



December 6, 2018

VIA CERTIFIED MAIL

The Honorable Michael J. Missal
Inspector General
U.S. Department of Veterans Affairs
810 Vermont Avenue NW
Washington, D.C. 20420

Dear Mr. Missal,

We respectfully request that your office investigate the politicization of the selection process for Veterans Law Judges on the Board of Veterans' Appeals ("Board") at the U.S. Department of Veterans Affairs ("Department" or "VA"), as recently reported in the *Washington Post*. According to an article published by the *Post* on October 23, 2018, half of the career civil service candidates recently selected by the Department to serve as Veterans Law Judges, all of whom were comparably qualified and had assisted in leadership roles on the Board, were rejected after the White House intervened to require the candidates to disclose information and material about their personal political affiliations.¹

The conduct described in the *Post*, if confirmed, raises serious concerns that the Department's selection process violated multiple laws and policies aimed at protecting against discrimination in the federal hiring process as well as federal employees' First Amendment rights. The Department's selection process also makes it more difficult for the Board to fully staff itself while it seeks to reduce the claim processing delays that have long plagued veterans seeking to get the care pledged to them by our government.

¹ Lisa Rein, *I've Never Seen These Positions Politicized': White House Rejection of Veterans Judges Raises Concerns of Partisanship*, Wash. Post (Oct. 23, 2018), https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politicized-white-house-rejection-of-veterans-judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html [hereafter "Rein"].

I. Background

A. The Board of Veterans' Appeals

The VA is the product of a 150-year-old promise by the federal government to provide healthcare to Americans who serve their country in the military. Today, over nine million individuals are enrolled in the VA healthcare system.²

When veterans believe their care or claims for benefits have not been properly handled by the VA, their recourse is to file a claim with the Board of Veterans' Appeals. The Board's Veterans Law Judges decide tens of thousands of such claims every year to try to ensure that injured veterans receive the care that they are entitled to by law.

Veterans Law Judges are "appointed by the Secretary, with the approval of the President, based upon recommendations of the Chairman" of the Board.³ The Board has historically been a nonpartisan body: Veterans Law Judges are drawn largely from the ranks of career civil servant attorneys already working as assistants within the Board, where they have earned the requisite, specialized legal experience to enable them to fairly adjudicate veterans' claims.⁴ As the Department has made clear, Veterans Law Judges are impartial arbiters who enjoy decisional independence and work free from the influence of the Department's political leadership.⁵

As the *Post* reports, the Board is currently going through a period of expansion, adding judges and attorneys in order to reduce the chronic backlog of cases and the long waits veterans endure to have their claims resolved.⁶ During FY 2017, veterans whose claims were resolved by the Board waited an average of seven years for their appeals to be resolved after initiating their appeal.⁷ As of the end of FY 2017, there were ninety-five Veterans Law Judges sworn in, with an additional forty-one acting judges over the course of the year providing further assistance.⁸ The Board is considering additional candidates to fill remaining vacancies.⁹

B. Allegations in the *Washington Post*

On October 23, 2018, the *Post* reported that, in a clear break with the Board's tradition of nonpartisanship, four applicants to become Veterans Law Judges were rejected, after they and

² VA, *Department of Veterans Affairs FY 2018-2024 Strategic Plan* 6 (Feb. 12, 2018), <https://www.va.gov/oei/docs/VA2018-2024strategicPlan.pdf>.

³ 38 U.S.C. § 7101A(a)(1).

⁴ *See Rein*.

⁵ *See, e.g.*, Department of Veterans Affairs; Appeals Regulations: Title for Members of the Board of Veterans' Appeals, 68 Fed. Reg. 6621, 6623 (Feb. 10, 2003) ("We categorically deny both that VA management has attempted to influence the result of Board members' decisions and that Board members do not provide appellants the assurance of impartiality.").

⁶ *See Rein*.

⁷ VA, *Department of Veterans Affairs Board of Veterans' Appeals Annual Report Fiscal Year (FY) 2017 13*, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2017AR.pdf

⁸ *Id.* at 26.

⁹ *See Rein*.

other prospective applicants were required by the White House to disclose “their party affiliation and other details of their political leanings”; their “address on Election Day in 2016”; and “whether they had ever given a speech to Congress, spoken at a political convention, appeared on talk radio, or published an opinion piece in a conservative forum such as Breitbart News or a liberal one such as Mother Jones,” among other materials.¹⁰

According to the *Post*, which based its reporting on documents and interviews with current and former VA staff, three of the four rejected applicants were Democrats and one was an independent. At the same time, four applicants approved to serve as Veterans Law Judges consisted of three Republicans and an unaffiliated individual who had previously voted in GOP primaries. All eight applicants were career Board attorneys with six to twelve years of experience, who had been serving as acting Veterans Law Judges due to the staffing shortage described above and had been vetted by multiple interviewers and recommended for promotion by Board Chairman Cheryl L. Mason.

II. Areas for Investigation

As outlined below, the conduct described by the *Post* raises concerns that Departmental policy as well as multiple laws may have been violated as part of the VA’s recent selection process for Veterans Law Judges, which is ongoing as the Department continues to seek to fill the Board’s vacancies.

A. Anti-discrimination Provisions

For over 130 years, the United States government has strived to ensure that the federal civil service is governed by merit selection principles, rather than the wheels of partisan patronage.¹¹ To that end, the Civil Service Reform Act (“CSRA”) provides that “[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation . . . and with proper regard for their privacy and constitutional rights”¹² and “should be . . . protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.”¹³ The CSRA prohibits the government from making any personnel decision that “discriminate[s] for or against any employee or applicant for employment . . . on the basis of . . . political affiliation.”¹⁴

Further, the Department’s “Equal Employment Opportunity, Diversity and Inclusion, No FEAR, and Whistleblower Rights and Protection Policy Statement,” signed by VA Secretary Robert L. Wilkie on August 27, 2018, provides that the “VA does not tolerate unlawful discrimination . . . based on . . . political affiliation,” a protection that “applies to *all* terms and

¹⁰ *Id.*

¹¹ See, e.g., Ronald N. Johnson and Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy*, 12-14 (U. Chi. Press. 1994), available at <https://www.nber.org/chapters/c8633.pdf>.

¹² 5 U.S.C. § 2301(b)(2).

¹³ *Id.* § 2301(b)(8)(A).

¹⁴ *Id.* § 2302(b)(1)(E).

conditions of employment, including recruitment, hiring, promotions, transfers, reassignments, training, career development, benefits, and separation.”¹⁵

The selection process described in the *Post* appears to implicate both the Department’s broad anti-discrimination policy as well as the CSRA provisions that prohibit employment decisions based on political affiliation, rather than merit. In this regard, we ask that your investigation address at least the following:

- Were the recent applicants for Veterans Law Judge positions required to disclose materials regarding their political affiliations? What materials? Have applicants ever been required to disclose such materials before as part of this process? Who directed that this material be disclosed and considered?
- Did the political affiliations of the rejected applicants for Veterans Law Judge positions play any part in the VA’s decisions concerning their appointment to the Board? Who reviewed the materials gathered concerning the applicants’ political activity? Were either the CSRA or the VA’s anti-discrimination policy violated in the appointment process?
- Was the review of materials concerning political activity an isolated event? Are these types of political materials being considered as part of the VA’s ongoing efforts to fill Veterans Law Judge positions, or any other positions at the Department?
- What role did the White House play in the selection process for the four rejected applicants? How did this role compare to historic practices?
- Who made the decision to reject the applicants, and how was that decision conveyed?
- Are the rejected applicants being properly protected from any potential retaliation based on the disclosures required as part of the selection process?

B. Privacy Act

The Privacy Act, 5 U.S.C. § 552a(e)(7), prohibits federal agencies from maintaining any “record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.” Passed in the wake of Watergate, and amidst revelations that the White House had improperly compiled information on individuals’ political viewpoints, Section 552a(e)(7) has been construed broadly to “clearly prohibit[] even the mere collection of such a record, independent of the agency’s maintenance, use, or dissemination of it thereafter.”¹⁶ Further, the Privacy Act allows for claims of money damages against an agency under Section 552a(e)(7) of the Privacy Act for

¹⁵ VA, *Equal Employment Opportunity, Diversity and Inclusion, No FEAR, and Whistleblower Rights and Protection Policy Statement 1* (Aug. 27, 2018),

https://www.diversity.va.gov/policy/files/EEO_Policy_Statement.pdf (emphasis added).

¹⁶ *Albright v. United States*, 631 F.2d 915, 918 (D.C. Cir. 1980).

intentionally taking adverse action against individuals because of records collected in violation of the Privacy Act.¹⁷

Materials regarding individuals' voting patterns and political associations, such as those reportedly collected as part of the VA's recent selection process, are plainly protected by the First Amendment and therefore subject to Section 552a(e)(7) of the Privacy Act.¹⁸ In order to assess whether the agency has or is currently violating the Privacy Act, we ask that your investigation also address at least the following:

- Did the VA collect or maintain records regarding the Board applicants' First Amendment-protected activities, including party affiliation?
- Was the Board applicants' provision of materials concerning First Amendment-protected activities to the VA or the White House understood to be a condition for their approval as Board members?
- Is the VA currently in possession of these types of records for any past or present applicants to be Veterans Law Judges? Are applicants aware that their records are being so maintained?
- How are these records being used and stored?
- Did the VA violate the Privacy Act by collecting information concerning the political activity of Board applicants? Are any such violations ongoing?

C. Unconstitutional Retaliation

The First Amendment's guarantees of freedom of speech and association create a prohibition on government retaliation against employees based on their political affiliation. As the Supreme Court has explained, "[t]he First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity."¹⁹ If the VA failed to advance the applicants to become Veterans Law Judges because of their party affiliation, the Department may also have violated the First Amendment. In addition to the questions raised above, we ask that your investigation also address at least the following:

- Do the rejected applicants remain in their previous positions at the VA? If not, how and why were they transferred?

¹⁷ 5 U.S.C. § 552a(g)(1)(D), (g)(4); *See also, e.g., Gerlich v. U.S. Dep't of Justice*, 659 F.Supp.2d 1, 13–15 (D.D.C. 2009).

¹⁸ *E.g., Gerlich v. U.S. Dep't of Justice*, 711 F.3d 161, 172 (D.C. Cir. 2013)

¹⁹ *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1416 (2016) (holding that an employee who was demoted over the belief that he had supported a particular candidate for mayor had suffered a First Amendment violation).

- Do their failed candidacies for Veterans Law Judges have any continuing consequences for their federal employment?
- Did the VA or the White House violate the constitutional rights of the Board applicants by retaliating against them for activity protected by the First Amendment? Are the applicants likely to face such violations of their rights in the future?

D. Nondisclosure agreements

The Whistleblower Protection Enhancement Act provides that,

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to that authority . . . implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”²⁰

Further, the Consolidated Appropriations Act, 2018, forbids agencies from using any appropriated funds to implement nondisclosure policies, forms, or agreements that run afoul of the restrictions in 5 U.S.C. § 2302(b)(13).²¹ In order to ensure that the VA complied with the Whistleblower Protection Enhancement Act and all applicable laws related to the use of appropriated funds in compliance with that Act, we ask that your investigation further address at least the following:

- Were the recent applicants for Veterans Law Judge positions requested or required to sign nondisclosure agreements as part of the application process?
- If so, were the nondisclosure agreements compliant with federal whistleblower protections?
- Did any officials at the VA violate federal law by implementing unlawful nondisclosure agreements as part of the Veterans Law Judge selection process?

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²⁰ 5 U.S.C. § 2302(b)(13).

²¹ Pub. L. No. 115-141, § 744(a), 132 Stat. 348 (2018).

The Board plays a crucial role in ensuring that America's veterans receive the care they are entitled to. The infection of the selection process with rank partisanship not only does a great disservice to those who have made tremendous sacrifices on behalf of our country but, as outlined above, may also have violated multiple laws.

We hope that you share our concern regarding these troubling allegations. As the VA is in the process of continuing to fill Veterans Law Judge positions, we request that you urgently investigate this matter and look forward to your conclusions.

Please contact us if you have any questions or need additional information.

Sincerely,

/s/ Anne Harkavy

Anne Harkavy
Executive Director

Democracy Forward
Foundation

/s/ Will Fischer

Will Fischer
Director of Government
Relations

VoteVets