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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

May 20, 2014

VIA ELECTRONIC TRANSMISSION

The Honorable Eric K. Shinseki
Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Dear Secretary Shinseki:

Some of your agency's employees have reportedly been placed on paid administrative leave as a result of investigations into the allegations that the Department of Veterans Affairs (VA) kept secret waiting lists and that 40 or more veterans have died waiting for care.

According to press reports, on Thursday, May 1, the Phoenix, Arizona VA system placed Director Sharon Helman, Associate Director Lance Robinson, and a third employee who was not identified by name on administrative leave pending investigations into their actions.¹ Similarly, David Newman, an employee at the Cheyenne, Wyoming VA facility who allegedly wrote an email providing instructions on "gaming the system," was reportedly placed on administrative leave on Friday, May 9, when that email was published.² The VA has promised an investigation into his actions.³ Most recently, on Monday, May 12, two Durham, North Carolina VA employees were reportedly put on administrative leave because of allegations that they were "cooking the books" to skirt the VA policy that patients should be able to see a medical professional within 14 days of their request and to avoid the requirement that any patient wait time longer than that be reported to the VA.⁴

OPM's rule on administrative dismissals for certain types of employees is outlined in 5 CFR § 610.302, which states:

The authority in this subpart may be used only to the extent warranted by good administration **for short periods of time not generally exceeding 3 consecutive work days** in a single period of excused absence. **This authority may not be used in situations of extensive duration** or for periods of interrupted or suspended operations

¹ Scott Bronstein, Drew Griffin, and Nelli Black, "Phoenix VA officials put on leave after denial of secret wait list," *CNN Health* (May 1, 2014), <http://www.cnn.com/2014/05/01/health/veterans-dying-health-care-delays>.

² Jacob Siegel, "Did the VA Pay Out Bonuses for Screwing Veterans?," *The Daily Beast* (May 12, 2014), <http://www.thedailybeast.com/articles/2014/05/12/did-the-va-pay-out-bonuses-for-screwing-veterans.html>.

³ *Id.*

⁴ Drew Griffin, Scott Bronstein, and Dana Ford, "Two VA employees in North Carolina on leave over 'inappropriate scheduling,'" *CNN* (May 13, 2014), <http://www.cnn.com/2014/05/12/us/va-scandal-durham-north-carolina>.

such as ordinarily would be covered by the scheduling of leave, furlough, or the assignment of other work...” (emphasis added).

While other types of employees aren’t explicitly covered by these regulations, the precedents of the Comptroller General and OPM similarly limit the authority for paid administrative leave. Agency discretion to place employees on administrative leave only exists for brief absences.⁵ That discretion has generally been held to be appropriate only for short periods of time, and more lengthy absences would only be permissible in the unusual event that an absence “is in connection with furthering a function of the agency.”⁶

Accordingly, it is troubling that several VA employees are being placed on administrative leave pending potentially lengthy investigations. If those employees are receiving their full salary while on leave, it could result in significant waste of taxpayer money in annual salaries for highly paid employees who are not working. It would only add insult to injury if the investigations find that these expensive paid vacations are being given to the very employees responsible for the misconduct at the VA.

⁵ To the Chairman, U.S. Civil Service Commission, 38 Comp. Gen. 203 (1958) (where removal of an employee is necessitated by safety concerns, only 24 hours administrative leave is appropriately authorized, and extensive paid leave pending an investigation does not qualify as a proper use of “administrative leave,” but rather “immediate” steps should be taken to reduce time during which an employee is on paid leave); Navy Department-Reduction In Force-Administrative Leave During 30-Day Notice Period, 66 Comp. Gen. 639, 640 (1987) (holding that decisions of the Comptroller General and the guidelines of the Office of Personnel Management limit an agency's discretion to grant administrative leave to situations involving brief absences); Ricardo S. Morado – Excused Absence, 1980 WL 17293, 1 (1980) (when it became clear that an employee would not be returning to work, an agency was not authorized to grant administrative leave pending the separation); Miller v. Department of Defense, 45 M.S.P.R. 263, 266 (MSPB, 1990) (a settlement agreement was declared invalid as the Merit Systems Protection Board determined that the Department of Defense did not have the authority to grant an employee nine months of paid administrative leave, where said employee was to be removed at the end of the period of administrative leave, because there was no statutory provision that authorized the agency to grant paid administrative leave for such an “extended period of time”); *pet. for rehearing denied by Miller v. Dep’t of Defense*, 1992 U.S. App. LEXIS 2457 (Fed. Cir. Feb. 18, 1992); In the Matter of the Grant of Administrative Leave Under Arbitration Leave, 53 Comp. Gen. 1054, 1056-57 (the Comptroller General refused to grant an employee thirty days of administrative leave, where that employee was injured on the job and unable to work in his full capacity, as the grant of administrative leave constituted an “extended period of excused absence” that was not permitted under any statute); Nina R. Mathews-Age Discrimination/Title VII Resolution Agreement-Compensatory Damages, 1990 WL 278216, 1-2 (where an employee was granted twenty-two weeks of administrative leave pay in settlement of a personnel claim, the agreement was deemed invalid by the GAO, as the Comptroller determined that there was no relevant legal basis by which the employee could be placed on extended administrative leave with pay); Excused Absence for Bar Examination Preparation, 1975 WL 8763, 1 (1975) (periods of 14, 28 and 31 days did not constitute “periods of brief duration” under which an agency had authority to grant administrative leave for employees to take their Bar examinations); Department of Housing and Urban Development Employee-Administrative Leave, 67 Comp. Gen. 126, 128 (1987) (The Comptroller General held that the agency’s “decision to allow the employee to participate in a NIH therapeutic trial for 3 days a month in a cancer research effort being run by the National Cancer Institute is consistent with the broad framework of decisions of this Office and the FPM Supplement addressing the discretionary agency review of administrative leave requests”); Frederick W. Merkle, Jr. – Administrative Leave, 1980 WL 14633, 1 (1980) (an eight-week period could not constitute administrative leave for an employee awaiting a decision on his eligibility for early retirement, as it constituted an “extended period of time”); Gladys W. Sutton-Administrative Leave in Lieu of Leave Without Pay, 1983 WL 27142, 1 (a five-week period constituted an “extended period” where administrative leave could not be properly granted by an agency so that an employee could preserve her eligibility for a discontinued service retirement program).

⁶ 67 Comp. Gen. 126, 127 (1987); 45 M.S.P.R. 263 (1990).

In an effort to examine the potential abuse of paid administrative leave more broadly, I requested that the Government Accountability Office (GAO) conduct a detailed analysis of extended administrative leave across the federal government. GAO is currently conducting this study. To better understand the VA's policies and procedures concerning paid administrative leave, please answer the following questions:

1. Are all of the VA employees who are currently placed on administrative leave pending investigations related to this matter continuing in a paid status? If not, which ones mentioned in this letter are not receiving their salary?
2. How many employees have been placed on paid administrative leave as a result of investigations related to this matter, and what is the annual salary for each?
3. How much money has been spent from 2009 until the present to pay VA employees who are or were on administrative leave for more than one month pending any investigation (not just those related this matter)?
4. What is the longest period of paid administrative leave pending an investigation during that time?
5. What is the median period of paid administrative leave pending an investigation during that time?
6. How many VA employees are currently on paid administrative leave pending investigation?
7. For how long do you anticipate each of those employees will be on administrative leave?
8. What alternatives to paid administrative leave did the agency consider, if any, to address the concerns that caused it to initiate the leave in the first place? If none, why not?
9. When do you believe administrative leave becomes of extensive duration as opposed to a short period of time?
10. Do you agree that administrative leave is only within the agency's discretion if it is limited to a short period of time?

Thank you for your cooperation and attention in this matter. I would appreciate a response by June 10, 2014. If you have any questions, please do not hesitate to contact Tristan Leavitt of my committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Judiciary