



CONGRESSIONAL TESTIMONY

STATEMENT FOR THE RECORD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PROVIDED TO THE

HOUSE COMMITTEE ON VETERANS' AFFAIRS

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

HEARING ON

“ACCOUNTABILITY AT VA: LEADERSHIP DECISIONS IMPACTING ITS EMPLOYEES AND
VETERANS”

MARCH 9, 2023

Chairman Kiggans, Ranking Member Mrvan, and Members of the Subcommittee:

The American Federation of Government Employees, AFL-CIO (AFGE) and its National Veterans Affairs Council (NVAC) appreciate the opportunity to submit a statement for the record on today's hearing titled "Accountability at VA: Leadership Decisions Impacting its Employees and Veterans." AFGE represents more than 750,000 federal and District of Columbia government employees, 291,000 of whom are proud, dedicated Department of Veterans Affairs (VA) employees. These include front-line providers at the Veterans Health Administration (VHA) who provide exemplary specialized medical and mental health care to veterans, the Veterans Benefits Administration (VBA) workforce responsible for the processing veterans' claims, the Board of Veterans' Appeals (Board) employees who shepherd veterans' appeals, and the National Cemetery Administration Employees (NCA) who honor the memory of the nation's fallen veterans every day.

With this firsthand and front-line perspective, we offer our observations on the problems the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 has caused front-line VA Employees. Specially, AFGE has long objected to the VA's use of 38 U.S.C. 714 (§714) of the law and how it has harmed hardworking and dedicated employees. Additionally, through this experience AFGE is also aware of the failure of VA leadership to hold managers accountable under other provisions of the law. AFGE has supported efforts to amend the law to restore fairness to VA employees and encourages the committee to restore basic fairness to the VA workforce.

Background

Public Law 115-41, the Department of Veterans Affairs Accountability and Whistleblower Protection Act (Accountability Act or Act), was signed into law on June 23,

2017. At the time of its passage, supporters claimed the Act was intended to simplify and expedite the disciplinary process at VA so that it could better hold bad employees accountable. The Act is divided into two parts, Title I, which established the Office of Accountability and Whistleblower Protections (OAWP) and Title II, which governs Accountability and Adverse Actions for Senior Executives, VA Employees, and Supervisors disciplinary procedures. Within Title II, the bill enacted 38 U.S.C. §714 which changed the following disciplinary procedures for bargaining unit employees (38 U.S.C. §713 is for managers):

- Required management to make a final decision within 15 business days of proposing an adverse action (i.e., suspension of more than 14 days, demotion, or removal);
- Reduced the time period for an employee to respond to proposed adverse action to 7 business days;
- Reduced the time period for an employee to appeal the final adverse action;
- Lowered the standard of proof necessary to sustain an adverse action before a third party, such as arbitrators and the Merit Systems Protection Board (MSPB), from preponderance of the evidence to substantial evidence;
- Prevented third part adjudicators from mitigating the penalties assigned by VA.

Oversight

Since the Act's enactment, there has been robust oversight over the Act's implementation, and its effect on the workforce in multiple venues:

Congressional Oversight

The House Veterans' Affairs Committee held an oversight hearing in July 2018 before the Committee on Veterans' Affairs entitled "*The VA Accountability and Whistleblower Protection Act: One Year Later.*"¹ The committee's goal was to address problems caused by the VA's implementation of the Act. In his opening statement, then-Ranking Member Mark Takano

¹ *The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018), <https://republicans-veterans.house.gov/calendar/eventsingle.aspx?EventID=2212>.

addressed the VA’s penchant to use the Act to disproportionately discipline rank and file employees as opposed to supervisors and other management officials stating:²

“[Of] the 1,086 removals during the first five months of 2018, the majority of those fired were housekeeping aides...I also find it hard to believe that there are large numbers of housekeeping aides whose performance is so poor that it cannot be addressed. If that is truly the case, then it stands to reason that there are also management issues behind their poor performance. But of those 1,096 removals, only fifteen were supervisors which is less than 1.4 percent. Firing rank and file employees does nothing to resolve persistent management issues.” He continued “it is not possible to fire your way to excellence.”

AFGE also testified at this hearing citing how the law disproportionately harmed lower paid federal workers and not the managers who supervised them, and also further explained many of the structural problems with the law that continue to exist today.³ AFGE has also commented on the Accountability Act and Whistleblower at other House Veterans’ Affairs Committee hearings including before this subcommittee on May 19, 2021 at hearing titled “*Protecting Whistleblowers and Promoting Accountability: is VA Making Progress?*”⁴ citing the problems with the current law and the need to pass reforms.

Inspector General Investigation

In response to requests for an investigation from multiple legislators, the Office of Inspector General (OIG) highlighted VA’s failure to properly implement the portion of the Act pertaining to whistleblower protection. The OIG issued a report, which explained, “in many

² *The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018) (statement of Mark Tano, ranking member), <https://republicans-veterans.house.gov/calendar/eventsingle.aspx?EventID=2212>.

³ *The VA Accountability and Whistleblower Protection Act: One Year Later: Before the H. Comm. On Veterans Affairs*, 115th Congr. (2018) (statement of AFGE National President J. David Cox). <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=108516>.

⁴ *Protecting Whistleblowers and Promoting Accountability: is VA Making Progress? Before the H. Comm. On Veterans Affairs Subcommittee on Oversight and Investigations*, 117th Congr. (2021) (AFGE Statement for the Record).

instances, [OAWP] focused only on finding evidence sufficient to substantiate the allegations without attempting to find exculpatory or contradictory evidence.”

Further, while VA front-line employees were being disciplined more often and more harshly under section 202 of the Accountability Act, the OIG report found that VA “struggled with implementing the Act’s authority to hold executives accountable.” OIG explained that despite statements from then-Secretary Shulkin, as of May 22, 2019, VA had only removed one covered executive employee under 38 U.S.C. 713, which addresses discipline for senior executives. Further, of thirty-five cases involving executives, VA mitigated the discipline of thirty-two.

The OIG investigation revealed unlawful whistleblower retaliation by OAWP itself, noting that after an OAWP employee made a whistleblower complaint, Executive Director O’Rourke instructed a subordinate to remove the employee. Finally, the OIG found that the VA did not comply with reporting and training requirements of the Act and failed to adequately report to Congress regarding the outcomes of disciplinary actions.

Freedom of Information Act

In an attempt to learn more about the VA’s use of its authorities under the Accountability Act, on May 31, 2022, AFGE submitted a Freedom of Information Act (FOIA) Request to the VA. This request asked the VA to share, without violating the privacy of employees, the VA’s use of Section 204 of the Veterans Affairs Accountability and Whistleblower Protection Act of 2017, 38 U.S.C. §721, which authorizes the Secretary to issue an order, under certain circumstances, directing an employee to repay an award or bonus paid to the employee. This request covered the period from June 23, 2017, through May 31, 2022. In response to the

AFGE's request, the VA responded on June 2, 2022, and stated that "This is a recently enacted VA policy and there are no responsive records." This is evidence that the VA has not utilized all of the tools at its disposal to hold employees accountable, and that the VA does not need additional tools for accountability.

Challenges in Federal Court

Since the enactment of the Accountability Act, the certain parts of the law have been challenged in federal courts, relating to the restrictions on the MSPB or third party adjudicators to mitigate a penalty. In *Sayers v. Dep't of Veterans Affairs*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit or Court) determined that, contrary to VA's contentions, the MSPB was permitted to review the penalty as well as the facts of a case under §714. The Court explained that "[d]eciding that an employee stole a paper clip is not the same as deciding that the theft of a paper clip warranted the employee's removal." It is clear that prior to *Sayers*, the Agency promoted a limited review and harshly disciplined employees under §714, often for similarly trivial acts.

The perceived inability to mitigate led judges to affirm decisions where even a single charge was proven by substantial evidence. Where the harshest available penalty, removal, was used liberally, this led to a loss of employee resources for the smallest of infractions. VA's rush to remove employees was clear in performance cases as well. As Administrative Judges believed they could not mitigate penalties, employees were removed for easily remedied performance failures.

Another key element of the law examined by the courts is the elimination of the preponderance of the evidence standard, and the implementation of the new substantial evidence standard. In *Rodriguez v. Dep't of Veterans Affairs*, the Court held that the "preponderance of the

evidence, rather than substantial evidence was the correct standard for management to apply at the administrative level in conduct cases under [§]714.”⁵ The Court explained that when determining whether conduct justified discipline under §714, preponderance of the evidence was the correct evidentiary burden, and the MSPB’s standard of review should be substantial evidence. Consequently, the Court found that VA had applied the wrong evidentiary standard in its §714 conduct cases. The Court held in August 2021 that VA and MSPB must apply the *Douglas Factors* in deciding and reviewing the imposed penalty.⁶

By subjecting management’s decisions to additional scrutiny, the Court demonstrated VA’s overreach in its use of the Accountability Act. The use of §714 has proven to have had its greatest impact on lower-level employees, compounding a staffing crisis while doing little to address systemic problems such as inadequate training and hostile managers. Thus, while the reviewing arbitrators, Administrative Law Judges, and Federal Circuit Judges have done much to curtail VA’s broad interpretation of the law, the law itself must be amended if it is to accomplish its stated goal of improving systemic flaws in the Agency.

Furthermore, in the recent case *Richardson v. Department of Veterans Affairs*, the MSPB further limited the applicability of the law.⁷ In *Richardson*, the MSPB ruled that an employee appointed under 38 U.S.C 7401(3), a “hybrid” Title 38/Title 5 employee, could not be terminated under §714 as the text of 38 U.S.C. 7403(f)(3) dictated its reliance on “the procedures” of chapter 75 of Title 5.⁸

⁵ *Ariel Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290 (Fed. Cir.) (2021).

⁶ *Stephen Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).

⁷ *Richardson v. Department of Veterans Affairs*, Docket No. AT-0714-21-0109-I-1 (MSPB) (2023).

⁸ *Id.*

As a result of these and other legal rulings and determinations, the VA announced on March 5, 2023, that the VA will prospectively “cease using the provisions of 38 U.S.C. § 714 to propose new adverse actions against employees of the Department of Veterans Affairs (VA), effective April 3, 2023.”

Suggested Reforms

Irrespective of the possibility that future VA Secretaries could reverse the Secretary’s determination to cease using §714, AFGE recommends two legislative changes to the Accountability Act:

Restore the Standard of Review to Preponderance of Evidence

38 U.S.C. § 714 established by the Accountability Act mandates that the MSPB uphold management’s decision to remove, demote, or suspend an employee if the decision is supported by substantial evidence. While not defined in the law, management guidance defined substantial evidence as “relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree, or evidence that a reasonable mind would accept as adequate to support a conclusion.”

Prior to the implementation of §714, discipline based on unacceptable performance was considered under Chapter 43. Disciplinary actions to promote the efficiency of the service were considered under Chapter 75 of Title 5 of the United States Code. Under those chapters, a disciplinary action was upheld where substantial evidence demonstrated that the unacceptable performance took place under Chapter 43, and where a preponderance of the evidence demonstrated that the misconduct or performance took place under Chapter 75. The difference in the burdens of proof aligned with the differences in penalties, as Chapter 43 actions led to

attempts to improve that performance whereas harsher penalties, to include immediate removal, were available for misconduct under Chapter 75.

As discussed in *Rodriguez v. Dep't of Veterans Affairs*, VA improperly read §714 to mean that its burden of proof in justifying discipline was lowered to the substantial evidence standard. The Federal Circuit disagreed with the Agency's position, finding that the Agency conflated burden of proof and standard of review. Consequently, the Court found that the VA still had to meet the preponderance of the evidence burden of proof in its decision to discipline for conduct.

Rodriguez clarified the difference between the burden of proof required of management, a preponderance of the evidence for conduct cases, and the standard of review by the MSPB, changed to substantial evidence under §714. Even a proper reading of §714, however, puts reviewers in a position they often have little choice but to rubber stamp VA's harsh penalties. Changing the standard of review to the preponderance of the evidence is necessary to ensure that VA reassumes the burden of proving that the claimed action occurred. Where an employee's job is on the line, VA's decisions should be held to a higher degree of scrutiny.

Restore the Authority to Mitigate Unreasonable Penalties

Connor v. Department of Veterans Affairs, spoke to the issue of mitigation. In that case, on appeal, the MSPB sustained only one of the 27 charges against the employee. On appeal to the Federal Circuit, the Agency argued it need not consider the *Douglas Factors* in §714 proceedings.⁹

Under current statute established by §714, the law provides that where the Agency's decision is supported by substantial evidence, the MSPB or an arbitrator may not mitigate the

⁹ Stephen *Connor v. Department of Veterans Affairs*, 8 F.4th 1319 (Fed. Cir.) (2021).

penalty. Thus, the MSPB or an arbitrator could only reverse an Agency decision it determined was unreasonable. MSPB had an extremely high rate of affirming Agency decisions even before the enactment of the Accountability Act. MSPB's affirmance rate of VA decisions was 83.7 percent, of the years recorded since, 2019 was the highest rate of affirmance at 89.44 percent. Few cases were mitigated prior to 2017, however, mitigation was available to reviewing entities, saving the time of sending back a case, causing needless delay.

The Accountability Act was promoted as enabling management to streamline the disciplinary process. VA's failure to use the right evidentiary standard and MSPB's inability to mitigate discipline caused many disciplinary cases to be returned to the Agency for time-consuming work and increased the time it took to process discipline.

AFGE strongly supports restoring the standard of review applicable to the Agency to the preponderance of the evidence and restoring the ability of reviewing bodies to mitigate penalties under §714. Such changes would ensure fair determinations and streamline the disciplinary process.

Conclusion

AFGE thanks the House Veterans' Affairs Committee for the opportunity to submit a Statement for the Record for today's hearing. AFGE stands ready to work with the committee and the VA to address the workforce issues currently facing the department and find solutions that will enable VA employees to better serve our nation's veterans.