CONGRESSIONAL TESTIMONY

STATEMENT BY

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BEFORE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

ON

THE VA ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION ACT: ONE YEAR LATER

JULY 17, 2018

Chairman Roe, Ranking Member Walz and Members of the Committee:

Thank you for the opportunity to present the views of the American Federation of Government Employees, AFL-CIO (AFGE) and its National VA Council (NVAC) regarding the implementation of the Department of Veterans Affairs (VA) Accountability and Whistleblower Protection Act of 2017 (Accountability Act). AFGE and NVAC represent over 250,000 front line employees who honor our nation's veterans every day by providing exemplary services at VA medical centers, benefits offices, vet centers and other VA entities. It should be noted that AFGE and NVAC do not represent any VA management employees, the workforce segment targeted by bills leading up to the Accountability Act.

The Accountability Act has proven to be one of the most misguided and counterproductive VA laws ever enacted. It has demoralized and harmed its dedicated workforce, including a disproportionately large share of the 115,000 veterans who have the honor of taking care of other veterans as proud members of the VA workforce. It has deprived veterans who depend on the VA for health care and benefits of the services of employees with extensive training and experience who have been fired under the Act's new authorities without a fair chance to improve their performance or defend their jobs, as well as others who have left the VA or chose not to apply because of its uniquely harsh firing laws and hostile workplace. The Act has also squandered taxpayer dollars through unnecessary job turnover and litigation by empowering managers to go straight to the nuclear option of removal on the first alleged offense.

Who is getting fired under the Accountability Act?

Here's what "accountability" looks like under the new firing law. The VA has tried to hide the true harm that Act has caused by publishing limited firing data and denying information requests from Members of Congress and AFGE. Notwithstanding the VA's intentional lack of transparency, its own published data still illustrates the Act's severe unintended consequences and its failure to hold management accountable for mismanagement and misconduct.

For example, of the 2,742 VA employees fired in 2018, only 18 were supervisors (less than 1 percent). Housekeeping aides were the largest number fired, followed by nursing assistants, registered nurses, food service workers and medical support assistants. In contrast, supervisors (across the entire Department) ranked in *19th place.*

AFGE and NVAC attorneys discovered the perverse impact of this firing law soon after enactment, through individual cases involving positions historically held by veterans, including large numbers of service-connected disabled veterans. These include housekeeping aides, cemetery caretakers, police officers and Veterans Benefits Administration (VBA) veterans service representatives, claims examiners and claims assistants. Other cases highlighted the Act's greater impact on low wage VA employees generally, such as food service workers, nursing assistants and scheduling clerks.

The first set of VA published data confirmed what we were seeing at the facility level, i.e. that extremely few managers were being held accountable under a law that was justified largely as a management accountability tool.

After we learned that the VA's published data masked the disproportionate effect of this harsh law on the veterans and other vulnerable segments of the VA workforce, we filed a Freedom on Information request for data on *veteran status, age, gender and race* (Attachment A). The VA has not responded with the data requested for nine months, forcing us to file an appeal. Similarly, Members of Congress have not gotten a response to their data requests (Attachment B).

Despite the limited published data, the Act's disproportionately large impact on VA's low wage workforce and veterans is undeniable. Currently, the Veterans Health Administration (VHA) has a national job posting for **housekeeping aides** at 13 medical centers. All the openings are restricted to preference eligible veterans and all pay less than $35,000 annually. The salaries for VHA **nursing assistant** positions currently posted start at $30,449. All current food service national postings list hourly wages below $13 an hour.

The Act's adverse impact on the VA health care system is also evident from the large number of removals of employees in nursing positions. VA Inspector General (IG) Michael J. Missal testified before this Committee last month that the IG has consistently included **registered nurses and other nursing occupations** in its top five determinations of VHA occupational staffing shortages.

The VA cannot fire its way to success

This destructive law was enacted despite warnings from experts that mismanagement, not job protections for front line employees, was undermining the VA's capacity to deliver

services to veterans. Health care experts repeatedly presented evidence that the VA health care system, the primary target of proponents of this firing law, outperforms the private sector.

First hand statements by VA scheduling personnel confirmed that wait list gaming was caused by severe shortages of providers and distorted management incentives, not incompetent or heartless employees who were too easy to fire.

Surveys by veterans' groups and other entities indicated that the VA remains a leader in customer satisfaction and that veterans using the VA health care system overwhelmingly prefer the VA's own providers to private providers and want the VA to increase its own staff.

Wait list gaming and its causes did not first make headlines in 2014. When post-9/11 veterans started returning home with complex medical needs over 15 years ago, AFGE and veterans' groups cautioned Congress that chronic short staffing was causing wait list manipulation and severe access problems at VA medical centers.

Similarly, every year, the Independent Budget recommends additional staff to reduce claims backlogs at the Veterans Benefits Administration (VBA). The VA's 2018 firing data reveals that four essential claims processor positions – veterans service representative, rating specialist, claims examiner and claims assistant – were among the 20 largest groups of fired employees in 2018.

Nonetheless, assaults on federal employee due process rights and collective bargaining rights have remained the vehicle of choice for those intent on destroying the civil service and starving the VA into further privatization and reduced health care services and benefits. The Accountability Act was the culmination of three years of VA employee bashing and

misrepresentation about the quality and access of care provided by the VA as compared to the private sector.

Impact of the new management authorities provided by the Accountability Act

The new authorities caused severe cuts in the due process and existing collective bargaining rights of all VA frontline employees, as well as supervisors. These changes made it easier for managers to fire employees for any reason, good or bad and incentivized them to rush to fire without providing employees with an opportunity to improve.

The Act made changes in three major areas: the standard of evidence that the agency must meet to prove its case; shorter timeframes for employees to respond to the agency's proposal to remove or discipline; and elimination of the right of the Merit System Protection Board to impose a lower penalty when the evidence does not support removal.

Lower evidentiary standard: The Act requires the Merit System Protection Board (MSPB) administrative judges (AJ) and the Board to apply the *substantial evidence* standard to determine if the agency has proved its case instead of the higher, more widely applied *preponderance of the evidence* standard. The *substantial evidence* standard only requires the agency to produce some evidence (or in the words of the U.S. Supreme Court, a "mere scintilla" of the evidence) to win, even if more of the evidence favors the employee. Before this bill became law, the VA had to meet the preponderance standard that requires that the majority of evidence had to weigh against the employee. When managers know that the agency will easily prevail before the Merit System Protection Board, they are encouraged to skip over reprimands, suspensions and demotions and instead, propose removal in response to a single

alleged offense. (This change applies only to Title 5 and Hybrid Title 38 employees. It does not apply to physicians, RNs and other Full Title 38 health care personnel as they do not appeal adverse actions to the MSPB).

Elimination of the MSPB's authority to lower the penalty sought by the agency: Civil service case law has historically required that the MSPB AJs and the Board adjust the penalty to reflect that severity of the underlying misconduct or performance deficiencies. If the Board or AJ concluded that the evidence did not support removal, he or she could apply a demotion, suspension or other lesser penalty instead of being forced to either carry out a removal or dismiss the entire case. The Act has been interpreted to eliminate the ability of the employee to argue that the penalty is too harsh in light of the seriousness of the charge or his or her prior good record. (This change also applies only to Title 5 and Hybrid Title 38 employees.)

Additionally, for all employees including Full Title 38 employees, the Act significantly reduced the amount of time that an employee facing a proposed removal or other major adverse action had to prepare a response to the agency and file an appeal. Previously, employees had 14 calendar days to respond to the agency's notice of proposed removal. Now, they must respond within 7 business days. The timeframe for appealing a final agency decision to the MSPB (in the case of Title 5 and Hybrid Title 38 employees) has been reduced from 30 calendar days to 10 business days. Similarly, for Full Title 38 health care personnel, the timeframe for appealing a removal or other major adverse action involving professional conduct or competence to the agency Disciplinary Appeals Board has been reduced from 30 calendar days to 7 business days.

Inadequate statutory whistleblower protections: One of the strongest arguments made by proponents of this law to reduce rights was that it would provide stronger protections for "deserving" employees who are agency whistleblowers. However, the Act has a flawed, inequitable and confusing process for protecting whistleblowers from retaliatory firings. It is important to note that none of Full Title 38 health care personnel listed above are protected by the requirement in the new law that the Office of Special Counsel (OSC) approve the removal of whistleblowers proposed by the agency. The VA can fire these clinicians unilaterally even if they have strong whistleblower claims, except in extremely limited cases.

This gap in the law has led to inequities and confusion. Recently, management proposed to remove an RN who had registered as a whistleblower with the Office of Special Counsel (OSC). VA management initially informed her (incorrectly) that OSC approval was required; then management proceeded to remove her because she did not have a right to review by the OSC to save her job.

This gap in the Accountability Act will result in significant inequities. For example, if a Hybrid Title 38 psychologist (with both Title 5 and Title 38 rights) files with OSC as a whistleblower, he or she cannot be fired unless OSC approves the action. In contrast, a psychiatrist (who is covered only by Title 38) providing similar mental health treatment in the same clinic who also reports deficiencies in mental health services who files for whistleblower status will receive no OSC review prior to removal.

Effect of the Accountability Act on Performance Improvement Plans: Prior to enactment of this law, the VA routinely offered employees with time limited opportunities to improve their

performance through Performance Improvement Plans (PIPs) prior to removing them for poor performance under Chapter 43 of Title 5. (Misconduct actions are covered by Chapter 75 of Title 5).

Since enactment, the Agency has incorrectly interpreted the Accountability Act as removing the requirement (found in federal statutes and the AFGE NVAC Master Agreement at Article 27) to give employees an opportunity to improve before they can be subject to a performance-based action under Chapter 43. While the Act does state that the procedures of Chapter 43 do not apply to an action under the Act, the reasonable interpretation of this provision is that the Act shortened the timelines in Chapter 43 performance actions similar to Chapter 75 misconduct actions *but did not eliminate the requirement to provide employees with an opportunity to improve.*

We recently grieved the elimination of PIPs in a VBA case. The arbitration hearing was held on April 26, 2018. Briefing was completed on June 18, 2018 and we are currently awaiting a decision from the arbitrator.

CASE EXAMPLES

AFGE and NVAC have handled and/or identified numerous examples of the harsh and counterproductive effects of the Accountability Act.

Whistleblower cases

- An employee out of the Overton Brooks VA Medical Center (Shreveport) reported a management official for improperly accessing her personnel medical records. A few weeks after management learned of the employee's whistleblowing activity, she was given a proposed removal for conduct that occurred four months earlier. The

conduct in question involved a dispute between two union officers about union matters. She had received no prior discipline. The employee has filed a whistleblower retaliation complaint with OSC, which is currently pending.

- A local union officer in Pittsburgh was featured in an article about the Accountability Act where he made disclosures about Management's abuse of authority. Management immediately expressed their dissatisfaction with his statements. On June 13, 2018, the VA proposed his removal under the Accountability Act. He has filed a whistleblower retaliation complaint with OSC, which is currently pending.

Disabled veteran seeking accommodation:

- A disabled veteran with a chronic condition requested a reasonable accommodation for telework to accommodate his condition. The accommodation would have obviated the alleged conduct. The Agency never responded to his request, then issued a proposed removal.

VBA Performance Actions:

AFGE and NVAC have serious concerns about the validity of VBA performance standards and whether employees know how these numbers are calculated or understand how to adjust their work flow in response. It is not sufficient to tell an employee that he or she is not "meeting the standards"; the employee also needs to know what is needed to meet them – which is exactly what a PIP would have provided.

Other VBA cases illustrate management's willingness to remove long term employees with valuable claims processing experience on the first offense for failure to meet questionable performance periods during brief evaluation periods.

- An employee with modest performance problems was denied a PIP prior to dismissal to attempt improvement. Instead, the supervisor repeatedly told the employee that

he was not meeting the standards. The supervisor did not discuss why the employee was not meeting the standards.

- Another employee who had modest performance issues was proposed for removal after 9 years with the VA. The VA held the employee accountable for performance standards prior to the employee receiving them. The notice stated the employee failed to meet standards over a 6-month period when in fact he only received the standards 4 months in that time. Despite the VA's claims that the employee's problems were severe, it kept the employee on board for an additional 3 months yet refused to offer him a PIP or any other assistance prior to firing him.
- A career VA employee with approximately 28 years worked at the Philadelphia VBA and held various positions in the Insurance Center before being promoted to the Pension Management Center. She was not performing regular VSR work because she was moved around within the PMC by multiple assignments for several years. When she was moved back to her regular VSR position, she was unfamiliar with the new PMC rules and regulations. She asked for retraining but was told by PMC Management that she was "fully trained" and they would not provide her with any additional training. She was proposed for removal under the new law for failing to meet her performance standards.
- After working for more than 12 years for the VA, a Philadelphia VBA employee with two advanced degrees who teaches part time at a local community college was forced into retirement under the new law. When the performance standards underwent drastic changes, he repeatedly asked for help, but management refused to provide them. He was forced into a lower graded position. Instead of risking a termination or further downgrade, he chose to retire early.

VHA Performance Action: (*Walls v. VA*, 118 LRP 10484):

- This VHA claims assistant was fired for poor performance as a document scanner. The agency used flawed data to makes its case. The MSPB overturned the removal but the disruption of the employee's livelihood had already occurred. This case also demonstrates the benefits of a PIP; it informed the employee of exactly what she was doing wrong and ways to improve, but because of its interpretation of the Act, the agency cut her PIP short and failed to give her the complete 90 days to improve.

HOW THE OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION WORKS

The AFGE NVAC legal team has had mixed experiences working with the Office of Accountability and Whistleblower Protection (OAWP). OWAP appears to have met some of its requirements including establishing and staffing its office, creating a form for disclosures and

conducting investigations. However, there are some significant items that have not been implemented.

For example, the Accountability Act requires that the OAWP include as a critical element in each supervisor's performance plan how he or she deals with whistleblowers. The VA has yet to do this. When questioned about this, they say they are working on a handbook to accomplish this but over a year has passed with no action.

In addition, the Act requires that OAWP have a toll-free phone number for anonymous whistleblower complaints. The VA does have a toll-free number (855-4AWONOW or 855-429-6669), but it is difficult to find because it is not posted on their site (va.gov/accountability). When asked about this, the VA stated that the number is available internally and that the intent was that they only receive disclosures from employees.

A third concern relates to the VA's policy on reports of wrongdoing. Wouldn't the VA want reports of wrongdoing from other groups with knowledge of the activity, such as the Union, contractors, or veterans service organizations? In fact, nothing in the Act requires that disclosures come exclusively from VA employees. Yet, the OAWP site describes its own disclosure form as follows: "*This form is only for use by VA Employees or Applicants for Employment.*"

In addition, it appears that OAWP has overstepped its bounds by ordering investigations of matters filed with OSC. As previously noted, under Section 714(e) of the Act, if an employee seeks corrective action from OSC for a whistleblower retaliation complaint, the VA cannot exercise its new authorities to remove the employee. What is supposed to happen in order to

stop the action is that OSC reaches out to its contact in OAWP, who then reaches out to the facility. Then OSC does its own investigations of whistleblower retaliation. While OAWP has been taking the necessary steps to proactively stop the actions, they have also been taking the information from OSC and doing their own investigations, and in some cases, retaliating *again* by subjecting the whistleblower to an additional mandatory investigation.

Our legal team is also concerned about the relationship between OAWP and the General Counsel. The Act states that OAWP is not an element of the General Counsel and the Assistant Secretary may not report to the General Counsel. In practice, these two offices work hand-in-hand. If the intention was that there be some semblance of independence, that has clearly not been given effect.

Other concerns about OAWP:

- The Accountability Act requires that OAWP have an internet website to receive anonymous whistleblower disclosures. The VA has yet to do this. They have an email address *VAAccountabilityTeam@va.gov* which is not anonymous.
- The Accountability Act requires the VA to provide training, in person (to the greatest extent practicable) regarding what whistleblowing is, how to make disclosures, and an explanation that they will not be reprised against. No such training has occurred.
- The Accountability Act requires the OAWP to take actions against senior leaders under Section 713. Based on their own "CY 2018 VA Accountability Report Details," https://www.va.gov/accountability/Accountability_Report_062618_1.pdf in the year since the Act was passed, they have done so in *one* case. This is out of the 1,044 disclosures and whistleblower retaliation complaints the office received. (It is unclear if this report includes referrals from OSC (https://www.va.gov/accountability/Whistleblower-Disclosures-Summary_070518_1.pdf)
- OAWP is required to have an Assistant Secretary; it currently has an Executive Director. VA's reason for this is that Congress has specified the number of Assistant Secretaries they could have. When they passed the Accountability Act, they did not simultaneously increase the VA's allotment. Assistant Secretaries report directly to

the Secretary, while Executive Directors must report to a Management official along the chain below the Secretary.

CONCLUSION

AFGE urges lawmakers to take immediate steps to curb the devastating impact of the Accountability Act and restore the essential VA employee rights it stripped away by supporting H.R. 6101, the VA Personnel Equity Act, a bipartisan bill that will restore the higher standard of evidence, longer timeframes and authority to provide appropriate penalties that will ensure fairness and true accountability.

We also urge lawmakers to enact legislation to mandate greater transparency of VA firing data. Similar to the VA Mission Act, which requires greater transparency of VA *hiring* data, it seems very reasonable to impose a legislative mandate to publish full *firing* data. The VA's refusal to respond properly to multiple requests for firing data confirms that this additional legislative authority is needed. The Committee should also insist that the VA provide it with the data on veterans and other fired groups that has been requested to date.

Finally, any additional whistleblower protections afforded to VA employees should also apply to the entire workforce and not exclude VA Full Title 38 health care personnel.

Thank you.