *The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018) (statement of Mark Tano, ranking member), https://republicans-veterans.house.gov/calendar/eventsingle.aspx?EventID=2212.

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.[3] 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*?"[4] 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, 2019, VA had only removed one covered senior executive employee under 38 U.S.C. 713. Further, of thirty-five cases involving senior

[3] *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.

[4] *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).

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. [5]

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

[5] *Brenner v. Dep't of Veterans Affairs*, 990 F.3d 1313, (Fed. Cir. 2021)

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."[6] 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.[7]

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 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.[8] 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

[6] *Ariel Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290 (Fed. Cir.) (2021).
[7] *Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).
[8] *Richardson v. Department of Veterans Affairs*, Docket No. AT-0714-21-0109-I-1 (MSPB) (2023).

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.[9]

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."

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

[9] *Id*.

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 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. [10] 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."[11] 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."[12] In turn, by excluding seven "Douglas Factors" the legislation goes out of its way 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."[13] 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

[10] Stephen *Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).
[11] *Id*.
[12] 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.
[13] *Id*.

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

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.