



POSITION PAPER

SEA

Reclassification of the Department of Veterans Affairs Title 5 Senior Executive Service Members under the Title 38 Appointment, Compensation, Performance Management, and Accountability System

- I.) Business-oriented employment authorities**
- II.) Competition with private sector for talent**
- III.) Outcome-based rewards and appraisals**
- IV.) Current accountability authorities**

SEA has significant concerns and strongly opposes the VA's proposal to move all VA career Senior Executive Service (SES) employees from Title 5 to Title 38. SEA arrived at this position because of the thinly veiled primary purpose of this proposal as a politically driven attempt to achieve the ease of firing career civil servants by making VA Senior Executives a separate class of civil servants and de facto political appointees.

Ultimately, this proposal will not improve delivery of services and benefits to our nation's veterans, nor will it allow the VA to attract and retain the exemplary career executive leadership necessary to advance the agency.

Neither SEA nor our members at the VA believe this proposal is about compensating VA Senior Executives appropriately. In the past, SEA worked with Congress and the VA to shift some executives within Veterans Health Administration (VHA) between Title 5 and Title 38 to ensure the agency was able to retain that talent and compete with the private sector, where compensation is significantly higher than what the VA pays its SES, particularly those serving as Medical Center and Network Directors. The shared goal behind those past proposals was to ensure the VA was equipped with the tools it needed to compensate and support its career executive leaders, knowing that in doing so care and services for veterans would benefit.

Yet in this case, the compensation element appears to be merely window dressing for a proposal that is really just about "accountability." It makes no sense to move non-medical VHA executives, and even less to move executives at the Veterans Benefits Administration (VBA) or National Cemetery Administration (NCA), to Title 38, a section of the U.S. Code designed for medical professionals, besides depriving executives of their Title 5 rights and making it easier to terminate or discipline them.

The denial of meaningful due process and management by fear will not garner the intended result of accountability for driving mission results and providing care and services to our veterans.

If approved, SEA believes this proposal will only serve to exacerbate the VA's career leadership challenges, as the VA will become an employer of last resort for talented government executives. It also does nothing to put the agency on even footing with industry in the war for top executive talent.

SEA urges policymakers to move beyond the talking point policy on "accountability," attempt to publicly acknowledge the real problems at the agency, and work with stakeholders to craft meaningful solutions to VA's complex, multifaceted issues. As Deputy Secretary Gibson told the House Veterans' Affairs Committee on December 9, 2015, "You can't fire your way to excellence."

I. VA needs business-oriented employment authorities

As the proposal begins with a justification using agency statistics to quantify the reality of a leadership vacuum, it is evident the VA has been derelict in meeting the congressional mandate to “develop a comprehensive management succession program, based on the agency's workforce succession plans, to fill agency supervisory and managerial positions” pursuant to 5 CFR 412.201-202.

While the VA is requesting new authorities to restructure its workforce, it appears to have made little progress meeting the government-wide succession planning standards set by Congress to prevent the exact recruitment and retention problems the agency has experienced in recent years. Instead of focusing exclusively on the 350-400 SES employees, far greater consideration and attention should be devoted to how the agency plans to develop and strengthen not only its SES corps, but its leadership talent pipeline, including considering whether this proposed executive system would be attractive to rising GS-14 and -15 employees at the agency and across government.

SEA is also concerned about balkanization of the SES via creation of a VA specific executive system, which will likely be a disincentive for talented executives from other agencies to consider employment at the VA. Making the timing of this proposal especially confusing is the fact that VA was scheduled to be on phase 1 of implementation of the President's recent [Executive Order on the SES](#).

Lastly, in attempting to lead a “radical transformation” of the VA by altering the employment authorities of the agency only as to its very small SES career corps, the Secretary and Deputy Secretary have with this proposal succeeded in alienating the career executives that work for them - the very people expected to lead the transformation. Below are a few reactions from SEA members who work at the VA about the proposal:

"Demoralizing." "Betrayed." "Just bad policy." "Happy I am retirement eligible." "Obviously little here to the benefit of the executive." "Morale lowest I've seen in 33 years at the VA." "There is no interest in buy-in from employees."

II. VA must compete with private sector employers for top leadership talent

The VA has lauded this proposal as an effort to better attract and retain qualified candidates and employees by expanding the VA's ability to more competitively compensate executives as compared to their private sector counterparts. However, the proposal cites the 2013 Healthcare Compensation Survey conducted by the Hay Group where individuals holding the position of Chief Executive Officer (CEO) in private sector health care systems received on average \$731,800 annually in cash compensation and CEOs of a single facility within a system received an average of \$393,100 in annual cash compensation.

If the impetus of this proposal is to allow the VA to compete on a level playing field with top healthcare systems in the country for executive talent, the newly recommended pay bands with a high of \$235,000, and a total compensation cap of \$400,000 – a cap that would be reached by a mere handful of executives – falls drastically short as compared to the market value of comparable healthcare executive positions. Additionally, the highest band, Pay Band 1A, would only allow for that specific base pay for 20 executives.

The realities of this proposed reform demonstrate this: the VA's proposal to move its career executives out of Title 5 into Title 38 is really just a ruse to avoid the merit system principles of Title 5 and not really about creating a business structure comparable to the private sector.

Senior executives at the VA understand they will not earn the same compensation as their counterparts in private industry, and they accept that because of their dedication to the VA's mission of serving veterans.

However, as the imbalance has continued to grow, the VA has witnessed incredible challenges filling its executive positions.

Despite the government's clearly demonstrated disadvantage in terms of competing with the private sector over executive compensation, it is hard to imagine that deserving VA executives truly will see increased compensation for their efforts. Actions by the Administration, VA leadership, and Congress in recent years to use executives as political pawns and to curtail or eliminate performance based awards for VA's senior executives have exacerbated the agency's recruitment and retention challenges. In SEA's view these actions have directly contributed to the alarming statistics the proposal highlights:

- 30% vacancy rate for the agency's SES allocations
- VHA losing 22.3% of Medical Center Directors in one fiscal year
- VHA losing 22.9% of Network Directors in one fiscal year, and
- The agency having to re-announce 37 recruitment actions because no qualified applicants were attracted by the VA

SEA also takes issue with the proposal's citing of "cumbersome administrative requirements" as one of the challenges to attracting qualified candidates. What is alluded to, but not directly named, is the Qualifications Review Board (QRB), wherein the agency submits a candidate's application package to the OPM-administered QRB for certification of executive core qualifications and to ensure the merits of the candidate. The QRB process is a key barrier to politicization of the government's career executive corps, and this proposal would eliminate QRBs for VA SES. Data, however, show the QRB process only adds two weeks to an application, and it is in fact likely internal dysfunction within the agency hiring practices that cause delays beyond that in the executive hiring process.

III. Appraise and reward executives based on outcomes

The VA's proposal is too vague and does not specify any details about the intended performance appraisal system except by saying the agency will establish such a system by regulation. The use of false and unattainable performance metrics in the past has masked the lack of substantive leadership by the VA, and it is unclear how an undefined appraisal system will address the agency's challenges.

Under existing Title 5 authority, the VA Secretary already has ultimate authority to sign-off on all SES performance appraisals. Complaints or reports from various oversight bodies are already taken into account in assessments of executive performance. Inspectors general are already consulted prior to issuance of performance awards.

The VA has recently put in place new performance appraisal policies.

[VA Directive 5013/15](#) was issued less than a year ago on March 27, 2015, and established performance appraisal policy for both Title 5 and Title 38 employees at the agency. [VA Directive and Handbook 5027](#), issued November 4, 2014 revised procedures for the agency's SES performance management system. Questions should be asked to determine if these directives are meeting their intended goals.

IV. Current executive accountability authorities do not support transformation

Senior Executives are already the easiest type of career federal employees to terminate or discipline, and failure of agencies to do so reflects a failure on behalf of agency leadership to understand and employ tools already established in law (or an agency practice of using those tools for improper motives), and which have been

determined to be fair and constitutional. Title 5 is not broken, but there are failures in implementing its authorities.

Regarding the Choice Act authority for VA SES, codified at 38 U.S.C. § 713, those provisions are currently subject to a constitutional challenge at the United States Court of Appeals for the Federal Circuit in *Helman v. Dept. of Veterans Affairs*, Case No. 15-3086 (Fed. Cir. 2015). Additionally, when Congress attempted to apply that same authority to the entire VA workforce with H.R. 1994, the President's advisors at the Office of Management and Budget (OMB) issued a strongly worded [Statement of Administration Policy](#), saying the legislation "could have a significant impact on VA's ability to retain and recruit qualified professionals and may result in a loss of qualified and capable staff to other government agencies or the private sector." SEA believes the Choice Act provisions already have done so for the VA's SES.

It is clear recent outcomes from MSPB decisions made public by the VA in cases the agency utilized the Choice Act's expedited termination/demotion authority are the real reason for this proposal, which cites "third party appellate processes [that] rely too heavily on unsuitable precedent" as a challenge to "true accountability."

The MSPB was created to provide government employees an independent forum that protects them from a politically controlled system where civil servants could be battered about by political appointees who could change with the political winds. A return to the era in which the government's workforce came and went with the winning party of political elections threatens to politicize the delivery of services and benefits to the American people, and in this case, Veterans and their families.

By moving VA executives from Title 5 into Title 38, VA Senior Executives would not be afforded the current - albeit truncated - administrative review before the MSPB provided for by the Choice Act. Instead, they would be subjected to the disciplinary procedures Title 38 medical staff undergo - procedures modeled after private sector hospitals where a peer panel reviews accusations of professional misconduct or incompetence.

It makes absolutely no policy sense to move NCA or VBA executives into Title 38, other than because it gives the Secretary more power to fire them. Title 38 is for medical professionals.

The Title 38 alternative to MSPB review for major actions is it to appeal to the Federal Circuit Court - where MSPB case law and precedent would still apply. Within SEA, as it should for all, various concerns have been raised about the ramifications this will have on the third branch of government:

- Why does the VA believe the federal courts should be saddled with reviewing Federal personnel decisions when the MSPB, an independent agency skilled and dedicated to that function, already exists?
- Has the VA considered the impact on the federal judiciary to send personnel matters into its jurisdiction, particularly if this proposal for just the VA executives is expanded to the entire VA and beyond?
- What will be the cost to federal judiciary to adjudicate these appeals, and how does this compare to the costs in having the MSPB fulfill this function?
- Which arm of government will defend these appeals in the federal courts – the VA counsel which would handle MSPB appeals or the Justice Department?

Cost Benefit Analysis

After laying out on page 2 and 3 of the proposal the challenges the agency is having filling executive roles and demonstrating the disparity between private sector and VA executive pay, the proposal to only add one level to the agency's executive pay banding system (1A) that brings just 20 executives into the \$205-235,000 salary range, with a pay cap for all executives at the President's salary of \$400,000 that appears to fall far short of allowing the agency to compete on an equal playing field with the private sector.

Executive compensation has long been a challenge at the VA, with VHA executives working, via SEA, with the Administration and Congress many times in the past to shift between Title 5 and Title 38 to ensure an equitable system in which the agency could compete for talent and fairly compensate its executives. However, in those instances, there was mutual agreement that it was bad policy and ultimately detrimental to veterans to undercompensate the VA's SES cadre. This current situation is obviously different and SEA believes there is little intention to actually strengthen VA executive compensation, and the entire conversation around pay adjustment is a ruse to help sell the "accountability" provisions.

The agency also makes bold predictions that this new policy will reduce executive turnover and attrition, but history suggests otherwise. SEA simply does not believe, as the agency appears to, that this entire proposal "would motivate highly experienced, seasoned executives to take on leadership roles in VA most demanding positions."

SEA posits that a large part of the reason the agency has had such challenges filling its SES positions is the toxic "gotcha" atmosphere of Capitol Hill and the media, coupled with inadequate investment in the development and compensation of executives, and lack of recognition of executive accomplishments, in recent years. It is unclear how this proposal addresses those issues.

Conclusion

It is baffling that the Secretary and Deputy Secretary feel this proposal would lead the transformation they are envisioning, especially when it comes at the expense and alienation of their entire senior leadership corps. Treating the agency's problems as solely a function of less than 400 individuals, rather than examining the structural and cultural troubles plaguing the VA is a disservice to our Veterans and the American public.

It is a shame that so much taxpayer time, effort, and energy was put into a proposal that purports to help the agency address its shortcomings, but makes little effort to substantiate its recommendations. There may be a need for improvement at VA, but hastily constructed and politically motivated solutions will not help this already troubled organization.

The Senior Executives Association (SEA) represents the interests of career federal executives in the Senior Executive Service (SES), and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions.