



(February 3, 2016)

In order to further improve the lines of communication and to respond to the concerns between the National VA Council and you our members, I have established a National VA Council Briefing. This NVAC Briefing will bring you the latest news and developments within DVA and provide you with the current status of issues this Council is currently addressing. I believe that this NVAC Briefing will greatly enhance the way in which we communicate and the way in which we share new information, keeping you better informed.

Alma L. Lee
National VA Council, President

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**In This Briefing: Judge reinstates Philadelphia VA director**

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Philly.com reports

An administrative judge on Monday [reversed the Veterans Affairs Department's decision](#) to demote Diana Rubens from her position in the Senior Executive Service to a lower-paying and less high-profile job.

The decision in the case involving the former director of the Veterans Benefits Administration's Philadelphia office, comes just days after another Merit Systems Protection Board judge, in a separate case, [overturned the agency's decision to demote Kimberly Graves](#), former director of VBA's St. Paul, Minn., regional office. The two have been at the center of a controversy over the department's use of relocation incentives and reassignments of career senior executives, sparked by an [inspector general report](#) released in September.

VA Deputy Secretary Sloan Gibson [demoted Graves and Rubens formally on Jan. 6](#) from the SES to General Schedule jobs, and reassigned them to assistant director positions at the VBA's Houston and Phoenix regional offices, respectively. Those demotions came with pay cuts of more than \$50,000 each: [Rubens' annual salary](#) decreased from

\$181,497 to \$123,775, [Graves' annual salary](#) fell from \$176,558 to \$122,932. The official reason for demoting the two was "failure to exercise sound judgment."

The MSPB's decision to overturn the agency's punishment means Rubens and Graves will be reinstated to the SES, with back pay dating to Jan. 6. They also can recoup attorneys' fees from the VA.

Gibson will hold a conference call with reporters Tuesday afternoon to discuss the decisions.

The IG report had concluded the two [improperly helped create vacancies](#) at their respective offices and volunteered to fill them. The two employees occupying the Philadelphia and St. Paul director jobs at the time were relocated to jobs they did not volunteer for to make room for Rubens and Graves, who were working elsewhere at the time in positions with more responsibility, according to the watchdog. VA paid roughly \$274,000 in relocation expenses for Rubens, and about \$129,000 for Graves, for a total of more than \$400,000.

While the MSPB judges in both cases believed that Rubens and Graves helped create an appearance of impropriety by not recusing themselves from the discussions over reassigning SESers Robert Mckenrick and Antione Waller, they found no evidence that the two coerced or directed the reassignments to benefit themselves (the agency did not make the latter claim in the case). Moreover, the judges pointed out that several other high-ranking officials, including then-Principal Deputy Secretary for Benefits Danny Pummill; then-Undersecretary for Benefits Allison Hickey; Beth McCoy, deputy undersecretary for field operations; and then-Chief of Staff Jose Riojas, advanced and signed off on the relocation incentives and reassignments for all the players involved. The department did not punish any of those officials, so MSPB concluded that it was unfair to then demote Rubens and Graves.

"I find that there is a significant problem created by the inconsistent treatment of a comparable employee, and that this makes the penalty unreasonable under the circumstances," said the decision issued by Chief Administrative Judge William Boulden in the Rubens case.

Under the 2014 Veterans Access, Choice and Accountability Act, the VA can fire or demote SES employees immediately, with paychecks getting cut off the day of termination. The affected executive has seven days to issue an appeal to MSPB, which in turn has 21 days for an [expedited adjudication](#). The law says that MSPB is the final word in such cases.

VA's decision to demote and not fire Rubens and Graves added more tension to an already hot debate over firing in the federal government. Many lawmakers of both parties and other observers are frustrated with the department's inability to quickly shed poor performers or those engaged in misconduct. The 2014 Choice Act makes it easier for the department to fire and demote senior executives, but some believe VA isn't using the new authority adequately. (Department officials used that authority to

demote Rubens and Graves.) Critics of the expedited firing authority say it violates career employees' due process rights.

House Veterans' Affairs Committee Chairman Jeff Miller, R-Fla. -- one of the architects of the 2014 Choice Act -- was not happy about the decisions. "For the second time in less than a week, a judge prevented VA from disciplining an employee involved in a relocation scandal because of the department's refusal to hold accountable other workers linked to the same scandal," Miller said in a Feb. 1 statement. "Today's decision, along with a similar one last week, provides irrefutable proof of two facts: VA isn't consistently and fairly holding employees accountable and -- contrary to the repeated assertions of department officials -- VA leaders do not have the authority they need to swiftly discipline misbehaving employees."

VA Deputy Secretary Sloan Gibson has been emphatic about the importance of following due process and evidence in disciplinary actions against employees. During a Dec. 9 hearing before the House Veterans' Affairs Committee, he [defended his decision to demote and reassign](#) rather than fire Rubens and Graves. The evidence against the two did not warrant firing, or the IG's criminal referral to the Justice Department, Gibson argued.

"I'm not going to recommend, I'm not going to propose a disciplinary action that is based upon media coverage, or an opinion that is expressed in the IG report, if it is not supported by the evidence," he said, adding that he knew his decision not to fire Rubens and Graves wasn't going to "sit well, with virtually everybody."

Judge Boulden and Judge Michele Szary Schroeder, who decided the Graves case, both said they found Gibson's testimony particularly strong and credible. "It is apparent from the record in this matter that the VA was under political pressure to take action against Ms. Graves," said Schroeder in her decision. "Regardless, Deputy Secretary Gibson's testimony removes any doubt in my mind that he yielded to this pressure."

In the Rubens case, Gibson said he told Congress "that there was no evidence to support the notion that appellants' [Rubens] and Graves's reassignments to McKenrick's and Waller's former positions were 'improper or contrary to law,'" stated Boulden's decision. "He also confirmed in his testimony that he had stated to Congress that the OIG could not identify any law, rule, or regulation that was violated by the moving expenses paid to appellant or Graves. I note that he also stated to Congress that the gap between the rhetoric and the evidence in the report had created unreasonable expectations regarding possible future disciplinary actions."

