



(April 19, 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: Federal Times: How easy should it be to fire a fed?**  
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Department of Veterans Affairs Secretary Bob McDonald sat before a Senate committee on March 15 to lay out a slate of department goals and provide testimony on pending legislation.

But the central focus of McDonald's appearance that day was the same as it has been every day since he became secretary: to restore accountability to a department beset by scandal.

Indeed, McDonald's latest plan was one borne out of prolonged

battles of attrition to fire, or at least discipline, VA executives accused of wrongdoing — to shift them from Title 5 of the United States Code to Title 38.

“Under this system, employees in these senior health care positions would be hired more quickly, have flexible salary ranges to compete with the private sector, and be subject to disciplinary processes comparable to those now applicable to VA physicians and dentists, where appeals on disciplinary actions are adjudicated by the VA secretary as opposed to the Merit Systems Protection Board,” McDonald said in testimony.

The secretary’s proposal is the next move in a larger sustained struggle between accountability advocates and employee rights stalwarts to answer one central question: How easy should it be to fire a fed?

VA scandal as catalyst

Not long after the initial allegations hit the VA in 2014, Congress passed the Veterans Access, Choice and Accountability Act, giving the VA

secretary more powers to remove or demote senior executives for misconduct in an effort to police the quickly multiplying accusations of malfeasance.

The measure, which was signed into law on Aug. 7, 2014, allowed VA employees accused of misconduct to appeal the secretary's decision to the MSPB within seven days. The board, an agency tasked with hearing appeals to disciplinary actions, then had an expedited appeals process of 21 days to hear the filing and render a decision.

If an MSPB judge could not reach a decision within the three-week timeline, the VA's action would stand and could not be overturned. Likewise, if the employee didn't get their appeal into the MSPB within a week, the decision became final.

Jason Briefel, interim president of the Senior Executives Association — a nonprofit representing active and retired executives — said the result of legislation was intensified scrutiny on both the VA and senior executives, a vital

management group that has seen difficulty recruiting new talent into its ranks.

And while the current issues at the VA are a unique case study, they shine a broad spotlight on how agencies will handle accountability and how federal employees will navigate a climate of increased scrutiny in the future.

“The VA is somewhat of a microcosm for some of the challenges that I think the government is facing [in recruiting and retaining senior executives],” he said. “It appears that Congress has gotten away from that point in a time when there was bipartisan support for the workforce itself at that agency, because they knew that having a competent and talented, well-trained workforce there would ultimately benefit veterans.”

After the VA scandals in 2014, Congress passed the Veterans Access, Choice and Accountability Act to give the VA secretary more power to remove senior executives for misconduct.

A war of appeals

Another byproduct of the legislation was a strong rampart of MSPB rulings that repeatedly

upended the VA's efforts to discipline executives it accused of poor leadership or illegal activity.

Most notably, the MSPB overturned three cases where it ruled the VA's punishment of executives went too far. The department sought to demote two Veteran Benefits Administration officials after an inspector general's report claimed they had criminally used their positions for personal gain.

Diana Rubens and Kimberly Graves were two senior executives within the VBA who sought positions of less responsibility in regional VA offices, but because of pay grade rules, they were allowed to keep their original salaries. The pair also used a relocation program for federal employees that paid them a combined \$417,000 in new home compensation to make the move.

Following the IG's call for criminal charges, the VA opted for demoting the pair rather than firing them, with Deputy Secretary Sloan Gibson saying that the evidence showed

mismanagement more than criminal activity. But the MSPB overturned the demotions, noting that the punishment was not congruent with other penalties for similar offenses.

While Rubens and Graves were reinstated, VA officials recommended a 10 percent pay cut and suspended VBA chief Danny Pummill for 15 days for a “lack of oversight” in the incident on March 22.

In another case, the VA fired the director of a department medical center in Albany N.Y., for failure “take timely action” against an employee accused of physical and verbal abuse toward veterans in her care. The hospital chief, Linda Weiss, appealed to the MSPB, who found that despite evidence of misconduct, that the VA’s firing was an excessive penalty and overturned it.

MSPB's decisions have not lacked push back. Gibson said in a Feb. 17 letter to House and Senate committees on Veterans Affairs that the MSPB ruling in the Albany case was invalid because it was filed outside of the 21-day window, making

Weiss' firing final. And Rep. Jeff Miller, R-Fla., chairman of the House Committee on Veterans' Affairs and a critic of the MSPB, said its recent rulings show a bias toward employees that are failing to fulfill their duties.

"I think we are reminded almost every day that the civil service system, as it is currently designed, coddles and protects incompetent and possibly corrupt employees from any type of accountability," he said.

In defending its decisions, MSPB released a Feb. 11 statement on its website, calling accusations that it was protecting poor performers "baseless and unfair."

Title 5 vs. Title 38

The current battles for accountability don't only extend between the VA and MSPB, but also between the House and Senate, where authors of competing reform legislation are jockeying to get their bills in an omnibus package set to come to the floor by Memorial Day.

Sen. Richard Blumenthal, D-Conn.; Sen. Marco Rubio, R-

Fla.; and Miller have all authored bills to give McDonald more power to remove executives, but which bill will be included in a massive reform package being spearheaded by Senate Committee chair Johnny Isakson, R-Ga., is a matter of debate.

The VA secretary's plan is a shift in the employment statutes that govern the VA's executives. Under Title 5 of the U.S. Code, employees charged with wrongdoing may request an appeal to the MSPB board. By moving VA executives to Title 38 — which already applies to VA physicians — the department could sidestep the MSPB entirely and defer appeals to its internal Disciplinary Appeals Board.

But Miller said he is skeptical that such a move would affect real change at the VA, or if it can even become law.

"I know the White House is opposed to the secretary's suggestion," Miller said. "There's nothing in the VA's proposal that would change the disciplinary process for those who VA is currently trying to discipline in

Phoenix or Cincinnati or any of the countless rank-and-file employees that it has problems with across the country.”

Briefel also has problems with the proposed Title 38 shift, but inversely from Miller. He said the move would all but negate decades of employee rights in favor of making it easier for heads to roll.

“Now it seems that the pendulum has swung to the point where we say, ‘Well, damn all of the employees, damn all of the executives. We’ll fire our way to excellence.’”

Rubio and Miller penned a March 31 letter to Isakson asking him to consider their bills in an omnibus package. Both bills give MSPB 45 days to rule on an appeal, but removes pay and benefits while the appeal is being heard for terminated employees and pays demoted employees a demoted rate.

McDonald’s plan has also moved forward in a draft bill, which he submitted to Congress on March 23.

From micro to macro

The struggle of how to apply accountability to the VA has centered on the smallest of slivers within the federal workforce, but discussions have inexplicably dominated Secretary McDonald's tenure and mobilized stakeholders on both sides of the argument.

One reason for that is the repercussions could ripple out broadly to other agencies when accountability issues arise.

"This is only dealing with 0.014 percent of the 340,000 VA employees," Miller said. "It doesn't get to the root of the issue, which is the need to hold poor performing or non-performing federal employees accountable."

Title 5 statutes outside of the VA allow employees to have 20 days to file an appeal. Appellants can beat the department's decision if they can show there was harmful error in the application of the department's procedures in arriving at its decision, the decision was based on a prohibited personnel practice, or the decision was not in accordance with law.

Briefel said that process has provided federal workers with valuable protections. The real issue of accountability, he said, is the operational challenges for senior executives in an environment where they are facing greater political scrutiny with little incentives for mission success.

“Title 5 is not broken,” he said. “The authorities that exist in Title 5 for both compensating executives as well as holding them accountable, all of those pieces are in place. It’s much more of an issue of implementation and execution of those authorities and willingness of the agency leadership to use those authorities that’s at issue.”

With shrinking budgets and a political environment that relies on a propensity to punish, Briefel said that there’s little attraction for strong leaders to want to become senior executives.

But Miller said that pitched battles in the VA have shown there is no easy road to accountability.

“Ronald Reagan used to say the only thing close to forever is a

federal program, and I guess
you can say the only thing closer
to forever would be federal
employment.”