

**STATEMENT OF TRACEY THERIT
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DEPARTMENT OF VETERANS AFFAIRS OFFICE OF HUMAN RESOURCES AND
ADMINISTRATION/OPERATIONS, SECURITY AND PREPAREDNESS
DEPARTMENT OF VETERANS AFFAIRS
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE
ON
VA ACCOUNTABILITY AND TRANSPARENCY: A CORNERSTONE OF QUALITY
CARE AND BENEFITS**

October 25, 2023

Good afternoon, Chairman Tester, Ranking Member Moran, and Members of the Committee. Thank you for the opportunity to discuss employee and organizational accountability across the Department of Veterans Affairs (VA), as well as labor-management relationships, workforce management and accountability related to workplace misconduct or performance issues. We also look forward to providing our views on S. 2679, the Leadership, Engagement, Accountability and Development (LEAD) Act of 2023 and S. 2158, the Restore VA Accountability Act of 2023. I am joined today by David Perry, Chief Officer, VHA Workforce Management and Consulting Office, Veterans Health Administration (VHA), Ted Radway, Executive Director, Investigations, and Acting Executive Director, Compliance and Oversight, Office of Accountability and Whistleblower Protection, and Mr. Aaron Robison, Senior Attorney Advisor, Accountability, VA Office of the General Counsel.

While our testimony will address the elements of the hearing invitation, I want to echo a recent statement by the Under Secretary for Health Dr. Shereef Elnahal: "we're hiring and retaining the best, most talented and dedicated employees in health care." At VA, "we're bringing on new people with one goal in mind: providing world-class care to every Veteran who entrusts us with their health." I cannot think of a better way to exemplify our commitment to world-class care than to share a story about one of our valued employees, who epitomizes the ethos of service above self.

Bill Barksdale, Assistant Director of the Roanoke Regional Office, was recently recognized with an "Own the Moment Award" at a Customer Experience Symposium. When a Veteran experiencing homelessness came to Bill's office in crisis, Bill jumped into action. He phoned the Vet Center and was instructed to transport the Veteran to the Vet Center to get the medical attention he needed. Bill drove the Veteran to the Vet Center himself. Once there, it was determined the Veteran needed more care at the Salem Veterans Affairs Medical Center (VAMC) and Bill drove him there, too. While sitting in the waiting room, Bill made some calls, reached out to Support Services Division, checked on the Veteran's finances and checked to see if he was receiving his compensation checks.

Bill discovered that the Veteran was forced from his home in Newport News, Virginia, after a series of thefts. Bill called the Louisville Fiduciary Hub, asking them to help set up a temporary fiduciary. By night's end, after the Veteran was released from the VAMC, Bill drove him to the Roanoke Rescue Mission to set him up with temporary housing. Bill worked across VA, setting up support systems to help the Veteran manage his finances and facilitate his transition to a permanent place he can call home. Two weeks later, the Veteran was permanently housed in a senior living facility and Bill has been following up with the Veteran to ensure he is adjusting and getting the services and resources he needs. Every step of the way, Bill was right there--not because it is his job--but because getting Veterans the support they need to be successful is, to Bill, a sacred duty and source of personal pride.

This is just one of many examples of the high caliber of employees whose dedication and commitment to service and Veterans typifies VA. While we are very proud of our talented and outstanding employees, VA recognizes that more can be done in to ensure an effective and efficient management of a nearly 500,000-member workforce.

We thank Congress for providing critical authorities and appropriations in bills such as the Reforming American Immigration for Strong Employment Act, the PACT Act and the 2023 Consolidated Appropriations Act. Because of this legislation, VHA's total workforce has grown by 6%. That is the greatest growth we have seen in more than 15 years and VHA is on pace to exceed this year's goal of 52,000 new hires. As of September 2023, VHA has an onboard strength of 464,720 employees and continues to grow each year in response to increased demand for its services, improved access to care and benefits, reduced wait times, improved quality, enhanced Veteran satisfaction and overall mission growth. VHA accounts for approximately 89% of VA employees and most of the additional staffing needed at VA in the past 5 years have been in clinical occupations, which account for approximately 63% of VA employees. As the largest integrated health care delivery system in America, most of VA's challenges in maintaining a clinical workforce mirror those faced in the private health care industry.

A. Background on Section 714

Before we present VA's perspectives on the two accountability bills, context is important. Let me first provide some history on the VA Accountability and Whistleblower Protection Act of 2017, particularly the language codified at 38 U.S.C. § 714 and then share how we think proposed legislation may improve current processes and support VA's goals.

Since the Accountability Act was passed, decisions from the U. S. Court of Appeals for the Federal Circuit, the Merit Systems Protection Board (MSPB), independent arbitrators, and the Federal Labor Relations Authority (FLRA) have significantly limited the application of section 714. These courts and administrative bodies have interpreted section 714 to require higher standards for these disciplinary

actions. According to the Federal Circuit, VA was required to use a preponderant evidence standard and to apply Douglas factors (which are 14 specific factors that must be reviewed when a disciplinary decision is made under title 5) even when taking actions under section 714. The Court also decided that section 714 could not be used for conduct and performance actions that took place prior to its implementation. See *Sayers v Department of Veterans Affairs*, No. 18-2195 (Fed. Cir. 2020); *Connor v. DVA*, No. 2021-1064 (Fed. Cir. 2021); *Rodriguez v. DVA*, No. 2019-2025 (Fed. Cir. 2021). The decisions also limited section 714 coverage to fewer types and numbers of employees by excluding “hybrid” employees. Additionally, in March 2021, VA was ordered to cease using section 714 to take adverse actions against American Federation of Government Employees (AFGE) bargaining unit employees until retroactive bargaining was completed. Thus, VA is currently unable to use section 714 for a large portion of its workforce. Out of approximately 465,000 VA employees, the section 714 authority can only be used for approximately 75,000 employees, which is roughly 16% of VA’s workforce. Section 714 authority cannot be used for pure title 38 employees title 38 hybrid employees or AFGE bargaining unit employees. Because there are few remaining practical differences between the use of 38 U.S.C. § 714 and traditional title 5 adverse action authorities, and because VA could not use section 714 on an overwhelmingly majority of its workforce, VA ceased proposing new adverse actions under section 714 in April 2023.

B. VA’s Position on the Proposed Restore Accountability Act

Given the complexities and dynamics of our experience with section 714, VA is confident that the authorities currently available to VA are sufficient to hold employees accountable for misconduct and poor performance. Even without using section 714 against any AFGE bargaining unit members, its largest union, since 2021, VA has taken more than 4,000 adverse actions in each of the last 2 fiscal years using its existing authorities.

As such, VA does not support S. 2158, the Restore Accountability Act of 2023. VA has legal concerns regarding some of the language in the draft bill. Specifically, this language will continue to be the subject of extensive litigation and constitutional challenges, creating uncertainty and potentially leading to a continued pattern of overturned disciplinary actions. VA’s position is informed by the experience of using these authorities over the past 6 years and the morass of litigation they spawned.

While VA appreciates the Committee’s efforts, VA believes that other authorities available to address performance and conduct deficiencies (e.g., 5 U.S.C. Ch. 43 and 75) are sufficient to act against supervisory personnel when warranted. This includes being subject to mandatory proposed penalties for certain types of misconduct related to whistleblower retaliation or other prohibited personnel actions pursuant to 38 U.S.C. § 731 and 5 U.S.C. § 7515. Finally, this bill is potentially detrimental to VA in the form of legal risk, uncertainty and further litigation, potentially resulting in overturned adverse actions and substantial monetary damages, which VA experienced in its implementation of section 714. The enactment of 38 U.S.C. § 712 as well as the proposed amendments

to 38 U.S.C. §§ 713 and 714 will likely face the same gamut of legal challenges. VA recommends that disciplinary action continue to be taken under applicable existing authorities, providing certainty and minimizing legal risk to VA.

To be a model employer for the Federal Government, VA must focus on modernizing and improving VA's hiring, preserving rights of VA employees and fostering a positive and collaborative labor-management relationship. Ensuring we deliver the best health care, benefits and services to our Veterans is non-negotiable. Providing the very best outcomes means having agile and responsive workforce management policies and processes.

C. VA's Position on the Proposed LEAD Act

To ensure our workforce continues to meet the standards of excellence Veterans and their families deserve, VA generally supports S. 2679, the LEAD Act of 2023, subject to the availability of appropriations. This bill seeks to strengthen accountability and oversight at VA. VA has taken several steps to strengthen accountability and oversight across the Department, including implementing the VA Accountability and Whistleblower Protection Act of 2017 and being committed to continuous improvement in this area. VA supports this bill, if amended for clarity, legal sufficiency and more effective implementation as outlined in the Department's technical assistance and subject to the approval of funding to support. This testimony will highlight specific provisions of the bill that serve to strengthen VA's existing programs and will express where we do not support provisions of the legislation.

First, section 101 of S. 2679, the LEAD Act, would require VA to determine the steps and processes for responding to potential acts of misconduct and poor performance, provide training on this process and compile data regarding the outcomes. As VA already has policies governing these procedures, it will not need to establish a new system or standards for accountability. VA agrees with the underlying premise of this section, acknowledging that, while scenarios will differ, it is possible to provide overall steps to the process as established in existing policies. This information can be distributed, and training provided within the organization to ensure a better understanding of the process for investigating and addressing potential misconduct and poor performance and the rights of employees.

VA recommends this section be amended to include clarifying the definition of adverse actions given the differing definitions of that term in title 5 and title 38 and aligning the outcome metrics with available data. We estimate this section of the bill will cost \$5 million over fiscal year (FY) 2024 and FY 2025 and \$500,000 each year over a 10-year period to hire staff to manage this section; develop, deliver and track the training; and modify and maintain the system.

Section 102 establishes the Office of Transparency, Engagement, Accountability and Management (TEAM Office) in VHA. VA supports creating the TEAM Office, which aligns with ongoing consolidation efforts under VHA's optimization plan. VA requests

amendments to this section to: (1) expand the pool of qualified candidates for the head of the TEAM Office to include compliance professionals; (2) make technical edits to avoid conflict with 38 U.S.C. § 7306 and clarify reporting structures; (3) clarify that Government Accountability Office (GAO) and Office of Inspector General (OIG) recommendations are not mandatory; and (4) add functions and offices to the TEAM Office to align with VHA's operations.

Second, section 201 of the bill requires officials such as medical center directors, other medical center executive leaders and network directors to conduct oversight visits to medical facilities within their jurisdictions. This section also contains required reporting. VA supports the site visit requirement in section 201 since it is a good management practice and is currently a VHA practice. VA requests this section be amended by omitting or modifying the reporting requirements in subsection (b). The way this reporting is structured, it would potentially contain observations from more than 600 leaders and VHA will have difficulty providing all the submitted observations as required in section 201(b)(1). Instead, VHA will be able to provide data highlighting important changes from leadership engagements.

Section 202 creates a new provision at 38 U.S.C. § 7306B, which directs VHA to establish the Office of the Medical Inspector (OMI) and align OMI within the TEAM Office from 38 U.S.C. § 7306A. The provision also outlines the requirements for the head of the office, the Medical Inspector to codify the OMI functions and directs VHA to establish certain capabilities and internal controls for OMI. VA supports codifying OMI and its functions in the bill. OMI has existed as a health care investigation entity within VHA since 1980 and VHA wants to ensure the language in the bill supports this role and OMI's unique mission. VA requests amendments to section 202 to (1) ensure that the existing OMI office is realigned to the TEAM Office; (2) modify OMI's functions to confirm proper coordination of oversight functions in VHA; (3) ensure OMI's mission remains focused on health care related incidents; and (4) avoid duplicating efforts of other existing offices. VHA also seeks technical amendments to the provisions covering the appointment of the Medical Inspector to conform to the amendments made by section 203.

Section 204 requires VHA to either establish a new program or consolidate existing programs to create a mobile temporary staffing program to temporarily fill vacancies and provide coverage for extended absences for shortage occupations and report annually on the program. VA is requesting amendment to section 204 to refocus the legislation on expanding and supporting VHA's existing staffing contingency framework. VHA requests support for expanding its contingency staffing model. The contingency staffing model leverages float pool reserve staff established at the facility level in combination with Clinical Resource Hub (CRH) staff at the Veterans Integrated Services Network (VISN) level, supplemental staffing programs at the national level and contract staff or community care in emergency circumstances.

The CRH model is currently being used by VISNs to provide contingency staffing for multiple occupations including providers and VHA's Travel Corps is currently being used to provide contingency nursing coverage to the field from a national program. The

Disaster Emergency Medical Personnel System Program and the more recently established Clinical Deployment Teams support the field and Fourth Mission in the event of emergencies. However, to support the contingency staffing model, VHA is seeking additional amendments to address recruitment and retention issues for the contingency float pool fund, CRH staff and the Travel Corps. Shortage occupations may result from nationwide shortages of specific occupations in the health care industry. Without monetary or other incentives, finding employees willing to participate in a program requiring mobility and frequent assignment changes to short- or long-term duty locations will be difficult.

Third, while VA generally supports most of the provisions in title 3, VA does not support certain provisions of section 3, most notably, establishing a second General Counsel housed within the Office of Accountability and Whistleblower Protection (OAWP). Under 38 U.S.C. § 311 and 38 C.F.R. Part 14, VA's General Counsel is the chief legal officer of the Department and is the principal legal advisor to the Secretary concerning all programs and policies of the Department. The General Counsel is responsible to the Secretary for all litigation, interpretive legal advice and legal services. The General Counsel also serves as the Regulatory Policy Officer for the Department - managing, directing and coordinating all rulemaking activities. Establishing a second General Counsel within OAWP would create significant legal risk to VA through the potential for conflicting legal advice to the Secretary.

The statute establishing OAWP was passed in 2017 and was designed to improve accountability within VA and to increase protection of whistleblowers. Its provisions are innovative within the Federal Government and created an additional tool for whistleblowers. OAWP has made significant strides these last several years involving its investigative work, disciplinary recommendations, training and outreach. OAWP is implementing valuable non-disciplinary tools that are part of the statute that include: (1) the ability to issue reports and recommendations that enable advice to the Secretary on matters that involve accountability and (2) analyzing trends involving intake data and recommendations by oversight bodies such as OIG, GAO, OMI and the Office of Special Counsel (OSC), that will permit VA to address issues timely. VA looks forward to continuous improvement and execution of the important tools that Congress provided when it created OAWP.

VA believes the current organizational structure that includes attorneys within OAWP's investigations directorate and who are not attorneys within the Office of General Counsel (OGC), meets the intent of this proposed amendment concerning independence in investigations while maintaining appropriate legal consistency, uniformity and reliability within the Department. As an alternative to striking the section, VA proposes alternative language, which was also proposed in response to H.R. 8510, the Strengthening Whistleblower Protections at the Department of Veterans Affairs Act, in 2022. The language codifies OAWP's current investigative attorney division which VA developed to alleviate concerns regarding OGC involvement in providing legal advice in OAWP investigations.

Additionally, VA does not support the proposed language which would require OAWP to get involved in the negotiation and enforcement of settlement agreements involving whistleblower retaliation claims by tracking negotiation of agreements and developing metrics and standards for negotiation. OAWP involvement in tracking negotiations of settlement agreements will not increase efficiency, timeliness or effectiveness of the negotiations. Settlement negotiation and agreements are largely driven by fact-specific privileged legal advice and delegations of authority within VA. VA recommends limiting any tracking of such settlement agreements to only implementation of a settlement agreement once it is signed and effective (i.e., after the agreement is executed).

OAWP policies generally defer to the choice of the whistleblower to pursue corrective action through OSC and/or OGC involvement and therefore does not have any clear role in settlement negotiations for complaints which were not presented to it. OAWP involvement in tracking negotiation of settlement agreements may also interfere with the Complainant's interests which may be driven by privileged legal advice from Complainant's legal advisor. Confidentiality provisions of other complaint statutes (e.g., OSC, OIG reports) and those that are parties to a mediation process may also be implicated.

It is also unclear what tracking enforcement of settlement agreements means. Settlement agreements are generally enforced through mediation or judicial proceedings. OAWP does not have a role in these proceedings and does not have enforcement authority.

Finally, VA generally supports section 4 with amendments, and we look forward to continuing to work with the Committee to provide greater clarity regarding scope and more specificity to the training requirements.

D. AFGE Settlement Agreement

VA understands the Committee has interest in the recent AFGE settlement. In 2017, AFGE filed a grievance asserting VA failed to bargain impact and implementation of 38 U.S.C. 714's enhanced disciplinary authority prior to implementation. After extensive litigation, FLRA ruled that VA was required to bargain impact and implementation prior to implementation. In March 2021, VA was ordered to cease using section 714 until retroactive bargaining was completed and make whole those who suffered loss of pay, benefits, allowances or differentials due to VA's failure to bargain prior to implementation. Consequently, pursuant to these rulings, in April 2021, VA ceased using section 714 for AFGE bargaining unit employees and the parties entered into retroactive bargaining in May 2021, in accordance with the order. During this period, the parties reached an impasse and jurisdiction was declined by the Federal Impasse Services Panel. AFGE filed additional charges of unfair labor practices against VA. In November 2021, the parties began negotiating an agreement to resolve all disputes associated with the matter. After more than 6 months of mediation with AFGE, which included FLRA involvement, on July 28, 2023, VA and AFGE-National VA Council

signed a settlement resolving all current disputes associated with AFGE's failure to bargain grievance.

This settlement may impact approximately 4,000 current and former VA employees. As part of the agreement with AFGE, many former VA employees will have the option to either return to work at VA or receive compensation in lieu of being reinstated. However, according to the terms of the agreement, hundreds of former VA employees who VA and AFGE mutually agree were terminated for grievous misconduct will not be eligible to return to work. The total cost of this settlement will not be known for several years since it depends on how many former employees elect to return to VA or choose compensation in lieu of restatement. For those AFGE bargaining unit employees who choose to be reinstated, VA retained the right to elect to move forward with a removal using other disciplinary authorities.

Conclusion

VA appreciates the close collaboration with Committee staff and looks forward to continuing future legislative efforts, especially those centered around more pay flexibilities and hiring provisions that are critical to recruiting and retaining health care professionals in an increasingly competitive labor market. We continue to seek legislative and regulatory interventions to make VA a fully competitive health care employer.

I am proud to be part of this noble mission to care for the Nation's Veterans. I look forward to working with each of you on this Committee on health care hiring and staffing opportunities across VA, as well as investing in our current employees so they can continue to provide the best care and service to deserving Veterans and their families. This concludes my testimony. My colleagues and I are prepared to respond to any questions you may have.