

HOUSE COMMITTEE ON VETERANS AFFAIRS
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
TRUST IN TRANSPARENCY: HOLDING VA ACCOUNTABLE AND PROTECTING WHISTLEBLOWERS
NOVEMBER 2, 2023

TESTIMONY OF TRISTAN LEAVITT
PRESIDENT
EMPOWER OVERSIGHT

Chairman Kiggans, Ranking Member Mrvan, and members of the Subcommittee:

I'm very pleased to have been invited back before this Subcommittee today. I appear today as the president of Empower Oversight, a nonpartisan nonprofit dedicated to enhancing independent oversight of government and corporate wrongdoing. In its two years of existence, Empower has conducted extensive oversight of the Department of Veterans Affairs (VA).¹

This Subcommittee plays an important oversight role in ensuring the VA properly cares for our nation's veterans. I deeply believe the United States of America is a land of the free because of the brave women and men who serve in our Armed Forces. Our nation owes them an immense debt of gratitude. Many know these famous words from President Abraham Lincoln's second inaugural address: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds..." They were delivered in 1865, one month before the end of the Civil War and Lincoln's assassination. Less well-known is what Lincoln said next, which for nearly 65 years served as the motto of the VA: "To care for him who shall have borne the battle and for his widow, and his orphan."

Eighteen years later, when Congress contemplated adopting a merit-based civil service system, more effectively serving the American people was a prime motivation for Congress. Hiring based on merit would ensure taxpayers received the best service possible for their hard-earned tax dollars. As it has later been described, "the other side of the merit coin" is the removal of federal employees who are not providing the best service for the American people.

¹ "Empower Oversight probes conflicts of interest and resistance to Congressional oversight at the Veterans Benefits Administration," Aug. 6, 2021, <https://empowr.us/empower-oversight-probes-conflicts-of-interest-and-resistance-to-congressional-oversight-at-the-veterans-benefits-administration>; "Did the Department of Veterans Affairs Enable Insider Trading?" Sep. 21, 2021, <https://empowr.us/did-the-department-of-veterans-affairs-enable-insider-trading>; Jason Foster, "Newly Uncovered Documents Show Senior VA Officials Smearing a Whistleblower to Avoid Congressional Oversight," *Whistleblower Network News*, Oct. 25, 2021, available at <https://whistleblowersblog.org/opinion/newly-uncovered-documents-show-senior-va-officials-smearing-a-whistleblower-to-avoid-congressional-oversight>; "Empower Oversight Obtains Copy of Veterans Affairs Department Letter Being Withheld from Senate," Nov. 9, 2021, <https://empowr.us/empower-oversight-obtains-copy-of-veterans-affairs-department-letter-being-withheld-from-senate>; "Internal Watchdog Uncovers More Evidence of Conflicts of Interest at the VA After Push from Empower Oversight," Mar. 24, 2022, <https://empowr.us/internal-watchdog-uncovers-more-evidence-of-conflicts-of-interest-at-the-va-after-push-from-empower-oversight>; "Empower Oversight and Whistleblowers of America Seek Accountability for VA Watchdog's Findings of Ethical Violations," Jun. 16, 2022, <https://empowr.us/empower-oversight-and-whistleblowers-of-america-seek-accountability-for-va-watchdogs-findings-of-ethical-violations>.

When the Civil Service Reform Act of 1978 was signed into law 45 years ago, it included new provisions for removing underperforming federal employees. It also established statutory protections for federal whistleblowers, a first in our Nation's history. These provisions attempted to strike a balance that Congress continues to grapple with today: How to ensure accountability for employee performance and misconduct without chilling whistleblower disclosures or enabling retaliation. This is usually more difficult than it sounds, since whistleblower retaliation is almost always disguised as appropriate discipline. Thus, the Civil Service Reform Act established the independent Merit Systems Protection Board, or MSPB, to review adverse personnel actions and ensure whistleblowers are protected while not impeding accountability for poor performers or employees committing misconduct. In my view, this administrative process provides a more cost-effective way to consider these cases than sending them directly to the federal court system to be decided.

When I last testified before this Subcommittee, in July of 2019, I was serving as the acting head of MSPB because it had no Senate-confirmed Board members. Later, on March 1, 2022, the Senate confirmed me to that Board, restoring a quorum after five years without. As a member of the Board, I considered case after case that hinged on the appropriateness of adverse personnel actions. I was always very mindful that we as adjudicators are fallible, that from time to time facts buried in the record get overlooked despite our best efforts, and that *no* written record can perfectly capture all the complicated circumstances that often surround personnel actions. However, I felt we tried our best to identify whistleblower retaliation in the cases we adjudicated while I was there.

By contrast, I am concerned that our current system does not strike the right balance to ensure accountability for federal employees. This is a concern with which the Veterans Affairs Committee has grappled for years. In the spring of 2014, whistleblower disclosures to the U.S. Office of Special Counsel helped bring to light the scandal of veterans' wait times at the VA. Just a few months later Congress passed the Veterans Access, Choice and Accountability Act of 2014. That law authorized expedited demotion and removal timelines for senior executives at the VA, and gave MSPB administrative judges 21 days to decide appeals before they became final. After the U.S. Court of Appeals for the Federal Circuit held it was unconstitutional to limit appeals to MSPB administrative judges, who are not appointed by the President, Congress passed the VA Accountability and Whistleblower Protection Act of 2017. This law addressed the constitutionality issue by simply eliminating MSPB review of senior executive removal. It further authorized expedited demotion and removal timelines for large swaths of VA employees.

As I've indicated, I believe MSPB can play an important role in distinguishing whistleblower retaliation from proper accountability. I believe it would be a serious mistake to further limit the categories of employees who have MSPB appeal rights. However, I do not have confidence that, in non-whistleblower cases, MSPB always contributes to protecting "the other side of the merit coin" by ensuring accountability. My experience on the Board has led me to believe the most important variables for accountability are not timeframes, but rather how MSPB sees its role in the disciplinary process.

In the seminal 1980 case on this issue, *Douglas v. Veterans Administration*, the Board held that it "must give due weight to the agency's primary discretion in exercising the managerial function

of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness... The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance."² Yet time and again since then, the Board *has* in my view displaced management's reasonable judgment regarding disciplinary decisions. What's more, appellate courts have limited latitude in reviewing Board decisions.³ For these reasons, I support statutorily lowering the standard of proof required to support disciplinary decisions—not just at the Department of Veterans Affairs, but across the civil service. Standardizing relevant personnel laws across the civilian workforce would reduce confusion and contribute to greater consistency across the federal government.

That said, there is wisdom in the observation that you can't fire your way to excellence. At the end of the day the most important variable for any federal agency or department may be cultivating a culture of excellence and accountability—both for employees and for supervisors. The Office of Accountability and Whistleblower Protection (OAWP) would likely be best situated to contribute to building such a culture if investigating whistleblower retaliation was left to the far more experienced Office of Special Counsel, and OAWP focused on the big picture of addressing trends at the agency.

Congress must also help ensure agency management receives sufficient training and invest in the intentional cultivation of leadership in federal agencies. The example at the top matters. The Senate recently voted to confirm as Deputy VA Secretary an official who did nothing to protect the confidential information of veterans and whistleblowers in its VIEWS system, even after she became aware of the problem through whistleblower disclosures.⁴ Such a lack of leadership or accountability sets the tone for the agency, and requires that Congress maintain particular vigilance at this time and vigorously exercise its oversight responsibilities.

Whether promoting the development of better leaders and managers, removing inadequate or misbehaving employees, or protecting the brave employees who point out the problems, we should care deeply about the quality of the VA workforce. They are the front lines: only through them can we “care for him who shall have borne the battle and for his widow, and his orphan.”

Thank you.

² 5 M.S.P.R. 280 (1981).

³ See 5 U.S.C. 7703(c).

⁴ “Empower Oversight Urges Scrutiny of Top VA Nominee's Failure to Safeguard Veterans' Info,” Jun. 12, 2023, <https://empowr.us/empower-oversight-urges-scrutiny-of-top-va-nominees-failure-to-safeguard-veterans-info>; “Whistleblower Coalition Groups Jointly Call on Senate Committee to Investigate VA Whistleblower Claims,” Jun. 26, 2023, <https://empowr.us/whistleblower-coalition-groups-jointly-call-on-senate-committee-to-investigate-va-whistleblower-claims>.