

118TH CONGRESS
1ST SESSION

H. R. 4278

To amend title 38, United States Code, to modify personnel action procedures with respect to employees of the Department of Veterans Affairs, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 22, 2023

Mr. BOST introduced the following bill; which was referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to modify personnel action procedures with respect to employees of the Department of Veterans Affairs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restore Department
5 of Veterans Affairs Accountability Act of 2023” or the
6 “Restore VA Accountability Act of 2023”.

1 **SEC. 2. SUPERVISORS: REMOVAL, DEMOTION, OR SUSPEN-**
2 **SION BASED ON PERFORMANCE OR MIS-**
3 **CONDUCT.**

4 (a) DISCIPLINE OF SUPERVISORS.—

5 (1) IN GENERAL.—Title 38, United States
6 Code, is amended by inserting after section 711 the
7 following:

8 **“§ 712. Supervisors: removal, demotion, or suspension**
9 **based on performance or misconduct**

10 “(a) IN GENERAL.—The Secretary may remove from
11 civil service, demote, or suspend a covered individual who
12 is an employee of the Department if the Secretary deter-
13 mines by substantial evidence that the performance or
14 misconduct of the covered individual warrants such action.

15 “(b) RIGHTS AND PROCEDURES.—(1)(A) When mak-
16 ing an initial decision under subsection (a) with respect
17 to determining whether a covered individual should be re-
18 moved, demoted, or suspended, the deciding employee of
19 the Department shall exclusively apply the following fac-
20 tors:

21 “(i) The nature and seriousness of the of-
22 fense, and its relation to the covered individ-
23 ual’s duties, position, and responsibilities, in-
24 cluding whether the offense was intentional or
25 technical or inadvertent, or was committed ma-
26 liciously or for gain, or was frequently repeated.

1 “(ii) The covered individual’s job level and
2 type of employment, including supervisory or fi-
3 duciary role, and prominence of the position.

4 “(B) The Secretary shall review the initial decision
5 and uphold such decision if it is supported by substantial
6 evidence.

7 “(2) A covered individual subject to an action under
8 subsection (a) is entitled to—

9 “(A) advance notice of the action and a file
10 containing all evidence in support of the proposed
11 action;

12 “(B) be represented by an attorney or other
13 representative of the covered individual’s choice; and

14 “(C) grieve the action in accordance with an in-
15 ternal grievance process that the Secretary, in con-
16 sultation with the Assistant Secretary for Account-
17 ability and Whistleblower Protection, shall establish
18 for purposes of this subsection.

19 “(3) A final decision by the Secretary under para-
20 graph (1)(B) that is not grieved, and a grievance decision
21 under paragraph (2)(C), shall be final and conclusive.

22 “(4) The procedures under chapter 43 of title 5 shall
23 not apply to a removal, demotion, or suspension under this
24 section, and the Secretary may carry out such a removal,

1 demotion, or suspension without first placing a covered in-
2 dividual on a performance improvement plan.

3 “(c) TIMING.—(1)(A) The aggregate period for no-
4 tice, response, and final decision by the Secretary of an
5 action under this section may not exceed 15 business days.

6 “(B) The period for the response of a covered indi-
7 vidual to a notice under subsection (b)(2)(A) shall be 7
8 business days.

9 “(C) The final decision by the Secretary under sub-
10 section (b)(1)(B) shall—

11 “(i) be issued not later than 15 business days
12 after notice is provided under subsection (b)(2)(A);
13 and

14 “(ii) be in writing and shall include the specific
15 reasons for the decision.

16 “(D) The Secretary shall ensure that the grievance
17 process established under paragraph (2)(C) takes fewer
18 than 21 days after the final decision.

19 “(d) JUDICIAL REVIEW.—(1) A covered individual
20 adversely affected by a final decision under this section
21 that is not grieved, or by a grievance decision under sub-
22 section (b)(2)(C), may obtain judicial review of such deci-
23 sion.

24 “(2) Any removal, demotion, or suspension under this
25 section is not appealable to the Merit Systems Protection

1 Board, or to any administrative judge or other person ap-
2 pointed by the Merit Systems Protection Board.

3 “(3) In any case in which judicial review is sought
4 under paragraph (1), the court shall review the record and
5 may set aside any Department action found to be—

6 “(A) arbitrary, capricious, an abuse of discre-
7 tion, or otherwise not in accordance with a provision
8 of law;

9 “(B) obtained without procedures required by a
10 provision of law having been followed; or

11 “(C) unsupported by substantial evidence.

12 “(4) Except to the extent that an appeal under this
13 subsection presents a constitutional issue, such court may
14 not review a challenge to the penalty imposed against the
15 covered individual or mitigate such penalty.

16 “(e) DEMOTED INDIVIDUALS.—(1) A demotion under
17 subsection (a) shall be carried out as a reduction in grade
18 for which the covered individual is qualified, that the Sec-
19 retary determines is appropriate, and that reduces the an-
20 nual rate of pay of the covered individual.

21 “(2) Notwithstanding any other provision of law, any
22 covered individual so demoted—

23 “(A) shall, beginning on the date of such demo-
24 tion, receive the annual rate of pay applicable to
25 such grade;

1 “(B) may not be placed on administrative leave
2 during the period during which an appeal (if any)
3 under this section is ongoing, and may only receive
4 pay if the covered individual reports for duty or is
5 approved to use accrued unused annual, sick, family
6 medical, military, or court leave; and

7 “(C) who does not report for duty or receive ap-
8 proval to use accrued unused leave shall not receive
9 pay or other benefits.

10 “(f) WHISTLEBLOWER PROTECTION.—(1) In the
11 case of a covered individual seeking corrective action (or
12 on behalf of whom corrective action is sought) from the
13 Office of Special Counsel based on an alleged prohibited
14 personnel practice described in section 2302(b) of title 5,
15 the Secretary may not remove, demote, or suspend such
16 covered individual under subsection (a) without the ap-
17 proval of the Special Counsel under section 1214(f) of title
18 5.

19 “(2) In the case of a covered individual who has made
20 a whistleblower disclosure to the Assistant Secretary for
21 Accountability and Whistleblower Protection, the Sec-
22 retary may not remove, demote, or suspend such covered
23 individual under subsection (a) until—

24 “(A) in the case in which the Assistant Sec-
25 retary determines to refer the whistleblower disclo-

1 sure under section 323(c)(1)(D) of this title to an
2 office or other investigative entity, a final decision
3 with respect to the whistleblower disclosure has been
4 made by such office or other investigative entity; or

5 “(B) in the case in which the Assistant Sec-
6 retary determines not to refer the whistleblower dis-
7 closure under such section, the Assistant Secretary
8 makes such determination.

9 “(g) TERMINATION OF INVESTIGATIONS BY OFFICE
10 OF SPECIAL COUNSEL.—(1) Notwithstanding any other
11 provision of law, the Special Counsel (established by sec-
12 tion 1211 of title 5) may terminate an investigation of
13 a prohibited personnel practice alleged by an employee or
14 former employee of the Department after the Special
15 Counsel provides to the employee or former employee a
16 written statement of the reasons for the termination of
17 the investigation.

18 “(2) Such statement may not be admissible as evi-
19 dence in any judicial or administrative proceeding without
20 the consent of such employee or former employee.

21 “(h) APPLICATION.—This section shall apply to any
22 performance or misconduct of a covered individual begin-
23 ning on the date of enactment of the Department of Vet-
24 erans Affairs Accountability and Whistleblower Protection
25 Act of 2017 (Public Law 115–41).

1 “(i) DEFINITIONS.—In this section:

2 “(1) The term ‘civil service’ has the meaning
3 given that term in section 2101 of title 5.

4 “(2) The term ‘covered individual’ means an
5 employee of the Department who is a supervisor or
6 management official as defined in section 7103(a) of
7 title 5 occupying a position at the Department, in-
8 cluding individuals appointed pursuant to this title,
9 title 5, and hybrid employees appointed pursuant to
10 section 7401 of this title, but does not include—

11 “(A) an individual occupying a senior execu-
12 tive position (as defined in section 713(d) of
13 this title);

14 “(B) an individual appointed pursuant to
15 section 7306, 7401(1), 7401(4), or 7405 of this
16 title;

17 “(C) an individual who has not completed
18 a probationary or trial period; or

19 “(D) a political appointee.

20 “(3) The term ‘grade’ has the meaning given
21 such term in section 7511(a) of title 5.

22 “(4) The term ‘misconduct’ includes neglect of
23 duty, malfeasance, or failure to accept a directed re-
24 assignment or to accompany a position in a transfer
25 of function.

1 “(5) The term ‘political appointee’ means an in-
2 dividual who is—

3 “(A) employed in a position described
4 under sections 5312 through 5316 of title 5
5 (relating to the Executive Schedule);

6 “(B) a limited term appointee, limited
7 emergency appointee, or noncareer appointee in
8 the Senior Executive Service, as defined under
9 paragraphs (5), (6), and (7), respectively, of
10 section 3132(a) of title 5; or

11 “(C) employed in a position of a confiden-
12 tial or policy-determining character under
13 schedule C of subpart C of part 213 of title 5,
14 Code of Federal Regulations, or successor regu-
15 lation.

16 “(6) The term ‘suspend’ means the placing of
17 an employee, for disciplinary reasons, in a temporary
18 status without duties and pay for a period in excess
19 of 14 days.

20 “(7) The term ‘whistleblower disclosure’ has the
21 meaning given such term in section 323(g) of this
22 title.”.

23 (2) CLERICAL AMENDMENT.—The table of con-
24 tents for title 38, United States Code, is amended

1 by inserting after the item relating to section 711
2 the following:

“712. Supervisors: removal, demotion, or suspension based on performance or
misconduct.”.

3 **SEC. 3. SENIOR EXECUTIVES: MODIFICATION OF PROCE-**
4 **DURES TO REMOVE, DEMOTE, OR SUSPEND**
5 **BASED ON PERFORMANCE OR MISCONDUCT.**

6 Section 713 of title 38, United States Code, is
7 amended—

8 (1) in subsection (a)—

9 (A) after “determines”, insert “by sub-
10 stantial evidence”; and

11 (B) by adding at the end the following:

12 “(3) When making an initial decision under this sub-
13 section with respect to determining whether a covered in-
14 dividual should be reprimanded or suspended, involun-
15 tarily reassigned, demoted, or removed, the deciding em-
16 ployee of the Department shall exclusively apply the fol-
17 lowing factors:

18 “(A) The nature and seriousness of the offense,
19 and its relation to the covered individual’s duties,
20 position, and responsibilities, including whether the
21 offense was intentional or technical or inadvertent,
22 or was committed maliciously or for gain, or was fre-
23 quently repeated.

1 “(B) The covered individual’s job level and type
2 of employment, including supervisory or fiduciary
3 role, and prominence of the position.

4 “(4) The Secretary shall review the initial decision
5 and uphold such decision if it is supported by substantial
6 evidence.”;

7 (2) in subsection (b)—

8 (A) in paragraph (3), by inserting “after
9 the final decision” after “21 days”; and

10 (B) by adding at the end the following:

11 “(7) Except to the extent that an appeal under this
12 subsection presents a constitutional issue, such court may
13 not review a challenge to the penalty imposed against the
14 covered individual or mitigate such penalty.”; and

15 (3) insert after subsection (c) the following
16 (and redesignate subsection (d) as subsection (e)):

17 “(d) APPLICATION.—This section shall apply to any
18 misconduct or performance of a covered individual begin-
19 ning on the date of enactment of the Department of Vet-
20 erans Affairs Accountability and Whistleblower Protection
21 Act of 2017 (Public Law 115–41).”.

1 **SEC. 4. MODIFICATION OF DISCIPLINARY PROCEDURES**
2 **FOR EMPLOYEES OF THE DEPARTMENT OF**
3 **VETERANS AFFAIRS.**

4 (a) DEPARTMENT OF VETERANS AFFAIRS EM-
5 PLOYEE DISCIPLINE MODIFICATIONS.—Section 714 of
6 title 38, United States Code, is amended—

7 (1) in subsection (a),

8 (A) in paragraph (1), by inserting “by sub-
9 stantial evidence” after “the Secretary deter-
10 mines”; and

11 (B) by adding at the end the following:

12 “(3)(A) When making an initial decision under this
13 subsection with respect to determining whether a covered
14 individual should be removed, demoted, or suspended, the
15 deciding employee of the Department shall exclusively
16 apply the following factors:

17 “(i) The nature and seriousness of the offense,
18 and its relation to the covered individual’s duties,
19 position, and responsibilities, including whether the
20 offense was intentional or technical or inadvertent,
21 or was committed maliciously or for gain, or was fre-
22 quently repeated.

23 “(ii) The covered individual’s job level and type
24 of employment, including supervisory or fiduciary
25 role, and prominence of the position.

1 “(iii) The covered individual’s past disciplinary
2 record.

3 “(iv) The covered individual’s past work record,
4 including length of service, performance on the job,
5 ability to get along with fellow workers, and depend-
6 ability.

7 “(v) Mitigating circumstances surrounding the
8 offense such as unusual job tensions, personality
9 problems, mental impairment, harassment, or bad
10 faith, malice, or provocation on the part of others in-
11 volved in the matter.

12 “(B) The Secretary shall review the initial decision
13 and uphold such decision if it is supported by substantial
14 evidence.”.

15 (2) in subsection (c)—

16 (A) by striking paragraph (1)(D); and

17 (B) in paragraph (3), by inserting before
18 the period the following: “, and the Secretary
19 may carry out such a removal, demotion, or
20 suspension without first placing a covered indi-
21 vidual on a performance improvement plan”;

22 (3) in subsection (d)—

23 (A) in paragraph (2), by adding at the end
24 the following:

1 “(C) Except to the extent that an appeal under this
2 subsection presents a constitutional issue, the administra-
3 tive judge may not review a challenge to the penalty im-
4 posed against the covered individual.”;

5 (B) in paragraph (3), by adding at the end
6 the following:

7 “(D) Except to the extent that an appeal under this
8 subsection presents a constitutional issue, the Merit Sys-
9 tems Protection Board may not review a challenge to the
10 penalty imposed against the covered individual.”;

11 (C) in paragraph (5), by adding at the end
12 the following:

13 “(C) Except to the extent that an appeal under this
14 subsection presents a constitutional issue, such Court may
15 not review a challenge to the penalty imposed against the
16 covered individual or mitigate such penalty.”; and

17 (D) by striking paragraph (10);

18 (4) by redesignating subsection (h) as sub-
19 section (j);

20 (5) by inserting after subsection (g) the fol-
21 lowing:

22 “(h) COLLECTIVE BARGAINING AGREEMENTS.—The
23 procedures in this section shall supersede any collective
24 bargaining agreement to the extent that such agreement
25 is inconsistent with such procedures.

1 “(i) APPLICATION.—This section shall apply to any
2 performance or misconduct of a covered individual begin-
3 ning on the date of enactment of the Department of Vet-
4 erans Affairs Accountability and Whistleblower Protection
5 Act of 2017 (Public Law 115–41).”; and

6 (6) in paragraph (1) of subsection (j), as reded-
7 icated by paragraph (4)—

8 (A) by inserting “including individuals ap-
9 pointed pursuant to this title, title 5, and hy-
10 brid employees appointed pursuant to section
11 7401 of this title” after “Department”;

12 (B) in subparagraph (D), by striking the
13 period and inserting “; or”; and

14 (C) by adding after subparagraph (D) the
15 following:

16 “(E) a supervisor or management official
17 as defined in section 7103(a) of title 5.”.

18 (b) VHA EMPLOYEE DISCIPLINE MODIFICATIONS.—
19 Section 7403(f)(3) of such title is amended—

20 (1) by striking “Notwithstanding any other pro-
21 vision of this title or other law,” and inserting “(A)
22 Notwithstanding any other provision of this title or
23 other law, and consistent with subparagraph (B),”;
24 and

25 (2) by adding at the end the following:

1 “(B) With respect to any covered individual (as that
2 term is defined in section 712 or 714) appointed to such
3 positions, such matters shall be resolved, at Secretary’s
4 sole discretion, under—

5 “(i) section 712;

6 “(ii) section 714; or

7 “(iii) title 5 as though such individuals had
8 been appointed under that title.”.

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