

# United States Senate

February 13, 2018

## VIA ELECTRONIC DELIVERY

The Honorable David Shulkin  
Secretary  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

Dear Secretary Shulkin:

One of your stated priorities as Secretary of the U.S. Department of Veterans Affairs (VA), which we have discussed, is to secure legal authority that would enable VA to more efficiently implement accountability measures without sacrificing vital due process rights. This included expanding the Senior Executive Service removal or transfer authorities that Congress originally enacted through the Veterans Access, Choice and Accountability Act of 2014 (Public Law 113-146), to apply beyond VA senior leadership.

Congress responded to your request by passing the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115-41) in June 2017. This bipartisan legislation codified the new VA Office of Accountability and Whistleblower Protection (OAWP) in Federal law and strengthened whistleblower protections for rank and file VA personnel. This new law further enhanced your ability to discipline and remove VA Senior Executives and provided you with authority to “remove, demote or suspend” a VA employee, if you determine that the individual’s performance or misconduct warrants such an adverse action.

I supported this bipartisan bill because on balance it made important and necessary improvements to accountability and whistleblower protections at the VA. However, I had concerns about the potential impacts of certain provisions in the final version of Public Law 115-41, such as eliminating the ability of VA Senior Executives to appeal adverse actions to the Merit Systems Protection Board (MSPB) and reducing the time for VA employees to file an appeal with MSPB to 10 business days. The success of this bill depends on careful and effective implementation of the modified accountability provisions. Congress has a critical role in conducting implementation oversight to make sure this goal is achieved. Accordingly, I am writing to address potential concerns that emerged in the initial months of implementation.

In reviewing the February 2, 2018 Adverse Actions Report submitted by OAWP, I found it notable that a significant portion of the removals made under the new authorities were of front-line workers, such as housekeeping aids, health technicians, registered nurses, nursing assistants, technicians and even a cook and laundry worker. In VISN 12 and 15 alone, 16 housekeeping aids were either removed or suspended for greater than 15 days; more than any other position that

was subject to removal or suspension. In addition, this report did not indicate the reasons for taking adverse action, whether related to poor performance or misconduct. It appears that your new personnel authorities have not yet been used to address higher-ranking VA personnel, such as supervisors and Senior Executives, who are experiencing performance problems or committed misconduct.

When testifying before Congress last month, you stated that leadership required working with underperforming employees to make them better instead of just firing them: "...every good manager works with their employees to make them better and to give them feedback." As you noted, VA employee engagement scores indicate that you are not seeing sufficient improvement and efforts must be made to improve management results. I agree that a good manager must seek to improve employees and avoid the inappropriate use of major adverse actions for all personnel challenges. That is why I am concerned that the initial data indicates that removal efforts are being targeted on less senior, frontline employees, rather than managers who play a critical role in establishing cultures of accountability that protect whistleblowers.

The intent of Congress in enacting Public Laws 115-41 and 113-146 was to enable the VA Secretary to hold bad actors accountable with greater efficiency, transparency and effectiveness. This includes Senior Executives and managers who are most responsible for VA's day-to-day operations. Congress did not intend for VA supervisors to use new authorities to only remove frontline employees, or pursue mass removals without cause. I am requesting the following information to ensure this legislation is being implemented as Congress intended:

1. The specific date VA will appoint a permanent Assistant Secretary for Accountability and Whistleblower Protection to lead OAWP, as required by Public Law 115-41.
2. An explanation of the delay in making the OAWP appointment referenced above.
3. Additional data and information on adverse actions instituted under Public Law 115-41, including the specific causes and justifications for each proposed adverse action.
4. A detailed explanation of how VA is measuring and collecting information on the outcomes of disciplinary actions to make sure each is appropriate and not whistleblower retaliation.
5. Section 102 of Public Law 115-41 requires you to develop criteria that will be used "as a critical element in any evaluation of the performance of a supervisory employee and promotes the protection of whistleblowers." Please provide me with the criteria you have developed and an explanation of the standard employees will be held to.
6. Please provide me with the criteria and standard that non-supervisory employees are held to and explain how these employees are educated and trained to comply with the standard.
7. Please provide me with the materials you are developing to comply with Section 102 of Public Law 115-41 that requires you to develop training regarding whistleblower disclosures and retaliation.
8. Please provide copies of the guidance referenced in your congressional testimony dated January 17, 2018 ("developed four Human Resources Management Letters as guidance to

- managers and Human Resources personnel on how to implement several of the disciplinary provisions”).
9. Please describe in detail the training referenced in that same congressional testimony (“training was provided to managers, HR personnel, and the Office of General Counsel on the provisions of the Act, and how it would be implemented”).
  10. Please provide VA’s current assessment of employee engagement and what actions VA is taking to address this deficiency.
  11. OAWP is required to “receive, review and investigate allegations of misconduct, retaliation or poor performance” of VA employees. Please describe which personnel conduct these reviews and investigations and the policies that are in place to make sure each allegation is thoroughly and fairly reviewed and due process is upheld.
  12. Since enactment of Public Law 115-41, what is the average time from the initiation of an adverse action against a covered employee to the final resolution of the action?
  13. Please share your own views, as Secretary, on how the authorities provided under Public Law 115-41 improve VA performance, transparency and accountability.

In our prior meetings we have discussed at length the importance of the VA and our shared commitment to ensuring the VA successfully fulfills its mission to care for those who have borne the burden. I know it is not lost on you that the majority of VA employees are former Veterans themselves and that the vast majority of VA employees are dedicated, skilled and committed to providing the best care and services to our nation’s Veterans.

Thank you in advance for your consideration of this congressional oversight request and I look forward to receiving your prompt response.

Sincerely,



Tammy Duckworth  
United States Senator