STATEMENT OF

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BEFORE THE

VETERANS' AFFAIRS SUBCOMMITTEE

ON ECONOMIC OPPORTUNITY

UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

H.R. 356, H.R. 1994 and H.R. 2344

JUNE 2, 2015

Chairman Wenstrup, Ranking Member Takano and members of the Subcommittee, thank you for the opportunity to testify today on behalf of the American Federation of Government Employees, AFL-CIO (AFGE) and the AFGE National Veterans Affairs Council, representing over 670,000 federal employees, including more than 220,000 employees of the Department of Veterans Affairs (VA).

H.R. 356, The Wounded Warrior Employment Improvement Act

As the exclusive representative of VA employees working in Vocational Rehabilitation and Employment (VR&E) in the Veterans Benefits Administration (VBA), AFGE strongly supports H.R. 356. Based on feedback from our membership, AFGE shares the concerns addressed in H.R. 356 regarding the performance measures for VR&E employees and believes that the metrics should be more nuanced and focus on the long term progress of veterans. One year, an employee may perform well and resolve a lot of cases. The following year, the same employee may perform well but struggle to resolve cases due to circumstances beyond the employee's control. Basing performance standards primarily on the number of rehabilitation successes must always be considered along with mitigating circumstances, since the changing circumstances of the veterans themselves have a significant impact on this metric. One of the other issues with the current performance measures is that employees are required to have a specific success rate for Serious Employment Handicap (SEH) cases. This number is arbitrary and the SEH designation is non-specific as well. Counselors may feel pressured to mark veterans' claims as SEH cases in order to achieve their performance standards when they may not be SEH cases.

It is our experience that newly hired veterans turn over at VBA at a significantly higher rate than non-veteran new hires. VA must set the standard as the exemplary employer of veterans in the federal government and find additional methods for retaining veterans. To that end, AFGE strongly supports the analysis, recommendation, and implementation requirements

in Section 3(1) of the bill that would remedy difficulties faced by employee veterans who are participating in a VR&E program themselves.

AFGE also encourages Congress to examine performance metrics for all VR&E employees and address the issues outlined above.

H.R. 1994, VA Accountability Act of 2015

AFGE and the National VA Council strongly oppose H.R. 1994 as currently drafted. We urge lawmakers to reject these counterproductive and dangerous proposals in favor of amendments that will bring about meaningful reform, including expanded whistleblower protections, revolving door restrictions, limits on administrative leave and other AFGE recommendations discussed below that would truly hold VA managers accountable and protect veterans. If H.R. 1994 is not amended so that the provisions that reduce due process, lengthen probationary periods and attack union official time are eliminated, AFGE will work to defeat the bill.

H.R. 1994 in its current form 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. The bill is dangerous because longer probationary periods will subject more veterans in the VA workforce to unfounded or discriminatory terminations. And the bill is dangerous because it diverts the resources of the Office of Special Counsel and Merit Systems Protection Board away from appropriate claims of retaliation and discrimination. The bill is dangerous because it puts at risk the union's ability to represent non-management employees facing retaliation, discrimination and other prohibited personnel practices.

Finally, this bill is dangerous because it will cause significant numbers of health care professionals in critical shortage occupations to leave the VA or reject a future VA career, undermining veterans' access to the high quality of health care they rely on from the VA.

H.R. 1994 targets front line, non-management VA employees including thousands of service-connected disabled veterans.

Section 2 of H.R. 1994 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 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' health care will suffer, along with the employees who have pledged their careers to care for veterans.

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 H.R. 1994 is enacted as drafted, 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.

The VA already has -- and uses -- existing tools to fire poor performers and front line employees engaged in misconduct.

This bill proceeds from the false premise that it is "too hard" to remove federal employees under the current system. It is not. Poorly trained supervisors and inadequate use of the existing probationary period are what are at issue here. 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.**

Eliminating the due process rights of VA front line employees will undermine the agency's mission and hurt the veterans it serves.

H.R. 1994 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.

We have a ready example of the impact of eliminating or severely limiting due process rights for employees. The Transportation Security Administration (TSA) has established a system that is, in many ways, an analog of the system proposed in H.R. 1994. TSA front line employees have few rights and little due process, while managers have full due process rights. Quite understandably, the unfairness inherent in TSA's system is reflected in some of the lowest

morale scores in the government, and a reluctance on the part of the frontline workforce to come forward with evidence of mismanagement that threatens public safety.

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

H.R. 1994 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). That section currently:

- Requires 30 days' advance notice before an adverse action may be imposed;
- Requires not less than 7 days for the employee to respond;
- Allows an employee representative; and
- Requires a written decision.

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

By eliminating these two sections, H.R. 1994 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.**

H.R. 1994 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 even 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 whistleblowers, 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.

Section 3 of the bill would extend the 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 even longer. Under current law, some VA employees have two-year probationary periods ("pure Title 38" clinicians including physicians, dentists, registered nurses (RN) and physician assistants (PA) (38 USC 7403(b)). VA employees in other positions have one-year probationary periods, including "hybrid Title 38" health care professionals.

What every probationary employee in the VA has in common is the ability to be fired very easily. 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. This Committee 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.)

Section 4 of H.R. 1994 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 H.R. 1994 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.

AFGE Recommendations for Amending H.R. 1994

AFGE is deeply committed to the same goals as lawmakers: Serving veterans through increased health care access, reduction of the claims backlog and other improvements. AFGE understands that lawmakers are facing intense rhetoric about mismanagement that attempts to place blame on non-management, front line employees (over one-third of whom are veterans themselves). But, a bill that reduces management accountability by undermining the rights and protections of front line employees is not the answer.

AFGE strongly urges you to demonstrate your commitments to veterans through positive reform, not through proposals to eliminate civil service protections -- proposals that Chairman Miller intends to use as a "test case" for the rest of government. (See http://www.govexec.com/feature/firing-line/e.)

Therefore, AFGE urges the Subcommittee to amend H.R. 1994 as follows:

Section 2:

1. Strike subsections (a) and (b).
2. Insert language that definitively states that the whistleblower protections in of 5 U.S.C.2302 (b)(8) and (9) apply to all VA employees, regardless of job classification, including any right or remedy available to an employee or applicant for employment in the civil service and any rule or regulation prescribed by law.
3. Provide OSC and MSPB with sufficient resources to handle additional claims.

Section 3:

1. Strike subsections (a) through (c).
2. Apply a uniform, one-year probationary period to all VA non-management employees.
3. Establish programs to support newly-hired veterans facing transition challenges, including training, mentoring, and protection from unsupportive managers.

Section 4:

1. Strike subsections (a) and (b).
2. Implement recommendations in GAO report discussed above (*GAO-15-9)*

Other AFGE Recommendations:

1. Limit amount of time that VA employees can be placed on paid administrative leave; mandate study of VA management abuse of paid administrative leave and restricted work duty as a form of retaliation;
2. Impose stronger "revolving door" restrictions on post-VA contractor employment and contract awards;
3. Improve management training and performance measures relating to personnel practices;
4. Impose stricter limits on the number and duration of non-permanent VA appointments; mandate a study on the impact of VA's growing use of temporary, term and part-time appointments on the cost and quality of patient care and other VA functions;
5. Improve effectiveness of VA administrative investigation boards (see GAO-12-483);
6. Assess the impact of VA police reporting structure on VA accountability.

As the Merit Systems Protection Board stated in its May 2015 report to the President and Congress, *What is Due Process in Federal Civil Service Employment?:*

> 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.

H.R. 2344, Veterans Vocational Rehabilitation and Employment Improvement Act

AFGE supports H.R. 2344. AFGE member reports confirm the need for the changes proposed Section 5 of the bill, which would require VA to use one payment system when making payments to veterans in a rehabilitation program. AFGE members reported issues with the Benefits Delivery Network (BDN) system, which has needed an upgrade for years. AFGE members also agreed that there were redundancies with inputting information into both BDN and the other payment system, the Subsistence Allowance Module. AFGE believes that this change would be beneficial for both veterans receiving benefits and employees working at the VA.

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

BIOGRAPHY OF DAVID A. BORER, GENERAL COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

David Borer is the General Counsel for the American Federation of Government Employees, AFL-CIO. As General Counsel, he directs a staff of approximately 25 attorneys engaged in all aspects of employment and labor law, including an extensive practice before the MSPB, the FLRA, various other agencies and in arbitration, as well as in the federal courts. Mr. Borer also serves as a top policy advisor to the union's leadership.

Before joining AFGE in 2010, Mr. Borer was the Executive Director/Treasurer of the Massachusetts Teachers Association where he oversaw the staff and operations of the largest union in the Commonwealth of Massachusetts. His earlier career in the Labor Movement includes over 22 years with the Association of Flight Attendants – CWA, AFL-CIO. In over two decades as AFA's General Counsel he directed the union's negotiations for hundreds of major collective bargaining agreements, and oversaw the union's arbitration and litigation practice.

Mr. Borer grew up in Ohio and graduated from the Ohio State University College of Law.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, AFGE has not received any federal grants in Fiscal Year 2014, nor has AFGE received any Federal grants in the two previous Fiscal Years.