

VA Accountability Act of 2015 (H.R. 1994) as Passed by the House

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Summary

This report describes H.R. 1994, 114th Congress, 1st Session, the VA Accountability Act of 2015, as passed by the House on July 29, 2015, and compares its sections to current law where appropriate. Sections 1 through 10 were reported by the Committee on Veterans Affairs. Section 11 was added as a floor amendment.

Section 1 is the short title, “VA Accountability Act of 2015.” Section 2 would authorize the Secretary of Veterans Affairs to expedite removing or demoting most employees for misconduct. Section 3 would require an individual appointed to a permanent position in the competitive service or as a career appointee in the Senior Executive Service (SES) to serve an 18-month probationary period before the appointment would become final. Section 4 would establish a process for handling whistleblower complaints.

Section 5 would establish specific requirements for VA’s senior executive performance appraisal system and would require the Secretary of the VA to reassign senior executives to a new position at least every five years. It would also require a review of, and a plan for improvements to, the current management training program for senior executives. Section 6 would provide authority to reduce retirement benefits under the Civil Service Retirement System (CSRS) and the Federal Employees’ Retirement System (FERS) for certain former SES employees at the VA who were removed from service (or separated from SES employment before a final removal decision was issued) and convicted of a felony that influenced performance in that position.

Section 7 would provide that an employee of the department (1) who is subject to an investigation for purposes of determining whether he or she should be subject to any disciplinary action under Title 38 or Title 5 of the U.S.C., or (2) against whom any disciplinary action is proposed or initiated under Title 38 or Title 5 could not be placed on administrative leave, or any other type of paid non-duty status without charge to leave, for more than 14 days during any 365-day period.

Section 8 would provide that an employee, who is testifying in an official capacity before the House of Representatives or the Senate, a House or Senate committee, or a joint or select committee of Congress, is performing official duty when engaged in such activity.

Section 9 would limit the aggregate amount of awards and bonuses that could be paid to employees under 5 U.S.C. Chapter 45 or 5 U.S.C. Chapter 53, or any other awards or bonuses authorized under 38 U.S.C., to \$300 million in each of the fiscal years FY2015 through FY2018, and \$360 million in each of the fiscal years FY2019 through FY2024.

Section 10 would require the Comptroller General of the United States to conduct a study on the amount of time department employees spent in carrying out organizing activities related to labor organizations and the amount of space in department facilities used for such activities.

Section 11 would direct the VA Inspector General to submit a report that addresses a public health or safety issue relating to employee misconduct to the House and Senate Committees on Veterans Affairs when submitting it to the VA Secretary. It would require the Secretary to direct a responsible manager to resolve the issue; include in a manager’s performance review an evaluation regarding whether the manager took appropriate actions to resolve it; and deny any bonus to a manager if the issue is not resolved.

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Introduction

The Department of Veterans Affairs (VA) provides a range of benefits and services to veterans. The VA carries out its programs nationwide through three administrations and the Board of Veterans Appeals (BVA). The Veterans Benefits Administration (VBA) is responsible for, among other things, providing compensation, pensions, and education assistance. The National Cemetery Administration (NCA) is responsible for maintaining national veterans' cemeteries; providing grants to states for establishing, expanding, or improving state veterans' cemeteries; and providing headstones and markers for the graves of eligible persons, among other things. The Veterans Health Administration (VHA) is responsible for health care services and medical and prosthetic research programs.

In FY2014, the Department of Veterans Affairs employed approximately 323,016 full time equivalent (FTE) personnel.¹ Of this figure a majority of employees, approximately 287,179 FTEs, worked for the VHA. The rest of the FTEs were distributed among VBA, NCA, BVA, and various other staff offices including the Office of Information Technology and the Office of the Inspector General (OIG).²

The VA Accountability of 2015 (H.R. 1994) was introduced by Representative Jeff Miller, the chairman of the House Veterans' Affairs Committee, on April 23, 2015. In a statement regarding the bill, Chairman Miller said: "... our focus remains on giving the VA Secretary more tools to ensure corrupt and incompetent executives face serious consequences for mismanagement and malfeasance that harms veterans."³ During committee markup of H.R. 1994, an amendment in the nature of a substitute to H.R. 1994 was offered by Chairman Miller, and an amendment to the amendment in the nature of a substitute to H.R. 1994 that would authorize travel expenses for VA employees who testify before Congress was offered by Representative Tim Huelskamp. The committee agreed to the Miller amendment in the nature of a substitute and the Huelskamp amendment to it. A substitute for the Miller amendment in the nature of a substitute to H.R. 1994 offered by Representative Mark Takano was not adopted.

On July 28, 2015, the House Committee on Rules reported to the House a closed rule, H.Res. 388, that would permit floor debate on H.R. 1994 as reported by the House Committee on Veterans Affairs and two amendments.⁴ One amendment sponsored by Representative Dan Benischeck and Representative Kyrsten Sinema would require the VA Inspector General (IG) to submit a copy of an IG report relating to employee misconduct to the House and Senate Committees on Veterans Affairs when submitting it to the Secretary; explain in that copy changes

¹ Full time equivalent (FTE) or Full-Time Equivalent Employee (FTEE) is a staffing parameter equal to the amount of time assigned to one full time employee. It may be composed of several part-time employees whose total time commitment equals that of a full-time employee. One FTE generally equals 40 hours per week (definition adapted from: Department of Veterans Affairs, Office of Construction and Facility Management, PG 18-9: Space Planning Criteria, August 15, 2014, available at <http://www.cfm.va.gov/til/space/SPchapter222.pdf>). As defined by the Office of Management and Budget, Circular No. A-11, FTE means the total number of regular straight-time hours (i.e., not including overtime or holiday hours) worked by employees divided by the number of compensable hours applicable to the fiscal year, see, https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s85.pdf.

² Department of Veterans Affairs, FY2016 Congressional Budget Submission, *Budget in Brief* February 2015, p.2.

³ House Committee on Veterans Affairs, "Chairman Miller to Introduce Legislation to Address Near Complete Lack of Accountability After VA Scandal," press release, April 23, 2015, <http://veterans.house.gov/press-release/chairman-miller-to-introducHe-legislation-to-address-near-complete-lack-of.h>.

⁴ H.Rept. 114-234, 114th Cong., 1st Sess. (2015). H.Res. 388 also permitted floor debate on H.R. 3236, to extend transportation programs funded by the Highway Trust Fund and provide resource flexibility for VA health care services. That bill is beyond the scope of this report.

that the Secretary recommended to the report while it was being prepared; require the IG to identify managers responsible for correcting problems; and deny bonuses to managers who fail to rectify them. The other amendment sponsored by Representative Mark Takano would be a substitute to the bill reported by the Committee on Veterans Affairs. It would provide for immediate suspension without pay of any employee whose performance or misconduct threatens health or safety; ensure back pay for whistleblowers unfairly terminated; limit administrative leave to 14 days; and make the effective date of the back pay provision October 1, 2015.⁵

The Office of Management and Budget on July 28, 2015, issued a Statement of Administration Policy (SAP) expressing strong opposition to H.R. 1994 as amended by the House Committee on Veterans Affairs. It asserted that the removal authority granted in Section 2 may not provide adequate due process protections to VA employees and that the limited right to appeal a removal to an administrative judge of the Merit Systems Protection Board may contravene the Appointments Clause of the Constitution, Article II, § 2. The SAP stated that if H.R. 1994 should be reported to the President in the form reported by the committee, his senior advisors would recommend that he veto it.

On July 29, 2015, the House agreed to H.Res. 388, the rule for considering H.R. 1994, by a vote of 243 to 183.⁶ The House passed H.R. 1994 by a vote of 256 to 170⁷ after adopting the Benishek-Sinema amendment adding Section 11 by voice vote.⁸ The House rejected the Takano substitute amendment by a vote of 191 to 233,⁹ and a motion to recommit the bill to the Committee on Veterans Affairs with an amendment relating to removing whistleblowers by a vote of 184 to 241.¹⁰

This report provides a brief discussion of due process considerations. It then describes sections of the VA Accountability of Act of 2015 as passed by the House on July 29, 2015.¹¹

Due Process Considerations

To get a better understanding of some provisions in H.R. 1994 as reported, acknowledging the significance of due process in civil service employment is fundamental. The Supreme Court has held that a federal employee has a property interest in continued employment.¹² The Fifth Amendment of the Constitution provides that property may not be deprived without due process of law. Due process rights are provided to many federal employees covered by Title 5 of the United States Code (U.S.C.) at 5 U.S.C. Section 7513 and Chapter 43, which relate to adverse

⁵ See H.Rept. 114-234, 114th Cong., 1st Sess. 4-8 (2015) for the texts of the Benishek-Sinema amendment and the Takano substitute amendment. They also are reprinted in 161 Cong. Rec. H5635-H5636 and H5637-H5638 (daily ed. July 29, 2015), respectively.

⁶ 161 Cong. Rec. H5623-H5624 (daily ed. July 29, 2015).

⁷ *Id.* at H5653.

⁸ *Id.* at H5637.

⁹ *Id.* at H5650-H5651.

¹⁰ *Id.* art H5652-H5653.

¹¹ H.Rept. 114-225, Pt. 1, and H.Rept. 114-225, Pt. 2 (Supplemental Report correcting votes in the Committee), 114th Cong., 1st Sess. (2015). The Committee on Oversight and Government Reform, to which H.R. 1994 also was referred, was discharged and filed no report. See Status of H.R. 1994 in the Legislative Information System (LIS). See also a July 27, 2015 letter from Jason Chaffetz, Chairman of the Committee on Oversight and Government Reform, to Jeff Miller, Chairman of the Committee on Veterans Affairs, stating that the Oversight Committee will forego committee action on H.R. 1994 to expedite floor action and requesting support for appointing members of that committee to a conference on the bill, reprinted at 161 Cong. Rec. H5625 (daily ed. July 29, 2015).

¹² Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

actions and performance appraisals, respectively. The Court has held that to provide due process, an agency that proposes to remove an employee must give a charged employee notice and an opportunity to respond to charges, as well as a hearing either before or after removal.¹³ The Court also has required that if a hearing is granted after removal, it must be provided at a meaningful time and in a meaningful manner.¹⁴

Section-by-Section Descriptions

Section 1. Short Title

This act may be cited as the VA Accountability Act of 2015.

Section 2. Removal or Demotion of Employees Based on Performance or Misconduct¹⁵

Section 2 would amend Title 38 of the U.S.C. by adding a new Section 715. It would authorize the Secretary of Veterans Affairs to remove or demote an individual who occupies a position in the VA if the Secretary determines that the individual's performance or misconduct warrants removal or demotion. The Secretary could remove the individual from the civil service or demote the individual by reducing the grade or annual rate of pay to a grade or pay rate that the Secretary determines to be appropriate. Beginning on the date of a demotion, any demoted individual would receive the annual rate of pay applicable to the position to which he or she was demoted notwithstanding any other provision of law.

An individual who is demoted may not be placed on administrative leave or any other category of paid leave while an appeal (if any) is ongoing, and may only receive pay if the individual reports for duty. If a demoted individual does not report for duty, he or she would not receive pay or other benefits including awards, bonuses, or student loan repayments.

Not later than 30 days after removing or demoting an individual, the Secretary would have to submit to the House and Senate Committees on Veterans Affairs notice of the removal or demotion and the reasons for the removal or demotion.

Procedures under Section 7513(b) and Chapter 43 of Title 5 of the U.S.C. would not apply to a removal or demotion under 38 U.S.C. Section 715. These procedures provide for notice, an opportunity to respond, to be represented by an attorney or other representative, and to receive a written agency decision.

A removal or demotion under H.R. 1994 could be appealed to the Merit Systems Protection Board (MSPB or Board) if filed not later than 7 days after the removal or demotion. The Board would be required to refer an appeal to an administrative judge who would have to expedite it and issue a decision not later than 45 days after the appeal date.

¹³ *Cleveland Board of Education v. Loudermill*. 470 U.S. 532 (1985).

¹⁴ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1985). See CRS Report R44161, *Expedited Removal Authority for VA Senior Executives (38 U.S.C. § 713): Selected Legal Issues*, by (name redacted) for a discussion of due process cases relating to government employment.

¹⁵ (name redacted), Legislative Attorney, American Law Division, wrote this description.

The decision of an administrative judge would be final and not subject to any further appeal. If an administrative judge could not issue a decision within 45 days, the removal or demotion would be final. In such a case, the Board, within 14 days after a removal or demotion is final, would have to submit to Congress and the House and Senate Committees on Veterans Affairs a report that explains why a decision on an appeal was not issued.

During an appeal period, an individual who was removed could not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.

To the maximum extent practicable, the Secretary would be required to provide the Board and any administrative judge to whom an appeal is referred, such information and assistance as may be necessary to ensure expediting an appeal.

The Secretary could not remove or demote an individual who is seeking corrective action for whistleblowing (or on whose behalf corrective action is being sought) from the Office of Special Counsel based on an alleged prohibited personnel practice described in 5 U.S.C. Section 2302(b) without the approval of the Special Counsel under 5 U.S.C. Section 1214(f). The Secretary could not remove or demote an individual who has filed a whistleblower complaint until the central whistleblower office has made a final decision with respect to that complaint.

Notwithstanding any other provision of law, the Special Counsel could terminate an investigation of a prohibited personnel practice alleged by an employee or former employee after the Special Counsel provides to the employee or former employee a written statement of the reasons for terminating the investigation. This statement would not be admissible as evidence in any judicial or administrative proceeding without the consent of such employee or former employee.

The authority provided in 38 U.S.C. Section 715, as added by H.R. 1994, would be in addition to Subchapter V of Chapter 75 of Title 5 of the U.S.C., relating to adverse actions against career members of the Senior Executive Service, and Chapter 43 of Title 5 of the U.S.C., relating to performance appraisal.

Definitions are provided for an “individual” to whom this authority applies, “grade,” and “misconduct.” This authority would not apply to an individual defined in 38 U.S.C. Section 713(g)(1), that is, a career appointee in the Senior Executive Service (SES) or an individual who occupies a high administrative or executive position, or to a political appointee.

The Secretary’s authority to remove or demote an individual in the Department in H.R. 1994 would be similar to authority enacted in Section 707(a) of the Veterans Access, Choice, and Accountability Act of 2014, P.L. 113-146,¹⁶ codified at 38 U.S.C. Section 713. Section 713 authorizes the Secretary to remove career appointees in the Senior Executive Service (SES) and some individuals who occupy administrative or executive positions or demote them to General Schedule positions.¹⁷ H.R. 1994 would extend this removal and demotion authority to many employees in the VA.

¹⁶ See CRS Report R43704, *Veterans Access, Choice, and Accountability Act of 2014 (H.R. 3230; P.L. 113-146)*, by (name redacted) et al. for more information on provisions of the Veterans Access, Choice, and Accountability Act of 2014.

¹⁷ See CRS Report R44161, *Expedited Removal Authority for VA Senior Executives (38 U.S.C. § 713): Selected Legal Issues*, by (name redacted) for a discussion of selected legal issues relating to this expedited removal authority. Opinions of MSPB administrative judges on appeals and other materials relevant to this expedited removal, demotion authority are available at <http://www.mspb.gov>.

See also Debra Roth, “The New VA Statute: What It Means for You,” *Federal Times: Legal Matters* (January 20, (continued...))

A senior executive who was removed from federal service pursuant to 38 U.S.C. Section 713 has appealed her removal, which was upheld by an administrative judge of the Merit Systems Protection Board, to the Court of Appeals for the Federal Circuit alleging violations of due process and the Appointments Clause of the Constitution.¹⁸

Section 3. Required Probationary Period for New Employees of Department of Veterans Affairs¹⁹

Section 3 (a)(1) of H.R. 1994 would amend Chapter 7 of Title 38 of the U.S.C., as amended by Section 2 of the bill, by adding a new Section 717 on “Probationary period for employees.” The provision would provide that the appointment of an individual appointed (1) to a permanent position in the competitive service or (2) as a career appointee in the Senior Executive Service (SES)²⁰ in the department would become final only after the employee served an 18-month probationary period.²¹ The Secretary could extend the probationary period at his discretion. Upon the expiration of the probationary period, an employee’s supervisor would determine, based on regulations prescribed by the Secretary, whether the appointment would become final. The provision would apply to an individual appointed after the act’s enactment date. It would not apply to physicians, dentists, podiatrists, optometrists, nurses, physician assistants, expanded-function dental auxiliaries, and chiropractors whose probationary period is provided by 38 U.S.C. Section 7403.

Current law, at 5 U.S.C. Section 3321(a)(1), authorizes a probationary period before an appointment in the competitive service becomes final. Regulations prescribed by the Office of Personnel Management (OPM) to carry out the law require an individual, appointed as a career or career-conditional employee in the competitive civil service, to serve a one-year probationary period.²² The regulations also provide that an agency is to use “the probationary period as fully as possible to determine the fitness” of an employee and terminate the employee during the period if the employee “fails to demonstrate fully ... qualifications for continued employment.”²³

Congress may authorize a longer probationary period for certain federal employees. For example, 5 U.S.C. Section 9510(d) authorizes the Secretary of the Treasury to establish a probationary period “of up to 3 years for Internal Revenue Service positions if the Secretary determines that the nature of the work is such that a shorter period is insufficient to demonstrate complete proficiency in the position.” In the 112th Congress, the House Committee on Oversight and Government Reform reported H.R. 1470, a bill that would have extended the probationary period for appointments in the civil service from one year to not less than two years and required an

(...continued)

2015), for a discussion of constitutional issues in the SES removal, demotion authority by the attorney who represented Sharon Helman, former Director of the Phoenix VA Health Care System. Roth is an attorney in private practice who also serves as the General Counsel of the Senior Executives Association.

¹⁸ Helman v. Department of Veterans Affairs, Docket No. 15-3086 (Court of Appeals for the Federal Circuit).

¹⁹ (name redacted), Analyst in the Government and Finance Division, wrote this description.

²⁰ Under 5 U.S.C. §3132(a)(4) of Title 5, a career appointee means an individual in an SES position whose appointment to the position or previous appointment to another SES was based on approval of the executive qualifications of the individual by the Office of Personnel Management.

²¹ A conforming amendment would amend 5 U.S.C. §3321(c) and 5 U.S.C. §3393(d) to provide that they would not apply to an individual covered by the new section, 38 U.S.C. §717.

²² 5 C.F.R. §315.801.

²³ 5 C.F.R. §315.803.

agency head to certify an employee's successful completion of the performance and other requirements of the period.²⁴

An August 2005 report published by the Merit Systems Protection Board (MSPB), titled "The Probationary Period: A Critical Assessment Opportunity," found that

The probationary period, if fully used, is one of the most valid tests available to determine if an individual will be a successful employee. However, full and successful usage requires a fair, in-depth assessment of the probationer and a willingness to terminate the probationer if the individual fails to prove that a finalized appointment would be in the public's best interest. Until this occurs, the effectiveness of the probationary period will remain severely limited.²⁵

MSPB also noted that "a longer probationary period should not be used to delay taking action when there is sufficient data to create an informed decision at an earlier date."²⁶

Section 4. Treatment of Whistleblower Complaints in Department of Veterans Affairs²⁷

Section 4(a) of H.R. 1994 would add a new subchapter to Chapter 7 of Title 38 of the U.S.C. This new subchapter would establish a process for handling whistleblower complaints filed by VA employees that involve the disclosure of a potential violation of any law, rule, or regulation, or assisting another employee with the disclosure of a potential violation of any law, rule, or regulation.²⁸ This process would also be available for an employee who discloses or assists another employee to disclose gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

Currently, pursuant to the Whistleblower Protection Act (WPA), a covered employee may seek relief if a personnel action is taken in response to any disclosure of information by the employee that he or she reasonably believes evidences a violation of any law, rule, or regulation, or evidences gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.²⁹ The WPA identifies three forums or proceedings for obtaining relief: (1) an appeal of an adverse action against the employee to the Merit Systems

²⁴ In discussing the need for the legislation, the committee report stated: "Lengthening the probationary period provides individuals the opportunity to complete job-related training and begin performing the actual work of the position. More importantly, it allows candidates more time to demonstrate their capabilities." U.S. House of Representatives, Committee on Oversight and Government Reform, *Extension of Probationary Period Applicable to Appointments in the Civil Service*, report to accompany H.R. 1470, 112th Cong., 1st sess., H.Rept. 112-116 (Washington: GPO, June 23, 2011), p. 4, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt116/pdf/CRPT-112hrpt116.pdf>. H.R. 1470 saw no further action.

²⁵ U.S. Merit Systems Protection Board, *The Probationary Period: A Critical Assessment Opportunity*, (Washington: MSPB, August 2005), p. 33, available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=224555&version=224774>.

²⁶ *Ibid.*, p. 20. The House Committee on Oversight and Government Reform report that accompanied H.R. 1470 stated that, "The legislation maintains agencies' flexibility to lengthen the probationary period for a reasonable fixed duration, provided such probationary periods are uniformly applied." and expressed agreement with the MSPB view that the longer period should not be used to delay action (H.Rept. 112-116, p. 4).

²⁷ (name redacted), Legislative Attorney in the American Law Division, wrote this description.

²⁸ See H.R. 1994, 114th Cong. §4(a) (2015) (proposed 38 U.S.C. §731) (defining the term "whistleblower complaint").

²⁹ 5 U.S.C. §2302(b)(8)(A), (B).

Protection Board; (2) an action instituted by the Office of Special Counsel; and (3) an individual right of action.³⁰ Different timelines and procedures apply in each forum or proceeding.³¹

Under the new provisions that would be added by Section 4(a) of H.R. 1994, whistleblower complaints would be made on a form developed by the Secretary, in consultation with the Special Counsel.³² The complaint would have to be filed with the employee's immediate supervisor unless the supervisor was the basis of the complaint. In that case, the complaint would have to be filed with the employee's next-level supervisor. Upon receipt of the complaint, a supervisor would have up to four business days to notify the employee in writing about whether there was a reasonable likelihood that the complaint discloses a violation of any law, rule, or regulation, or gross management, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety. If the supervisor makes a positive determination about the complaint, the notification would have to identify the specific actions that will be taken by the supervisor to address the complaint. The supervisor would also have to submit a written report on the complaint to the next-level supervisor and a central whistleblower office. This office would be responsible for investigating all of the agency's whistleblower complaints, and would have to maintain a toll-free hotline to anonymously receive whistleblower complaints.

Under the new provisions, a supervisor who was found to have committed a prohibited personnel action related to the filing or investigation of a whistleblower complaint would be subject to not less than a 14-day suspension and not more than removal for a first offense.³³ For a second offense, such a supervisor would subject to removal. A supervisor's handling of whistleblower complaints and past prohibited personnel actions would be considered in performance evaluations.

The Secretary, in coordination with the Whistleblower Protection Ombudsman, would be required annually to provide to each employee of the agency training on whistleblower complaints.³⁴ The Secretary would also be required annually to submit a report to specified congressional committees that includes information about the number of whistleblower complaints filed during the year, the disposition of such complaints, and other specified subjects.

Section 5. Performance Appraisal System for Senior Executives at VA³⁵

Section 5 of H.R. 1994, as amended, would impose certain requirements on the performance appraisal system for members of the Senior Executive Service (SES) at the VA, and it would also make some other changes to the operations of the SES at the VA.³⁶ Performance appraisals at the

³⁰ For additional information on the Whistleblower Protection Act, see CRS Rept. CRS Report R42727, *Whistleblower Protections Under Federal Law: An Overview*, by (name redacted) and (name redacted).

³¹ *Id.*

³² H.R. 1994, 114th Cong. §4(a) (2015) (proposed 38 U.S.C. §732(g)).

³³ H.R. 1994, 114th Cong. §4(a) (2015) (proposed 38 U.S.C. §733(a)).

³⁴ H.R. 1994, 114th Cong. §4(a) (2015) (proposed 38 U.S.C. §735(a)).

³⁵ (name redacted), Analyst in the Government and Finance Division, wrote this description.

³⁶ The definition provided in Section 5 of H.R. 1994 for covered positions is the definition from 38 U.S.C. §713(g)(3): “(A) with respect to a career appointee (as that term is defined in section 3132(a)(4) of title 5), a Senior Executive Service position (as such term is defined in section 3132(a)(2) of title 5); and (B) with respect to an individual appointed under section 7306(a) or section 7401(1) of this title, an administrative or executive position.” In other words, this section would apply both to members of the SES as well as other SES-like positions in the VA, which are sometimes referred to as “SES-equivalent” positions.

VA, like at other agencies, are used as the basis for adjusting pay, granting performance and other awards, and making other personnel decisions, such as removing individuals from the SES.³⁷

SES Performance Appraisal Requirements

If enacted, Section 5(a) of H.R. 1994 would require five summary levels for VA's SES performance appraisal system: outstanding, exceeds fully successful, fully successful, minimally satisfactory, and unsatisfactory. Section 5 would cap the number of senior executives who are eligible to receive the top two ratings: no more than 10% of VA senior executives may receive an outstanding rating each year, and no more than 20% may receive the exceeds-fully-successful rating each year.

Under current requirements established in Title 5 of the U.S.C., agencies have some flexibility to establish their own performance appraisal systems but must do so in accordance with standards established by OPM.³⁸ Under OPM regulations, agencies must have at least three summary performance levels for their senior executives: at least one fully successful level, a minimally satisfactory level, and an unsatisfactory level.³⁹ Agencies have the option to create a performance appraisal system that falls under a more comprehensive set of OPM standards, and if OPM certifies that the appraisal system meets the standards, senior executives in that agency may be eligible for higher pay.⁴⁰ To obtain certification, an agency's performance appraisal system must include four or five summary levels, make meaningful distinctions between the levels, and meet certain other criteria.⁴¹

If H.R. 1994 is enacted, the Secretary would be required to take into consideration certain specific factors when evaluating the performance of individual senior executives at the VA. The factors include whether the individual had a complaint or report filed against them by an inspector general or other entity; whether the individual was deemed to be putting forth efforts "to maintain high levels of satisfaction and commitment" among his or her supervisees; and two additional criteria described in Section 4 of H.R. 1994: the individual's treatment of whistleblower complaints, and whether the individual was found to have committed a prohibited personnel action as described in the bill.

Currently, as is the case with setting the summary levels for performance appraisals, agencies have some flexibility to determine their own set of considerations to be used in assigning performance ratings, provided that they are using an appraisal system that conforms with OPM's requirements mentioned above. It is possible that some of these factors listed in H.R. 1994 would already be taken into consideration for a performance appraisal. According to the Senior Executives Association, the professional association for members of the SES, "complaints or reports from various oversight bodies are already taken into account in assessments of executive performance."⁴² Under OPM regulations, supervisors are to take into consideration "employee

³⁷ For information about current removal authorities for senior executives at the VA, see CRS Report R43704, *Veterans Access, Choice, and Accountability Act of 2014 (H.R. 3230; P.L. 113-146)*, by (name redacted) et al.

³⁸ 5 U.S.C. §§4311-4315.

³⁹ 5 C.F.R. §430.305(c)(2).

⁴⁰ This certification decision is made in consultation with the Office of Management and Budget (OMB). See 5 C.F.R. §§430.403-405.

⁴¹ OPM's certification criteria are explained in 5 C.F.R. §430.404.

⁴² Letter from Carol A. Bonosaro, President, Senior Executives Association, to House Committee on Veterans' Affairs, April 15, 2015, https://seniorexecs.org/images/documents/policy_letters/SEALettertoHVAConHR473.pdf.

perspectives” and “the effectiveness, productivity, and performance quality of the employees for whom the senior executive is responsible,” among other factors.⁴³

Mobility Requirement for Senior Executives

Section 5(a) would require the Secretary to reassign every senior executive at least once every five years to a position at a different location with different personnel and program supervision responsibilities. The Secretary may choose to waive this requirement and must provide the Veterans’ Affairs Committees in each chamber with notice and an explanation of the reasons for the waiver.

Although Congress created the SES with the intention of instilling mobility among its members, mobility is not an explicit requirement—either government-wide or within individual agencies. The Civil Service Reform Act of 1978, which created the SES, stated that “[OPM] shall encourage and assist individuals to improve their skills and increase their contribution by service in a variety of agencies as well as by accepting temporary placements in State or local governments or in the private sector.”⁴⁴ By exposing individuals to positions in various agencies, the goal was that SES members could bring fresh perspective to a range of needs in the government. As stated in one 2012 report, however, “the government’s original vision of SES mobility has not materialized. Today, almost half of the U.S. government’s 7,100 senior executives have stayed in the same position in the same organization their entire SES career.”⁴⁵

Report to Congress on SES Performance Appraisal System

Section 5(a) would require the Secretary to submit an annual report to Congress on the VA’s performance appraisal system for senior executives. The Secretary would be required to submit the report to the House and Senate Committees on Veterans’ Affairs, the House Committee on Oversight and Government Reform, and the Senate Committee on Homeland Security and Governmental Affairs. The report would be required to include documentation concerning the details of each individual senior executive’s performance review, as well as summary information about the performance reviews. Further, the Inspector General (IG) would be required to review the individual performance ratings, and the IG’s review would be included in the report to Congress.

Currently, appraisals for senior executives are performed and documented by the agency under guidance from OPM, and personnel records are generally retained by the agency. Retention of these records is subject to guidance and regulations from OPM.⁴⁶

Review of SES Management Training

Section 5(b) would require the Secretary, within 180 days of enactment, to contract with a nongovernmental entity to review the current management training program for senior executives

⁴³ 5 C.F.R. §430.307(a)(2).

⁴⁴ 5 U.S.C. §3396(d)(1).

⁴⁵ Partnership for Public Service and McKinsey & Company, *Mission-Driven Mobility: Strengthening our government through a mobile leadership corps*, February 2012, p. 1.

⁴⁶ For more information about OPM’s role in recordkeeping of personnel folders, see 5 C.F.R. Part 293 and Office of Personnel Management, *Operating Manual: The Guide to Personnel Recordkeeping*, updated June 1, 2011, at <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/personnel-recordkeeping/recguide2011.pdf>.

at the VA. The review would be required to compare VA's training to training for senior executives in other federal agencies and in the private sector. The entity writing the report would have 180 days, under the terms of its contract with VA, to complete the report and submit it to the Secretary. The Secretary would then be required to submit to Congress, within 60 days, a plan for carrying out the report's recommendations.

Section 6. Reduction in Federal Retirement Benefits for Certain SES Employees Convicted of Felonies⁴⁷

Section 6 of H.R. 1994, as reported, would provide authority to change the crediting of federal service under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS) for

- certain SES employees who were removed from service at the VA due to performance or misconduct, and were convicted of a felony that influenced performance in that position; and
- certain retirees who separated from SES employment at the VA before a final decision was issued with respect to a removal action, and were convicted of a felony that influenced performance in that position.

This change to current law would reduce the number of years of service used in the calculation of the CSRS or FERS pension amount by the period of time these individuals spent engaged in the activity that led to removal for performance or misconduct (or voluntary separation before issuance of a final decision on removal), thus decreasing the federal retirement benefit.

Most civilian federal employees first hired prior to 1984, including SES employees, are covered by CSRS, whereas most civilian federal employees first hired in 1984 or later, including SES employees, are covered by FERS. In order to be eligible for CSRS and FERS benefits in retirement, covered individuals must perform creditable federal service, make required employee contributions, and meet the age and years of service requirements under current law.⁴⁸ Under both CSRS and FERS, an individual's retirement benefit is calculated by multiplying three factors: the *salary base*,⁴⁹ the *accrual rate*,⁵⁰ and the number of *years of service*. This relationship is shown in the following formula:

$$\text{Pension Amount} = \text{salary base} \times \text{accrual rate} \times \text{years of service}$$

Under Section 6 of H.R. 1994, as reported, the years of service used in the CSRS or FERS benefit calculation of a SES employee at the VA who was removed due to performance or misconduct and was convicted of a felony that influenced his or her performance would no longer include the period between (1) when the employee engaged in activity that led to removal and (2) when the employee was removed due to performance or misconduct. Also under Section 6 of H.R. 1994, as reported, the years of service used in the CSRS or FERS benefit calculation of a retired individual receiving a CSRS or FERS benefit who voluntarily separated from the VA as a SES employee

⁴⁷ (name redacted) Analyst in the Domestic Social Policy Division, wrote this description.

⁴⁸ For more information on CSRS and FERS eligibility and benefits, see CRS Report 98-810, *Federal Employees' Retirement System: Benefits and Financing*, by (name redacted).

⁴⁹ Under both CSRS and FERS, the salary base is defined as the average of the highest three consecutive years of basic pay, or "high-three" pay.

⁵⁰ The accrual rates per year of service differ between CSRS and FERS. For detail on this issue, see CRS Report 98-810, *Federal Employees' Retirement System: Benefits and Financing*, by (name redacted).

before a final decision on removal was issued and was convicted of a felony that influenced his or her performance in that position would no longer include the period between (1) when the employee engaged in activity that led to removal action and (2) when the employee left employment at the VA before a final decision was issued with respect to the removal action.⁵¹

Prior to this reduction in federal service for the purposes of the CSRS or FERS benefit calculation, affected employees and retirees would be notified and given an opportunity for a hearing by another federal agency or department.⁵² After the notification and hearing, the Office of Personnel Management (OPM), which administers CSRS and FERS, would be required to recalculate the retirement benefit of an affected individual within 30 days after the reduction in federal service is determined. Finally, removed employees and current retirees would receive a lump-sum credit for any period of federal service no longer creditable under CSRS or FERS. This lump-sum credit would be paid in the amount of the employee contributions or deposits they previously made for that service plus interest.

Pension Forfeiture and Reductions in Retirement Service Credit Under Current Law

Under current law, CSRS or FERS retirement benefits may be forfeited or reduced only in limited circumstances. For instance, neither CSRS nor FERS benefits are payable to any individual if that individual is convicted of certain offenses that were committed during the period of service when the annuity was earned. In general, the only crimes that would lead to forfeiture of a federal retirement annuity are limited to acts of treason or espionage (also known as “Hiss Act” provisions).⁵³ In addition, current examples of reductions in service credit for the purposes of CSRS and FERS benefits are limited specifically to Members of Congress. They do not apply to other federal employees. Under the Honest Leadership and Open Government Act of 2007 (HLOGA; P.L. 110-81, Section 401), and as amended by the Stop Trading on Congressional Knowledge Act (STOCK Act; P.L. 112-105, Section 15) in 2012, Members of Congress lose service credit for any service performed as a Member of Congress if convicted of any one of a number of federal laws concerning corruption, election crimes, or misconduct while the individual was a Member of Congress or while the individual was the President, Vice President, or an elected official of a state or local government.⁵⁴

Section 7. Limitation on Administrative Leave for Employees Department of Veterans Affairs⁵⁵

Section 7(a)(1) of H.R. 1994 would amend Chapter 7 of Title 38 of the U.S.C. by adding a new Section 723 on “Limitation on administrative leave.” The provision would provide that the

⁵¹ Section 6 of H.R. 1994, as amended, would not make any changes to the crediting of federal service for the purposes of eligibility for a CSRS or FERS benefit (e.g., the years of service eligibility requirement). This section would only change the years of service used in the CSRS or FERS benefit calculation for particular SES employees at the VA.

⁵² After this hearing, the Secretary of the VA would be required to order that this reduction in federal service is lawful for retirees affected by Section 6 of H.R. 1994, as reported. The decision regarding this reduction in federal service for both employees and retirees would be final after the notification and hearing opportunity. There would be no subsequent review of this decision by any federal agency or department.

⁵³ Title 5 U.S.C. §8312.

⁵⁴ For a more details on this issue, see CRS Report 96-530, *Loss of Federal Pensions for Members of Congress Convicted of Certain Offenses*, by (name redacted)

⁵⁵ (name redacted), Analyst in the Government and Finance Division, wrote this description.

Secretary could not place an employee of the department—(1) who is subject to an investigation for purposes of determining whether he or she should be subject to any disciplinary action under Title 38 or Title 5, or (2) against whom any disciplinary action is proposed or initiated under Title 38 or Title 5—on administrative leave, or any other type of paid non-duty status without charge to leave, for more than 14 days during any 365-day period. The Secretary could waive this limitation and extend the administrative leave, or other paid non-duty status without charge to leave, if he submits a detailed explanation of the reasons the individual was placed in such a status and the reasons for the extension to the House and Senate Committees on Veterans' Affairs. The explanation would include the individual's name, employment location, and job title. The provision would apply to any 365-day period beginning on or after the act's enactment date.

The Department of Justice limits the number of days that an employee of the department can be placed on administrative leave. In a memorandum on the "Proper Use of Administrative Leave" issued on September 27, 2002, the Acting Assistant Attorney General for Administration (AAG/A) established the policy that "no component may place an employee on administrative leave for more than 10 work days, whatever the reason, without the prior approval of the Assistant Attorney General for Administration or his designee."⁵⁶ According to the memorandum,

an employee's status during the investigation or notice period will depend upon the nature of the misconduct and the employee's position. Managers must decide whether the continued presence of the employee in the workplace is likely to create a danger to personnel or office operations or otherwise be disruptive, detrimental to morale or good order, or an embarrassment to the employer. Where such a risk does not exist, the employee should remain in the workplace. Where the risk does exist but can reasonably be avoided by temporarily reassigning the employee to an available position, managers should make the effort to do so. Where the risk is present and cannot be avoided by reassignment, or where an appropriate position is not available, an indefinite suspension or enforced leave should be used, where possible, until the resolution of the matter. Where appropriate and allowed by statute or other regulation, components should consider the use of a shortened notice period. As a last resort, the [policy] allows managers to consider placing an employee on administrative leave during the pendency of disciplinary of actions, for no more than 10 work days, when component managers determine that such placement is required for the orderly operation of the component.⁵⁷

Section 8. Treatment of Congressional Testimony by Department of Veterans Affairs Employees as Official Duty⁵⁸

Section 8(a) of H.R. 1994 would amend Chapter 7 of Title 38 of the U.S.C. by adding a new Section 725 on "Congressional testimony by employees: treatment as official duty." The provision would provide that an employee of the department is performing official duty during the period in which he or she is testifying in an official capacity before the House of Representatives or the Senate, a House or Senate committee, or a joint or select committee of Congress. The Secretary would provide travel expenses, including per diem in lieu of subsistence,⁵⁹ to a department employee performing such official duty.

⁵⁶ U.S. Department of Justice. Memorandum, "Proper Use of Administrative Leave," September 27, 2002, available at <http://www.justice.gov/jmd/us-department-justice-memorandum-proper-use-administrative-leave>.

⁵⁷ Ibid.

⁵⁸ (name redacted), Analyst in the Government and Finance Division, wrote this description.

⁵⁹ The travel expenses would be in accordance with 5 U.S.C. Chapter 57, Subchapter I.

This provision would be similar to a provision codified at 5 U.S.C. §6322(b) that provides that an employee “is performing official duty” when “summoned, or assigned by his agency, to (1) testify or produce official records on behalf of the United States or the District of Columbia; or (2) testify in his official capacity or produce official records on behalf of a party other than the United States or the District of Columbia.”

Section 9. Limitation on Awards and Bonuses Paid to Employees of Department of Veterans Affairs⁶⁰

Section 9 of H.R. 1994 would amend Section 705 of P.L. 113-146, the Veterans Access, Choice, and Accountability Act of 2014, to provide a “Limitation on Awards and Bonuses Paid to Employees of Department of Veterans Affairs.”⁶¹ The provisions would require the Secretary to ensure that the aggregate amount of awards and bonuses paid in a fiscal year under 5 U.S.C. Chapter 45 or 5 U.S.C. Chapter 53, or any other awards or bonuses authorized under 38 U.S.C. do not exceed

- \$300 million in each of the fiscal years FY2015 through FY2018, or
- \$360 million in each of the fiscal years FY2019 through FY2024.

This provision would apply to various awards and bonuses. Chapter 45 of Title 5 U.S.C. authorizes incentive awards for federal employees for superior accomplishments, including performance-based cash awards⁶² and the awarding of ranks in the Senior Executive Service.⁶³ Periodic step increases, authorized by 5 U.S.C. Section 5335, may be paid to federal employees after certain time-in-service requirements are met for “work at an acceptable level of competence.” Additional step increases, authorized by 5 U.S.C. Section 5336, recognize “high quality performance above that ordinarily found in the type of position concerned.” Among other compensation, Title 38 authorizes performance pay for physicians and dentists at Section 7431 and cash bonuses for nurses and other health-care professionals at Section 7452. Policies on “Employee Recognition and Awards” for Titles 5 and Title 38 employees of the VA are set forth in a Handbook and Directive.⁶⁴

⁶⁰ (name redacted), Analyst in the Government and Finance Division, wrote this description.

⁶¹ For more information on provisions in the Veterans Access, Choice, and Accountability Act of 2014, see CRS Report R43704, *Veterans Access, Choice, and Accountability Act of 2014 (H.R. 3230; P.L. 113-146)*, by (name redacted) et al.

⁶² Under 5 U.S.C. §4505a(a), an employee whose most recent performance rating was at least fully successful may receive a cash award of up to 10% of basic pay. That amount may be increased to up to 20% of basic pay upon a determination by the agency head that the employee’s performance was exceptional.

⁶³ Under 5 U.S.C. §4507, “A small group of career senior executives is awarded a Presidential Rank Award each year. Presidential Rank Awards have two categories: Distinguished Rank, which awards recipients 35% of their annual basic pay, and Meritorious Rank, which awards recipients 20% of their annual basic pay. Up to 1% of senior executives can be Distinguished Rank recipients in a given year, and up to 5% can be Meritorious Rank recipients per year.” See CRS Report R41801, *The Senior Executive Service: Background and Options for Reform*, by (name redacted).

⁶⁴ U.S. Department of Veterans Affairs, VA Handbook 5017, “Employee Recognition and Awards” and VA Directive 5017, “Employee Recognition and Awards,” available at http://www1.va.gov/vapubs/Search_action.cfm.

Section 10. Comptroller General Study of Department Time and Space Used for Labor Organization Activity⁶⁵

Section 10 of H.R. 1994 would require the Comptroller General of the United States (the Government Accountability Office, GAO) to conduct a study on the amount of time department employees spent in carrying out organizing activities related to labor organizations and the amount of space in department facilities used for such activities. The study would include a cost-benefit analysis of time and space used for such activities and would be conducted within 180 days after the act's enactment. The Comptroller General would be required to submit a report on the results of the study to the House and Senate Committees on Veterans' Affairs within 90 days after the completion of the study.

According to OPM, "Official time, broadly defined, is paid time off from assigned Government duties to represent a union or its bargaining unit employees."⁶⁶ Under 5 U.S.C. Section 7131, any employee representing an exclusive representative in the negotiation of a collective bargaining agreement is authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees authorized to be on official time cannot exceed the number of individuals designated as representing the agency for such purposes. Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) are to be performed during the time the employee is in a non-duty status. The Federal Labor Relations Authority determines whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority is authorized official time for such purpose during the time the employee otherwise would be in a duty status. Any employee representing an exclusive representative, or in connection with any other matter covered by Chapter 71 of Title 5, and any employee in an appropriate unit represented by an exclusive representative, is to be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

OPM policy states that "Labor and management are equally accountable to the taxpayer and have a shared responsibility to ensure that official time is authorized and used appropriately."⁶⁷ Agencies report official time use to OPM on an annual basis.⁶⁸ The Government Accountability Office published an evaluation of official time in October 2014 that included data for the Department of Veterans Affairs. GAO found that the VA had an official time rate of 4.05 hours per bargaining unit employee in FY2013, calculated on 264,991 bargaining unit employees and 1,073,780 total hours of official time. The report stated that the department was "implementing a new time and attendance system, the Veterans Affairs Time and Attendance System (VATAS), which will capture official time usage." The report also stated that another recent GAO evaluation "found that official time activities at VA were recorded as administrative leave because the

⁶⁵ (name redacted), Analyst in the Government and Finance Division, wrote this description.

⁶⁶ U.S. Office of Personnel Management, "Labor-Management Relations Reports on Official Time," available at <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/#url=Overview>.

⁶⁷ Ibid.

⁶⁸ U.S. Office of Personnel Management, *Labor-Management Relations in the Executive Branch*, (Washington: OPM, October 2014), available at <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf>. The report provides FY2012 data on official time.

agency's current time and attendance system does not have a code to capture official time separately."⁶⁹

Section 11. Accountability of Secretary of Veterans Affairs to Inspector General of the Department of Veterans Affairs⁷⁰

Section 11 would direct the Inspector General (IG) of the Department of Veterans Affairs to submit a copy of a covered report to the Senate and House Committees on Veterans Affairs when submitting that report to the Secretary. A covered report is an IG report that recommends actions to the Secretary or other official or employee in the department to address a public health or safety issue relating to misconduct, or alleged misconduct, by an employee of the department. The IG must include in the copy any changes that the Secretary recommended while the IG was preparing a covered report and a list of names of each responsible manager, but the IG may not make public names of managers.

It requires the Secretary promptly to notify each responsible manager no later than seven days after the date that the IG submits a covered report to the Secretary; direct that manager to resolve each identified issue; and provide her or him with counseling and a mitigation plan to resolve it. The Secretary must ensure that any responsible manager's performance review includes an evaluation regarding whether that manager took appropriate actions to resolve identified issues. If a covered issue is not resolved, the Secretary may not pay a responsible manager any bonus or award under Chapter 46 or 53 of Title 5 of the U.S. Code or any other bonus or award authorized under that title or Title 38 of the U.S. Code. Authority provided by this section is in addition to any responsibility or authority provided to the IG in the Inspector General Act of 1970 (5 U.S.C. App.).

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⁶⁹ U.S. Government Accountability Office, *Labor Relations Activities: Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time*, GAO-15-9, (Washington: GAO, October 23, 2014), pp. 8, 9, 13, available at <http://www.gao.gov/assets/670/666619.pdf>. U.S. Government Accountability Office, *Federal Paid Administrative Leave: Additional Guidance Needed to Improve OPM Data*, GAO-15-79 (Washington: GAO, October 17, 2014), available at <http://www.gao.gov/assets/670/666566.pdf>.

⁷⁰ (name redacted), Legislative Attorney in the American Law Division, wrote this description.

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