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ADMINISTRATION/OPERATIONS, SECURITY, AND PREPAREDNESS (HRA/OSP),
DEPARTMENT OF VETERANS AFFAIRS (VA)
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
U.S. HOUSE OF REPRESENTATIVES**

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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 on site, 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 on site, 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 documentation, 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.