

# **THE VA ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT OF 2017:**

## **Impact on VA's Performance and Conduct-Based Adverse Actions**



Department of Veterans Affairs  
Office of Human Resources Management  
Employee Relations and Performance Management Service

## **Presenters**

From OHRM Employee Relations and  
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## Public Law 115-41



- Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017.
- Signed by the President June 23, 2017.
- Only applies to employees of the Department of Veterans Affairs.

P.L. 115-41: Impact on VA's Performance and Conduct-Based Adverse Actions

## Public Law 115-41

### Title I

- Establishes Office of Accountability and Whistleblower Protection (Sections 101-103)

### Title II

- Accountability of Senior Executives, Supervisors, and Other Employees (Sections 201-211)

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## Public Law 115-41

Purpose of the law:

To amend Title 38, United States Code (U.S.C.), to improve the accountability of employees of the Department of Veterans Affairs, and for other purposes.



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## Public Law 115-41

Although revisions were made to 38 U.S.C., the Act is not limited to just Title 38 employees.



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## Public Law 115-41

- 38 U.S.C. § 713 was amended to provide a new process for the Secretary to take action against Senior Executives of the VA.
- 38 U.S.C. § 714 is a new authority for the Secretary to use to take an adverse action against a covered employee of the VA, other than a Senior Executive.

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## Public Law 115-41

Section 208 of P.L. 115-41 modified the time frames and procedures for taking a **Disciplinary or Major Adverse Action** against a Title 38 employee as prescribed in 38 U.S.C. §§ 7462 and 7463.

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## 38 U.S.C. §§ 7462 and 7463

# Title 38 Employees

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## What has Changed?

TITLE 38







- The Act did not create a new authority by which to take an action.
- The Act modified 38 U.S.C. §§ 7462 and 7463, by shortening certain timeframes for all Disciplinary and Major Adverse Actions (MAA) for full-time permanent Title 38 employees.
- The Act also added a requirement that the evidence file be provided to the employee when the proposal notice is issued.

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# What has Changed?

TITLE 38

*New* 7462/7463 Requirements	OLD 7462/7463 Requirements
Advance Written Notice for Disciplinary or Major Adverse Actions	 30 Calendar Days Advance Written Notice for Major Adverse Actions
Evidence file must be included with the proposal notice	
7 Business Days to reply Orally and/or in Writing for Disciplinary or Major Adverse Actions	 5 Calendar Days for Disciplinary Actions; 7-30 Calendar Days for Major Adverse Actions to reply Orally and/or in Writing
15 Business Days after Proposal issued for the Deciding Official to issue a Decision	 21 Calendar Days after receiving employee's reply or expiration of reply period for the Deciding Official to issue a Decision
If action is based on PCC, 7 Business Days to appeal to Disciplinary Appeals Board	 If action is based on PCC, 30 Calendar Days to appeal to Disciplinary Appeals Board

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## Business Days

TITLE 38/TITLE 5/Ft HYBRID

Before we continue:





Business days are defined as weekdays, which are Monday through Friday in Washington DC, except when such a day is designated as a Federal holiday by OPM.



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# What has Changed?

TITLE 38

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Advance Written Notice for Disciplinary or Major Adverse Actions	 30 Calendar Days Advance Written Notice for Major Adverse Actions
Evidence file must be included with the proposal notice	
7 Business Days to reply Orally and/or in Writing for Disciplinary or Major Adverse Actions	 5 Calendar Days for Disciplinary Actions; 7-30 Calendar Days for Major Adverse Actions to reply Orally and/or in Writing
15 Business Days after Proposal issued for the Deciding Official to issue a Decision	 21 Calendar Days after receiving employee's reply or expiration of reply period for the Deciding Official to issue a Decision
If action is based on PCC, 7 Business Days to appeal to Disciplinary Appeals Board	 If action is based on PCC, 30 Calendar Days to appeal to Disciplinary Appeals Board

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## Effective Dates

TITLE 38

The effective date of the action may be at any time after consideration of the employee's oral and/or written reply, or after the expiration of the reply period but . . .



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## Effective Dates

TITLE 38

- In accordance with current VA policy, the effective date of a Major Adverse Action will be no earlier than 5 calendar days after issuance of the decision, whenever possible.
- Additionally, the effective date must be in compliance with any applicable CBA language that specifically addresses the effective date of an action.

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## Collective Bargaining Agreements

TITLE 38



- The Act supersedes any conflicting timelines and processes in any collective bargaining unit agreement (CBA).
- The Act is silent on some issues that are covered in CBAs, e.g. effective date of action.

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# Act and NFFE Comparison

TITLE 38

Accountability Act	HRML No. 05-17-08; MAJOR ADVERSE ACTION PROCEDURES	NFFE Contract Requirements
Amends 38 U.S.C. §§7462 and 7463	OHRM HRML (Major Adverse Actions) Title 38	NFFE Contract Requirements (Major Adverse Actions) Title 38
(Sec. 208 of P.L. 115-41)		
All Disciplinary and Major Adverse Actions		
Aggregate period for resolution of charges against an employee may not exceed 15 business days	The aggregate period for notice, reply and decision on a proposed disciplinary or major adverse action whether or not it involves PCC may not exceed 15 business days.	<b>SUPERSEDED AS AMENDED BY 38 U.S.C. 7462/7463:</b> 30 days advance written notice (proposal) for major adverse actions except when crime provisions has been invoked
Response period - 7 business days (amendment does not change provision that allows employee to answer orally and in writing)	Response period - 7 business days after receiving the proposal to respond orally and in writing.	<b>SUPERSEDED AS AMENDED BY 38 U.S.C. 7462/7463:</b> Response period - 14 calendar days
Final Decision - NLT 15 business days	Final Decision - will be issued on or before the 15th business day after the proposal was issued	<b>SUPERSEDED AS AMENDED BY 38 U.S.C. 7462/7463:</b> Final Decision - 10 calendar days after response date or the suspense date established if employee does not respond.

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## What Stays the Same?

TITLE 38

- All other provisions for Title 38 employees remain the same, i.e. there is no new “authority” to take a Title 38 action.
- Part-time and intermittent RNs and Probationary employees – continue following provisions in VA Handbook 5021
- Actions must still be supported by preponderance of the evidence.



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## What Stays the Same?

TITLE 38

- Once a Board is appointed, the Disciplinary Appeals Board (DAB) processes and timelines remain the same.
- DAB still has authority to mitigate penalty.
- If the action is not based on Professional Conduct or Competence (PCC), the employee can still appeal the action to either the Agency grievance process or the negotiated grievance process (one or the other, not both).
- Agency and negotiated grievance timelines remain unchanged.

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## Questions?

TITLE 38



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## 38 U.S.C. § 714

# Title 5 and Full-time Title 38 Hybrid Employees

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## What is new?

TITLE 5/FT HYBRID

- The Act created a new authority, 38 U.S.C. § 714, to take an adverse action (conduct or performance-based) against covered VA employees.
- Adverse actions = suspensions of 15 calendar days or more, demotion, removal
- The new authority did not “do away” with Chapter 75 or Chapter 43 authorities.



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## 38 U.S.C. § 714

TITLE 5/FT HYBRID

New authority for taking performance or conduct-based actions. Applies to all VA employees except:

- An individual occupying a senior executive position as defined in 38 U.S.C. § 713(d);
- An individual appointed pursuant to §§ 7306, 7401(1), 7401(4), or 7405 of Title 38;
- An individual who has not completed a probationary or trial period; or
- A political appointee.



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## 38 U.S.C. § 714

TITLE 5/FT HYBRID

### NOTE:

- Part-time/intermittent and temporary Title 38 Hybrid employees are appointed under 38 U.S.C. § 7405 and are NOT covered by this new authority (use Chapter 75 or Chapter 43 procedures as before).
- The new authority CAN be used for Canteen employees but will afford them MSPB rights that they currently do not have.

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## 38 U.S.C. § 714

TITLE 5/FT HYBRID

### NOTE:

38 U.S.C. § 714 CANNOT be used for Title 38 employees even though the relevant portion of the Act falls under 38 U.S.C. as they are specifically excluded.

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TITLE 5/FT HYBRID

## Performance Action Requirements - 714

- No requirement that the employee be under standards for 90 days.
- No longer required to afford the employee an opportunity to improve, i.e. issue a Performance Improvement Plan (PIP).
- Management can remove or demote an employee based on significant performance deficiencies.

**PERFORMANCE**

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TITLE 5/HYBRID

## What are Significant Performance Deficiencies?

- The failure of a critical element in an employee's performance plan;
- A reasonable belief that the employee's performance deficiency is so serious that it cannot be improved;
- The deficiency poses a clear danger to the employee or others;
- The deficiency presents a risk to important services provided to Veterans, e.g., health care or benefits; or
- The repeated failure of non-critical elements in an employee's performance plan.

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TITLE 5/HYBRID

## Performance Action Requirements - 714

- Management can base an adverse action for performance on evidence used to support deficiencies in a final rating, closeout rating, or recent progress review, or
- Management can base an adverse action on performance deficiencies noted during the rating cycle provided it was shared with the employee in some form of written communication (e.g. email or memo).

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# Misconduct

TITLE 5/Ft HYBRID

Misconduct refers to but is not limited to:

- Neglect of duty
- Malfeasance
- Failure to accept a directed reassignment
- Failure to accompany a position in a transfer of function
- Retaliation against a whistleblower for making a lawful whistleblower disclosure

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# Processing 38 U.S.C. § 714 Actions

TITLE 5/Ft HYBRID

## Required Burden of Proof under 38 U.S.C. § 714

Substantial Evidence means 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.

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## Processing Actions under 38 U.S.C. § 714

TITLE 5/HYBRID

Using the authority of 38 U.S.C. § 714,  
Management may:

- Suspend an employee for 15 calendar days or more (conduct-based action only)
- Demote an employee for misconduct or performance
- Remove an employee for misconduct or performance

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## 38 U.S.C. § 714 – Proposal Stage

TITLE 5/FT HYBRID

Proposal Notice:

Required for 714 Actions	Not a Requirement Under 714
Advance Written Notice	<i>30 Days Advance Written Notice</i>
Substantial Evidence	<i>Preponderance of the Evidence</i>
Evidence File must be Included with the Proposal Notice	<i>Douglas Factor analysis by the Proposing Official</i>
Employee has 7 business days to reply in writing to the Proposal Notice	<i>Oral reply unless an applicable CBA provides for an oral reply</i>
Proposing Official must be in accordance with VA Handbook 5021, Part I, Appendices B-E	

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# Business Days

TITLE 38/TITLE 5/Ft HYBRID

Before we continue:

Business days are defined as weekdays, which are Monday through Friday in Washington DC, except when such a day is designated as a Federal holiday by OPM.



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## Evidence - Title 5 and Full-Time Hybrid Title 38

TITLE 5/Ft HYBRID



- The employee must be informed of any information considered in arriving at the proposed action so he/she may address it in the reply.
- Additionally, any information the Proposing Official wishes the Deciding Official to consider must also be part of the proposal.

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# What has Changed?

TITLE 5/FT HYBRID

Douglas Factors are no longer applicable

BUT



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## Level of Discipline

TITLE 5/FT HYBRID

- The Proposing and Deciding Officials must impose an appropriate level of discipline that is reasonable and commensurate with the facts of the case, using non-discriminatory, business-related reasons that are not arbitrary or capricious.
- This rationale must be explained in the written Proposal and Decision notices.

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## 38 U.S.C. § 714 – Decision Stage

TITLE 5/Ft HYBRID

### Decision Notice:

Required for 714 actions	Not Required Under 714
Must be issued within 15 business days after issuance of the proposal notice	<i>Douglas Factor analysis by Deciding Official</i>
The effective date of action may be at any time after consideration of the employee's reply, or after the expiration of the reply period, unless otherwise prescribed by a CBA.	<i>A statement in the decision letter advising the action will be effective not less than 30 days from the day following the date of receipt of the proposal notice</i>
Decision Official must be in accordance with VA Handbook 5021, Part I, Appendices B-E	

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## Collective Bargaining Agreements

TITLE 5/Ft HYBRID

- The new timelines and processes in the Act supersede any conflicting timelines and processes in any CBA.
- The Act is silent on some issues that are covered in CBAs, e.g. effective date of action.



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## TITLE 5/FT HYBRID

# Act and NFFE Comparison

Accountability Act	HRML No. 05-17-06; ADVERSE ACTION PROCEDURES	NFFE Contract Requirements
38 USC 714 New Authority for removals, demotions, or suspensions based on performance or misconduct	HRML Title 5 & Full-time Hybrid (Conduct Based Actions)	NFFE Contract Requirements (Conduct Based Actions) Title 5 & Hybrid Title 38
Aggregate period for notice, response and final decision may not exceed 15 business days	Aggregate period for notice, response and final decision may not exceed 15 business days, even if an extension to the reply period is granted	<b>SUPERSEDED BY §714:</b> 30 days advance written notice (proposal) except when crime provision has been invoked
Response period - 7 business days (does not specify written or oral response)	Response period - 7 business days (specifies written reply only)	<b>REQUIRED:</b> Written and/or Oral Replies
Final Decision - NLT 15 business days	Final Decision - will be issued on or before the 15th business day after the proposal was issued	<b>SUPERSEDED BY §714:</b> Final Decision - 10 calendar days after response date or the suspense date established if employee does not respond.
Appeal - MSPB and negotiated grievance - Must be filed NLT 10 business days after the date the decision is issued.	Appeal - MSPB and negotiated grievance - Must be filed NLT 10 business days after the date the decision is issued.	<b>SUPERSEDED BY §714:</b> Employees subject to a CBA who choose to grieve an action through the negotiated grievance procedures must file NLT 10 business days after the date the decision is issued.

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## TITLE 5/FT HYBRID

# Act and NFFE Comparison

Accountability Act	HRML No. 05-17-06 ADVERSE ACTION PROCEDURES	NFFE Contract Requirements
38 USC 714 New Authority for removals, demotions, or suspensions based on performance or misconduct	OHRM HRML (Performance Based Actions) Title 5 & Hybrid Title 38	NFFE Contract Requirements (Performance Based Actions) Title 5 & Hybrid Title 38
The procedures under chapter 43 of title 5 shall not apply to a removal, demotion, or suspension under this section	Performance based action can be taken based on deficiencies noted in an issued Final Rating, Closeout Rating, or recent Progress Review. Or if written communication (email or memo) was provided to an employee at least once during the rating cycle.	<b>SUPERSEDED BY §714:</b> Employees with unacceptable performance will receive a PIP and at least 90 days to bring their performance to an acceptable level
	No requirement for employee to serve under performance plan for 90 days or to be provided an opportunity to improve prior to action being taken	<b>SUPERSEDED BY §714:</b> Employees with unacceptable performance will receive a PIP and at least 90 days to bring their performance to an acceptable level
Aggregate period for notice, response and final decision may not exceed 15 business days	Aggregate period for notice, response and final decision may not exceed 15 business days, even if an extension to the reply period is granted	<b>SUPERSEDED BY §714:</b> 30 days advance written notice (proposal)
Response period - 7 business days (does not specify written or oral response)	Response period - 7 business days (specifies written reply only)	<b>SUPERSEDED BY §714:</b> 14 day response period; <b>REQUIRED:</b> Must still allow Written and/or Oral Replies
Final Decision - NLT 15 business days	Final Decision - will be issued on or before the 15th business day after the proposal was issued	<b>REQUIRED:</b> Final Decision - Notice of Removal or Demotion will be provided at least 7 calendar days prior to the effective date
Appeal - MSPB and negotiated grievance - Must be filed NLT 10 business days after the date the decision is issued.	Appeal - MSPB and negotiated grievance - Must be filed NLT 10 business days after the date the decision is issued.	<b>SUPERSEDED BY §714:</b> Employees subject to a CBA who choose to grieve an action through the negotiated grievance procedures must file NLT 10 business days after the date the decision is issued.

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## What about Whistleblowers?

TITLE 5/FT HYBRID

### Important:

If a covered employee files an alleged prohibited personnel practice with the Office of Special Counsel (OSC) or makes a whistleblower disclosure with the Office of Accountability and Whistleblower Protection (OAWP), an action proposed under 38 U.S.C. § 714 cannot be taken without consultation with the Office of General Counsel (OGC) and/or the OAWP.



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## Filing an Appeal under 38 U.S.C. § 714

TITLE 5/FT HYBRID

- Employee can file an appeal to the Merit Systems Protection Board (MSPB) or a negotiated grievance, if covered by a CBA.
- Employee has 10 business days to file an appeal with MSPB or a negotiated grievance, if applicable.



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## Mitigation of Penalty under 38 U.S.C. § 714

TITLE 5/FT HYBRID

- MSPB does **not** have the authority to mitigate the level of discipline imposed by the agency, but it can overturn the action if the decision is not supported by substantial evidence.
- MSPB has 180 calendar days to decide the appeal.



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## Questions?



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## What Stays the Same?

TITLE 5/Ft HYBRID



- The provisions of Chapter 75 as defined in VA Handbook 5021, Part I, Chapter 2, must still be used for actions based on misconduct for admonishments, reprimands, and suspensions of 14 calendar days or less on any non-probationary employee.
- Additionally, Chapter 75 can still be used for conduct-based actions; however, a higher standard of proof, 30-day advance notice, and a Douglas Factor analysis will be required.

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## What Stays the Same?

TITLE 5/Ft HYBRID

- An evidence file is still required to support all actions being taken.
- The provisions of Chapter 43 can still be used to take a performance-based action against an employee; however, an opportunity to improve period will be required under that authority.
- The performance appraisal process has not changed. Performance deficiencies must still be supported by documentation.

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## Don't Forget.....

TITLE 5/Ft HYBRID



Some MSPB case law that will likely still apply:

- Making sure there is a nexus between the employee's job and the charged misconduct.
- Ensuring the employee's right to due process is not violated, as failure to do so will result in the action being overturned.
- Ensuring ex parte communication issues such as those found in *Ward v. USPS* and *Stone v. FDIC* do not occur as a finding of a due process violation may result.

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## 38 U.S.C. § 731 – Supervisory Employees

If a supervisor is found to have engaged in Whistleblower retaliation in conjunction with a finding by the Secretary, the Office of Inspector General (OIG), or, if the matter is still pending or under appeal, an administrative judge, the MSPB, or a Federal judge, consult with the OAWP.



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## 38 U.S.C. § 731 – Supervisory Employees

If the Secretary concurs with a recommendation for disciplinary action, the Supervisor will receive:

- A minimum of a 12 day suspension up to removal for a first offense; and
- Removal for the second offense.



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## 38 U.S.C. § 731- Supervisory Employees

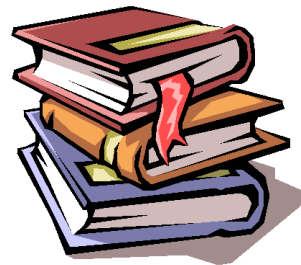
If a supervisor is issued a proposed action due to a finding of whistleblower reprisal, he/she will be afforded 10 calendar days to submit a written response instead of 7 business days.



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## References

- Public Law 115-41
- VA Directive and Handbook 5021
- HRMLs 05-17-05, 06, 07, and 08
- <http://vaww.va.gov/OHRM/EmployeeRelations>



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## Questions?



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