

AFGE



J. David Cox, Sr.
National President

Augusta Y. Thomas
NVP for Women & Fair Practices

October 3, 2017

Chairman Johnny Isakson
U.S. Senate Committee on Veterans' Affairs
412 Russell Senate Office Building
Washington, D.C. 20510-6050

Ranking Member Jon Tester
U.S. Senate Committee on Veterans' Affairs
825A Hart Senate Office Building
Washington, D.C. 20510-6050

Dear Chairman Isakson and Ranking Member Tester,

I write to you today on the matter of Cheryl Mason's nomination as chairman of the Board of Veterans' Appeals. The American Federation of Government Employees, AFL-CIO (AFGE) and its National VA Council represent more than 700,000 employees in the federal and D.C. government including 250,000 front line employees at the Department of Veterans Affairs who provide vital care and services for our veterans. This includes serving as the exclusive representation of the approximately 700 attorneys who work for the Board of Veterans' Appeals and will serve under the leadership of Ms. Mason, should she be confirmed.

AFGE and its National VA Council do not take a position on Ms. Mason's nomination to Chair the Board of Veterans' Appeals. However, AFGE is deeply concerned about new performance standards for the Board's attorneys that are scheduled to go into effect on October 16, 2017, and the negative impact these new standards will have on attorneys' ability to perform their duties. AFGE is also deeply concerned that this change in performance standards was made without completion of the bargaining process, which is prohibited. AFGE would like to know Ms. Mason's position on these new performance standards, and how she plans to work collaboratively with AFGE to address concerns about performance standards, new attorney training, inadequate systems including the Veterans Benefits Management System (VBMS), equipment, and office space that were raised by AFGE Local 17 President Douglas E. Massie on September 11, 2017 in a letter to Secretary David J. Shulkin.

Under the previous standard, attorneys were expected to complete 125 cases in a calendar year. Based on the new standards scheduled to go into effect later this month, Board attorneys would be expected to complete 169 cases a year, which is a 33% increase from the previous standard. This increase in production is being proposed despite that in previous years, smaller increases in quotas were later withdrawn or reduced because they were found to be unreasonable and had an overall negative impact on the Board's mission. In turn, there is a strong likelihood that there is a significant number of attorneys who meet the current standard but would fail to meet the new standard, and would either face termination or resign in lieu of termination.

This depletion of the workforce would further impede the ability of the Board of Veterans' Appeals to process its caseload, exacerbate a backlog of cases that already exceeds 150,000, and delay veterans having their cases resolved. This is especially relevant when the Board considers how it will backfill these positions, as it takes at least a year for a board attorney to become proficient in processing cases, and several years to truly master the requisite skill set. These personnel losses would weaken the Board's ability to fulfill its overarching mission of supporting veterans and accurately resolving their claims.

Therefore, AFGE asks the committee to ensure that any future Board Chairman commit to work collaboratively with AFGE to address performance standards, and achieve a reasonable set of standards for Board of Veterans' Appeals attorneys that best serves veterans' needs for quality and efficiency.

I respectfully request that this letter, and the attached letter from Doug Massie, President of AFGE Local 17 be submitted for the record.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. S. Kahn', written in a cursive style.

Thomas S. Kahn
Director, Legislative Affairs
American Federation of Government Employees, AFL-CIO

Douglas E. Massey, Esq.
Board of Veterans' Appeals
Department of Veterans Affairs
(202) 361-3017

September 11, 2017

Dear Secretary Shulkin:

We the undersigned employees of the Board of Veterans' Appeals (Board) submit this declaration of our loss of confidence in the current leadership of the Board. The Board has been grossly mismanaged since the departure of Executive-in-Charge (EIC) Carol DiBattiste in January 2017, which is undermining our ability to fulfill the Board's statutory mission of deciding appeals in a timely manner based on a review of the entire record. We therefore petition the Secretary of the Department of Veterans Affairs to replace the current leadership in order to restore the integrity of the Board for our nation's Veterans.

An award of service connection by the Board entitles a Veteran access to free health care and compensation benefits. Claims for increased ratings, education benefits, death benefits, and pension benefits are also important entitlements under the Board's jurisdiction. Unfortunately, several senior officials are undermining our ability to fulfill the Board's statutory mission of properly adjudicating these appeals. Gross mismanagement by senior officials is reflected by their plan to effectively eliminate *de novo* review, their failure to adequately train hundreds of new attorneys, and their refusal to provide the necessary systems and equipment necessary to do our jobs. As a result, Veterans are receiving inaccurate decisions and waiting longer for health care and compensation benefits to which they are entitled. We find this unacceptable.

The law requires the Board to decide appeals based on a *de novo* review of the record.¹ The *de novo* standard of review is essential because many claims for VA benefits are incorrectly denied at the regional offices. Reviewing the entire record, therefore, ensures accuracy. EIC David Spickler, however, is intent on interfering with our ability to review the entire record by imposing a production quota on attorneys he knows is unattainable unless *de novo* review is abandoned. In effect, EIC Spickler will render the Board meaningless. The result will be a short-term, artificial increase in the Board's overall output in an effort to maintain EIC Spickler's position at the expense of the Board's integrity and the Veterans we serve. In the long-run, this shortsighted policy will only increase the Board's backlog because inaccurate decisions result in more unnecessary remands to the regional offices and appeals to U.S. Court of Appeals for Veterans Claims, many of which will come back to the Board for additional review.

Senior officials have further undermined our ability to fulfill the Board's mission by inadequately training 300 new attorneys hired in the past year. Comprehensive training is essential because attorneys must apply rapidly changing regulations, statutes, and case law to complex medical issues. Former Chief Judge Constance Tobias estimated that training a new attorney costs approximately \$100,000. Therefore, investing in a new attorney through

¹ Final decisions on such appeals are made by the Board based on the entire record in the proceeding and upon consideration of all evidence and applicable provisions of law and regulation. 38 U.S.C. §7104(a).

comprehensive training is essential to fulfilling the Board's mission and protecting taxpayers' money. The Board's current leadership, though, is failing in this regard.

Training a new attorney traditionally involved being assigned an experienced attorney (GS14) as a mentor for six months. The mentor would answer any questions, provide sample decisions, and review and edit the new attorney's draft decisions. Classes on various aspects of VA law were also offered. The mentor would often spend at least 20 hours per week training the new attorney for the first three months. This system was effective but has been replaced because senior officials do not want to take experienced attorneys away from producing their own decisions.

The result of this shortsighted approach is an abysmal training program in which quite a number of new attorneys are unable to draft legally sufficient draft decisions. One new attorney, a fifteen-year Veteran of the Army's Judge Advocate General's (JAG) Corps, said he had no hesitation signing the Loss of Confidence Statement because the training program is "nonexistent" and that he had better working-conditions while serving in the desert. Moreover, Judges are now complaining that draft decisions submitted by new attorneys are legally insufficient. Judges are faced with the dilemma of wasting their precious time editing these inadequate decisions or signing them. The Board has yet to release information on the number of new attorneys who have left the Board, either voluntarily or involuntarily, but many believe the number is high. Once again, shortsightedness is undermining the Board's integrity and wasting millions of dollars of taxpayers' money at the expense of Veterans.

These problems are compounded by the Board's failure to provide adequate office space for both new and senior attorneys. New attorneys are crammed into small workstations in overcrowded, noisy offices. In addition, over 100 senior attorneys were recently relocated from the Board's offices, located at 425 I Street, NW, to 1722 I Street NW, where they were unable to work. A Senior Executive at the Board mismanaged the entire process to the detriment of employees and the Veterans we serve. The Senior Executive initially created mass confusion by his inability to compile an accurate list of the attorneys moving to 1722 I Street. The Senior Executive then failed to issue security cards necessary to permit access to the fourth floor where their offices are located; and when attorneys were escorted to the fourth floor by security, they were unable to enter their offices because the Senior Executive failed to provide the four-digit security code to unlock the door. Unable to get to their desks, attorneys lost valuable time and simply went home. When attorneys were finally issued security cards and given the access code, many were unable to access the system. The Senior Executive also refused to provide telephones; ergonomic keyboards to those who needed them; and a copy of the current version of Title 38 CFR and Title 38 of USCA, both of which are required for attorneys to adjudicate appeals.

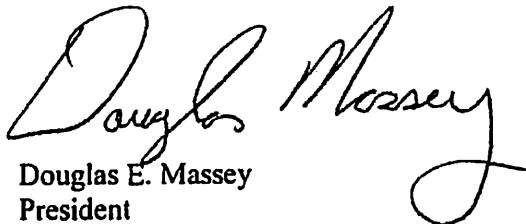
Poor planning by this Senior Executive is also putting Veterans' personal identifying information (PII) and personal health information (PHI) at risk. Employees asked the Senior Executive to provide locked shredder bins at the new location, which are generously located on all floors the Board occupies at 425 I Street. These bins are not for our convenience but are required pursuant to VA Directive 1605.01 (VA employees must "destroy all documents containing PHI when no longer needed in accordance with VA Directive 6371"). In violation of this VA Directive, however, the Senior Executive refused to place a single shredder bin at the new location. His

lack of respect for Veterans' PII and PHI is deeply troubling.

Furthermore, nothing has done more to impede the Board's productivity than the paperless system known as VBMS (Veterans Benefits Management System). Senior officials are well aware that VBMS is frequently unavailable and highly inefficient, requiring twice as much time to review a file than a paper file. The Board is currently working on a new system to replace VBMS, but attorneys who participated in a recent pilot program believe the improvements will be marginal. EIC Spickler's solution is to increase our quota, despite having acknowledged that the quota is unreasonable, unrealistic, and unattainable, requiring attorneys to submit legally insufficient decisions while working unauthorized overtime in order to avoid being fired. As a result, Veterans will not have their appeals decided under the required *de novo* standard to which they are entitled.

In an email issued on July 31, 2017, EIC Spickler notified all attorneys and Judges that it is now easier to remove employees for poor performance under the VA Accountability and Whistleblower Protection Act. Attorneys and Judges are outraged at this irony, as EIC Spickler, the Senior Executive in charge of office space, and several other senior officials have grossly mismanaged the Board by proposing to increase the quota to an unattainable level, thereby interfering with *de novo* review; failing to properly train hundreds of new attorneys; putting Veterans' PII and PHI at risk; and refusing to provide an adequate work environment with the necessary equipment and systems needed for us to fulfill the Board's mission. We respectfully request a thorough investigation of the Board's practices.

Respectfully,

A handwritten signature in black ink that reads "Douglas Massey". The signature is written in a cursive style with a large, looping initial "D" and a long, sweeping tail on the "y".

Douglas E. Massey
President
AFGE Local 17