

Date: March 5, 2023

From: Assistant Secretary for Human Resources and Administration/Operations, Security and Preparedness (006)

Subj: Cessation of the Discretionary Authority to Use 38 U.S.C. § 714 - Employees: Removal, Demotion, or Suspension based on Performance or Misconduct (VIEWS 9547134)

To: Under Secretaries, Assistant Secretaries and Other Key Officials

1. The purpose of this memorandum is to communicate the Secretary's decision to 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. Although VA will cease using this provision, management will employ other authorities to continue to hold employees accountable for their conduct and performance deficiencies and will defend actions that were previously taken under 38 U.S.C. § 714.

2. On June 23, 2017, P.L. 115-41, the VA Accountability and Whistleblower Protection Act of 2017 (the Act) was signed into law. Title I, Section 202 of the Act granted the Secretary the discretionary authority to remove, demote or suspend certain employees for conduct or performance deficiencies using the procedures codified at 38 U.S.C. § 714. Since its inception, the U.S. Court of Appeals for the Federal Circuit, the Merit Systems Protection Board and the Federal Labor Relations Authority have issued several decisions impacting the use of this authority and rendering it currently inapplicable to a large portion of the workforce. As a result of these decisions, there are few remaining practical differences between the use of 38 U.S.C. § 714 and traditional title 5 adverse action authorities. Additionally, the complexities of using section 714 have created confusion regarding the application and processing of the relevant adverse action requirements.

3. No new adverse actions will be proposed under section 714 on or after April 3, 2023. Actions proposed under section 714 prior to April 3, 2023, may proceed (i.e., a decision may be issued) and are not impacted by the Secretary's decision to cease the use of this authority. Additionally, prior to April 3, 2023, management may propose an action under either section 714 or another appropriate authority, e.g., 5 U.S.C. Chapters 43 or 75. Given the facts of each case may differ, management should consult with the Office of General Counsel as needed to determine the appropriate authority to use or when there are questions regarding the impact of section 714 litigation decisions on an action.

4. Human Resources Management Letter (HRML) Nos. [05-17-05](#) and [05-17-06](#), Adverse Action Procedures, will not be used to propose actions on or after

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April 3, 2023, but these HRMLs will continue to govern any action proposed under section 714 prior to that date. Additionally, references to the use of 38 U.S.C. § 714 in [HRML 05-21-01, Actions Taken in Accordance with 38 U.S.C. § 731 and 5 U.S.C. § 7515](#), are no longer applicable.

5. Management will ensure the timely processing of all disciplinary and adverse actions regardless of the authority under which they are imposed in accordance with [VA Directive and Handbook 5021, Employee Management Relations](#). Management should continue to provide the evidence file to an employee for whom an action has been proposed at the time the proposal notice is issued. Management must also adhere to the provisions of relevant collective bargaining unit agreements when taking a disciplinary or adverse action against bargaining unit employees. Management is strongly encouraged to issue a decision notice as soon as possible, following any required reply and/or notice periods, as applicable (e.g., decision notices will generally be issued within 30 calendar days of the proposal when practicable, noting the appropriate effective date).

6. The decision to cease using 38 U.S.C. § 714 does not impact disciplinary and major adverse actions imposed against employees appointed under 38 U.S.C. § 7401(1). [HRML 05-21-02, Disciplinary and Major Adverse Action Procedures \(Title 38 Employees\)](#), remains in effect. It also does not impact any other employees who were excluded from coverage of section 714, such as senior executives covered by 38 U.S.C. § 713, employees appointed under 38 U.S.C. § 7405 and probationary employees.

7. Thank you for your attention to this important matter. Questions concerning this memorandum may be directed to the Employee Relations and Performance Management Service (051) at [vaco051cacgohrm@mail.va.gov](mailto:vaco051cacgohrm@mail.va.gov).

**GINA GROSSO** Digitally signed by GINA GROSSO  
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