STATEMENT FOR THE RECORD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
PROVIDED TO THE
SENATE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
PENDING HEALTH CARE AND BENEFITS LEGISLATION
JUNE 24, 2015

Chairman Isakson, Ranking Member Blumenthal, Members of the Committee, thank you for the opportunity to present the views of the American Federation of Government Employees, AFL-CIO and its National Veterans Affairs Council (AFGE) regarding pending legislation. AFGE represents over 670,000 federal employees, including more than 220,000 employees of the Department of Veterans Affairs. AFGE's representation of non-management, front line employees working in virtually every non-management position in the Veterans Health Administration (VHA), Veterans Benefits Administration (VBA), National Cemetery Administration and other VA functions allows us to share a unique perspective with the Committee. AFGE also greatly appreciates the efforts by members of this Committee to solicit the views of our AFGE locals in settings where they feel free to share their concerns and recommendations without reprisal.

S. 1082

Overview of S. 1082

AFGE and the National VA Council strongly oppose S. 1082. We urge lawmakers to reject this counterproductive and dangerous anti-accountability bill in favor of legislation that will truly improve accountability by reducing mismanagement from the outset, expanding protections against prohibited personnel practices for every VA employee and strengthening the VA investigative process.

S. 1082 is dangerous because it destroys the civil service protections of the very non-management employees who can hold management accountable to uphold the interests of veterans.

This bill is dangerous because longer probationary periods will subject more veterans in the VA workforce to unfounded or discriminatory terminations. This bill is also dangerous because it diverts the resources of the Office of Special Counsel (OSC) and Merit Systems Protection Board (MSPB) away from appropriate claims of retaliation and discrimination. Finally, this bill is dangerous because it will cause significant numbers of physicians and other employees skilled in critical shortage occupations to leave the VA or reject a future VA career, undermining veterans' access to the high quality services they rely on from the VA.

S. 1082 is poised to set the clock of workers' rights back more than 100 years. It makes the employment of VA employees subject to the whims of the VA Secretary, a political appointee. We learned in the Progressive Era that it is a great public good to have a civil service insulated from politics. Anyone who doubts that this bill creates a full-fledged patronage system should take a look at the history of government employment prior to the passage of the Pendleton Act of 1883.

By tearing down the due process protections granted to the covered employees, this bill would have the overall effect of chilling disclosures, destroying employee morale, and undermining the retention of many of VA's most experienced and valuable employees.

Analysis of Section 2: Removal or Demotion of Employees Based on Performance or Misconduct

Section 2 of S. 1082 takes away fundamental due process rights from front line, non-management VA employees in the VHA, VBA, NCA and other VA units, including thousands of service-connected disabled veterans. This section extends the SES due process cuts enacted in the Choice Act to non-SES managers as well as to every non-management front line employee. Despite the fact that the bill is presented as a tool to enhance accountability for SES and upper management, its greatest target is the 350,000 plus non-management employees who work on the front lines, including service-connected disabled veterans who clean operating rooms, police emergency rooms, maintain VA cemeteries and

rate disability claims, and their coworkers who are primary care providers, PTSD therapists, surgeons, bedside nurses, electronic health record technicians, among so many other essential positions. Stripping job protections from non-management employees will result in more mismanagement in the form of retaliation, discrimination, patronage and anti-veteran animus. And veterans care will suffer, along with the employees who have pledged their careers to care for veterans.

This bill proceeds from the false premise that it is "too hard" to remove federal employees under the current system. It is not. The VA already has -- and uses -- existing tools to fire poor performers and front line employees engaged in misconduct. If more terminations need to go forward, lawmakers should focus on poorly trained supervisors and inadequate use of the existing probationary period. Employees should only be removed for legitimate causes. Yes, this is harder than "at will" employment, but maintaining an apolitical, merit-based civil service requires that termination be for demonstrable causes. This is not "too hard" for a competent and responsible manager.

According to the Merit Systems Protection Board's 2015 Report, *What is Due Process in Federal Civil Service Employment?*, over 77,000 full-time, permanent, federal employees were discharged as a result of performance and/or conduct issues from FY 2000 to FY 2014. In FY 2014, 2,572 VA employees were terminated or removed for disciplinary or performance reasons, according to the Office of Personnel Management. Also, contrary to some of the rhetoric behind calls to eliminate federal employee job rights, federal employees do not continue to receive their salaries after they are terminated.

S. 1082 entirely eliminates the procedural protections of 5 U.S.C. § 7513(b) and 5 U.S.C. § 4303. Section 7513(b) is the adverse action section of the Civil Service Reform Act (CSRA). If S. 1082 were enacted, every non-management VA employee would lose the following rights:

- Right to 30 days' advance notice before an adverse action may be imposed;

- Right to 7 days for the employee to respond;
- Right to a representative; and
- Right to a written decision.

Section 4303 serves much the same function for unacceptable performance actions, although the specifics are different.

By eliminating these two sections, S. 1082 eliminates the "notice and opportunity to be heard" that have been a hallmark of federal sector due process since before the CSRA was adopted in 1978. These provisions form the very foundation for due process in the civil service system. To be clear, nothing in section 7513 or in section 4303 currently prevents agencies from removing employees or requires the MSPB or any other reviewing body to reach a particular result.

S. 1082 eliminates 7513(b), the core notice and opportunity to be heard section of the CSRA's adverse action protections. This sets up a fundamental denial of due process, which might never be heard because the bill also provides that notwithstanding any other provision of law, including 5 U.S.C. § 7703 (the CSRA's judicial review section for adverse actions), the decision of the MSPB's administrative judge shall be final and shall not be subject to any further appeal.

Put another way, while the bill provides a nominal right to appeal a removal or demotion action by the Secretary to the MSPB, if it is appealed before a harsh 7-day deadline that itself has no textual support, the bill substantively precludes both full MSPB review and judicial review.

This creates a situation that is arguably worse than traditional notions of at-will employment. In the private sector, for example, at-will employees may have access to the courts under a contract or tort theory even if they do not have due process rights. Because of the comprehensive nature of the CSRA, and numerous cases interpreting the CSRA, federal employees are prohibited from bringing these same

types of contract and tort claims to court. VA employees covered by this bill would thus become "at-will plus" or, perhaps more accurately, "at-will minus."

Blocking access to the objective review provided by the courts, or even blocking full review by the MSPB, would invite VA managers (who have already shown themselves willing to abuse the rights of whistleblowers) to engage in arbitrary or capricious conduct vis-à-vis the front line VA workers. This is compounded by the fact that bill contains a provision mandating that if the MSPB's Administrative Judge cannot issue a decision within 45 days, then "the removal or demotion is final." Given that the MSPB already has an active and heavy caseload, this provision is an additional and intentional elimination of fundamental employee rights.

With respect to whistleblower provisions in Section 2, the bill ignores the practical reality that not all individuals will file for corrective action and that OSC is not well-suited to essentially pre-approving the removal of every putative whistleblower. The bill would nonetheless force employees facing discrimination and other forms of prohibited personnel practices into OSC complaints in order to shield themselves from their new at-will employment status. This helps neither veterans nor whistleblowers. It only precipitates a flood of OSC complaints that are likely to paralyze OSC and obscure the most valid cases of whistleblower retaliation at the same time.

AFGE has worked with more than 40 rank-and-file whistleblowers in the VA who have been threatened or retaliated against by VA managers precisely because they blew the whistle on waste, fraud and abuse that was, like the wait list scandal, caused by VA managers. If S. 1082 is enacted, there will be no recourse for these employees, and the derelictions of VA managers will likely be swept under the rug. VA employees will be left with the choice of keeping quiet about mistreatment of veterans or losing their jobs.

Analysis of Section 3: Required Probationary Period for New VA Employees

Section 3 of the bill would extend the current one-year probationary period to 18 months, and the employee's ability to secure permanent status after that would be subject to the complete discretion of the Secretary to extend that probation to two years, three years or even longer. Contrary to the assertions of bill proponents, Section 3 would also extend the probationary periods of over 70,000 health care employees under the Hybrid Title 38 personnel system, including every psychologist, pharmacist, blind rehabilitation specialist, social worker, licensed practical nurse, orthotist-prosthetist, respiratory therapist, physical therapist and other positions under 38 USC 7401(3). (Under current law, health care personnel appointed under 38 USC 7401(1), including physicians and registered nurses have two year probationary periods.)

The large numbers of veterans recently hired into the VA workforce know firsthand how powerless they are when a manager who has failed to train them properly or resents having to hire a veteran decides to fire them. Congress has heard testimony about claims processors and health care professionals, among others, who were summarily fired during probation without recourse, even though their terminations were motivated by retaliation, or what would otherwise be prohibited personnel practices.

It is already extremely difficult for agencies such as the OSC and MSPB to protect probationary employees from unjustified adverse actions, because the burden of proof on employers is extremely low. Subjecting more employees to longer probations and the whim of managers who wish to harass then with even longer periods of at-will employment will further devastate the VA's efforts to hire veterans and Hybrid Title 38 mental health professionals in VA "mission critical" occupations in short supply such as psychologists, pharmacists and physical therapists. (See the Veterans Health Administration's 2014 report, Interim Workforce and Succession Strategic Plan, Table 3.)

Analysis of Section 4: Comptroller General Study of Department Time and Space Used for Labor Organization Activity

Section 4 of S. 1082 mandates a study of Department time and space for labor organization activity. We are concerned that this provision may be used to weaken the rights of non-management employees and limit the ability of taxpayers to hold VA management accountable.

Under current law, union official time allows federal employees who are volunteer union representatives to represent all their coworkers (those who pay dues and those who don't) while in an official duty status. Union representatives are prohibited from using official time to conduct union-specific business, solicit members, hold internal union meetings, elect union officers, or engage in partisan political activities.

The use of official time in the VA benefits taxpayers, veterans, and federal employees because it reduces costly employee turnover, improves service, creates a safer workplace, and leads to quicker implementation of agency initiatives. Official time gives workers a voice to resolve disputes efficiently so they can get back to work, protect whistleblowers from retaliation, and implement new technology and other innovations to solve workplace problems in collaboration with management.

In its 2014 report, *Labor Relations Activities: Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time* (GAO-15-9), GAO studied union official time and recommended that the Office of Personnel Management consider alternative approaches to developing cost estimate and new opportunities to increase efficiency of data collection and reporting.

A study that assesses the use of official time in VA according to objective criteria, such as those identified and used in the GAO study, is never problematic. But we are concerned that the study of official time mandated in S. 1082 may be used as a means to legitimize the elimination of this important function, given the overall animus toward front line VA employees that infuses the remainder of the bill. We urge the Committee to amend the language in the bill to require that the study use a template

resembling the GAO study referenced above, or OPM's annual studies of official time. The study must not be yet another highly politicized means of eliminating frontline workers' ability to hold VA management accountable.

Finally, AFGE urges Committee members to consider the unintended consequences of S. 1082's extreme assault on civil service protections, as articulated by the MSPB in its 2015 report:

> Due process is available for the whistleblower, the employee who belongs to the "wrong" political party, the reservist whose periods of military service are inconvenient to the boss, the scapegoat, and the person who has been misjudged based on faulty information. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit based civil service rather than a corrupt spoils system.

S. 1117

Overview of S. 1117

AFGE and the National VA Council strongly oppose S. 1117. We urge lawmakers to reject this equally counterproductive and dangerous anti-accountability bill in favor of legislation that will truly improve accountability. Although S. 1117 is described as an SES bill (a bill "to expand the authority of the Secretary of Veterans Affairs to remove senior executives"), in fact, this bill strips fundamental due process rights from *every non-management VA employee*. Whereas S. 1082 also targets VA employees in Title 5 positions (including VBA, NCA, and information technology), S. 1117 focuses its due process cuts on the vast majority of *VHA* employees, i.e. the Full Title 38 and Hybrid Title 38 employees.

Who are the health care employees who will lose all their civil service protections and become at-will employees under S. 1117?

- Every front-line non-management Full Title 38 employee, i.e. every physician, dentist, registered nurse, physician assistant, podiatrist, optometrist, chiropractor and expanded-function dental auxiliary (38 USC 7401(a); and

- Every front-line non-management Hybrid Title 38 employee including every psychologist, audiologist, biomedical engineer, respiratory therapists, physical therapist, licensed practical nurse, nursing assistant, orthotist-prosthetist, pharmacist, social worker, family therapist, blind rehabilitation specialist and every other position covered by 38 USC 7401(3).

All these employees will lose the following fundamental due process rights to challenge unfair terminations, demotions, and other adverse actions:

- Right to 30 days' advance notice before an adverse action may be imposed;

- Right to 7 days for the employee to respond;

- Right to a representative; and

- Right to a written decision.

Like S. 1082, S. 1117 is dangerous because it destroys the civil service protections of the very non-management employees who can hold management accountable to uphold the interests of veterans. This bill is also very harmful to the VA health care system because it will cause significant numbers of physicians and other healthcare professionals skilled in critical shortage occupations to leave the VA or reject a future VA career, undermining veterans' access to the high quality of medical services they rely on from the VA.

Like S. 1082, S. 1117 makes the employment of every VA Title 38 employee subject to the whims of the VA Secretary. By tearing down the due process protections granted to the covered employees, this bill would have the overall effect of chilling disclosures, destroying employee morale, and undermining the retention of many of VA's most experienced and valuable employees. Every brave Title 38 employee from Phoenix, Tomah, Pittsburgh, Hines, Wilmington, Delaware and other medical centers

who made lifesaving disclosures to Congress, investigators and their own managers in order to protect veterans will become at-will employees with no civil service protections if S. 1117 is enacted.

Analysis of Section 2: Expansion of Authority of Secretary of Veterans Affairs to Removed Senior Executives of Department of Veterans Affairs for Performance or Misconduct to Include Certain Other Employees of the Department

Contrary to the title, Section 2 of S. 1117 does not make any further changes to SES rights. Instead, Section 2 applies all the SES due process cuts from the Choice Act to every non-management Title 38 employee.

The only difference in due process rights between S. 1117 and S. 1082 relates to the length of time the MSPB has to complete its one-level review before the termination is finalized. Under S. 1117, MSPB has 21 days, whereas under S. 1082, MSPB has 45 days. Under both bills, if MSPB is unable to review this case within the fixed timeframe, the Secretary's unilateral decision to terminate or demote the employee becomes final. Under this bill, Title 38 whistleblowers will have the identical, diminished rights as every other Title 38 employees.

In summary, AFGE strongly urges the Committee to oppose S. 1117 which will have enormous unintended consequences including: (1) a vast reduction in disclosures from non-management employees regarding patient safety issues and other mismanagement; (2) additional obstacles to the VA health care system's ability to compete for physicians and other health care professionals and retain valuable clinicians already on board; and (3) increased harm to VA clinicians through retaliation and other prohibited personnel practices.

S. 469

AFGE supports S. 469, the Women Veterans and Families Health Services Act of 2015. AFGE represents dedicated medical and behavioral health care personnel in facilities across the nation who provide specialized care to women veterans and their families. We commend Senator Murray for her

continued leadership in ensuring that comprehensive health care services are available to women veterans and their families.

S. 901

AFGE supports S. 901, the Toxic Exposure Research Act of 2015. We commend Ranking Member Blumenthal and Senator Moran for their leadership on this important legislation.

S. 1085

AFGE support S. 1085, the Military and Veteran Caregiver Services Improvement Act. We commend Senator Murray for her leadership in providing adequate support to veterans' caregivers**.**

Draft Bill - Jason Simcakoski Memorial Opioid Safety Act

AFGE supports this important legislation and commends Senator Baldwin for her continued leadership on behalf of veterans by ensuring safe prescribing practices. Front-line health care professionals represented by AFGE played a vital role in disclosing improper prescribing practices at the Tomah, Wisconsin medical center. Every day, the dedicated front-line employees we represent at VA medical centers strive for maximum patient safety, including proper prescribing practices. We urge lawmakers and VA officials to include front line employees and their employee representatives on working groups, pain management boards and other groups and research efforts established under this legislation.

Thank you for the opportunity to testify on these important legislative issues.