

**VA ACCOUNTABILITY AND WHISTLEBLOWER
PROTECTION ACT OF 2017:**

An Introduction and Overview of Public Law 115-41

Presented by VHA Workforce Management and Consulting
Human Resources Development Service,
HR Development, Retention, and Policy

In collaboration with VA Office of Human Resources Management,
Employee Relations and Performance Management Service

July 2017

1

Presenter

Bruce Suskie
Human Resource Consultant

HR Development Service
HR Development, Retention, and Policy
Workforce Management and Consultant
Veterans Health Administration

2

Important to Note

- The materials in this presentation are not intended to be a substitute for official VA policy from the VA Office of Human Resources Management or as a substitute for guidance from your Servicing Human Resources Office or Office of District Counsel. Rather, this material has been developed as a supplement to any policy information or guidance that has been developed on this issue.
- For guidance on specific questions at your facility please contact your servicing Human Resources Office or Office of District Counsel.

3

Public Law 115-41

Purpose of this training:

- To introduce and provide an overview of the changes resulting from the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Public Law 115-41) and the effect of those changes on how performance and conduct-based actions are implemented.
- Will refer to this Public Law as “the Act” throughout the presentation.

4

Public Law 115-41 – What is it?

- Signed by the President June 23, 2017.
- Only applies to employees of the Department of Veterans Affairs.
- VA worked collaboratively with Congress to write this new legislation.

5

Public Law 115-41

- The Act gives the Secretary of VA increased authority to hold VA employees accountable for performance and conduct deficiencies.
- Various sections of the Act provide VA with additional authorities (new processes) to deal with HR matters, including some that impact key disciplinary process.
- The Act also modifies some existing laws and authorities effecting disciplinary processes.

6

Public Law 115-41

Although revisions were made to 38 U.S.C., the Act is not limited to just Title 38 employees. There are changes to both Title 38 and Title 5/Hybrid processes.

7

38 U.S.C. §§ 7462 and 7463

Changes to processes involving Full-time Title 38 Employees

8

Who are Title 38 Employees?

- Physicians.
- Dentists.
- Optometrists.
- Podiatrists.
- Physician Assistants.
- Registered Nurses and Nurse Anesthetist.
- Chiropractors.
- Expanded-Function Dental Auxiliaries.

9

Changes to Title 38

- The authorities for Title 38 actions stayed the same, but the Act modified the *time frames* and *procedures* for taking a **Disciplinary or Major Adverse Action** against a Full-time Title 38 employee. There were really no other major changes to Title 38 processes.
- The Act also added a requirement that the evidence file be provided to the employee when the proposal notice is issued.

10

What has Changed? TITLE 38

New Requirement for FT T38	OLD Requirements for FT T38
Advance Written Notice for Disciplinary or Major Adverse Actions Evidence file must be included with the proposal notice	30 Calendar Days Advance Written Notice for Major Adverse Actions
7 Business Days for employee to reply Orally and/or in Writing for Disciplinary or Major Adverse Actions	5 Calendar Days for Disciplinary Actions; 7-30 Calendar Days for Major Adverse Actions to reply Orally and/or in Writing
15 Business Days after Proposal issued for the Deciding Official to issue a Decision	21 Calendar Days after receiving employee's reply or expiration of reply period for the Deciding Official to issue a Decision
If action is based on PCC, 7 Business Days to appeal to Disciplinary Appeals Board	If action is based on PCC, 30 Calendar Days to appeal to Disciplinary Appeals Board

11

Business Days TITLE 38/TITLE 5/FT HYBRID

Business days are defined as weekdays, which are Monday through Friday in Washington DC, except when such a day is designated as a Federal holiday by OPM.

12

Effective Dates T38 Actions TITLE 38

Remember:

- 7 Business Days for Employee to Reply to Proposal
- 15 Business Days for Management to Issue Decision on Proposed Action

The effective date of the action may be at any time after consideration of the employee's oral and/or written reply, or after the expiration of the reply period but . . .

13

Effective Dates T38 Actions TITLE 38

- In accordance with current VA policy, the effective date of a Major Adverse Action will be no earlier than 5 calendar days after issuance of the decision, whenever possible.
- Additionally, the effective date must be in compliance with any applicable Collective Bargaining Agreement (CBA) language that specifically addresses the effective date of an action.

Note: Servicing HR and District Counsel Offices will determine appropriate effective dates of actions based on applicable contract language for bargaining unit employees

14

What has NOT changed? TITLE 38

- Title 38 Employees are still entitled to "Due Process" with Disciplinary and Major Adverse Actions - however, the timeframes have been shortened.
- Actions/Charges must still be supported by preponderance of the evidence.
- Disciplinary Appeals Board (DAB) still has jurisdiction of Major Adverse Action cases involving Professional Conduct and Competence (PCC).
- DAB still has authority to mitigate penalty.

15

What has NOT changed?

TITLE 38

- Part-Time and Intermittent RNs – continue to use provisions in VA Handbook 5021.
- Probationary Period employees – continue to use provisions of VA Handbook 5021, e.g., Summary Review Boards.
- Agency and negotiated grievance timelines remain unchanged.

16

What has NOT changed?

TITLE 38

- Supervisors/Managers are still required to orient and communicate workplace expectations to employees.
- Supervisors/Managers are still required to monitor performance and document performance deficiencies.
- Supervisors/Managers are still required to manage and deal with conduct issues on a timely basis.
 - Includes conducting fact-findings for issues of misconduct (unless other investigation is appropriate)

17

Impact on Title 38 Actions

In essence, nothing has really changed for Full-time Title 38 employees, except some key process timeframes have been shortened and the employee must be provided a copy of the evidence file at time action is proposed.

18

38 U.S.C. § 714

Changes to processes for Title 5 Employees and Full-time/Permanent Title 38 Hybrid Employees

19

What is new?

TITLE 5/FT HYBRID

- The Act created a new authority, **38 U.S.C. § 714**, to take adverse actions (conduct or performance-based reasons) against “covered” VA employees.
- The new authority did not “do away” with old authorities (Chapter 75 or Chapter 43 under Title 5), however, most facilities will likely not use them anymore for Adverse Actions.

20

Covered Employees

TITLE 5/FT HYBRID

VA employees covered by new authority include:

- Title 5 employees who have completed a probationary or trial period.
- Full-Time/Permanent Hybrid Title 38 employees (appointed under 38 USC 7401(3)) who have completed a probationary or trial period.
- The new authority **CAN** be used for Canteen employees but will afford them MSPB rights that they currently do not have.

21

TITLE 5/FT HYBRID
New Authority - 38 U.S.C. § 714

Employees NOT COVERED by new authority:

- The new authority CANNOT be used for Title 38 employees even though the relevant portion of the Act falls under 38 U.S.C. as they are specifically excluded.
- We use the modified processes (per the Act) as explained earlier in this presentation.

22

TITLE 5/FT HYBRID
New Authority - 38 U.S.C. § 714

Employees NOT COVERED by New Authority:

- Part-time/intermittent and temporary Title 38 Hybrid employees are NOT covered by this new authority (the Act excluded employees appointed under the authority of 38 USC 7405).
- We will continue to use current authorities and procedures for them.

23

TITLE 5/FT HYBRID
New Authority - 38 U.S.C. § 714

- The New Authority can be used for AND only applies to **Adverse Actions** based on Conduct or Performance reasons for "covered" Title 5 & Full-time Hybrid Employees:
 - Suspensions for 15 calendar days or more (conduct-based actions only).
 - Demotions for misconduct or performance.
 - Removals for misconduct or performance.

NOTE: VA facilities can technically still use existing authorities and procedures for taking adverse actions for "covered" employees, but will likely elect not to use them.

24

TITLE 5/FT HYBRID
New Authority - 38 U.S.C. § 714

- The New Authority **DOES NOT** apply to Disciplinary Actions for Title 5 & Hybrid Employees (these are not Adverse Actions):
 - Suspensions of 14 Days or Less
 - Admonishments
 - Reprimands
- VA will continue to use the current authorities and VA processes for these Disciplinary Actions.

25

TITLE 5/FT HYBRID
Performance Action Requirements - 714

- No requirement that the employee be under performance standards for 90 days.
- No longer required to afford the employee a reasonable opportunity to improve, i.e. issue a Performance Improvement Plan (PIP) prior to taking action.
- With the new authority, management can remove or demote an employee based on "significant performance deficiencies".

26

TITLE 5/HYBRID
What are Significant Performance Deficiencies?

Examples include, but not limited to:

- The failure of a critical element in an employee's performance plan;
- A reasonable belief that the employee's performance deficiency is so serious that it cannot be improved;
- The deficiency poses a clear danger to the employee or others;
- The deficiency presents a risk to important services provided to Veterans, e.g., health care or benefits; or
- The repeated failure of non-critical elements in an employee's performance plan.

27

Performance Action Requirements - 714 TITLE 5/HYBRID

- Management can base an adverse action for performance-based reasons and use evidence to support deficiencies documented from:
 - A Final Rating;
 - A Closeout Rating; or
 - A Recent Progress Review.
- Management can also base an adverse action on performance deficiencies noted during the rating cycle provided it was shared with the employee in some form of written communication (e.g. email or memo).

28

Misconduct - 714 TITLE 5/FT HYBRID

Misconduct refers to, but is not limited to:

- Neglect of duty
- Malfeasance
- Failure to accept a directed reassignment
- Failure to accompany a position in a transfer of function
- Retaliation against a whistleblower for making a lawful whistleblower disclosure

29

Processing 38 U.S.C. § 714 Actions TITLE 5/FT HYBRID

Required Burden of Proof under 38 U.S.C. § 714

"Substantial Evidence" is burden of proof with charges/actions under the new authority. It means relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree, or evidence that a reasonable mind would accept as adequate to support a conclusion.

30

TITLE 5/FT HYBRID
38 U.S.C. § 714 – Proposal Stage

Proposal Notice:

Required for 714 Actions	Not a Requirement Under 714
Advance Written Notice	30 Days Advance Written Notice
Substantial Evidence	Preponderance of the Evidence
Evidence File must be Included with the Proposal Notice	Douglas Factor analysis by the Proposing Official
Employee has 7 business days to reply in writing to the Proposal Notice	Oral reply unless an applicable CBA provides for an oral reply
Proposing Official must be in accordance with VA Handbook 5021, Part I, Appendices B-E	

31

TITLE 38/TITLE 5/FT HYBRID
Business Days

Business days are defined as weekdays, which are Monday through Friday in Washington DC, except when such a day is designated as a Federal holiday by OPM.

32

TITLE 5/FT HYBRID
Evidence - with 714 Actions

- The employee must be informed of any information considered in arriving at the proposed action so he/she may address it in the reply.
- Additionally, any information the Proposing Official wishes the Deciding Official to consider **must** also be part of the proposal.

33

What has Changed?

TITLE 5/FT HYBRID

Douglas Factors are not applicable when determining Penalty for Adverse Actions under the new authority....

BUT....

34

Level of Discipline

TITLE 5/FT HYBRID

- The Proposing and Deciding Officials must impose an **appropriate level** of discipline that is reasonable and commensurate with the facts of the case, using non-discriminatory, business-related reasons that are not arbitrary or capricious.
- The rationale for penalty chosen must be explained in the written Proposal and Decision notices.

35

38 U.S.C. § 714 – Decision Stage

TITLE 5/FT HYBRID

Decision Notice:

Required for 714 actions	Not Required Under 714
Must be issued within 15 business days after issuance of the proposal notice	<i>Douglas Factor analysis by Deciding Official</i>
The effective date of action may be at any time after consideration of the employee's reply, or after the expiration of the reply period, unless otherwise prescribed by a CBA.	<i>A statement in the decision letter advising the action will be effective not less than 30 days from the day following the date of receipt of the proposal notice</i>
Decision Official must be in accordance with VA Handbook 5021, Part I, Appendices B-E	

36

Filing an Appeal under 38 U.S.C. § 714

TITLE 5/FT HYBRID

- Employee can file an appeal to the Merit Systems Protection Board (MSPB) or a negotiated grievance, if covered by a CBA.
- Employee has 10 business days to file an appeal with MSPB or a negotiated grievance, if applicable.

37

Mitigation of Penalty under 38 U.S.C. § 714

TITLE 5/FT HYBRID

- MSPB does **not** have the authority to mitigate the level of discipline imposed by the agency, but it can overturn the action if:
 - The action taken by VA is not supported by “substantial evidence”;
 - Penalty chosen was arbitrary or capricious; or
 - Penalty chosen was found to be discriminatory.
- MSPB has 180 calendar days to decide the appeal.

38

What has NOT changed?

TITLE 5/FT HYBRID

- Supervisors/Managers are still required to communicate performance and conduct expectations with employees.
- Supervisors/Managers are still required to investigate issues of misconduct and collect evidence to support the action taken against the employee.
- The requirement for using the performance appraisal process has not changed. Performance deficiencies must still be supported by documentation.

39

What has NOT changed?

TITLE 5/FT HYBRID

- Employees are still entitled to "Due Process" with all Disciplinary and Adverse Actions.
- An evidence file is still required to support all actions being taken under this authority.
- The rights of Bargaining Unit employees have not changed. However, some time frames associated with taking an Adverse Action and filing appeals/grievances for those actions have been shortened.

40

Other Changes with the Act

- The Act established a new office, the Office of Accountability and Whistleblower Protection (OAWP)
- Functions of new OAWP include:
 - Advising the Secretary on all matters related to accountability regarding Whistleblowers.
 - Receiving Whistleblower complaints.
 - Referring Whistleblower complaints to appropriate investigative entity.
 - Recording, tracking, and confirming implementation of recommendations for from audits/investigations.
 - Analyzing and Reporting on such matters.

41

What about Whistleblowers?

TITLE 5/FT HYBRID

Important:

If a covered employee files an alleged prohibited personnel practice with the Office of Special Counsel (OSC) or makes a whistleblower disclosure with the OAWP, an action proposed under 38 U.S.C. § 714 cannot be taken without consultation with the Office of General Counsel (OGC) and/or the OAWP.

42

38 U.S.C. § 731 – Supervisory Employees

- Another New Authority, **38 U.S.C. § 731**, applies to cases where supervisors are found to have engaged in Whistleblower reprisal/retaliation.

- Applies if it is determined that a supervisor has engaged in Whistleblower reprisal/retaliation, determined by:
 - The Secretary of VA;
 - VA Office of the Inspector General (OIG);
 - The VA Office of Special Counsel;
 - An Administrative Judge;
 - An MSPB Judge;
 - An adjudication body under a union contract; or
 - A Federal Judge.

43

38 U.S.C. § 731 – Supervisory Employees

- If the Secretary concurs with a recommendation for disciplinary action based on Whistleblower retaliation, the Supervisor will receive:
 - A minimum of a 12 day suspension up to removal for a first offense; and
 - Removal for the second offense.

- If a supervisor is issued a proposed action due to a finding of Whistleblower reprisal under this authority, he/she will be afforded 10 calendar days to submit a written response instead of 7 business days.

44

38 U.S.C. § 719 – Reduction of Benefits

- The Act created an authority for the Secretary to order that certain employee's or retiree's benefits (calculation of an annuity) be reduced if it is determined that the individual is convicted of a felony that influenced the individual's performance while employed in their position with VA.

- If ordered, the employee/retiree has procedural rights and a right to appeal the decision to the Director of the United States Office of Personnel Management (OPM).

45

38 U.S.C. § 721 – Recoupment of bonuses or awards

- The Act created an authority for the Secretary to order that if it is determined that an individual engaged in misconduct or poor performance prior to receiving an bonus or award, and the bonus or award would not have been paid had the misconduct or performance been known, their bonus or award can be recouped.
- If ordered, the employee has procedural rights and a right to appeal the decision to the Director of OPM.

46

38 U.S.C. § 723 – Recoupment of relocation expenses

- The Act created an authority for the Secretary to order that if it is determined that relocation expenses were paid following an act of fraud or malfeasance that influenced the authorization of the relocation expenses, the employee repay the amount, or portion of the amount, received by the employee.
- If ordered, the employee has procedural rights and a right to appeal the decision to the Director of OPM.

47

Key Takeaways

- With this Public Law, VA is required to expedite the process for taking certain actions against employees – intent is to speed up the process and eliminate time-consuming obstacles. Key timeframe changes:
 - 7 Business Days for Employee to Reply to proposal
 - 15 Business Days for Decision to be issued on the proposed action
- With these new shortened timeframes, employees must now be provided a copy of the evidence file at the time of the proposal.

48

Key Takeaways

- Supervisors are still required to communicate expectations and monitor employee performance and conduct – including conducting fact-findings for misconduct cases.
- Supervisors are still required to monitor performance and complete performance reviews and final ratings.
- Employees still retain the right to due process, however the timeframes for certain actions have been shortened.

49

Key Takeaways

- For Title 5 and FT/Permanent Hybrid employees
 - Performance Improvement Plan (PIP) no longer required for Performance-Based Adverse Actions
 - No longer required to be under performance standards for 90 days prior to taking Adverse Action
 - Performance-based Adverse Actions can be taken for Significant Deficiencies:
 - Based on evidence from a final rating, closeout rating, or recent progress review; or
 - Deficiencies noted during the rating cycle provided they were shared with the employee in some form of written communication prior to taking the action.

50

Key Takeaways

- For Title 5 and FT/Permanent Hybrid employees
 - Douglas Factors do not apply with new authority, but level of penalty must be reasonable and commensurate with the facts of the case, using non-discriminatory, business-related reasons that are not arbitrary or capricious – must be in proposal and decision.
 - MSPB can't mitigate the penalty with an Adverse Action under this authority, but can still overturn the action.
 - The Secretary now has authority to reduce benefits (reduce an annuity), recoup bonuses/awards, and recoup relocation expenses in certain situations.

51

References

- Public Law 115-41
- VA Directive and Handbook 5021
- HRMLs 05-17-05, 06, 07, and 08
- <http://vaww.va.gov/OHRM/EmployeeRelations>
- OHRM's Webpage for VA Accountability and Whistleblower Protection Act:
<http://vaww.va.gov/OHRM/EmployeeRelations/accountability/>.

52