



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

March 23, 2016

The Honorable Joseph R. Biden, Jr.
President of the Senate
Washington, DC 20510

Dear Mr. President:

I am transmitting a draft bill, the "Department of Veterans Affairs Accountability Enhancement Act." I request that the bill be referred to the appropriate committee for prompt consideration and enactment. Enclosed with the bill is a sectional analysis that describes each provision and provides a rationale and estimates of the costs that would result from enactment.

Today, VA faces unprecedented demands for health care services. The service offerings themselves have multiplied over the years through expanded eligibility for existing services and new health care service offerings. Many Veterans have increasingly complex health care needs, expectations, and requirements. As Veterans age, service-connected health care issues become more chronic and acute. Demands for mental health care and suicide prevention are rising dramatically. The standards for health care are changing, challenging our ability to meet expectations. Overall, this has increased the complexity of serving America's Veterans.

This challenging environment has required VA to re-examine its operating norms and institute new programs to meet these challenges. As a result, VA is in the midst of a radical transformation to improve its relationship with and service to Veterans and their families. The sustainability of this transformation is dependent upon the career VA leaders who provide executive level leadership for VA's health care facilities and programs. The VA Secretary needs greater flexibility than current authorities afford him in terms of recruiting, compensating, appraising, and – where necessary – disciplining career health care executives to ensure that VA can operate as a values-based high performance organization rather than a compliance-focused underperforming bureaucracy.

Title I of the draft bill includes provisions that would amend the senior executive accountability provisions of the Veterans' Access, Choice, and Accountability Act of 2014 to clarify the burden of proof and level of deference to be afforded VA's senior executive removal and demotion actions by the Merit Systems Protection Board.

Page 2.


The Honorable Joe Biden

Title II would authorize the VA Secretary to appoint, pay, and discipline senior health care executives – Medical Center Directors, Veterans Integrated Service Network Directors, and other executives responsible for leading the provision of health care to Veterans – in accordance with the Title 38 personnel authorities that currently apply to VA physicians, dentists, and other medical professionals.

These proposals are necessary to ensure that VA can recruit and retain the best and brightest leaders to run its world-class health care system, and can take and sustain necessary accountability actions, for the benefit of Veterans.

The Office of Management and Budget advises that there is no objection to the submission of this legislative proposal to the Congress and that its enactment would be in accordance with the program of the President.

Sincerely,

A handwritten signature in blue ink that reads "Robert A. McDonald". The signature is written in a cursive style and is positioned above the printed name.

Robert A. McDonald

Enclosure



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

March 23, 2016

The Honorable Paul Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

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Robert A. McDonald

Enclosure

A BILL

To amend title 38, United States Code, to improve senior executive accountability at the Department of Veterans Affairs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE

This Act may be cited as the “Department of Veterans Affairs Accountability Enhancement Act.”

SEC. 2. EMPLOYMENT STATUS OF CERTAIN SENIOR EXECUTIVES OF THE DEPARTMENT OF VETERANS AFFAIRS.

- a) **COVERAGE.** - Section 713 of such title is amended-
 - (1) by striking the period at the end of paragraph (a)(2)(C) and inserting “; and (D) does not occupy a senior health executive position covered by section 714 of this title”; and
 - (2) by striking the period at the end of paragraph (g)(1)(B) and inserting “; and (C) does not occupy a senior health executive position covered by section 714 of this title”.

- b) **APPEALS PROCESS.** - Subsection 713(e) of such title is amended by striking “administrative judge” and inserting “Merit Systems Protection Board” in the title, and by striking paragraphs (1) through (6) and inserting -

“(1) Upon receipt of an appeal under subsection (d)(2)(A), the Merit Systems Protection Board (Board) shall expedite any such appeal under such section and, in any such case, shall issue a final decision not later than 30 days after the date of the appeal. The decision shall include findings of fact, conclusions of law, and an order making final disposition of the case, and may set aside any agency action found to be –

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) obtained without procedures required by law, rule, or regulation having been followed; or
- (C) unsupported by substantial evidence.

(2) Notwithstanding any other provision of law, including section 7701(c)(1) of title 5, the Board shall sustain a removal or transfer by the Secretary taken under this section if such removal or transfer is supported by substantial evidence and the penalty imposed is within the tolerable bounds of reasonableness..

(3) In any case in which the Board cannot issue a decision in accordance with the 30-day requirement under paragraph (1), the Board shall, within 14 days after issuing a final decision, submit to Congress and the Committees on Veterans’ Affairs of the Senate and House of Representatives a report that explains the reasons why the decision was not issued in accordance with such requirement.

(4) The Board may not stay any removal or transfer under this section.

(5) During the period beginning on the date on which an individual appeals a removal from the civil service under subsection (d) and ending on the date that the Board issues a final decision on such appeal, such individual may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits, other than pay accrued for services rendered prior to the date of removal.

(6) To the maximum extent practicable, the Secretary shall provide to the Board such information and assistance as may be necessary to ensure an appeal under this subsection is expedited.

(7) Notwithstanding any other provision of law, including section 7703 of title 5, the decision of the Board under paragraph (1) shall be final and shall not be subject to any further appeal.”

c) DEFINITIONS. - Subsection 713(g) of such title is amended by adding the following new paragraph:

“(4) The term “substantial evidence” means the degree of relevant evidence that a reasonable person, considering the records as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree.”

SEC. 3. EMPLOYMENT OF SENIOR HEALTH CARE EXECUTIVES

(a) Chapter 7 of title 38, United States Code, is amended by adding at the end the following new section:

“§ 714. Senior Health Care Executives

(a) IN GENERAL.

- (1) Notwithstanding any other provision of law, the Secretary may appoint, employ, pay, appraise, discipline, and terminate from Federal service, any senior executive holding a position as a Medical Center Director, Veterans Integrated Service Network Director, and any other critical senior health care executive position within the Veterans Health Administration subject to the provisions of this section. A senior executive appointed under this paragraph shall not be considered a senior executive as defined in section 3132 of title 5.
- (2) Subject to such regulations as the Director of the Office of Personnel Management may prescribe, the Secretary and the Director of the Office of Personnel Management may enter into agreements that, among other things, permit employees appointed under subsection (a)(1) to transfer to Senior Executive Service positions in other federal agencies and to be deemed career appointees under section 3132(a)(4) of title 5 apart from competition or Qualifications Review Board certification otherwise required by section 3393 of such title.
- (3) The Secretary shall prescribe regulations to implement this subsection, except as provided in paragraph (2) of this subsection.

(b) PERFORMANCE MANAGEMENT.

The Secretary shall prescribe, by regulation, a performance management and awards system for employees appointed under subsection (a)(1) that ensures performance ratings and awards meaningfully differentiate extraordinary from satisfactory contributions and substantively reflect organizational achievements over which the executive has responsibility and control.

(c) PAY FOR SENIOR HEALTH CARE EXECUTIVES. The Secretary shall prescribe for individuals appointed under subsection (a)(1) a market rate of basic pay.

(1) MARKET RATE OF BASIC PAY.— Pay for individuals appointed under subsection (a)(1) shall be determined as follows:

(A) Pay provided under this section is intended to reflect the recruitment and retention needs of the Department for the assignment to be performed by the senior health care executive.

(B) The annual market rate of basic pay payable to an individual appointed under subsection (a)(1) shall be determined by the Secretary on a case-by-case basis.

(C) In determining the market rate of basic pay for individuals appointed under subsection (a)(1), the Secretary shall take into account—

(i) the experience of the individual in managing facilities or programs of the Department;

(ii) the complexity of the individual's assignment, whether assigned or to be assigned;

(iii) the labor market for individuals in similar positions, which may cover any geographic area the Secretary considers appropriate;

(iv) the experience of the individual in performing the assignment, whether assigned or to be assigned; and

(v) such other considerations as the Secretary considers appropriate.

(D) The market rate of basic pay for an individual appointed under subsection (a)(1) shall be evaluated by the Secretary not less often than once every 24 months. The market rate may be adjusted as the result of an evaluation under this paragraph.

(2) REQUIREMENTS AND LIMITATIONS ON TOTAL PAY.—

(A) Not less often than once every two years, the Secretary shall prescribe for Department-wide applicability the minimum and maximum annual market rates of basic pay that may be paid under this subsection. Amounts prescribed under this paragraph shall be published in the Federal Register, and shall not take effect until at least 60 days after the date of publication.

(B) In no case may the total amount of compensation paid to a senior health care executive under this title in any year exceed the amount of annual compensation (excluding expenses) specified in section 102 of title 3.

(C) No adjustment of the market rate of basic pay under paragraph (1)(D) may result in a reduction of the amount of market rate of basic pay of a senior health care executive while in the same position or assignment at the same location.

(3) TREATMENT OF PAY.— Pay under this subsection shall be considered pay for all purposes, including retirement benefits under chapters 83 and 84 of title 5 and other benefits. A senior health care executive receiving a market rate of basic pay under subsection (c)(1) may not receive a cost of living allowance under section 5941 of title 5.

(d) ADVERSE ACTIONS. Notwithstanding any other provision of law, including section 713 of this title or subchapter V of chapter 75 of title 5,

(1) The Secretary (or an official designated by the Secretary) may reprimand, suspend, involuntarily reassign, demote, reduce in pay, or remove an employee appointed under subsection (a)(1) if the Secretary (or designee) determines that the employee's misconduct or performance warrants such action.

(2) A senior health care executive who is removed, demoted, or suspended for 15 days or more under this subsection is entitled to be represented by an attorney or other representative of the employee's choice and –

(A) not less than ten business days' advance written notice of the charges and evidence supporting the action and an opportunity to respond, to the charges and evidence supporting the action, in a fashion prescribed by the Secretary, before a decision is made regarding the action; and

(B) appeal a decision taken in subsection (d)(2)(A) to an internal Senior Executive Appeals Board within seven business days of receipt of the final decision.

(3) Prior to obtaining judicial review of a decision taken under (d)(2), an employee must appeal the decision under subsection (e).

(4) A senior health care executive who is the subject of a reprimand, involuntary reassignment, reduction in the market rate of basic pay based on misconduct, or suspension for 14 days or less is entitled to be represented by an attorney or other representative of the employee's choice and –

(A) not less than five business days' advance written notice of the charges and evidence supporting the action and an opportunity to respond, to the charges and evidence supporting the action, in a fashion prescribed by the Secretary, before a decision is made regarding the action; and

(B) grieve the decision taken in subsection (d)(4)(A) in accordance with a grievance process to be established by the Secretary.

- (5) A decision or grievance decision under subsection (d)(4) shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

(e) INTERNAL EXECUTIVE APPEALS BOARD.

- (1) Upon receipt of an appeal referred to in paragraph (d)(2)(B), the Secretary shall appoint an Internal Executive Appeals Board consisting of three career senior health care executives of the Department.
- (2) The Internal Executive Appeals Board will, within 45 days of the appeal, deliver a written decision as to whether the Secretary should sustain the action or reverse the action based on harmful procedural error or lack of substantial evidence.
- (3) Upon receipt of the Internal Executive Appeals Board's decision, the Secretary may –
- (A) accept and implement the Executive Appeals Board's decision;
 - (B) vacate the decision of the board and remand the matter to the Internal Executive Appeals Board for further consideration; or
 - (C) if the Secretary finds the decision of the board to be not justified by the nature of the charges, the Secretary may mitigate the adverse action imposed.
- (4) The Secretary's execution of a board's decision shall be the final administrative action in the case.

(f) JUDICIAL REVIEW.

- (1) An employee adversely affected by a final decision under subsection (e)(4) may obtain judicial review of the decision.
- (2) In any case in which judicial review is sought under this subsection, the U.S. district court shall review the record and may set aside any agency action found to be –

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) obtained without procedures required by law, rule, or regulation having been followed; or
- (C) unsupported by substantial evidence.”

Subsection (c) would authorize the Secretary to set senior health care executives' pay based on market factors, and would cap such pay at the amount of annual compensation (excluding expenses) specified in section 102 of title 3.

Subsection (d) would authorize the Secretary to discipline senior health care executives based on misconduct or unacceptable performance, and would provide for appeal of suspensions, demotions, and removals to an internal appeals board, and of lesser actions through an internal agency grievance process. Actions appealed to an internal appeals board would be subject to limited judicial review by a United States District Court.

SECTIONAL ANALYSIS

SEC. 101 AMENDING THE VETERANS' ACCESS, CHOICE, AND ACCOUNTABILITY ACT OF 2014 TO CLARIFY THE LEVEL OF DEFERENCE TO BE AFFORDED TO VA ACCOUNTABILITY.

Section 101 would amend section 713 of title 38, United State Code, to specify the burden of proof and level of deference the Merit Systems Protection Board (MSPB) must afford VA's Senior Executive accountability actions.

Subsection (a) would amend section 713(a) to specify that the expedited executive removal, demotion, and MSPB appeals processed authorized by section 713 do not apply to VA's senior health care executives, who are appointed and disciplined under a separate Title 38 personnel system.

Subsection (b) would provide for review of appeals by the Presidentially-appointed Merit Systems Protection Board, rather than specifically referring such appeals to MSPB Administrative Judges (AJs), to insulate against legal challenges based on the Appointments Clause of the Constitution. This subsection would also direct MSPB to issue a decision, complete with findings of fact, conclusions of law, and an order making final disposition of the case, within 30 days after the date of an appeal. This subsection would require MSPB to defer to agency actions that are supported by substantial evidence, lawful, and within the tolerable bounds of reasonableness, and would authorize MSPB to mitigate the penalty imposed by the agency in certain limited circumstances.

Subsection (c) would define "substantial evidence" to mean the degree of relevant evidence that a reasonable person might accept as adequate to support a conclusion, even though other reasonable persons might disagree.

VA estimates that enactment of section 101 would be cost neutral.

SEC. 102 PERSONNEL SYSTEM FOR SENIOR VA HEALTH CARE EXECUTIVES.

Section 102 would amend chapter 7, title 38, United States Code, to provide a new personnel system for senior executives holding Medical Center Director, Veterans Integrated Service Network Director, or other senior executive position responsible for leading the provision of health care to Veterans.

Subsection (a) would authorize the VA Secretary to appoint, employ, appraise, pay, discipline, and terminate senior health care executives under a separate Title 38 system rather than under section 3132 of title 5, United States Code. This subsection would also authorize the Secretary and the Director of the Office of Personnel Management to enter into interagency transfer agreements permitting non-competitive transfer of senior VA health care officials to other federal agencies.

Subsection (b) would require the Secretary to prescribe by regulation a performance management system for employees appointed under subsection (a).