

**OFFICE OF ACCOUNTABILITY AND WHISTLEBLOWER PROTECTION:
INVESTIGATION OF WHISTLEBLOWER DISCLOSURES AND ALLEGATIONS INVOLVING
SENIOR LEADERS OR WHISTLEBLOWER RETALIATION**

1. **REASON FOR ISSUE:** This Department of Veterans Affairs (VA) directive establishes policy regarding the intake, investigation, and resolution of: whistleblower disclosures; allegations of whistleblower retaliation; and allegations of misconduct or poor performance by senior leaders conducted or referred by VA's Office of Accountability and Whistleblower Protection (OAWP). This directive does not address or control the disciplinary process associated with any recommendations ultimately made by OAWP. More information about OAWP can be found at www.va.gov/accountability.
2. **SUMMARY OF CONTENTS:** This directive sets forth policy concerning the responsibilities and process by which OAWP shall:
 - a. Receive and review whistleblower disclosures;
 - b. Refer whistleblower disclosures to the Office of Medical Inspector, the Office of Inspector General, or other investigative entities within VA and track reports of investigation produced by those offices and investigative entities;
 - c. Receive, review, and investigate allegations of whistleblower retaliation made against supervisors; and
 - d. Receive, review, and investigate allegations of misconduct or poor performance made against senior leaders.
3. **RESPONSIBLE OFFICE:** Office of Accountability and Whistleblower Protection.
4. **RELATED HANDBOOK:** None.
5. **RESCISSIONS:** None.

CERTIFIED BY:

**BY DIRECTION OF THE SECRETARY OF
VETERANS AFFAIRS:**

/s/
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1. **PURPOSE.** This purpose of this directive is to establish the policy regarding the intake, investigation, and resolution of: whistleblower disclosures; allegations of whistleblower retaliation; and allegations of misconduct or poor performance by senior leaders conducted or referred by VA's Office of Accountability and Whistleblower Protection (OAWP). OAWP was established by the President of the United States on April 27, 2017, under Executive Order 13793. OAWP was statutorily established by the VA Accountability and Whistleblower Protection Act of 2017, Public Law 115-41, and its functions are codified under 38 United States Code (U.S.C.) § 323. More information about OAWP can be found at www.va.gov/accountability.

2. **DEFINITIONS.** The following definitions apply for the purposes of this directive. Unique terms are defined, followed by explanations of acronyms.
 - a. **Assistant Secretary** refers to the Assistant Secretary for Accountability and Whistleblower Protection.

 - b. **Employee** refers to an individual employed by the VA, who meets the requirements of 5 U.S.C. § 2105(a). It does not include individuals employed by the VA Office of the Inspector General or the Office of Accountability and Whistleblower Protection.

 - c. **Investigative entity** refers to an individual(s) charged or empowered to conduct an investigation or fact-finding.

 - d. **Misconduct** includes, but is not limited to, neglect of duty, malfeasance, or failure to accept a directed reassignment or accompany a position in a transfer of function.

 - e. **POI** refers to a person of interest, which is an individual being investigated by OAWP.

 - f. **Personnel action**, as defined under 5 U.S.C. § 2302(a)(2)(A), refers to an appointment; a promotion; a disciplinary or corrective action; a detail, transfer or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation; a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action within this definition; a decision to order psychiatric testing or examination; the implementation or enforcement of any nondisclosure policy, form, or agreement; and any other significant change in duties, responsibilities, or working conditions.

 - g. **Poor Performance** refers to an assertion of deficient performance of assigned duties and responsibilities. It does not include routine performance management activities by a senior leader's supervisory chain such as a supervisor's determinations that a senior leader's performance is less than fully successful in accordance with applicable performance management systems (e.g. less than fully successful rating of record or

performance counseling) or personnel actions proposed or taken because of such determinations. See paragraph 3d of this directive.

h. **Senior Executive** refers to an individual who is:

- (1) A career appointee in the Senior Executive Service (SES), including those serving a probationary period, except for those individuals employed by the OIG; or
- (2) Appointed in an administrative or executive position under 38 U.S.C. §§ 7306(a), 7401(1), or 7401(4). These are:
 - (a) Title 38 SES-equivalent employees (e.g., Deputy Under Secretary for Health);
 - (b) Veterans Integrated Service Network (VISN) and VA Medical Center (VAMC) directors and deputy directors;
 - (c) VISN and VAMC chiefs of staff or equivalent positions (e.g., chief medical officers); and
 - (d) VISN and VAMC associate directors for patient care services or equivalent positions (e.g., nurse executives).

i. **Senior Leader** refers to an individual who is:

- (1) A Senior Executive;
- (2) Employed in a confidential, policy-making, policy-determining, or policy-advocating position (e.g., political appointees and those appointed under Schedule C (5 CFR part 213, subpart C)); or
- (3) Employed in a position the Secretary of Veterans Affairs considers similar to those identified in (h)(1) and (2) for purposes of this directive. These are:
 - (a) Senior-level (SL) positions described in 5 CFR § 319.102;
 - (b) Scientific and Professional (ST) positions described in 5 CFR § 319.103;
 - (c) Veterans law judges (including chief veterans law judges);
 - (d) Veterans Health Administration (VHA) and Veterans Benefits Administration (VBA) directors, associate and assistant directors at General Schedule grade 14 or above;
 - (e) National Cemetery Administration (NCA) cemetery directors and district chiefs of operation at General Schedule grade 14 or above; and
 - (f) Other SES appointees (e.g., noncareer SES appointees and limited term SES appointees).

- j. **Supervisor**, as defined under 38 U.S.C. § 323(g)(1), refers to an employee having authority to hire, direct, assign, promote, reward, transfer, furlough, lay off, recall, suspend, discipline, or remove other employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature, but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term “supervisor” includes only those individuals who devote a preponderance of their employment time to exercising such authority.
- k. **Whistleblower**, as defined under 38 U.S.C. § 323(g)(2), refers to a VA employee or applicant for employment at VA who makes a whistleblower disclosure.
- l. **Whistleblower disclosure**, as defined under 38 U.S.C. § 323(g)(3), refers to any disclosure of information by a whistleblower to OAWP, which the whistleblower reasonably believes evidences:
 - (1) A violation of law, rule, or regulation;
 - (2) Gross mismanagement;
 - (3) Gross waste of funds;
 - (4) An abuse of authority; or
 - (5) A substantial and specific danger to public health or safety.
- m. **Whistleblower retaliation** refers to a supervisor taking or failing to take, threatening to take or not to take, a personnel action because of a whistleblower disclosure.
- n. **NCA district** refers to one or more of the five NCA geographical areas that include the district and cemeteries.
- o. **OAWP** refers to VA’s Office of Accountability and Whistleblower Protection.
- p. **OEI** refers to VA’s Office of Enterprise Integration
- q. **HRA/OSP** refers to VA’s Office of Human Resources and Administration/ Operations, Security, and Preparedness.
- r. **OGC** refers to VA’s Office of General Counsel.
- s. **OMI** refers to VA’s Office of the Medical Inspector.
- t. **OSC** refers to the U.S. Office of Special Counsel.
- u. **VA** refers to the U.S. Department of Veterans Affairs.

- v. **VBA district** refers to one or more of the four geographical areas that include the district and regional offices.
- w. **VHA** refer to the Veterans Health Administration.
- x. **VISN** refers to a VHA Veterans Integrated Service Network.

3. **POLICY.**

a. **Whistleblower disclosures:**

- (1) Whistleblowers may contact OAWP by telephone, e-mail, mail, fax, or web-based form, to make a whistleblower disclosure. Whistleblowers may make a whistleblower disclosure anonymously.
- (2) OAWP will review the whistleblower disclosure and, where the Assistant Secretary, or designee, has a reason to believe the whistleblower disclosure is evidence of a violation of a provision of law, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety, may refer the disclosure for investigation to:
 - (a) OIG;
 - (b) OMI; and/or
 - (c) Other investigative entity within VA.
- (3) For investigations of whistleblower disclosures referred to OMI or other investigative entity, OAWP will review investigatory findings; the Assistant Secretary (or designee) may make recommendations for disciplinary action to the appropriate proposing official (or deciding official if the recommended action does not require a proposal); and OAWP will track the implementation of any recommended actions.

If a whistleblower disclosure alleges misconduct, poor performance, or whistleblower retaliation by a senior leader, or whistleblower retaliation by any supervisor, the procedures described in paragraph 3c of this directive will apply.

- (4) When whistleblower disclosures or allegations therein are under litigation or covered by another remedial administrative process (e.g., allegations of sexual harassment or hostile work environment, allegations of improper political activity/Hatch Act violations), including matters before the Merit Systems Protection Board; the Equal Employment Opportunity process; the Federal Labor-Management Relations statute, 5 U.S.C. § 7101 et seq., as amended; or the Federal Tort Claims Act processes, the Assistant Secretary, or designee, may determine not to investigate, or not refer for investigation, those whistleblower disclosures or allegations therein.
- b. **Whistleblower retaliation:** Under 38 U.S.C. § 323(c)(1)(H), OAWP receives, reviews, and investigates whistleblower disclosures and allegations of whistleblower retaliation

made against supervisors. The Assistant Secretary (or designee) may make recommendations for disciplinary action to the appropriate proposing official (or deciding official if the recommended action does not require a proposal), and will track the implementation of any recommended action.

- c. **Allegations of Senior Leader Misconduct, Poor Performance, or Whistleblower Retaliation:** Under 38 U.S.C. § 323(c)(1)(H), OAWP receives, reviews, and investigates allegations of misconduct, poor performance, or whistleblower retaliation made against senior leaders. Allegations involving senior leader misconduct, poor performance, or whistleblower retaliation may be made by any individual, regardless of whether they are a VA employee or applicant for employment, to OAWP. The Assistant Secretary (or designee) will review the allegation to determine whether it should be investigated (e.g., does the allegation identify a POI, dates, and/or describes an issue covered by this paragraph). The Assistant Secretary (or designee) may make recommendations for disciplinary action to the appropriate proposing official (or deciding official if the recommended action does not require a proposal), and will track the implementation of any recommended action.
- d. **Human Resources and Legal Advice:** OAWP does not provide human resources services, including providing human resources-related advice or guidance and preparing proposal or decision memoranda. If individuals need such assistance, they should contact their servicing human resources office. OAWP does not provide legal advice and services. If individuals need such assistance, they should contact OGC.

4. RESPONSIBILITIES.

- a. Assistant Secretary for the Office of Accountability and Whistleblower Protection, or designee, shall:

(1) Establish and maintain:

(a) Guidance to implement this directive, with input provided by VHA, VBA, NCA, OGC, OEI, and HRA/OSP, which shall be published at <https://vaww.va.gov/vapubs/>;

(b) Methods for whistleblowers to make a whistleblower disclosure, including by telephone or other electronic means and post such information on OAWP's website at <https://www.va.gov/accountability/>; and

(c) Methods to ensure that whistleblowers can make whistleblower disclosures anonymously.

(2) Conduct administrative investigations and fact-findings; convene administrative investigation boards; take affidavits; administer oaths and affirmations; and obtain and collect evidence related to administrative investigations conducted by OAWP;

- (3) Ensure that whistleblowers' identities for matters received by OAWP are not disclosed without the whistleblowers' consent, except in accordance with the Privacy Act, or as required by law;
- (4) Review whistleblower disclosures and refer such disclosure for investigation, where the Assistant Secretary, or designee, has a reason to believe the whistleblower disclosure is evidence of a violation of a provision of law, mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety, to:
 - (a) OIG;
 - (b) OMI; and/or
 - (c) Other investigative entity within VA;
- (5) Receive, review and investigate allegations of:
 - (a) Whistleblower retaliation made against supervisors; and
 - (b) Misconduct, poor performance, or whistleblower retaliation made against senior leaders;
- (6) Make recommendations, if appropriate and to the extent possible, for disciplinary action within 120 calendar days of OAWP's receipt of the allegation described in paragraph 4a(5) of this directive to the appropriate proposing official (or deciding official if the recommended action does not require a proposal), and track the implementation of any recommended actions;
- (7) For whistleblower disclosures referred by OAWP to OMI or other investigative entity:
 - (a) Review investigatory findings; and
 - (b) Make recommendations for disciplinary action, if appropriate, to the appropriate proposing official (or deciding official if the recommended action does not require a proposal), and track the implementation of any recommended actions;
- (8) Determine not to investigate, or not to refer for investigation, those whistleblower disclosures or allegations that are under litigation or covered by another remedial administrative process (e.g., allegations of sexual harassment or hostile work environment), including matters before the Merit Systems Protection Board, the Equal Employment Opportunity process; the Federal Labor-Management Relations statute, 5 U.S.C. § 7101 et seq., as amended; or the Federal Tort Claims Act processes;
- (9) Require OMI or other investigative entities to submit reports of investigation resulting from referred whistleblower disclosures to meet procedural and content

requirements (including requiring resubmission to achieve compliance, as necessary) prescribed through guidance issued by OAWP;

(10) Confirm receipt, in writing, within seven calendar days from the date that an Administration or Staff Office refers to OAWP allegations of:

(a) Whistleblower retaliation by a supervisory employee, including a senior leader; and

(b) Senior leader misconduct and poor performance;

(11) To the extent permissible by law, notify:

(a) Individuals who contact OAWP about the status of their allegations;

(b) Whistleblowers about the status of the investigation into their disclosure;

(c) POIs when OAWP has completed its investigation into allegations against them; and

(d) The head of the Administration or Staff Office (or their designee) employing the POI when OAWP has completed its investigation into allegations against the POI.

(12) In coordination with the Assistant Secretary for Human Resources and Administration/Operations, Security, and Preparedness, establish and maintain guidance or policy on:

(a) Whistleblower protections for actions proposed under 38 U.S.C. § 714; and

(b) Findings made by an authority described in 38 U.S.C. § 731.

b. Under Secretaries, Assistant Secretaries, Other Key Officials, and their designees, shall:

(1) Administer policy or guidance within their organization concerning the requirements prescribed in this directive and guidance issued by the Assistant Secretary;

(2) Administer policy or guidance within their organization for referring all allegations of misconduct, poor performance, or whistleblower retaliation by senior leaders to OAWP, including findings, decisions, determinations, or recommendations of such allegations made by entities external to the organization (e.g. OSC, the Merit Systems Protection Board, the VA Office of Employment Discrimination Complaint Adjudication);

(3) Administer policy or guidance within their organization for referring all allegations of whistleblower retaliation by any supervisor to OAWP, including findings, decisions, determinations, or recommendations of such allegations made by entities external to

the organization (e.g. OSC, the Merit Systems Protection Board, the VA Office of Employment Discrimination Complaint Adjudication);

- (4) In accordance with 38 U.S.C. § 323(f)(2), respond to OAWP recommended actions, including providing a copy of the action taken or proposed and, if the recommended action was not taken or proposed, providing a detailed justification why such an action was not taken or proposed within 60 calendar days of OAWP's recommendation;
 - (5) Confirm, in writing, receipt of whistleblower disclosures referred for investigation by OAWP within seven calendar days;
 - (6) Designate a liaison (and alternate) to receive whistleblower disclosures for investigation for each:
 - (a) Administration or Staff Office;
 - (b) VISN;
 - (c) VBA District; and
 - (d) NCA District;
 - (7) Investigate whistleblower disclosures referred by OAWP, including providing investigatory findings to OAWP within 90 calendar days from the date of referral, unless an extension is granted by OAWP;
 - (8) Cooperate with, and requiring employees in accordance with 38 CFR § 0.735-12, to cooperate with, OAWP investigations, including providing unredacted copies of documents, to the extent permitted by law, required for OAWP investigations;
 - (9) When requested by the Assistant Secretary, or designee, providing technical subject-matter expertise to OAWP during investigations;
 - (10) Provide logistical support and assistance (e.g., providing a conference room, ensuring witness availability) during OAWP investigations;
 - (11) Identify a liaison to collaborate with the Assistant Secretary, or designee, regarding guidance under this directive.
- c. In addition to the above responsibilities, the Assistant Secretary for HRA/OSP, or designee, shall:
- (1) Coordinate with the Assistant Secretary to establish and maintain guidance or policy on:
 - (a) Whistleblower protections for actions proposed under 38 U.S.C. § 714; and

- (b) Findings made by an authority described in 38 U.S.C. § 731;
 - (2) Disseminate guidance issued by OAWP to human resources professionals; and
 - (3) Ensure that OAWP has access to electronic personnel files and personnel databases managed by HRA/OSP for the purposes of conducting investigations and verifying implementation of OAWP recommendations.
- d. In addition to the above responsibilities, the Assistant Secretary for Information and Technology/Chief Information Officer, or designee, shall ensure that OAWP has access to electronic communications (e.g., emails) and documentation for the purposes of conducting investigations and verifying implementation of OAWP recommendations.
 - e. In addition to the above responsibilities, the General Counsel, or designee, shall provide legal advice to OAWP as appropriate, including addressing legal issues that may arise during OAWP investigations.

5. REFERENCES.

- a. 38 U.S.C. § 323
- b. 38 U.S.C. § 512
- c. 38 U.S.C. § 713
- d. 38 U.S.C. § 714
- e. 38 U.S.C. § 731
- f. 5 U.S.C. § 2302