

August 23, 2017

Senator Johnny Isakson  
Chairman  
Senate Committee on Veterans' Affairs  
131 Russell Senate Office Building,  
Washington, DC 20510

Representative Phil Roe  
Chairman  
House Committee on Veterans Affairs  
335 Cannon House Office Building  
Washington, DC 20515

Senator Jon Tester  
Ranking Member  
Senate Committee on Veterans' Affairs  
311 Hart Senate Office Building,  
Washington, DC 20510

Representative Tim Walz  
Ranking Member  
House Committee on Veterans Affairs  
1034 Longworth House Office Building  
Washington, DC 20515

Dear Chairmen Isakson and Roe and Ranking Members Tester and Walz:

I'm writing to you about Department of Veterans Affairs (VA) Secretary David Shulkin's plans to use the recently passed VA Whistleblower Protection and Accountability Act to fire Brian Hawkins, the former director of the VA hospital in Washington, DC. Without speaking to the merits of Hawkins' allegations against the VA, I believe the actions around his case and the Secretary's response to the MSPB order demonstrate a need for Congressional oversight of VA Whistleblower Protection and Accountability Act implementation, and urge you to conduct this oversight. It is critical that the due process rights of all VA employees be upheld to ensure that the VA does not abuse its new authority.

Late last month, the VA removed Mr. Hawkins for allegedly "failing to exercise effective oversight, follow instructions, follow policy, and for lack of candor."<sup>1</sup> The basis for the VA's action was an Office of Inspector General (OIG) report issued in April.<sup>2</sup> However, Hawkins asserts that the firing was instead in retaliation for his own previous disclosures to the OIG and the Central Office Acting Procurement Officer. According to MSPB's order, Hawkins initiated an administrative investigation to look into identified deficiencies within the VA Medical Center's Logistics Department and then informed the agency's OIG of his concerns.<sup>3</sup>

<sup>1</sup> Department of Veterans Affairs, "MSPB forces VA to take back fired official, VA exploring all options under new accountability authorities," August 9, 2017. (Hereinafter Press Release)

<https://www.va.gov/opa/pressrel/pressrelease.cfm?id=2939>

<sup>2</sup> Department of Veterans Affairs Office of Inspector General, *Interim Summary Report - Healthcare Inspection - Patient Safety Concerns at the Washington DC VA Medical Center*, Washington, DC, April 12, 2017.

<https://www.va.gov/oig/pubs/VAOIG-17-02644-202.pdf>

<sup>3</sup> Merit Systems Protection Board, "Special Counsel ex. Rel. Brian Hawkins v. Department of Veterans Affairs." August 2, 2017. (Hereinafter Stay Order)

The Office of Special Counsel (OSC), the office charged with protecting federal employees from prohibited personnel practices, found “reasonable grounds” based on a preliminary review that the VA violated merit system principles when it fired Hawkins, and successfully petitioned the MSPB to intervene in the removal while OSC conducts a full investigation.<sup>4</sup> These merit system principles require agencies to respect employee’s due process rights and are critical to defending whistleblowers and other employees. Agencies can afford these procedural rights and still have ample authority to remove employees for misconduct or poor performance.<sup>5</sup>

As *The New York Times* recently reported, Secretary Shulkin has indicated that he will use “a new law that makes it easier to fire—and keep fired—deficient department employees”<sup>6</sup> to fire Hawkins again, this time using the results of an OIG report finding that Hawkins violated VA policy by sending sensitive VA information from his work email to his unsecured private email accounts,<sup>7</sup> an allegation often used to penalize whistleblowers.

The Project On Government Oversight has extensively investigated allegations of wrongdoing at the VA and worked with Congress to address some of the problems facing the agency.<sup>8</sup> With this background, we are well aware of the need to appropriately discipline bad actors at the agency. However, we are also conscious that any such discipline should be carried out with the necessary due process afforded to those employees. Any departure from that due process sets the agency up for further scandal, low morale, and departure from its mission.<sup>9</sup> Hawkins’ case provides a good test of whether the VA will implement the new law in a way consistent with the Congressional intent behind it.

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<https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1433679&version=1439149&application=ACROBAT>

<sup>4</sup> Stay Order

<sup>5</sup> “From FY 2000-2014, over 77,000 full-time, permanent, Federal employees were discharged as a result of performance and/or conduct issues.” Merit Systems Protection Board, *What is Due Process in Federal Civil Service Employment?* May 2015, page 41.

<https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT>

<sup>6</sup> Nicholas Fando, “V.A. Plans to Fire Its D.C. Medical Director — Again,” *The New York Times*, August 9, 2017. <https://www.nytimes.com/2017/08/09/us/politics/veterans-affairs-brian-hawkins.html>

<sup>7</sup> Department of Veterans Affairs Office of Inspector General, *Administrative Investigation - Failure to Follow VA Policy, VA Medical Center, Washington, DC*, August 1, 2017. <https://www.va.gov/oig/pubs/VAOIG-15-01119-315.pdf>

<sup>8</sup> Lydia Dennett, “POGO Provides Statement for House Hearing on VA Whistleblowers,” April 13, 2015. <http://www.pogo.org/our-work/testimony/2015/pogo-provides-statement-for-house-hearing-on-va-whistleblowers.html>

<sup>9</sup> “MSPB research shows that actual or perceived failure to abide by the [merit system principles] MSPs can lead to—Decreased individual and organizational performance; Increased Equal Employment Opportunity (EEO) complaints; and Increased intention to leave the agency.” Merit Systems Protection Board, *The Merit System Principles: Keys to Managing the Federal Workforce*, January 2017, page 2. <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1371890&version=1377261&application=ACROBAT>

Whether or not Secretary Shulkin is justified in firing Hawkins, he should let the process play out and refrain from issuing press releases on the case until OSC has completed its investigation. The MSPB stay order is temporary and lasts 45 days. The stay order is not a permanent reversal of the VA's decision. The VA can take steps in the interim in consultation with OSC to mitigate any negative impact it believes Mr. Hawkins may pose consistent with his due process rights and the MSPB's stay order. According to the VA's press release, it may have already done this.<sup>10</sup>

Therefore, I urge you, as the Chair and Ranking Members of the committees with jurisdiction over the VA, to ensure that the VA is operating in compliance with all applicable statutory protections—especially in these early stages of implementation of the new law. The VA Whistleblower Protection and Accountability Act of 2017 was intended to improve the situation for whistleblowers at the VA, not be used as a tool by the VA's administration to run roughshod over employee's due process rights. Ongoing Congressional oversight of the law's implementation is necessary to make sure that the law is applied as it was intended.

If you have any questions or would like to discuss this matter further, please contact POGO's Policy Counsel, Liz Hempowicz at [ehempowicz@pogo.org](mailto:ehempowicz@pogo.org) or (202) 347-1122.

Sincerely,



Danielle Brian  
Executive Director

cc: Members of the Senate Whistleblower Protection Caucus  
Members of the House Whistleblower Protection Caucus  
Acting Special Counsel Adam Miles

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<sup>10</sup> Press Release: "VA has complied with the order and returned Hawkins to the payroll, but to an administrative position at the VA headquarters in Washington rather than to a patient-care position at the VA Medical Center."