STATEMENT FOR THE RECORD OF
MS. TIFFANY ELLETT
VETERANS AFFAIRS & REHABILITATION DIVISION DIRECTOR
THE AMERICAN LEGION
TO THE
COMMITTEE ON VETERANS' AFFAIRS,
UNITED STATES SENATE
ON
"VA ACCOUNTABILITY AND TRANSPARENCY: A CORNERSTONE OF QUALITY CARE AND BENEFITS FOR VETERANS"

OCTOBER 25, 2023

Chairman Tester, Ranking Member Moran, and distinguished members of the Committee, on behalf of our National Commander Daniel Seehafer and our 1.6 million members, the American Legion thanks you for the opportunity to offer this statement on accountability and transparency within the Department of Veterans Affairs (VA). The American Legion is directed by active Legionnaires who dedicate their time and resources to serve veterans and their families. As a resolution-based organization, our positions are guided by more than 104 years of advocacy that originates at the grassroots level.

S.2158 – Restore Department of Veterans Affairs Accountability Act

In 2017, the 115th Congress passed the *VA Accountability and Whistleblower Protection Act of 2017* (AWP) to assist the Department of Veterans Affairs (VA) in protecting veterans and employees by holding employees accountable and providing protection for whistleblowers.[1] In 2017 the VA Office of Accountability and Whistleblower Protection (OAWP) was established as a result of the new public law. Shortly thereafter, complaints were reported, identifying a possibility that VA was implementing the act improperly. As a result, the Office of Inspector General (OIG) conducted a review in 2018 that continued to 2019.[2] In this report, OIG identified 22 deficiencies, all of which VA concurred and planned to take action on.

During the peak of the COVID-19 pandemic, The American Legion supported the VA's decision to exercise its new authority granted under AWP against those found guilty of neglect and incompetence at State Veterans Homes.[3] Beyond this, data showed that AWP was working: in a

[1] Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41, 131 Stat. 862 (2017).
[2] Department of Veterans Affairs Office of Inspector General. "Failures Implementing Aspects of the VA Accountability and Whistleblower Protection Act of 2017." VA OIG 18-04968-249. October 4, 2019. Unless otherwise noted, all hyperlinks accessed October 18, 2023. https://www.va.gov/oig/pubs/VAOIG-18-04968-249.pdf
[3] The American Legion. "American Legion calls for accountability at Holyoke and other state homes." June 27, 2020. https://www.legion.org/commander/249341/american-legion-calls-accountability-holyoke-and-other-state-homes

12-month period from June 2019 to 2020, the VA had initiated 1,410 adverse actions, a 40% increase from 2016-2017.[4]

However, In August of 2021, it was found in court that VA misinterpreted the AWP Act of 2017 by the United States Court of Appeals for the Federal Circuit.[5] Though one of the protections assumed in the AWP Act of 2017 was to mitigate the involvement of the U.S. Merit Systems Protection Board in certain decisions surrounding an employee, there was nothing written in the law to do so. The lack of clarity and specific verbiage in the AWP Act of 2017 has given room for courts to dilute the Secretary of Veterans Affairs' authority in making decisions to hold employees accountable, protect whistleblowers, and keep veterans safe.

Having these newly granted disciplinary authorities hamstrung by different interpretations of law and policy after the bipartisan-supported legislation was passed is a difficult result for veterans and families harmed by misconduct and wrongdoing to process. The American Legion's System Worth Savings Task Force has previously uncovered numerous mistruths and wrongdoings at VA Medical Centers, and the Legion will continue to demand a process that delivers swift accountability for front-line workers, middle managers/ supervisors, and even senior executives. In the adjacent perspective, the Legion also advocates for safe working environments to increase staff protection and decrease attrition rates.

Restoring confidence in the VA system necessitates ensuring VA leaders possess the tools to hold ill-intentioned actors accountable and to protect those trying to create a more productive and safer environment. This legislation clarifies and reinforces these critical authorities initially granted in 2017 and introduces a supremacy clause to close the loopholes revealed in recent court rulings and labor union disputes, thereby reinstating the heightened accountability established by the AWP Act of 2017.

There are some apprehensions about VA's capacity to enforce the provisions of this bill that we would like to address. In a press conference this past March, Secretary McDonough expressed that Section 714 of the *VA Accountability and Whistleblower Protection Act* "wasn't really helping us necessarily manage our workforce as much as it was getting us in front of federal judges and in front of administrative bodies."[6] Every provision of the *Restore Department of Veterans Affairs Accountability Act* has been written not to expand the scope of the 2017 law, but rather to address the technical legal challenges the Secretary alluded to. VA's track record of enforcing AWP in the initial years after its passage demonstrated a good faith effort to address systemic workforce challenges that have plagued the Department for decades; The American Legion expects the VA to resume this effort with the passage of the *Restore Department of Veterans Affairs Accountability Act.*

---

[4] Adverse Action Data Request as-of June 14, 2023. HRSmart Data.
[5] Dirks, Connor D. "Federal Circuit Disputes VA's Interpretation of 2017 Accountability Law." FED Manager, Shaw Bransford & Roth P.C. August 17, 2021. https://fedmanager.com/news/federal-circuit-knocks-vas-interpretation-of-2017-accountability-law
[6] VA Secretary Press Conference. March 23, 2023. https://news.va.gov/press-room/va-secretary-press-conference-march-3-2023

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports legislation urging the VA to hold any employee or VA-contracted vendor found guilty of misconduct or wrongdoing fully accountable.[7]

The American Legion supports S. 2158 *as currently written.*

S.2679 – Leadership, Engagement, Accountability, and Development Act of 2023

The American Legion has long held that veterans deserve top-quality healthcare on par with comparable civilian hospitals. An important part of having such a healthcare system is ensuring proper oversight is conducted and documented. In testimony before the House Veterans Affairs Committee on July 12, 2023, American Legion Veterans Benefits Policy Analyst Joshua Hastings stated that "The American Legion's Systems Worth Savings program has previously uncovered numerous mistruths and wrongdoings at VA Medical Centers, and the Legion will continue to demand a process that delivers swift accountability for front-line workers, middle managers, supervisors, and even senior executives.[8]"

Several barriers stand in the way of such accountability at the Department of Veterans Affairs (VA). For example, a 2018 Government Accountability Office (GAO) report found multiple issues with VA's handling of employee misconduct and treatment of whistleblowers.[9] These included items such as: improperly maintained records for adjudication, arbitrary and unevenly applied consequences for misconduct, and VA whistleblowers being 10 times more likely to receive disciplinary action than their peers. This inconsistently documented disciplinary process, along with retaliation against whistleblowers, is not conducive to a top-quality healthcare system.

The pattern of VA retaliation against whistleblowers is particularly disconcerting. A further 2023 GAO report on VA whistleblowers found that from FY 2018-2022, 69% of all cases involving VA employees included claims of whistleblower retaliation. Of these, less than 1% were closed with a settlement agreement, and 59% of allegations of whistleblower retaliation were closed without action.[10] It is clear that improving the process and protection for whistleblowers needs to be made a priority.

The *Leadership, Engagement, Accountability, and Development (LEAD) Act of 2023* would address the VA's accountability and whistleblower protection deficiencies in several ways. One important step that this bill takes is requiring the VA to develop a consistent internal process to

---

[7] The American Legion Resolution No.16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. https://archive.legion.org/node/7908

[8] Testimony Of Joshua Hastings Veterans, Benefits Policy Analyst Veterans Affairs & Rehabilitation Division, The American Legion, before the Subcommittee on Oversight and Investigations Committee on Veterans' Affairs United States House of Representatives. July 12, 2023. https://docs.house.gov/meetings/VR/VR08/20230712/116186/HHRG-118-VR08-TTF-HastingsJ-20230712.pdf

[9] U.S. Government Accountability Office. "Department of Veterans Affairs: Actions Needed to Address Employee Misconduct Process and Ensure Accountability." Report # GAO-18-137. July, 2018. https://www.gao.gov/assets/gao-18-137.pdf

[10] U.S. Government Accountability Office. "VA Whistleblowers: Resolution Process for Retaliation Claims." Report # GAO-23-106111. May 3, 2023. https://www.gao.gov/assets/gao-23-106111.pdf

deal with employee wrongdoing, while ensuring that whistleblowers are properly protected, and reporting annually to Congress. Another important step the bill would take is to consolidate the VA's existing oversight, patient safety, and accountability offices into one new entity called the Transparency, Engagement, Accountability, and Management (TEAM) office. This will greatly streamline accountability at the VA and result in a less confusing and overlapping oversight system. Additionally, the bill will increase the empowerment of frontline VA staff by strengthening whistleblower protections and soliciting input from VA employees on how to continue improving the system. These and other provisions in the bill will greatly increase accountability at the VA and help ensure that bad actors are properly dealt with.

The American Legion supports this legislation through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*. This resolution expresses the Legion's view that the VA should have clear and that the VA should maintain close oversight and accountability for all VA care provided to veterans.

Through Resolution No. 16: *Department of Veterans Affairs Accountability and Whistleblower Protections*, The American Legion supports clear pathways and protections for whistleblowers to report on wrongdoings without fear of retaliation.[11]

The American Legion supports S. 2679 *as currently written.*

Conclusion

Chairman Tester, Ranking Member Moran, and distinguished members of the Committee; The American Legion thanks you for your leadership and for allowing us the opportunity to explain the positions of our 1.6 million members on the importance of these pieces of proposed legislation. Questions concerning this testimony can be directed to John Kamin at (202) 263-5748, or jkamin@legion.org.

[11] The American Legion Resolution No.16 (2022): *Department of Veterans Affairs Accountability and Whistleblower Protections*. https://archive.legion.org/node/7908