

May 18, 2016

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
Washington, DC 20510

Re: Veterans First Act, S. 2921

Dear Leader McConnell and Leader Reid:

On behalf of the federal and postal employees and retirees represented by the undersigned organizations, we write to express our deep concern over several provisions contained in Title I of the Veterans First Act, as approved by the Senate Committee on Veterans' Affairs. If enacted, these provisions would undermine constitutionally-guaranteed protections available to Department of Veterans Affairs (VA) employees who are subject to discipline for misconduct or performance. Moreover, these provisions would fail to protect the integrity of services to our nation's veterans by permitting the VA's workforce to become vulnerable to undue political influence. If enacted, the proposals could set a precedent leading to change in other federal components that eviscerate important safeguards long intended to protect against the abuse and politicization of an impartial federal civil service.

It deserves noting from the start that ample authority exists under current law to permit federal departments and agencies to fully hold their employees accountable for misconduct or performance. The U.S. Merit Systems Protection Board's own review of its caseload in 2015 reveals that the Board upheld agency personnel actions (such as firings and demotions) 92 percent of the time.¹ This record clearly demonstrates that federal departments and agencies are fully capable of assuring employee accountability -- when they follow the constitutional, statutory and regulatory rules.

Sections 112, 113, and 121 of the legislative package overreach and are deeply flawed. Elements of these sections raise significant constitutional concerns, challenge longstanding civil service policy and create dangerous and detrimental precedent, as explained below.

Section 112 (e) and Involuntary Reassignment Abuse. This provision opens the door to misuse and abuse by political appointees of involuntary geographic reassignments of senior executive employees. Under current law, VA senior executives may appeal involuntary reassignments that result in a reduction of their pay. Under section 112(e), executives would lose any right of review of their reassignment, even if it resulted in the reduction of their market-set pay. No opportunity for review by the Merit Systems Protection Board or to a federal court would exist, nor would redress be available to the employee even if it later became publicly acknowledged that the involuntary reassignment was motivated for purely political reasons. Section 112(e) will undermine constitutional principles of due process, and undo political pressure at the expense of an impartial civil servant.

The right of a public employee to due process must be recognized when the loss of their livelihood is at

¹ Annual Report for FY 2015, Merit Systems Protection Board, February 2016,
<http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1275851&version=1280945&application=ACROBAT>.

stake. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court held that the Constitution guarantees that if there must be a cause to remove a public employee from his or her job, then there is automatically a due process requirement to establish that the cause has been met. This due process requirement has been applied by the Federal Judiciary and the Executive Branch to most federal employees, including those employed in the Department of Veterans Affairs. The abolishment of any right of review over actions like those contemplated by section 112(e) raises serious concerns and could set a dangerous precedent for the dismantlement of long-recognized civil service protections if applied to other government components.

Sections 113 and Limitations on Review of Removal of VA Senior Executives. Section 113 establishes an accelerated, 21-day process for firing a VA senior executive, with minimal opportunity for the employee to prepare an adequate response to the charges through the VA grievance process. No internal appeal to an independent, higher-level official within the VA is permitted, nor is any appeal to the independent Merit Systems Protection Board available, contrary to current law. Judicial review is permitted, but with the utmost deference to the agency's removal decision. If applied more broadly in the future to non-Senior Executive employees, this approach will establish an employment-at-will doctrine toward federal civil service employment, opening the door to partisan political abuse in myriad ways.

Section 121 and the Removal of VA Employees. Section 121 applies to all VA employees other than senior executives and imposes a minimal notice, response, and appeal timetable on employees subject to removal charges. Limiting the periods of notice and response to ten days apiece severely restricts any meaningful opportunity by the employee to respond to the charges and limits the time available to the agency to meaningfully consider the employee's response to the charges. Depriving employees of an adequate opportunity to understand the charges or prepare a defense threatens constitutionally-guaranteed due process protections. Besides this significant loss, there is relatively little the Department itself will gain through these time constraints. The Department of Veterans Affairs will still be required to prove its charges before these bodies, and appellants will still be able to assert affirmative defenses.

The standard for all performance is reduced to substantial evidence, only more than a mere scintilla of evidence, rather than substantial evidence for Chapter 43 performance based actions and preponderance of the evidence for Chapter 75 performance based actions. Currently, unless the Agency offers an employee an opportunity to improve through a performance improvement period or PIP, the Agency must prove its case by a preponderance of the evidence for performance cases. By broadly applying the substantial evidence standard, to all performance cases, an employee could be removed for alleged performance issues with minimal evidence and no opportunity to correct his or her performance. This reduced standard could be used to unfairly target and retaliate against employees.

Section 121 also requires the MSPB to expedite the appeals of VA employees and to hear them and render a final decision within 90 days. Reducing the processing time puts unreasonable and unnecessary restrictions on the Agency, Appellant, and Administrative Judges. There is insufficient time to engage in discovery, motions practice, or to secure the availability of witnesses. Additionally, even though the timelines are reduced, the Agency must still prove the charges against the employees. Under the reduced timelines of the 2014 Veterans Choice and Accountability Act applicable to SES employees, the Agency has been unable to meet its burdens and comply with discovery and other requirements, resulting in the inability to prove certain charges in some cases at the MSPB.

Furthermore, if this provision were enacted and applied to greater numbers of employees by the MSPB, the operational impact to the MSPB would be dramatic, as the agency itself has noted.² Congress has

² *Ibid.*

never required the MSPB to prioritize the adjudication of appeals from any one particular agency over another. Picking winners and losers in a neutral, federal adjudicative agency like the MSPB is patently disruptive. And it will result in obvious unfairness to non-DVA appellants, including whistleblowers, veterans, widowers and others.

Taken collectively, these ill-considered proposals undermine a merit-based federal civil service system that traditionally has sought to remain free from partisan political influence. Over a century ago, our nation operated under a “spoils system” in which government employment was directly linked to political affiliation and personal connections. Delivery of government services and benefits was too often associated with political affiliation and personal connections. In response, Congress passed the Pendleton Act in 1883 to establish a civil service system awarding employment on the basis of merit. The Civil Service Reform Act of 1978 further affirmed the recognition of merit-based principles and the balance of agency authority and employee rights and protections. Even today, more than 130 years later, the merit system principles of independence, competence and professionalism remain at the heart of government employment.³

Elimination of these protections will only increase the vulnerability of the federal workforce to manipulation by partisan politics, the political agenda of future Administrations, and personal favoritism. In turn, the government’s delivery of services to its citizens, will be compromised. Without attention to these concerns, our nation’s care and respect for its veterans will be unrightfully diminished. Thank you for your consideration of our concerns.

Sincerely,

Federal Aviation Administration Managers Association
Federal Managers Association
National Active and Retired Federal Employees Association
National Association of Government Employees
National Association of Letter Carriers
National Association of Postal Supervisors
National Council of Social Security Management Associations
National Weather Service Employees Organization
Organization of Professional Employees of the U.S. Department of Agriculture
Patent Office Professional Association
Professional Managers Association
Senior Executives Association

CC: Members of the Senate
The Honorable President Barack Obama
The Honorable Shaun Donovan, Director, Office of Management and Budget
The Honorable Beth Cobert, Acting Director, Office of Personnel Management
The Honorable Robert McDonald, Secretary, Department of Veterans Affairs
Members of the Leadership of the House of Representatives

³ “What is Due Process in Federal Civil Service Employment?” Merit Systems Protection Board, May 2015, <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT>.