

Statement for the Record  
*from the*  
National Federation of Federal Employees, IAMAW  
*for the*  
Subcommittee on Oversight and Investigations  
Committee on Veterans Affairs  
U.S. House of Representatives  
*Hearing on Pending Legislation*

July 12, 2023

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

The National Federation of Federal Employees (NFFE), America's oldest federal employee union, appreciates the opportunity to submit this statement for the record regarding pending legislation before the Committee at today's hearing. NFFE represents a diverse population of employees at the U.S. Department of Veterans Affairs (VA), to include the Veterans Health Administration (VHA), that includes medical and health care professionals, and additional staff to include administrative, technical, support, and public safety personnel.

Many VA employees are veterans themselves who view their service to helping veterans at the VA and VHA as a continuation of their own service, now dedicated to fulfilling a promise to care for those who spent their lives defending and protecting the United States. The business of the Committee today will impact the lives and livelihoods of these veteran employees, and it will impact the ability of all VA/VHA staff to provide the best care possible for our nation's veterans.

**The Failed VA Accountability and Whistleblower Protection Act of 2017**

In 2017, Congress passed the *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017* (herein referred to as "the Act") that, ironically, gutted federal workforce systematic protections and regulations that guard against poor management, political overreach, and unfair labor practices. The Act also created the notoriously corrupt Office of Accountability and Whistleblower Protections (OAWP) that was investigated by both the VA Office of Inspector

General (VA OIG) and the Government Accountability Office (GAO). Findings from those investigations ranged from the consistent ineffectiveness of OAWP staff and leaders to perform their jobs properly, to OAWP staff and leaders committing regular and blatant violations of the laws and regulations that govern unbiased due process, ultimately causing failures of OAWP to act against claims of retaliation and improper actions by VA managers.

The momentous findings by the VA OIG (Report #18-04968-249) and the GAO (Report #GAO-18-137) investigations were further confirmed through federal court and independent agency decisions that invalidated many of the provisions of the original bill. These decisions were grounded in reasoning that ranged from unsound legal concepts within the law, to violations of case law and merit principles that protect the VA workforce and its veteran-patients from improper or inept practices and internal policies. Now, with the introduction of H.R. 4278, the “Restore VA Accountability Act,” it seems that all lessons learned are lost, as proponents of the bill try again to create an environment of fear and clouded transparency at all levels of staff and employees at the VA and VHA, including personnel with no direct contact with patients.

### **Why VA Accountability and Whistleblower Protection Act of 2017 Failed, and Why the Restore VA Accountability Act will also Fail**

There are a variety of reasons why the VA Accountability and Whistleblower Protection Act failed, and why the Restore the Accountability Act will also fail, but a few in particular are the clearest. First, this Act lowered the burden of proof for misconduct from “preponderance of the evidence” to “substantial evidence”. To put this in perspective, the evidence may show that there is a less than 1% chance that a worker did what they are being disciplined for, yet the Act could still be upheld.

Ridiculous by its very nature, this flagrant violation of the most basic legal principles opens the door to biased actions from managers and executives who seek retaliation or retribution against doctors, nurses, and other professionals and staff for questioning the policies and procedures that directly affect the success of veteran care. It continues to astound NFFE and the whistleblower community in general that such an unsophisticated requirement for adverse action is operational

anywhere in government, especially for positions that directly affect the lives and wellness of veterans.

This Act also erodes collective bargaining rights by arbitrarily shortening the timelines for grievances, allowing a restricted and often unrealistic amount of time to prepare for such proceedings. Like the lowering of the evidentiary standard, this artificial requirement also invites management impropriety under adverse actions against innocent employees.

The Act continues to violate commonly accepted legal practices by illogically shortening the timelines for appeals to the Merit Systems Protection Board (MSPB). For a lack of any legitimate reason, the purpose of the shortened timeline can only serve to obstruct generally accepted practices for legal discovery and preparation. The argument offered by the Act's proponents that this is a necessary step to speed the firing or discipline of employees is unfounded within legal academia.

Furthermore, the assault on legitimate due process continues more by eliminating the ability of an MSPB administrative judge to mitigate a penalty proposed by the agency, placing a bizarre and unparalleled restriction on the authority of an independent oversight agency to intervene and ensure that management and leadership do not act inappropriately nor, in the case of the VA and VHA, take any action that can contribute to the endangerment or deterioration of veteran care.

Most notoriously, the Act created an internal review board for disciplinary actions headed by a political appointee without any required expertise in the adjudication or evaluation of the appeals process within the federal workforce, or basic knowledge of the law. The relaxed requirement for such a position is telling, and the design of the office and its self-generated appraisal of its own virtue is a thinly veiled attempt to dilute legitimate due process and diminish the laws, regulations, and rules that keep government transparent, efficient, and effective.

**Time to Consider Disbanding the Failed VA Office of Accountability and Whistleblower Protections (OAWP)**

The office has a history of failings that wrongfully allowed the termination of dedicated, honest VA and VHA staff, and caused the voluntary resignations of highly trained professional staff who lost faith a system that left them vulnerable to irreparable damage to their professional reputations and careers. These separations come at a time when thousands of VA positions remain vacant, and at a time when VA/VHA care is rated at or higher than care provided in the private sector. Consider the following:

- **VA OIG Report #18-04968-249.** An overall lack of training, guidance, and rules has contributed to OAWP falling short in many ways. VA OIG conducted an investigation into these shortcomings and found that within the first two years of operation, OAWP was incredibly inconsistent both with executing proper authority and protecting whistleblowers. The investigation states that, “OAWP leaders made avoidable mistakes early in its development that created an office culture that was sometimes alienating to the very individuals it was meant to protect.” The investigation continued on to say that these failures likely contributed to whistleblowers feeling comfortable with coming forward and a general hesitation to file a complaint within the office.

The lack of guidance given to OAWP early on continues to have negative effects on those involved. From the beginning, this office was staffed with Human Resources Specialists who were inadequately trained for the job, and therefore were unaware of the proper procedures when interviewing witnesses or conducting other parts of an investigation. Even taking into consideration the trials and errors that may come with the induction of a new office, the VA OIG report states that, “Failure to put in place key systems and quality controls has resulted in OAWP conducting investigations that were not always thorough, objective, and unbiased—undermining OAWP’s credibility among some VA employees.”

- **GAO Report #GAO-18-13.** Although OAWP was intended to track misconduct and disciplinary actions against VA employees, the introduction of the office may have caused the opposite to occur. A 2019 report from the Government Accountability Office (GAO) states that OAWP has a habit of disregarding appropriate investigation procedures. For example, they have allowed VA employees at the receiving end of allegations from

whistleblowers to participate in investigations. Not only is this a conflict of interest, but it can cause confusion and bring discomfort upon the whistleblower. Additionally, OAWP stated that there is a process to ensure the safety of whistleblower protections, however, the process was not revealed.

OAWP failures are consistent because of the flawed law that originally authorized the office into existence, and no evidence exists to suggest that the “fix” bill—the Restore the VA Accountability Act—will provide any relief from the mismanagement, corruption, and political overreach provided by OAWP over the years. There is no substitute for the independent oversight provided by the MSPB, the Office of Special Counsel (OSC), the Federal Labor Relations Authority (FLRA), and the Equal Employment Opportunity Commission (EEOC). It is critical that VA employees have direct access to these anti-corruption, anti-impropriety tribunals established within the federal government to promote a fair, efficient, and effective government.

### **VA/VHA Employees are Disciplined and Terminated at Rates Comparable to the Rest of Government and the Private Sector**

A common falsehood often told by some on Capitol Hill is that federal employees are “impossible” to fire. Each year, approximately 10,000 Federal employees are terminated for cause (conduct or poor performance)<sup>i</sup>. This equates to approximately 40 involuntary terminations for cause per workday. The federal employee termination rate for cause is the same as the private sector. The involuntary separations (terminations) rate in the private sector is 1% annually<sup>ii</sup>. Of that 1%, about one-third are terminations for cause and two-thirds are layoffs<sup>iii</sup>. This means that the termination rate for cause in the private sector is .3%. The Federal government’s termination rate for cause is also .3%.<sup>iv</sup>

Detractors claim that Merit System Principles and the federal oversight agencies (MSPB, FLRA, OSC, EEOC) hinder the firing of poor performers or conduct. They claim federal unions do the same. Clearly this is false. Merit System Principles buttress accountability throughout the government by deterring political overreach, corruption, poor management, and unfair practices. Federal employees prevail only 18% of the time at the MSPB and only 3% of the time upon appeal

to the full board. Management prevails 60% of the time against unions at the FLRA. Cases involving VA/VHA employees are no different.

The oversight agencies external to the VA do not interfere with the timeliness or ability to discipline or terminate for performance or conduct. However, they are an extremely important part of the systematic protections that guard against corruption and malfeasance within government, as demonstrated by the investigations against OAWP. Given this, there is no legitimate reason to create and retain an internal tribunal within the VA to handle employee appeals for poor performance or conduct. This is especially true when the internal office of review, as is the OAWP, has the proven record of failings that cast a negative impact on VA/VHA operations and veteran care. This will worsen under the proposed Restore VA Accountability Act as it aims to reduce further basic legal principles, such as the proposal to eliminate seven of the twelve Douglas Factors that serve to maintain consistency and honesty in deliberations. There is no better proof of corrupt intent than this.

### **Support for HR 3504, VA Medical Center Security Report Act of 2023**

The National Federation of Federal Employees thanks Chairman Kiggans (R-VA) and Representative Pappas (D-NH) for introducing the VA Medical Security Report Act of 2023 to call attention to a growing safety and security crisis within the VA. For too long, our VA police officers have been treated like second-class law enforcement officers, constantly asked to do more with less while continually losing talent to area police departments who leave for better opportunities. More can be done to help our VA police officers identify and manage the unique challenges of providing a safe and secure environment in which to care for our veterans. This legislation will provide a foundation for that to happen. NFFE recommends that the Committee consider expanding the purview of the report to include other components of the VA, including outpatient clinics, regional offices, National Cemetery Administration facilities, and other executive function VA and VHA offices.

---

<sup>1</sup> Office, U. S. G. A. (n.d.). *Federal employee misconduct: Actions needed to ensure agencies have tools to effectively address misconduct*. Federal Employee Misconduct: Actions Needed to Ensure Agencies Have Tools to Effectively Address Misconduct | U.S. GAO. <https://www.gao.gov/products/gao-18-48>

---

<sup>ii</sup> U.S. Bureau of Labor Statistics. (2023, May 31). *Table 5. layoffs and discharges levels and rates by industry and region, seasonally adjusted - 2023 M04 results*. U.S. Bureau of Labor Statistics. <https://www.bls.gov/news.release/jolts.t05.htm>

<sup>iii</sup> Trevor, C., & Piyanontalee, R. (n.d.). *Discharges, poor-performer quits, and layoffs as valued exits: Is it ...* Annual Reviews. <https://www.annualreviews.org/doi/10.1146/annurev-orgpsych-012119-045343>