



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

June 1, 2018

The Honorable Tammy Baldwin
United States Senate
Washington, DC 20510

Dear Senator Baldwin:

Thank you for your February 26, 2018, co-signed letter to the Department of Veterans Affairs (VA) requesting information about VA's implementation of the VA Accountability and Whistleblower Protection Act (Accountability Act), including utilization data and the appointment of an Assistant Secretary for Accountability and Whistleblower Protection.

VA maintains our commitment to hold employees accountable under the provisions of the Accountability Act. VA's proposing and deciding officials have been empowered to take corrective action as deemed appropriate based on their evaluation of the misconduct or performance deficiencies. VA issued written guidance implementing sections 713 and 714 of title 38 of the United States Code (U.S.C.), as amended and added by the Accountability Act, shortly after the enactment of the Act. The written guidance implementing 38 U.S.C. § 714 was amended in August 2017.

Written guidance implementing 38 U.S.C. § 714 addresses both performance and misconduct actions. With regard to performance actions, VA requires that actions be supported by substantial evidence documenting a significant performance deficiency. Regardless of whether an action is based on performance or misconduct, VA written guidance requires that penalties are reasonable and commensurate with the facts of the case. Employees also have the opportunity to reply to any proposed action, and they are entitled to file an appeal as prescribed under 38 U.S.C. § 714(c)(4) if they feel an action is improper. VA will also hold making a decision on a pending proposed action, per 38 U.S.C. § 714(e), if an employee informs the deciding official that he or she has a pending complaint before the U.S. Office of Special Counsel or has an open disclosure with VA's Office of Accountability and Whistleblower Protection.

The written guidance includes a provision that performance improvement plans will not be used when proposing actions for covered employees, as 38 U.S.C. § 714(c)(3) states that the procedures of chapter 43 of title 5 of the United States Code shall not apply. This statutory requirement does not eliminate the expectation that supervisors will communicate with an employee about performance expectations and concerns about the employee's performances. VA's written guidance not only meets the language prescribed

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by 38 U.S.C. § 714, but also adheres to the mandate prescribed in the Office of Management and Budget's (OMB) memorandum issued on April 12, 2017, titled *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce*, which directed Federal agencies to remove steps not required in statute/regulation to streamline processes to the maximum extent for addressing poor performance.

With regard to the use of a table of penalties and progressive discipline, those tools are still available for a proposing and deciding official to consider, but they are no longer required under 38 U.S.C. § 714. Supervisors still need to thoroughly consider the level of penalty and the written guidance mandates that penalties are to be reasonable, as determined by the proposing and deciding officials versus the Merit Systems Protection Board and its judges, and commensurate with the facts of the case.

With respect to the Assistant Secretary for Accountability and Whistleblower Protection position, VA has forwarded candidates to the White House for consideration and expects a nominee soon.

The Department continues to assess usage of the authorities contained in the Act. With regard to the actions taken since enactment of the Act, the Department continues to use existing authorities (e.g., admonishments, reprimands, or suspensions of 14 days or less) to correct lesser acts of misconduct. Since enactment through March 31, 2018, the VA has issued over 1,500 admonishments, over 1,600 reprimands, and over 1,400 suspensions of 14 days or less.

Section 211 of the Act required a one-time report to present specific data elements for the 3-year period prior to enactment of the Act. The report did not contain the data stipulated in the law due to lack of tracking of the specific elements during the 3-year lookback period. Following discussions with Committee staff, the Department began assembling an estimate of the amount of time needed to gather the express data described in the statute. Based on review of the categories of data, the Department estimates that assembling this retrospective data will require at least 7,000 staff hours. Consequently, as discussed with Committee staff, the Department's decision as to the necessity and feasibility of gathering the data is pending further discussion. This estimate includes the following:

- Approximately 800 hours to review and capture the required data for the nearly 3,000 appeals over the lookback period;

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- Approximately 5,700 hours to review and capture the data for over 5,600 adverse actions taken during the lookback period; and
- Approximately 500 staff hours to review and capture data related to alternative discipline and use of authorized absence during the lookback period.

Should you have further questions, please have a member of your staff contact Mr. Darrell Donnelly, Congressional Relations Officer, at (202) 461-6418 or by email at Darrell.Donnelly@va.gov. A similar response has been sent to other cosigners of your letter.

Thank you for your continued support of our mission.

Sincerely,



Peter M. O'Rourke
Acting