



THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON

January 23, 2023

The Honorable Jon Tester  
Chairman  
Committee on Veterans' Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Because of the importance of our partnership and Congress's central role in this issue, I am writing to provide an update to you regarding the Federal court and administrative decisions impacting the Department of Veterans Affairs' (VA) implementation of the Veterans Affairs Accountability and Whistleblower Protection Act (VAAWPA). VAAWPA included 38 U.S.C. §714, which was intended to streamline the process for employee adverse actions by providing for shorter time periods and a reduced legal standard of review.

As explained in the enclosure, under these recent decisions, section 714 actions now require VA to use the same burden of proof required by preexisting authorities (preponderance of the evidence) and the same penalty review (i.e., consideration of relevant aggravating and mitigating factors by proposing/deciding officials to determine and defend a penalty in a misconduct action). The decisions have also limited the coverage of section 714 to fewer types and numbers of employees. As a result, there are few remaining practical differences between section 714 and the traditional title 5 disciplinary authorities. In addition, there is ongoing litigation with the American Federation of Government Employees (AFGE) regarding the past use of section 714. This matter is currently being mediated with AFGE and may result in a significant cost to VA as well as possibly returning to work some employees disciplined as far back as 2017.

Given your interest regarding the implementation of VAAWPA, I wanted to provide a summary of these decisions and their effects, as they are likely to impact VA's future usage of section 714. I also wanted you to be aware of the current status of the AFGE litigation. VA remains committed to providing timely access to world class health care to Veterans while pursuing the best options available to ensure the accountability of its employees.

Sincerely,

A handwritten signature in black ink, appearing to read "DMcDonough".

Denis McDonough

Enclosure