CONGRESSIONAL TESTIMONY

STATEMENT FOR THE RECORD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PROVIDED TO THE

SENATE COMMITTEE ON VETERANS' AFFAIRS

HEARING ON

PENDING LEGISLATION

MAY 22, 2019

Chairman Isakson, Ranking Member Tester, and Members of the Committee,

The American Federation of Government Employees, AFL-CIO and its National Veterans Affairs Council (AFGE) appreciates the opportunity to submit a statement for the record on the bills before the Committee today. AFGE represents more than 700,000 federal and District of Columbia government employees, 260,000 of whom are proud VA employees. In our comments on bills before the Committee today, we will discuss how these proposed bills will impact the frontline workforce and the veterans they serve every day. We appreciate your serious consideration of our recommendations, and we stand ready to work with the Members of the Committee to make adequate changes as highlighted in this statement.

S.123, Ensuring Quality for Our Veterans Act

S. 123, the "Ensuring Quality for Our Veterans Act," would allow the Secretary to enter into contracts with third party oversight providers in order to review non-VA healthcare providers whose license was terminated for cause by a state licensing board. AFGE has said for years that when a veteran receives care outside of the VA there is little accountability when it comes to private providers and the quality of care. However, there is an egregious double standard whereby outside providers are not held to the same quality and timeliness standards as the in-house VA workforce. The solution to this problem is not entering into agreements with more contractors. The VA has several oversight and investigative bodies comprised of career VA employees who understand the department and the needs of veterans. The VA is also the entity which enters into agreements with non-VA providers in the "community" who provide care to veterans. As such, the VA should be responsible for providing oversight of non-VA providers, as well as serve as the point of contact for veterans if it is found that they received substandard care or saw a problematic provider.

AFGE does not think that contractors should "police" other contractors providing care to veterans, and it is for this reason that we oppose this legislation.

S.221, Department of Veterans Affairs Provider Accountability Act

S. 221, the "Department of Veterans Affairs Provider Accountability Act," would significantly expand existing requirements for reporting VA medical personnel to the National Practitioner Data Bank (NPDB) and state licensing boards to include minor infractions unrelated to patient care. This bill would also drastically restrict the rights of every VA employee working at medical facilities, benefits offices and VA cemeteries including thousands of low-wage, service-connected disabled veterans, to enter into settlement agreements involving their personnel files in matters completely unrelated to patient care.

Reporting to the NPDB and state licensing boards

Section 2(a) of S. 221 would require the Under Secretary to report every adverse action taken against a Title 38 employee appointed under Section 7401(1) to the National Practitioner Data Bank (NPDB) and applicable state licensing board. This reporting requirement would affect every VA physician, dentist, registered nurse, physician assistant, podiatrist, optometrist, chiropractor, and expanded-function dental auxiliary.

These proposed reporting requirements would apply regardless of how minor the infraction or if the infraction was completely unrelated to patient care. This is because the bill requires the reporting of every "major adverse action" which is defined by 38 USC 7461 as every suspension, every transfer,

and every demotion as well as termination. In contrast, the NPDB already maintains reports on medical malpractice payments, licensure actions, loss of clinical privileges, health-care related criminal convictions and civil judgments, exclusions from Medicare, and other adjudicated actions.[1]

These proposed requirements also directly contradict current VHA policy (Handbook 1100.17) that only requires VHA to file a report with the NPDB if a payment was made as the result of a settlement or judgment of a claim of medical malpractice or an adverse clinical privileges action that affects privileges for more than 30 calendar days (Section 3 of Handbook 1100.17).

AFGE strongly supports accountability for actions that adversely impact patient care. However, neither VA health care accountability nor the objectives of the NPDB and state licensing boards are well served by requiring reports of minor infractions such as a resident's failure to turn in notes to the proper supervisor-physician or a two-day lapse in a nurse's license due to lost paperwork at the licensing board. Such extreme reporting requirements will also greatly undermine the VA's ability to compete with other health care employers in the recruitment and retention of medical professionals in short supply who would not face these threats to their careers in other workplaces.

Therefore, AFGE requests the following change to Section 2(a) of the bill:

Limit reporting in section (a) to "major adverse actions involving payments made as the result of a settlement or judgement of a claim of medical malpractice or a major adverse action that affects privileges for more than 30 calendar days".

Restricting the ability of every VA employee to clear his personnel file through a settlement agreement.

Section 2(b) of this bill contains two prohibitions. The first would no longer allow any VA employee to enter into a settlement agreement that would conceal a serious medical error. Second, it would prohibit any VA employee from entering into a settlement agreement that purges a negative record from the employee's personnel file, even when there is no issue related to patient care.

The Merit System Protection Board recognizes the ability to include "clean record agreements" in settlements as a highly efficient form of resolving personnel matters (See *Clear Record Agreements and the Law*, MSPB, December 2013). Opponents of federal workplace rights have made repeated attempts in past Congresses to pass legislation to eliminate the rights of VA employees and employees of other agencies facing termination to enter into settlement agreements that clear their personnel files.

Section 2(b) of this bill is a backdoor attempt to severely weaken this commonsense workplace right under the guise of health care accountability and patient care. This bill as currently drafted would also restrict the rights of employees of the National Cemetery Administration, Veterans Benefits Administration and employees of the Veterans Health Administration who do not provide direct patient care.

Therefore, AFGE requests the following change to Section 2(b) of the bill:

[1] https://www.npdb.hrsa.gov/hcorg/whatYouMustReportToTheDataBank.jsp

Limit the "personnel/settlement file" provision in section (b) to pure 7401(1) employees and limit the type of negative record to "a negative record related to professional conduct or competence."

In summary, AFGE opposes S. 221 in its current form and looks forward to working with the Committee to address these concerns.

S.318, VA Newborn Emergency Treatment Act

AFGE takes no position on this piece of legislation.

S.450, Veterans Improved Access and Care Act of 2019

AFGE takes no position on this piece of legislation.

S.514, Deborah Sampson Act

S. 514, the "Deborah Sampson Act," is the culmination of many years of advocacy from members of the Veteran Service Organization (VSO) community. At the heart of this legislation is a directive that the VA address one of the fastest growing cohorts in the veteran community: female veterans. This legislation would take several steps toward making the VA more inclusive and responsive to the unique needs of female veterans. Among the proposals in the legislation, S. 514 would create a "mini-residency" program for primary and emergency care providers centering around female veteran health, provide reintegration and adjustment assistance, expand maternity services for female veterans giving birth at a VA, and ensure each facility is staffed with at least one provider who specializes in women's health.

AFGE commends the work the VSOs have done on this legislation and hopes to see more women go to the VA to receive the care they have earned. The VA provides world class, veteran-centric care that is unlike anything available in the private sector, and this legislation would go a long way to make sure all veterans – especially women – have the same opportunity to receive these benefits at their local VA.

Similarly, we hope that the Administration will take this legislation as a serious first step to increase VA's internal staffing. In order to meet the needs of the veteran population and to adequately care for all veterans the VA must be fully staffed. We would be remiss if we did not mention that out of the nearly 50,000 vacancies systemwide at the VA, approximately 43,000 of those are in the Veterans Health Administration (VHA).

The intent of this legislation is clear – provide greater access to the VA for female veterans. The Administration should not use this call for greater access as a way to ship more care to the private sector.

AFGE supports this legislation and looks forward to seeing Congress pass this bill with funding for additional hiring, and honor all of those who have borne the battle.

S.524, Department of Veterans Affairs Tribal Advisory Committee Act of 2019

S. 524, the "Department of Veterans Affairs Tribal Advisory Committee Act of 2019," would require the VA Secretary to establish an advisory committee to provide advice and guidance on matters relating to Indian tribes, tribal organizations and Native American veterans. AFGE thanks Ranking

Member Tester (D-MT) for introducing this legislation and seeking broad participation on this proposed advisory committee.

AFGE represents employees of the Indian Health Service (IHS) including many veterans. AFGE plays an important role in safeguarding the rights and working conditions of frontline IHS employees who see firsthand management practices that may undermine the agency's mission. Therefore, AFGE urges the inclusion of current federal employees as voting Committee members of the advisory committee under this bill. AFGE believes that an employee designee can play a valuable role both as a voting member and as a meeting attendee.

AFGE cannot support this bill if employees are not provided a meaningful role on the advisory committee as stated above.

S.711, The Care and Readiness Enhancement (CARE) for Reservists Act of 2019

S. 711, the "Care and Readiness Enhancement for Reservists Act of 2019," or the "CARE for Reservists Act of 2019," would increase the eligibility of National Guardsmen and Reservists to receive mental healthcare within the VA. AFGE is both proud to represent the dedicated employees who provide high quality mental healthcare at the VA and supports all members of the armed services receiving that healthcare within the VA, with National Guardsmen and Reservists being no exception. AFGE applauds the efforts of Senator Tester (D-MT) and Senator Moran (R-KS) to extend eligibility to receive mental healthcare to veterans who were previously excluded. AFGE also wants to take this opportunity to remind Members of the Committee that this change would increase demand for mental healthcare at the VA, and AFGE encourages you to continue to ask why the VA has failed to fill nearly 50,000 vacancies, including those related to providing mental healthcare and processing those claims.

AFGE supports S. 711.

S.785, Commander John Scott Hannon Veterans Mental Health Care Improvement Act of 2019

S. 785, the "Commander John Scott Hannon Veterans Mental Health Care Improvement Act of 2019," aims to improve VA mental health services. AFGE's comments on this bill are limited to Title V of the bill, Medical Workforce and Title VI of the bill, Improvement of Telehealth Services.

VA psychologists are currently in the Hybrid Title 38 personnel system that applies a mix of Title 5 and Title 38 personnel rules. As a result, they have full Title 5 bargaining rights, earn pay under the Title 5 GS system, but are covered by the Title 38 hiring and promotion processes that are subject to full VA Secretary discretion.

This bill proposes to move VA psychologists from the 38 USC 7401(3) "hybrid" appointment group to the 38 US 7401(1) appointment group that covers physicians, registered nurses (RN) and other Title 38 clinicians. The proponents of this change assert that VA psychologists will receive higher pay and greater professional respect. Neither benefit is certain.

However, what is certain is that this change will vastly reduce the collective bargaining rights of VA psychologists. Their bargaining rights will be defined by 38 USC 7422 ("7422") instead of 5 USC 7114 and as a result, they will no longer be able to grieve over pay errors, assignments, schedules and other routine working conditions.

AFGE has fought for more than a decade to secure legislation to restore full bargaining rights to Title 38 clinicians and greatly appreciates the leadership of Senator Sherrod Brown (D-OH) for introducing S. 462. This is also a fight for veterans and the future of the VA health care system in the face of severe privatization threats. Unequal bargaining rights and the silencing of frontline clinicians have devastated workplace morale and severely limited the ability of the VA to recruit and retain medical providers. If the VA cannot maintain a strong workforce of physicians, RNs, other clinicians and now, psychologists, the vacancies will worsen, and VA funding will continue to go from the VA into the private sector.

With regard to pay, there is simply not enough evidence that this personnel system change will make psychologists better off. If this bill becomes law, psychologist pay will be based on three tiers: base pay (a national pay table), market pay (set at each facility) and performance pay (also set at the facility). Therefore, like physicians, dentists and podiatrists, market and performance pay will be completely subject to the discretion of managers.

In addition, there has not been an adequate study of how local market forces will impact psychologist market pay. Podiatrists were recently added to this pay group and are widely dissatisfied with their new pay rates.

AFGE has advocated for years to make the market pay system fairer for frontline physicians and dentists. The VA blocks virtually all AFGE pay grievances by using "7422," claiming any aspect of pay is not negotiable, even when managers utilize unfair market pay setting processes that apply the wrong market data or when they refuse to provide any market pay adjustments.

The VA also blocks the union's challenges to management performance determinations with "7422." Performance pay criteria are often delayed and inappropriate; in other cases, management's measures of performance are inconsistent, resulting in pay of only nominal awards or claims there is no money for any award.

As far as professional respect, many of our members would disagree that joining the same personnel system as physicians is a guarantee of greater professional respect for psychologists. AFGE would be happy to share the views of frontline psychologists on all of these matters.

Therefore, AFGE opposes Section 501(a) as currently drafted. AFGE strongly urges the Committee to remove Section 501(a) from the bill and instead, undertake a study of the impact of this proposed personnel change that considers the input of frontline psychologists and their employee representatives.

AFGE also strongly opposes Section 501(b) that would include psychologists in the list of positions that can be contracted out. The VA has approximately 43,000 health care vacancies. The VA is a few weeks away from implementation of the Mission Act, which AFGE believes will inevitably expand the amount of private care provided to veterans.

AFGE urges the Committee to strike section 501(b) from the bill.

Sections 502 and 503 of the bill would develop staffing plans for mental health professionals. Staffing plans will only be truly effective if the input of frontline mental health professionals and their employee representatives is considered. AFGE urges the Committee to include the same language that is in Section 521(a) of the bill: "include a means for ensuring employee involvement (for bargaining unit employees, through their exclusive representatives)."

Section 508 would mandate a study of alternative work schedules (AWS) for VHA employees. AWS is a critical staffing tool and AFGE supports it fully. In order to ensure that it is offered in the most effective and equitable way, the input of frontline employees and their employee representatives is essential. Again, AFGE strongly urges inclusion of the following language: "include a means for ensuring employee involvement (for bargaining unit employees, through their exclusive representatives.)"

AFGE opposes Section 521 of the bill. AFGE believes that this provision as unnecessary. VHA already has enormous flexibility in hiring under Title 38 and that it possesses many hiring and retention tools that are underutilized including the pay incentives already mentioned with regard to Section 501(a) of the bill. It should also be noted that Chapter 33 does not apply to Title 38 under current law.

Therefore, AFGE opposes Sec. 521.

Section 601 of the bill would authorize partnerships between the VA and non-VA organizations to expand VA's telehealth capabilities. AFGE strongly opposes this section. VA is a national leader in telehealth. The cornerstone of VA telework is the ability to reach all geographic areas where veterans reside. There is no justification for contracting out any VA telehealth.

In summary, AFGE cannot support S.785 in its current form. We hope to work with the Committee to address our stated concerns.

S.805, Veteran Debt Fairness Act of 2019

AFGE takes no position on this piece of legislation.

S.850, Highly Rural veteran Transportation Program Extension Act

AFGE takes no position on this piece of legislation.

S.857, A bill to amend title 38, United States Code, to increase the amount of special pension for Medal of Honor recipients, and for other purposes

AFGE takes no position on this piece of legislation.

S.980, Homeless Veterans Prevention Act of 2019

S. 980, the "Homeless Veterans Prevention Act of 2019," amends Title 38 to allow for the improvement of services for homeless veterans. This legislation would allow monetary benefits to be given to caregivers of homeless veterans, provide greater access to legal services, expand access to dental care, provide counseling services to transitioning veterans who are at risk of homelessness, and give financial assistance to very low-income veterans and their families. This bipartisan legislation has a noble goal and purpose; if there is even one veteran homeless in our country that is one homeless veteran too many. AFGE applauds the introduction of this legislation and hopes that the bill advances quickly for a vote before the Chamber.

S.1101, The Better Examiner Standards and Transparency for Veteran Act of 2019

S. 1101, the "Better Examiner Standards and Transparency for Veterans Act of 2019," or the "BEST for Vets Act of 2019," is designed "[t]o ensure that only licensed health care providers furnish disability examinations under a certain Department of Veterans Affairs pilot program for use of contract physicians for disability examinations." According to Senator Rubio (R-FL), "This bill closes [a] loophole and ensures that only health care providers who meet the VA's requirements are able to treat our service men and women." While AFGE agrees that "only health care providers who meet the VA's requirements" should treat veterans, AFGE would like to point out the fact that this is another example of the overuse of contract providers who in many cases provide sub-standard services compared to services provided by the VA. This bill also raises the broader question of why the VA has vastly increased the use of contractors to conduct compensation and pension exams (C&P).

AFGE would like to highlight last year's GAO report titled "VA DISABILITY EXAMS: Improved Performance Analysis and Training Oversight Needed for Contracted Exams."[2] AFGE was not surprised by the GAO finding that "VBA reported that almost all contractors missed VBA's quality target of 92 percent in the first half of calendar year 2017."[3] Additionally, it is concerning that the GAO reports that "VBA's lack of reliable data on the status of exams, including insufficient exams—exam reports that VBA returns to contractors to be corrected or clarified—limits its ability to effectively oversee certain contract provisions."[4] Moreover, it is unacceptable that "VBA relies on contractors to verify that their examiners complete required training, […] VBA does not review contractors' self-reported training reports for accuracy or request supporting documentation, such as training certificates, from contractors."[5]

AFGE has the strongly held belief that veterans' medicine is a specialty all its own, and that contractors should have the same experience, training, and familiarity with veterans' unique needs as VA clinicians who spend years exclusively treating veterans. Surely, that is what is "BEST for Vets."

AFGE opposes S. 1101.

S. 1154, Department of Veterans Affairs Electronic Health Record Advisory Committee Act

S. 1154 would establish an advisory committee of experts and stakeholders to provide guidance regarding implementation of a new VA electronic health record system.

AFGE commends Ranking Member Tester (D-MT) for seeking broad input into this major health care technology undertaking. AFGE members are also stakeholders who possess valuable expertise as users of the existing electronic health care record system. AFGE is very proud of the important role that the union played in implementation of the VA's first electronic health record through ongoing labor-management cooperation supported and encouraged by former Under Secretary of Health Dr. Kenneth Kizer.

AFGE is not able to support the bill as currently drafted. However, we would fully endorse the bill if Section 2(a) was amended to add a new subsection to 38 USC 7330(D) that includes two individuals appointed by the union, one of whom is a veteran enrolled in the VA healthcare system.

[2] U.S. Gov't Accountability Office, GAO-19-13, "VA DISABILITY EXAMS: Improved Performance Analysis and Training Oversight Needed for Contracted Exams (October 12, 2018).

[3] *Id*. at 11.

[4] *Id*. at 20.

[5] *Id*. at 24.

The Janey Ensminger Act of 2019

The Janey Ensminger Act of 2019 would amend the Public Health Service Act by expanding the number of specific illnesses and conditions the VA will cover for veterans and their families related to toxic substance exposure while stationed at Camp Lejeune, North Carolina between 1953 and 1987. AFGE agrees that all veterans should receive the treatment they need as a result of their military service and is proud to represent the employees who both treat these veterans and process their claims to ensure they get the care they need. AFGE applauds Senator Burr for introducing this legislation and trying to rectify some of the many wrongs caused by the Camp Lejeune contaminated water exposure (Camp Lejeune claims).

As the Committee considers this legislation and its possible implementation, AFGE would like to raise two specific points for its consideration. First, with the number of veterans continuing to grow, and more medical conditions of the past potentially being covered by the VA, including both Camp Lejeune claims and Blue Water Navy Veterans, AFGE hopes the committee works to increase both the number of employees working within the VA to process claims and treat veterans, as well as make sure veterans continue to receive their benefits and other essential services as quickly as possible.

Second, like all VA compensation claims, Camp Lejeune claims go through a process where they are evaluated by both Veteran Service Representatives (VSRs) and Rating Veteran Service Representatives (RVSRs) within the Veterans Benefits Administration (VBA) to ensure that veterans get the benefits they have earned. While all claims go through a similar process, different types of claims require different amounts of attention and time based on their complexity. Relative to other claims, Camp Lejeune claims can be highly labor intensive and require specialized attention.

Camp Lejeune claims can take significantly more time to process than most claims. In particular it takes more time to gather evidence for these claims both because of the significant amount of time that has elapsed since the period of Camp Lejeune contaminated water exposure and the specificity of evidence required to corroborate an entitlement to benefits. However, as a result of existing VBA performance standards, VBA does not adequately consider the complex nature of claims handled by VSRs and RVSRs. As a result, VSRs and RVSRs have been unfairly penalized for handling claims that take additional time. While VSRs and RVSRs are qualified and capable of processing these claims, the system of evaluating these employees should take into account the complexity of Camp Lejeune claims and the time and attention needed to accurately process and evaluate them for the benefit of both employees and the veterans they serve.

In turn, as the Committee considers the Janey Ensminger Act of 2019, and its eventual implementation, AFGE urges the Committee and VBA to consider steps to rectify the system of evaluating VSR and RVSR performance, particularly for labor intensive and complex claims. Specifically, AFGE urges the Committee and VBA to appropriately adjust the performance standards to reflect the complexity of cases reviewed and processed by VSRs and RVSRs. Those adjustments should be reestablished for the benefit of both VBA employees and the veterans they serve.

AFGE supports The Janey Ensminger Act of 2019.

S. __ Educational Assistance

AFGE takes no position on this draft legislation.