



CONGRESSIONAL TESTIMONY

STATEMENT BY

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BEFORE

HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

ON

"VA APPEALS PROGRAM: EXAMINING THE STATE OF MODERNIZATION EFFORTS"

JULY 13, 2021

Chairwoman Luria, Ranking Member Nehls, and Members of the Subcommittee:

Thank you for inviting the American Federation of Government Employees to participate in today's Subcommittee Hearing titled, "VA Appeals Program: Examining the State of Modernization Efforts." My name is Gillian Slovick, and I have served as a frontline attorney for the Board of Veterans' Appeals (the Board) for 12 years and serve as the Second Vice President of AFGE Local 17, which represents 871 Board attorneys and additional support staff. On behalf of AFGE, its National Veterans Affairs Council, and AFGE Local 17, it is an honor to have this opportunity to provide input to the subcommittee on ways that the Board can improve its service to veterans through the recruitment and retention of the Board's dedicated and specialized workforce. Specifically, I hope to build on the continuing dialogue that AFGE has had with Secretary McDonough's team, and thank him for recently taking the time to attend AFGE Local 17's Black History Month discussion and speaking individually with Board attorneys, support staff, and cafeteria workers in the building. I also want to thank Chairwoman Luria and her staff for always having an open door to listen to AFGE's concerns and giving AFGE today's opportunity to offer substantive recommendations to the Subcommittee on how the Board can improve on the topics of Workload and Performance, the Board Attorney Workforce, and Technology.

Workload and Performance:

In examining the Workload and Performance of Board attorneys, it is critical to understand the continually evolving quotas and performance metrics Board attorneys face, the

obstacles outside of an attorney's control, and the differences between "Legacy Claims" and new Appeals Modernization Act (AMA) claims.

The Board has made significant changes over the past several years regarding the number of cases and issues a Board attorney must complete annually. Prior to the implementation of the AMA, Board attorneys were expected to complete 125 cases a year, a pace that averaged 2.4 cases per week. Each case, regardless of the number of issues decided, carried the same weight towards an attorney's production quota. In FY 2018, the Board increased its production standards from 125 to 169 cases per annum, (or 3.25 cases per week), a 35% increase in production requirements which was overwhelming for Board attorneys. In FY 2019, the Board created an alternative measure of production for Board attorneys which evaluated the total number of issues decided by an attorney, regardless of the number of cases completed, setting that number at 510 issues decided. AFGÉ supports the creation of this alternative metric as it better accounts for the amount of work required to complete each case. However, we caution that measuring the number of issues can also be manipulated to create unfair metrics. Unfortunately, this manipulation appeared in FY 2020, the first full year the AMA was fully implemented, because while the case quota remained at 169, the issue quota was raised to 566. Finally in FY 2021, the quota was changed to a more manageable but still difficult 156 cases or 491 issues. AFGÉ members and Board attorneys are not afraid of the hard work necessary to satisfy the mission of serving veterans. However, extraordinarily challenging and constantly changing metrics make it more difficult to meet standards, setting attorneys up for failure or encouraging them to cut corners in order to meet their production goals. We understand that the FY 2021 quotas were lowered in large part because of a management

initiative related to a hearing backlog caused by the suspension of hearings during part of the COVID-19 pandemic, and AFGE is deeply concerned that the Board may raise the standard again in FY 2022. We raise this concern because the Board recently announced that it is increasing its Board-wide quota from 91,500 appeals annually to 111,500. AFGE strongly urges the Board not to reinstate the counterproductive quotas of the past, but instead to hire more attorneys to meet its increased production goal. AFGE is supportive of the Biden Administration's budget proposal to increase funding for the Board by \$32 Million, that will in part enable it to hire more attorneys. Unfortunately, AFGE truly fears that if the quota is significantly increased, many hardworking and successful attorneys will leave the board either from over work or inability to meet the quota. Because of this, AFGE also urges Congress to request a Government Accountability Office study on the production standards of Board attorneys to determine what is feasible.

Beyond the issues surrounding production quotas there are other concerns that should be explored by this Subcommittee. The first is the requirement that an attorney may only receive credit for a case once a judge signs off on the work. While in theory this may sound like a plausible requirement, considering the amount of work and burden already placed upon judges, this can severely delay an attorney's ability to timely reach his or her quota. These delays are entirely out of the attorney's control, can prevent an attorney from meeting his/her quota, and factoring them into an attorney's quota violates Article 27, Section 8, Subsection E of AFGE's collective bargaining agreement with the VA, which states "When evaluating performance, the Department shall not hold employees accountable for factors which affect

performance that are beyond the control of the employee.” This requirement is arbitrary and should be adjusted.

Additionally, like many other workplaces throughout the nation, COVID-19 affected attorneys working at the Board. While some attorneys thrived with the option of telework and found themselves to be more productive, that was not the case for all Board attorneys. Out of a workforce of 871 attorneys, there have historically been between two to three employees on Performance Improvement Plans (PIPs) at one time, often connected to an attorney failing to meet a quota. Currently, there are 31 attorneys on PIPs, 20 of whom are women, and many whom are also parents of young children who did not have childcare for all or part of the COVID-19 pandemic. As a mother of a young child myself, I can assure you that having my child at home made a hard job requiring intense focus and concentration even more difficult. While attorneys were grateful for a slight change in their quotas in consideration of COVID-19, the biggest concession by management to Board attorneys during this unprecedented time was a suspension of core hours. While this was helpful to some attorneys who wanted flexibility, telling attorneys with young children that their solution to addressing the COVID-19 pandemic was that they could now work on nights and weekends while still raising children was not helpful, and instead had a predictably negative effect on morale and only increased pressure on working parents. Considering these exceptional circumstances, AFGE urges the Board to show the empathy required by the circumstances when evaluating performance of its employees during the pandemic, particularly for the time periods where childcare was truly unavailable.

Lastly, a critical issue that affects the Board’s productivity is its transition from older/legacy appeals to AMA appeals. AFGE supports the Board’s efforts to complete all legacy

appeals but believes that the Board can be more strategic in its approach. As one of my colleagues recently described it, while legacy appeals and AMA appeals are at their core both veterans' appeals, because of the differences in processes and rules governing the different types of claims, you are speaking French when evaluating one claim, and Italian with the other. The two systems are certainly related, but each has its unique language. Unfortunately, the Board does not distinguish between the two types of claims when assigning work to attorneys, and Board attorneys often experience whiplash going back and forth between the two, creating unnecessary challenges. AFGE strongly urges the Board to consider allowing some Board attorneys to exclusively process legacy appeals until that backlog is complete, and other attorneys to exclusively work on AMA appeals, allowing each group to fully immerse themselves in the one type of claim. Furthermore, once the attorneys working on the legacy appeals complete their work, they should be given an adjustment period to reacclimate to the processes used for AMA claims. This would allow attorneys to specialize, making their work easier and allowing them to better serve veterans.

Board Attorney Workforce:

The Board of Veterans' Appeals operations and production are entirely determined by the performance of its workforce. Unfortunately, the Board has for many years suffered from poor morale and high turnover among employees, and there is certainly room for improvement. In the period between March 1, 2019 through June 23, 2021, a total of 148 Board attorneys resigned or were removed from the Board. During that same time frame, only five retired. While there is no single change that can be made to address all of the Board's

workforce issues, I want to highlight several small changes that would have a real impact for Board attorneys and help improve employee morale.

In relation to recruitment and retention and creating a career path where attorneys can stay for the entirety of their career, AFGE urges the Secretary to create journeyman non-supervisory GS-15 Board Attorney positions. Currently, Board attorney grades range from GS-11 to GS-14. Of the 871 attorneys currently at the Board, 439 attorneys are at the GS-14 level. While not all attorneys would qualify or choose to advance to a GS-15 position, creating the possibility for 100 to 200 GS-15 attorneys would help with long term recruitment and retention. It is also important to note that there are non-supervisory journeyman GS-15 attorneys within the VA Office of General Counsel, thus setting a precedent. As Board attorneys are in the Excepted Service, it is entirely within the Secretary's discretion to create this new position. AFGE strongly encourages the Secretary to create this advancement opportunity and calls on this Subcommittee to voice its support for this change.

Another proposal that would help with recruitment and retention is for the VA to utilize its existing authority under 5 U.S.C. § 5757 to reimburse every Board attorney for the cost associated with maintaining their membership with one state bar, as is done at many agencies, including for attorneys at the VA Office of General Counsel upon request. As all Board attorneys are required to be admitted to a bar, this would be a simple, equitable, and non-cost prohibitive way to retain employees at the Board and help keep parity with the private sector where many law firms pay for such fees. Reimbursement for Continuing Legal Education (CLE), similar to what exists for VA clinicians under 38 U.S.C. § 7411, would also be appreciated for

attorneys licensed in states that require CLE, and would further help with recruitment and retention.

Beyond issues related to compensation and reimbursement, there are other quality of life issues that affect Board attorneys. Since the start of the COVID-19 pandemic, attorneys have had to use telework to complete their duty. While this is preferable for many attorneys at the Board, there are those who would prefer to come into their duty station part time or full time once public health allows it. It is clear the Board is reducing its office footprint in the Washington, DC area, and may not have enough permanent workspace for all Board attorneys to work simultaneously from their duty station if they so choose. AFGE wants to ensure that following the office closures brought on by the COVID-19 pandemic, there is increased flexibility for Board attorneys and administrative staff to utilize as much or as little telework as they choose, as long as they are meeting their work quota.

Finally, AFGE urges the Board to increase the amount of training it provides to Board attorneys and include representatives from AFGE Local 17 to take part in designing that training. With the rollout of the Appeals Modernization Act as the most prominent example, new or refresher training is necessary for Board attorneys as new processes are created and tested. AFGE has long advocated for the VA to include frontline workers, the individuals actually completing the work and who have encountered problems firsthand, when deciding what training would be most relevant to employees in the performance of their duties. Considering that of the 148 attorneys who left the board between March 1, 2019 through June 23, 2021, 85 were GS-11, providing better training with input from long tenured Board attorneys can certainly help with the recruitment and retention of newer Board attorneys.

Additionally, as the Board is represented by a single union local, and all of the Board attorneys are headquartered within the Washington, DC area, it should not be difficult to form a working group with AFGE employees to maximize the effectiveness of training. Requiring the VA or the Board to work with union representatives can be mandated by Congress, and AFGE urges the Subcommittee to explore this requirement for Board attorneys.

Technology:

In regard to technology, there is one point that I would like to bring to the Subcommittee's attention. Board attorneys use the software "Caseflow Reader" to manage cases and track progress. While this technology has improved in recent years, it unfortunately still has a habit of malfunctioning and preventing Board attorneys from fulfilling their work. Employees are permitted "down time" for this unavailability, but it would be preferable to have the Board invest more resources into technology to better prevent future work delays.

Thank you for giving me the opportunity to testify at today's hearing. I look forward to answering any questions you may have.