UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

STATEMENT FOR THE RECORD
U.S. OFFICE OF PERSONNEL MANAGEMENT

before the

COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

on

Pending Health Care and Benefits Legislation

September 16, 2015

Thank you for the opportunity to provide this statement for the record related to the September 16, 2015 Senate Committee on Veterans' Affairs hearing on pending health care and benefits legislation. In its letter of invitation, the Committee noted particular interest in hearing the U.S. Office of Personnel Management's (OPM) views on S. 1450, the Department of Veterans Affairs Emergency Medical Staffing Recruitment and Retention Act, but also requested OPM to provide written testimony on each agenda item for which OPM has a position or an interest. We appreciate the opportunity to share OPM's views.

In reviewing the legislation on the Committee's agenda, OPM would like to express concerns about S. 1450, the Department of Veterans Affairs Emergency Medical Staffing Recruitment and Retention Act; S. 290, the Increasing the Department of Veterans Affairs Accountability to Veterans Act of 2015; S. 1856, the Department of Veterans Affairs Equitable Employee Accountability Act of 2015 and two other bills that impact personnel matters. OPM would like to work with the Committee in order to address our concerns, and we welcome further discussions.

S. 1450, the Department of Veterans Affairs Emergency Medical Staffing Recruitment and Retention Act

S. 1450 would give the Secretary of Veterans Affairs broad authority to allow irregular work schedules greater than or less than 80 hours in a biweekly pay period for physicians and physician assistants who would otherwise be assigned to work 80 hours on a full-time basis. This seems to imply that the physicians and physician assistants would be considered to still be full-time while on these irregular schedules, but it is not clear. Under the provisions of the bill, total hours of employment for an employee in a calendar year could not exceed 2080 hours, but there would be no minimum amount of hours in a calendar year. It is unclear why this authority is

needed. The proposal does not include any criteria establishing the circumstances under which the Secretary should use this broad authority. It is also unclear what effect is intended with regard to benefit programs. For example, the bill does not expressly state whether a physician or physician assistant would be considered to be full-time under the retirement law. Special retirement annuity computations apply to part-time employees. For retirement computation purposes, there are limited but well-defined exceptions to the requirement that employment on full-time basis is a tour of 80 hours in a biweekly pay period. In addition, contributions for health insurance premiums for part-time employees are prorated based on the Federal Employee Part-Time Career Act. It is unclear whether this bill would override this requirement under the law. Clarity on this issue becomes more important as employers are required to offer full-time employees (work more than 30 hours a week) affordable coverage under the Affordable Care Act or pay a penalty. It is also unclear whether all hours worked would be included in the calculation of FEGLI basic insurance amount. The provisions of the bill should clearly express the intended effects with respect to benefit programs. There are similar concerns with physician and physician assistant leave benefits under the bill. Although VA physicians are excluded from coverage under the title 5 leave system by 5 U.S.C. § 6301(2)(v), physician assistants are not excluded and are therefore covered by the title 5 leave system, which requires proration of annual, sick, and other leave for part-time employees.

As a matter of policy, we would be concerned if the bill would have the effect of treating a part-time employee as a full-time employee for retirement, health insurance, and leave purposes.

S. 290, the Increasing the Department of Veterans Affairs Accountability to Veterans Act of 2015

Section 2 creates a new 38 U.S.C. § 715, which provides for the reduction of annuities for removed senior executive employees. Existing law (subchapter II of chapter 83 of title 5, U.S.C.) provides for loss of annuity based upon having been convicted of one of a number of felonies for national security offenses (or if indicted for them, for leaving the country to avoid prosecution). These are all major offenses and are clearly articulated in statute. The legislation here does not provide such clear articulation. Additionally, 5 U.S.C. § 8312(d)(2) provides for methods of review should an individual be found guilty of certain offenses necessitating the reduction of the individual's annuity. No such review is laid out in this legislation.

OPM questions whether the legislation as drafted would be sufficient to make a loss of a CSRS or FERS annuity under its provisions defendable by VA and OPM. Subchapter III of chapter 83 and chapter 84 of title 5 provide for a right to retirement benefits. Clearly, a decision by OPM to reduce an individual's annuity under section 715(b)(3), or a decision by the Secretary of the VA under section 715(a), would be an action or order that would be subject to appeal to the Merit Systems Protection Board (MSPB) and judicial review (see 5 U.S.C. § 8347(d) and 5 U.S.C. § 8461(e); 5 U.S.C. § 7703). If an individual subject to the loss of retirement benefits under the

legislation appealed to the MSPB (or to the courts), it is by no means clear OPM could successfully defend the matter since it would have had no involvement in the underlying substantive determinations involved.

Before service credit could be terminated, OPM would have to be able to prove what the elements of the offense were, when each element occurred, and that each directly related to the performance of the individual's official duties as a senior executive at the VA. The vagueness of the substantive standard for reduction of the annuity – "convicted of a felony that influenced the individual's performance while employed in the senior executive position" – would make this a far more complex task than faced by a prosecutor. Furthermore, it is unclear what Congress intends to cover with "influenced the individual's performance." Since Congress's intended targeted behavior is not clear, the application of the standard could result in unfair punishment. Reduction of an existing annuity could also result in an overpayment of annuity that OPM would have to attempt to recover; however, OPM may not be able to successfully recover such overpayments in every case if the overpayment recovery is contested. Finally, we note that the provision could be challenged as an *ex post facto* law since it imposes an additional punishment for past misconduct and past crimes.

Other portions of the legislation are also troubling. For example, the proposed 38 U.S.C. § 717 in section 3 ignores the needs of agencies in assessing and evaluating their own workforce, and it imposes an assessment and evaluation system by statute that will be very difficult to modify in the future if adopted. Additionally, the language in the proposed Sec. 717(a)(2) would undo a regulatory prohibition against assigning candidates to categories based on percentages. The intended effect behind this regulation is to ensure executives are not being ranked against each other, as a set of prescribed percentages would require, but each executive is rated against the standards to which he or she is being held.

Sec. 717(a)(3) provides that the Secretary shall take into consideration a complaint or report submitted by the Inspector General, the Comptroller General, the Equal Employment Opportunity Commission, or any other appropriate person or entity related to any facility or program managed by the individual in evaluating the performance of senior executives. Most of the named entities have their own appeal and review process. It is important to ensure an individual is not being punished inappropriately. A complaint can be unfounded, and it is important the Secretary of the VA not allow the wrong information to unnecessarily cloud his or her independent assessment and review of the senior executive's performance. Providing that the Secretary "shall take into consideration" any complaint or report, including pending reports, not only from the named entities but from "any other appropriate person or entity" without regard to verification or final resolution seems to imply that a senior executive's appraisal should be adversely affected by any assertion or allegation, unless the Secretary determines otherwise.

Finally, section 4 proposes a new 38 U.S.C. § 719, which imposes limitations on administrative leave, or any other type of paid non-duty status, for employees of the VA. OPM, through regulations promulgated pursuant to chapter 75, has already made it clear that the usual practice is that an employee who is the subject of an adverse action proceeding will remain in a duty status in his or her regular position during the advance notice period. OPM recommends agencies use administrative leave as a last resort only after exhausting alternatives that require the employee to remain in a duty status. Agencies have no incentive to place employees on excused absence unless they have already made a determination that the employee's continued presence poses a significant concern thus the total amount of administrative leave should not be limited. The VA should be allowed to utilize the option of placing an employee on administrative leave where an employee's continued presence in the workplace poses a threat to the employee or others, results in loss of or damage to government property or otherwise jeopardizes legitimate government interests. Also, please be aware that "any other type of pay non-duty status" could encompass many types of excused absences, such as excused absence granted in weather or other emergencies that prevent an employee from working or the five days of excused absence that are provided to reservists returning from active duty in a contingency operation. We question whether this is the actual intent of the bill drafters and recommend the bill be clarified.

S. 1856, the Department of Veterans Affairs Equitable Employee Accountability Act of 2015

Similarly, OPM has concerns about S. 1856. This legislation also creates a new 38 U.S.C. § 715, under which an individual may be suspended or removed if the Secretary determines the employee's performance or misconduct is a clear and direct threat to public health or safety. This is a very broad standard without context of what constitutes a clear and direct threat. The Secretary may remove someone "after such investigation and review as the Secretary considers necessary." This language does not provide any clarity on who will be conducting the investigation and review or how the Secretary will determine what is necessary. Once the Secretary takes an action under this authority, it appears the legislation would inadvertently create a situation where a bargaining unit employee may pursue both an appeal to the MSPB as well as through the negotiated grievance procedure instead of electing one or the other as what happens today under existing law. Finally, it is unclear why the legislation creates a new avenue for back pay when most Federal employees are already covered by the Back Pay Act when a suspension or removal is found to have either not been warranted or to have constituted a prohibited personnel practice. Accordingly, OPM recommends revising the legislation to provide that the payment of back pay is subject to 5 U.S.C. 5596.

Similarly, the language in the proposed new 5 U.S.C. 715(b), providing procedures for suspension and removal, is unclear. While subsection (a) provides that the Secretary suspends the employee, (b) further provides that "after suspension" the employee is entitled to notice and review of the case by the same Secretary who has suspended the employee. In this language,

there does not appear to be any room for anything between a suspension and a removal, and it is also unclear how a Secretary would determine suspension is appropriate, but a removal is unwarranted with reinstatement and back pay.

The language in the proposed 5 U.S.C. 715(b) would also impose administrative burdens. This section permits the Secretary of the VA to suspend an employee based upon the employee's poor performance or misconduct constituting a clear and direct threat to public health and safety; and to then allow the Secretary, within a 30-day time limit following the suspension, to initiate a removal action against the employee, subject to advance notice, an opportunity for a response, and a departmental hearing prior to the final removal action. Please note that each action would give rise to a separate MSPB appeal.

Section 2 creates a new section 38 U.S.C. 715(d), which provides "[t]he authority provided under this section shall be in addition to the authority provided by . . . title 5 with respect to disciplinary actions for performance or misconduct." However, Chapter 75 is not "authority" for taking an action. Instead, it is a limitation on what would otherwise be an agency's plenary authority to remove or discipline employees. The standard for removal or suspension, as contemplated by the legislation, is a determination that the action is "a clear and direct threat to public health or safety" and "necessary in the interests of public health or safety." This should not be referenced as an "authority." The language of the legislation should instead reference "procedures" to make it parallel with prevailing, longstanding legal principles.

Sec. 4 of S. 1856 provides that "with respect to any employee of the Department of Veterans Affairs that is required to serve a probationary period at a position in the Department, the Secretary of Veterans Affairs shall require the manager of such employee to determine, not later than 30 days before the end of the probationary period, whether the employee has demonstrated successful performance and should continue past the probationary period before allowing the employee to continue at that position after the end of the probationary period." Under current regulation, agencies are already required to notify in writing the intent to terminate an employee during probation when performance or conduct impacts the employee's ability to demonstrate his or her fitness or qualifications for continued employment. This same requirement applies to the intent to terminate an employee during probation for conditions that arise before the initial appointment. Therefore, managers are already required to assess and verify the fitness and qualifications of competitive service appointees near the conclusion of a probationary period. Sec. 6 requires improvements to training for managers, including how to effectively motivate, manage, and reward employees, and how to manage employees who are underperforming. The language of this section seems redundant in light of 5 U.S.C. § 4121. Specifically, existing law requires agencies to "establish . . . a program to provide training to managers on actions, options, and strategies a manager may use in . . . relating to employees with unacceptable performance; mentoring employees and improving employee performance and productivity; and conducting employee performance appraisals."

Sec. 7 proposes a career track for high-performing technical experts to advance their careers without having to take on management functions. However, under present law, there's no requirement that a GS-14 or a GS-15 be a manager. 5 U.S.C. § 5104 provides that, to be a GS-15, a position can simply require one "to plan and direct or to plan and execute specialized programs of marked difficulty, responsibility, and national significance, along professional, scientific, technical, administrative, fiscal, or other lines, requiring extended training and experience which has demonstrated leadership and unusual attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities" or "to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications." There's no need to create a promotional track when there's no requirement that one be a manager in order to be promoted. Additionally, this track is not necessary given that VA can place these individuals in Senior Level positions. Most Senior Level employees are in non-executive positions whose duties are broad and complex enough to be classified above GS-15.

Finally, the newly proposed 38 U.S.C. § 719 in section 11, with its limitations on the use of administrative leave raise the same concerns here as they do in S. 290.

Other Legislation Impacting Personnel Matters

- S. 563, the Physician Ambassadors Helping Veterans Act, creates a new 38 U.S.C. 7405A, which authorizes VA to employ physicians on a without compensation basis.

- S. 564, the Veterans Hearing Aid Access and Assistance Act, amends title 38 to include licensed hearing aid specialists as eligible for appointment in the Veterans Health Administration, and for other purposes.

- As previously discussed, S. 1450 amends 5 U.S.C. 7423 to modify hours of employment for VA physicians and physician assistants.

Title 5 provides OPM with the authority to delegate to other Federal agencies the discretionary use of certain VA personnel authorities regarding pay, hours of work, classification and qualifications provided under chapter 74 of title 38 to help recruit and retain employees in health care occupations. (See 5 U.S.C. 5371.) Currently, OPM has delegated the authority to use such title 38 provisions to the Departments of Defense, Health and Human Services, Homeland Security, and Justice, and the Armed Forces Retirement Home. If enacted, it is possible that OPM could delegate the above noted provisions in S. 563, S. 564, and S. 1450 to these other Federal agencies.

As a broader observation, we do ask the Committee to be mindful of the fact that the Civil Service Reform Act was enacted to replace the existing patchwork quilt with a comprehensive system, especially with respect to appeals of adverse and performance-based actions. Specifically, it is OPM's view that Chapter 75 of title 5 covers the waterfront of misconduct, and we urge care in amending this framework. In addition, OPM supports the merit system principles codified in 5 U.S.C. 2301, and we recognize adherence to these principles is a responsibility shared by all in Federal employment.

Further, in addition to the above concerns on these bills, OPM has a number of additional technical concerns. OPM welcomes the opportunity to discuss these additional concerns in greater detail with the Committee.

Thank you again for the opportunity to provide OPM's views.