

118TH CONGRESS  
1ST SESSION

# S. 2158

To amend title 38, United States Code, to provide for disciplinary procedures for supervisors and managers at the Department of Veterans Affairs and to modify the procedures of personnel actions against employees of the Department, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

JUNE 22, 2023

Mr. MORAN (for himself, Mr. MANCHIN, and Mr. RUBIO) introduced the following bill; which was read twice and referred to the Committee on Veterans' Affairs

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## A BILL

To amend title 38, United States Code, to provide for disciplinary procedures for supervisors and managers at the Department of Veterans Affairs and to modify the procedures of personnel actions against employees of the Department, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restore Department  
5 of Veterans Affairs Accountability Act of 2023” or the  
6 “Restore VA Accountability Act of 2023”.

1 **SEC. 2. SUPERVISORS: REMOVAL, DEMOTION, OR SUSPEN-**  
2 **SION BASED ON PERFORMANCE OR MIS-**  
3 **CONDUCT.**

4 (a) DISCIPLINE OF SUPERVISORS.—

5 (1) IN GENERAL.—Title 38, United States  
6 Code, is amended by inserting after section 711 the  
7 following:

8 **“§ 712. Supervisors: removal, demotion, or suspension**  
9 **based on performance or misconduct**

10 “(a) IN GENERAL.—The Secretary may remove from  
11 civil service, demote, or suspend a covered individual who  
12 is an employee of the Department if the Secretary deter-  
13 mines by substantial evidence that the performance or  
14 misconduct of the covered individual warrants such action.

15 “(b) RIGHTS AND PROCEDURES.—(1)(A) When mak-  
16 ing an initial decision under subsection (a) with respect  
17 to determining whether a covered individual should be re-  
18 moved, demoted, or suspended, the deciding employee of  
19 the Department shall exclusively apply the following fac-  
20 tors:

21 “(i) The nature and seriousness of the offense,  
22 and its relation to the covered individual’s duties,  
23 position, and responsibilities, including whether the  
24 offense was intentional or technical or inadvertent,  
25 or was committed maliciously or for gain, or was fre-  
26 quently repeated.

1           “(ii) The covered individual’s job level and type  
2           of employment, including supervisory or fiduciary  
3           role, and prominence of the position.

4           “(B) The Secretary shall review the initial decision  
5           and uphold such decision if it is supported by substantial  
6           evidence.

7           “(2) A covered individual subject to an action under  
8           subsection (a) is entitled to—

9           “(A) advance notice of the action and a file  
10          containing all evidence in support of the proposed  
11          action;

12          “(B) be represented by an attorney or other  
13          representative of the covered individual’s choice; and

14          “(C) grieve the action in accordance with an in-  
15          ternal grievance process that the Secretary, in con-  
16          sultation with the Assistant Secretary for Account-  
17          ability and Whistleblower Protection, shall establish  
18          for purposes of this subsection.

19          “(3) A final decision by the Secretary under para-  
20          graph (1)(B) that is not grieved, and a grievance decision  
21          under paragraph (2)(C), shall be final and conclusive.

22          “(4) The procedures under chapter 43 of title 5 shall  
23          not apply to a removal, demotion, or suspension under this  
24          section, and the Secretary may carry out such a removal,

1 demotion, or suspension without first placing a covered in-  
2 dividual on a performance improvement plan.

3 “(c) TIMING.—(1)(A) The aggregate period for no-  
4 tice, response, and final decision by the Secretary of an  
5 action under this section may not exceed 15 business days.

6 “(B) The period for the response of a covered indi-  
7 vidual to a notice under subsection (b)(2)(A) shall be 7  
8 business days.

9 “(C) The final decision by the Secretary under sub-  
10 section (b)(1)(B) shall—

11 “(i) be issued not later than 15 business days  
12 after notice is provided under subsection (b)(2)(A);  
13 and

14 “(ii) be in writing and shall include the specific  
15 reasons for the decision.

16 “(D) The Secretary shall ensure that the grievance  
17 process established under paragraph (2)(C) takes fewer  
18 than 21 days after the final decision.

19 “(d) JUDICIAL REVIEW.—(1) A covered individual  
20 adversely affected by a final decision under this section  
21 that is not grieved, or by a grievance decision under sub-  
22 section (b)(2)(C), may obtain judicial review of such deci-  
23 sion.

24 “(2) Any removal, demotion, or suspension under this  
25 section is not appealable to the Merit Systems Protection

1 Board, or to any administrative judge or other person ap-  
2 pointed by the Merit Systems Protection Board.

3 “(3) In any case in which judicial review is sought  
4 under paragraph (1), the court shall review the record and  
5 may set aside any Department action found to be—

6 “(A) arbitrary, capricious, an abuse of discre-  
7 tion, or otherwise not in accordance with a provision  
8 of law;

9 “(B) obtained without procedures required by a  
10 provision of law having been followed; or

11 “(C) unsupported by substantial evidence.

12 “(4) Except to the extent that an appeal under this  
13 subsection presents a constitutional issue, such court may  
14 not review a challenge to the penalty imposed against the  
15 covered individual or mitigate such penalty.

16 “(e) DEMOTED INDIVIDUALS.—(1) A demotion under  
17 subsection (a) shall be carried out as a reduction in grade  
18 for which the covered individual is qualified, that the Sec-  
19 retary determines is appropriate, and that reduces the an-  
20 nual rate of pay of the covered individual.

21 “(2) Notwithstanding any other provision of law, any  
22 covered individual so demoted—

23 “(A) shall, beginning on the date of such demo-  
24 tion, receive the annual rate of pay applicable to  
25 such grade;

1           “(B) may not be placed on administrative leave  
2           during the period during which an appeal (if any)  
3           under this section is ongoing, and may only receive  
4           pay if the covered individual reports for duty or is  
5           approved to use accrued unused annual, sick, family  
6           medical, military, or court leave; and

7           “(C) who does not report for duty or receive ap-  
8           proval to use accrued unused leave shall not receive  
9           pay or other benefits.

10          “(f) WHISTLEBLOWER PROTECTION.—(1) In the  
11          case of a covered individual seeking corrective action (or  
12          on behalf of whom corrective action is sought) from the  
13          Office of Special Counsel based on an alleged prohibited  
14          personnel practice described in section 2302(b) of title 5,  
15          the Secretary may not remove, demote, or suspend such  
16          covered individual under subsection (a) without the ap-  
17          proval of the Special Counsel under section 1214(f) of title  
18          5.

19          “(2) In the case of a covered individual who has made  
20          a whistleblower disclosure to the Assistant Secretary for  
21          Accountability and Whistleblower Protection, the Sec-  
22          retary may not remove, demote, or suspend such covered  
23          individual under subsection (a) until—

24                 “(A) in the case in which the Assistant Sec-  
25                 retary determines to refer the whistleblower disclo-

1       sure under section 323(c)(1)(D) of this title to an  
2       office or other investigative entity, a final decision  
3       with respect to the whistleblower disclosure has been  
4       made by such office or other investigative entity; or

5               “(B) in the case in which the Assistant Sec-  
6       retary determines not to refer the whistleblower dis-  
7       closure under such section, the Assistant Secretary  
8       makes such determination.

9       “(g) TERMINATION OF INVESTIGATIONS BY OFFICE  
10      OF SPECIAL COUNSEL.—(1) Notwithstanding any other  
11      provision of law, the Special Counsel (established by sec-  
12      tion 1211 of title 5) may terminate an investigation of  
13      a prohibited personnel practice alleged by an employee or  
14      former employee of the Department after the Special  
15      Counsel provides to the employee or former employee a  
16      written statement of the reasons for the termination of  
17      the investigation.

18             “(2) Such statement may not be admissible as evi-  
19      dence in any judicial or administrative proceeding without  
20      the consent of such employee or former employee.

21             “(h) APPLICATION.—This section shall apply to any  
22      performance or misconduct of a covered individual begin-  
23      ning on the date of enactment of the Department of Vet-  
24      erans Affairs Accountability and Whistleblower Protection  
25      Act of 2017 (Public Law 115–41).

1 “(i) DEFINITIONS.—In this section:

2 “(1) The term ‘civil service’ has the meaning  
3 given that term in section 2101 of title 5.

4 “(2) The term ‘covered individual’ means an  
5 employee of the Department who is a supervisor or  
6 management official as defined in section 7103(a) of  
7 title 5 occupying a position at the Department, in-  
8 cluding individuals appointed pursuant to this title,  
9 title 5, and hybrid employees appointed pursuant to  
10 section 7401 of this title, but does not include—

11 “(A) an individual occupying a senior execu-  
12 tive position (as defined in section 713(d) of  
13 this title);

14 “(B) an individual appointed pursuant to  
15 section 7306, 7401(1), 7401(4), or 7405 of this  
16 title;

17 “(C) an individual who has not completed  
18 a probationary or trial period; or

19 “(D) a political appointee.

20 “(3) The term ‘grade’ has the meaning given  
21 such term in section 7511(a) of title 5.

22 “(4) The term ‘misconduct’ includes neglect of  
23 duty, malfeasance, or failure to accept a directed re-  
24 assignment or to accompany a position in a transfer  
25 of function.

1           “(5) The term ‘political appointee’ means an in-  
2           dividual who is—

3                   “(A) employed in a position described  
4                   under sections 5312 through 5316 of title 5  
5                   (relating to the Executive Schedule);

6                   “(B) a limited term appointee, limited  
7                   emergency appointee, or noncareer appointee in  
8                   the Senior Executive Service, as defined under  
9                   paragraphs (5), (6), and (7), respectively, of  
10                  section 3132(a) of title 5; or

11                  “(C) employed in a position of a confiden-  
12                  tial or policy-determining character under  
13                  schedule C of subpart C of part 213 of title 5,  
14                  Code of Federal Regulations, or successor regu-  
15                  lation.

16           “(6) The term ‘suspend’ means the placing of  
17           an employee, for disciplinary reasons, in a temporary  
18           status without duties and pay for a period in excess  
19           of 14 days.

20           “(7) The term ‘whistleblower disclosure’ has the  
21           meaning given such term in section 323(g) of this  
22           title.”.

23           (2) CLERICAL AMENDMENT.—The table of con-  
24           tents for title 38, United States Code, is amended

1 by inserting after the item relating to section 711  
 2 the following:

“712. Supervisors: removal, demotion, or suspension based on performance or  
 misconduct.”.

3 **SEC. 3. SENIOR EXECUTIVES: MODIFICATION OF PROCE-**  
 4 **DURES TO REMOVE, DEMOTE, OR SUSPEND**  
 5 **BASED ON PERFORMANCE OR MISCONDUCT.**

6 Section 713 of title 38, United States Code, is  
 7 amended—

8 (1) in subsection (a)—

9 (A) in paragraph (1), by inserting “by sub-  
 10 stantial evidence” after “determines”; and

11 (B) by adding at the end the following new  
 12 paragraphs:

13 “(3) When making an initial decision under this sub-  
 14 section with respect to determining whether a covered in-  
 15 dividual should be reprimanded or suspended, involun-  
 16 tarily reassigned, demoted, or removed, the deciding em-  
 17 ployee of the Department shall exclusively apply the fol-  
 18 lowing factors:

19 “(A) The nature and seriousness of the offense,  
 20 and its relation to the covered individual’s duties,  
 21 position, and responsibilities, including whether the  
 22 offense was intentional or technical or inadvertent,  
 23 or was committed maliciously or for gain, or was fre-  
 24 quently repeated.

1           “(B) The covered individual’s job level and type  
2           of employment, including supervisory or fiduciary  
3           role, and prominence of the position.

4           “(4) The Secretary shall review the initial decision  
5           and uphold such decision if it is supported by substantial  
6           evidence.”;

7           (2) in subsection (b)—

8                   (A) in paragraph (3), by inserting “after  
9                   the final decision” after “21 days”; and

10                   (B) by adding at the end the following:

11           “(7) Except to the extent that an appeal under this  
12           subsection presents a constitutional issue, such court may  
13           not review a challenge to the penalty imposed against the  
14           covered individual or mitigate such penalty.”; and

15           (3) by redesignating subsection (d) as sub-  
16           section (e); and

17           (4) by inserting after subsection (c) the fol-  
18           lowing new subsection (d):

19           “(d) APPLICATION.—This section shall apply to any  
20           misconduct or performance of a covered individual begin-  
21           ning on the date of the enactment of the Department of  
22           Veterans Affairs Accountability and Whistleblower Protec-  
23           tion Act of 2017 (Public Law 115–41).”.

1 **SEC. 4. MODIFICATION OF DISCIPLINARY PROCEDURES**  
2 **FOR EMPLOYEES OF THE DEPARTMENT OF**  
3 **VETERANS AFFAIRS.**

4 (a) DEPARTMENT OF VETERANS AFFAIRS EM-  
5 PLOYEE DISCIPLINE MODIFICATIONS.—Section 714 of  
6 title 38, United States Code, is amended—

7 (1) in subsection (a)—

8 (A) in paragraph (1), by inserting “by sub-  
9 stantial evidence” after “the Secretary deter-  
10 mines”; and

11 (B) by adding at the end the following:

12 “(3)(A) When making an initial decision under this  
13 subsection with respect to determining whether a covered  
14 individual should be removed, demoted, or suspended, the  
15 deciding employee of the Department shall exclusively  
16 apply the following factors:

17 “(i) The nature and seriousness of the offense,  
18 and its relation to the covered individual’s duties,  
19 position, and responsibilities, including whether the  
20 offense was intentional or technical or inadvertent,  
21 or was committed maliciously or for gain, or was fre-  
22 quently repeated.

23 “(ii) The covered individual’s job level and type  
24 of employment, including supervisory or fiduciary  
25 role, and prominence of the position.

1           “(iii) The covered individual’s past disciplinary  
2 record.

3           “(iv) The covered individual’s past work record,  
4 including length of service, performance on the job,  
5 ability to get along with fellow workers, and depend-  
6 ability.

7           “(v) Mitigating circumstances surrounding the  
8 offense such as unusual job tensions, personality  
9 problems, mental impairment, harassment, or bad  
10 faith, malice, or provocation on the part of others in-  
11 volved in the matter.

12          “(B) The Secretary shall review the initial decision  
13 and uphold such decision if it is supported by substantial  
14 evidence.”;

15           (2) in subsection (c)—

16               (A) by striking paragraph (1)(D); and

17               (B) in paragraph (3), by inserting before  
18 the period the following: “, and the Secretary  
19 may carry out such a removal, demotion, or  
20 suspension without first placing a covered indi-  
21 vidual on a performance improvement plan”;

22           (3) in subsection (d)—

23               (A) in paragraph (2), by adding at the end  
24 the following:

1 “(C) Except to the extent that an appeal under this  
 2 subsection presents a constitutional issue, the administra-  
 3 tive judge may not review a challenge to the penalty im-  
 4 posed against the covered individual.”;

5 (B) in paragraph (3), by adding at the end  
 6 the following:

7 “(D) Except to the extent that an appeal under this  
 8 subsection presents a constitutional issue, the Merit Sys-  
 9 tems Protection Board may not review a challenge to the  
 10 penalty imposed against the covered individual.”;

11 (C) in paragraph (5), by adding at the end  
 12 the following:

13 “(C) Except to the extent that an appeal under this  
 14 subsection presents a constitutional issue, such Court may  
 15 not review a challenge to the penalty imposed against the  
 16 covered individual or mitigate such penalty.”; and

17 (D) by striking paragraph (10);

18 (4) by redesignating subsection (h) as sub-  
 19 section (j);

20 (5) by inserting after subsection (g) the fol-  
 21 lowing:

22 “(h) COLLECTIVE BARGAINING AGREEMENTS.—The  
 23 procedures in this section shall supersede any collective  
 24 bargaining agreement to the extent that such agreement  
 25 is inconsistent with such procedures.

1       “(i) APPLICATION.—This section shall apply to any  
 2 performance or misconduct of a covered individual begin-  
 3 ning on the date of the enactment of the Department of  
 4 Veterans Affairs Accountability and Whistleblower Protec-  
 5 tion Act of 2017 (Public Law 115–41).”; and

6           (6) in paragraph (1) of subsection (j), as redes-  
 7 igned by paragraph (4)—

8           (A) in the matter before subparagraph (A),  
 9 by inserting “including individuals appointed  
 10 pursuant to this title, title 5, and hybrid em-  
 11 ployees appointed pursuant to section 7401 of  
 12 this title,” after “Department,”;

13           (B) in subparagraph (D), by striking the  
 14 period and inserting “; or”; and

15           (C) by adding after subparagraph (D) the  
 16 following:

17           “(E) a supervisor or management official  
 18 as defined in section 7103(a) of title 5.”.

19       (b) VETERANS HEALTH ADMINISTRATION EM-  
 20 PLOYEE DISCIPLINE MODIFICATIONS.—Section  
 21 7403(f)(3) of such title is amended—

22           (1) by striking “Notwithstanding any other pro-  
 23 vision of this title or other law,” and inserting “(A)  
 24 Notwithstanding any other provision of this title or

1 other law, and consistent with subparagraph (B),”;

2 and

3 (2) by adding at the end the following:

4 “(B) With respect to any covered individual (as that

5 term is defined in section 712 or 714) appointed to such

6 positions, such matters shall be resolved, at Secretary’s

7 sole discretion, under—

8 “(i) section 712;

9 “(ii) section 714; or

10 “(iii) title 5 as though such individuals had

11 been appointed under that title.”.

○