AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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7w/334154

June 13, 2014

The Honorable William Gunn
General Counsel
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington DC 20420

Re: VA Waiting List Investigations

Dear Mr. Gunn,

Recent reports of so-called "secret waiting lists" and other patient care issues at the Department of Veterans Affairs have created a substantial concern among employees at the Department of Veterans Affairs (VA). Our organization, the American Federation of Government Employees (AFGE), represents over 200,000 VA employees. We routinely hear from our members who wish to make disclosures about problems with the patient care system and other conduct within the VA. Most are reluctant to do so both because of a history of reprisals by VA management, and because of recent experience with laws designed to protect patients which are instead being used as a sword against employees by VA management. AFGE and our members at the VA are committed to serving our veterans, and in that spirit we would like to offer our view as to steps that can be taken to ensure that the current investigations are both effective and fair.

We ask that your office issue guidance to VA employees and management in order to foster transparency and to ensure that investigators are able to thoroughly examine and enhance systems and procedures for the care of our veterans. The guidance should specify that employees may, without fear of reprisal, work with union representatives to report to the VA Office of Inspector General (OIG) or the Office of Special Counsel (OSC), or Congress, concerns about waste, fraud, abuse, violations of law, policy, and safety and health concerns. The guidance should further specifically provide that disclosure to such entities, or to the union or an attorney, which may by necessity include patient-specific information, is not a violation of The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191 (HIPAA), the Privacy Act of 1974, 5 U.S.C. § 552., or any other related VA policy, rule or regulation.

Some examples should serve to illustrate the dilemma facing employees who want to come forward with what they know about the current crisis:

- In the case of one whistleblower at the Phoenix VA, we have been made aware she provided disclosures to the OIG, OSC, and Members of Congress. As a result of making these limited whistleblower disclosures to proper authorities about the current patient wait list process, she was given a disciplinary counseling for violating patient information/privacy by the Chief of Staff at the facility. She has informed us that she asked for, but was not given, the details.
- During the legionella investigation in Pittsburgh, our local union president was threatened with being charged for a HIPAA violation based on her efforts to expose the facts behind the legionella outbreak.
- Other VA whistleblowers have informed AFGE staff that management has made it known that if the employees speak out they could be cited for HIPAA or Privacy Act related violations, and in some cases it has chilled their desire to come forward.

- In at least two recent situations employees sought and were denied a written waiver of HIPAA related discipline in making reports to the OIG. In both cases, they were told that no written waiver would be given. In both cases, important information that related to patient safety was unable to be provided based upon the lack of a written waiver.

VA OIG reports often state that allegations cannot be substantiated. This should not be surprising when whistleblowers feel they do not have sufficient protections from agency retaliation, directly though HIPAA or Privacy Act related discipline, or indirectly though negative and subjective personnel evaluations, or other personnel related harassment. Their concerns are very real. In addition to whatever threats may chill disclosures, the VA General Counsel's Office is on record in *Parikh v. Department of Veterans Affairs*, 116 M.S.P.R. 197 (2011), as arguing that whistleblower disclosures that contain patient identification and diagnoses to the Inspector General and Congress are violations that merit termination. In that case, Dr. Parikh was ultimately reinstated a full four years after termination of his employment because the MSPB found he had established that his protected disclosures were a contributing factor in his removal. However, most medical and clerical personnel can ill afford to litigate a termination and be without employment for four years. It is our understanding that the VA General Counsel's Office may not even recognize as an exception the disclosure to the employee's union, or attorney, even when the circumstances involve an employee who seeks advice as to how to proceed as a whistleblower. This office believes that such disclosures are protected under 45 CFR §164.502(j)(1)(B). The Secretary's Office and multiple press releases claim the VA does not retaliate, but the verifiable actions of the VA prove otherwise; guidance must be issued that the employees can rely upon or many employees will simply refuse to come forward to aid the current investigation out of fear of retaliation.

Patients themselves have rights and protections, but they may be waived under HIPAA. We are therefore copying the Department of Justice and Department of Health and Human Services to seek their assistance with whatever waiver authority they may be able to provide for these limited disclosures, in the interests of justice and for substantiating concerns related to patient safety and improved quality of care. It is the opinion of this office that under HIPAA that OSC, and the VA OIG are covered entities, disclosures to which entities by VA employees should be entitled to safe harbor status Under 45 CFR §164.502(j)(1)(A)). Facility and regional level VA management appear to disagree with us as to OSC and the OIG's status. Based upon prior legal arguments of the VA General Counsel's Office, one can certainly see why employees feel managers have been empowered to retaliate. Rather than discipline VA employees in such matters, which can lead to extensive litigation, VA should issue clear written guidance in this area, with wide dissemination to the entire Department.

If your offices need any follow up, we stand ready to assist you in moving forward quickly on this matter. VA employees need to be free of retaliation, or even the threat of retaliation, when they come forward in these investigations regarding waiting lists and other patient care concerns. We know you join with us in seeking great transparency. We hope that this will result in more appropriate staffing levels at the VA for the greatly increasing number of patients seeking quality care from the VA. Even if you disagree, it would be helpful for all VA employees to know where things stand. If legislative action is needed to provide VA whistleblowers the limited protections necessary to report serious and appropriate concerns through proper channels, we need to work together to enact such legislation immediately.

Sincerely,

David A. Borer
General Counsel

cc: The Honorable Sloan Gibson, Acting Secretary, Department of Veterans Affairs
The Honorable Carolyn Lerner, Office of Special Counsel,
The Honorable Bernie Sanders, U.S. Senate, Chair, Committee on Veterans Affairs
The Honorable Jeff Miller, Chair, House Veterans Affairs Committee
The Honorable Michael Michaud, Ranking Member, House Veterans Affairs Committee
The Honorable Richard Burr, Ranking Member, U.S. Senate, Committee on Veterans Affairs
The Honorable Richard J. Griffin, Acting Inspector General, VA
The Honorable Rob Nabors, White House Deputy Chief of Staff
The Honorable W. Neil Eggleston, White House Counsel
The Honorable Sylvia Mathews Burwell, Secretary of Health and Human Services
The Honorable Eric H. Holder, Jr., Attorney General
J. David Cox, Sr., National President, AFGE
Alma Lee, Council President, NVAC