



The Voice of VA Physicians and Dentists Since 1975

NEWS

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VA is Critical to Medicine and Vets

by Robert A. McDonald, Secretary, U.S. Department of Veterans Affairs

During preparation for my confirmation as secretary of Veterans Affairs (VA), I was repeatedly asked, "Why doesn't VA just hand out vouchers allowing veterans to get care wherever they want?" For a department recovering from serious issues involving health care access and scheduling of appointments, that was a legitimate question.

After nine weeks at VA, travel to 31 VA facilities in 15 cities, discussions with hundreds of veterans and VA clinicians, meetings with 75 Members of Congress, two hearings before the Senate and House Veterans' Affairs committees and dozens of meetings with Veterans Service Organizations and other stakeholders, I can answer that question.

VA's accomplishments on all three pillars and contributions to the practice of medicine are as broad, historically significant and profound as they are generally unrecognized.

VA is affiliated with over 1,800 educational institutions providing powerful teaching and research opportunities. And our research initiatives, outcomes and honors are tremendous. Few understand that VA medical professionals:

- Pioneered and developed modern electronic medical records;
- Developed the implantable cardiac pacemaker;
- Conducted the first successful liver transplants;
- Created the nicotine patch to help smokers quit;
- Crafted artificial limbs that move naturally when stimulated by electrical brain impulses;
- Demonstrated that patients with total paralysis could control robotic arms using only their thoughts — a revolutionary system called "Braingate";
- Identified genetic risk factors for schizophrenia, Alzheimer's and Werner's syndrome, among others;

- Applied bar-code software for administering medications to patients — the initiative of a VA nurse;
- Proved that one aspirin a day reduced by half the rate of death and nonfatal heart attacks in patients with unstable angina;
- Received three Nobel Prizes in medicine or physiology; seven prestigious Lasker Awards, presented to people who make major contributions to medical science or public service on behalf of medicine; and two of the eight 2014 Samuel J. Heyman Service to America medals.

No single institution trains more doctors or nurses than VA. More than 70 percent of all U.S. doctors have received training at VA. Each year, VA trains, educates and provides practical experience for 62,000 medical students and residents, 23,000 nurses and 33,000 trainees in other health fields — people who go on to provide health care not just to veterans but to most Americans.

The 278,000 employees of the Veterans Health Administration work in a system spanning all 50 states and beyond, providing — from Maine to Manila — a high volume of quality, clinical care. Our 150 flagship VA Medical Centers are connected to 819 Community-Based Outpatient Clinics, 300 Vet Centers providing readjustment counseling, 135 Community Living Centers, 104 Residential Rehabilitation Treatment Centers, and to mobile medical clinics, mobile Vet Centers and telehealth programs providing care to the most remote veterans.

That network of facilities allows VA to deliver care to veterans from the greatest generation of World War II to the latest generation from Afghanistan and Iraq. In 2013, VA provided over 90 million episodes of care; that's an average of over 240,000 each day. And since 2004, the American Customer Satisfaction Index survey has consistently shown that veterans receiving inpatient and outpatient care from VA hospitals and clinics give a

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Samuel V. Spagnolo, MD

The President's Corner

Greetings! As we all get into the end-of-the-year rush, I wanted to take this time to let you all know about what's been going

on here in Washington, and how we at **NAVAPD** have been working on your behalf within the Administration and Congress.

November is the time of year where we give thanks for family, friends, faith, good fortune, and great health. It's also the time of year we extend a little extra warmth and kindness to those around us. I see it in family relationships, among work colleagues, and particularly in patient care. No one wants to be in the hospital or undergo surgery around Thanksgiving and leading up to the holidays, and the VA physicians I work with do everything they can to make sure our veterans get the very best care while they're here with us. It's heartening to see the extra effort we all put into patient care this time of year, and I personally will endeavor to keep that same level of mindfulness throughout 2015, and I hope you will, too.

There is no doubt 2014 has been a tumultuous year for the VA health care system. Many of us have been aware of and reporting problems for years, to no avail. To have our system go through such a public crisis hasn't been easy,

but I am hopeful it will begin to create the much-needed change we have all been clamoring for. I have to remind myself, and thus all of you, that change takes time, particularly in a government bureaucracy. I am hopeful that we will soon be on the right path toward positive change and a more efficient, patient-centered system, but I have to temper that hope with the realization that it won't happen overnight, and there will be bumps along the way.

I was reminded of this when I had a very positive meeting with Robert McDonald, the new VA Secretary in October. We spent an hour together, talking about what doctors and dentists have been experiencing at VA medical centers across the country -- staffing challenges, pay and performance issues, and how long critical medical positions have gone unfilled. We had a very honest and frank discussion, and he is aware of and work toward addressing many of our frustrations. He knows our desire to provide the very best patient care, and is aware -- now more than ever -- of the issues that are preventing that. We also talked about some of the good things going on in the VA. We talked about the many physicians and dentists who are providing exemplary care and going out of their way to do good work, despite the hurdles in front of them. We talked about how we can all be catalysts for change within the system, and how we need to keep an open dialogue as decisions are made and changes implemented. I am

committed to keeping a positive attitude about this, because it's been too negative for far too long.

I am also committed to keeping a hopeful attitude as we adjust to changes coming in the new Congress. This past election cycle was tough for many on Capitol Hill for a variety of reasons. You'll read in this issue about how the elections played out for the Veterans Affairs and other congressional committees we need to work with. In the first few months of 2015, the **NAVAPD** team will be on the Hill, meeting with new members and staff, and representing your issues in the hopes we can make a real difference.

The whole **NAVAPD** team is approaching this transition time in Congress and in the VA Central Office with the spirit of cooperation, collaboration, and continued education about what doctors and dentists need to provide the very best care to our nation's veterans.

I encourage you to do the same in your centers, and to be in touch with us about issues you need our support on. We have the eyes and ears of the people leading this long-term change, and it's our mission to represent your needs here in Washington.

I wish you a happy Thanksgiving, and continued good health and happiness as you gather together with your loved ones now and throughout the rest of the year. ☺

VA is Critical for Medicine and Vets (continued)

(Continued from page 1)

higher customer satisfaction score, on average, than patients at private sector hospitals.

Finally, VA is uniquely positioned to contribute to the care of veterans with traumatic brain injury (TBI), prosthetics, PTSD and other mental health conditions, and the treatment of chronic diseases such as diabetes and hepatitis. The work we do in these areas, as well

as many others, produces results and life changing improvements in care for veterans -- and for all Americans and people around the world who suffer from these conditions.

Fixing access to VA care is important; we have a plan to do that and are dedicated to implementing it. That process will take time -- but it must be done, and we will be successful. Those who fully understand the value of the de-

partment in research, training, and clinical care understand that veterans and all Americans need and deserve their VA to continue providing exceptional care to those we serve. ☺

This Op-Ed article was first published in the Baltimore Sun on October 23, 2014. Reprinted by permission of the author.

Navigating Whistleblower's Rights in the Fallout of VA Scandal

By Stephen J. Stlne, Esq.

"It was the best of times, it was the worst of times."

Charles Dickens' famous opening to *A Tale of Two Cities* may have never rung more true for VA whistleblowers than now, following this year's widespread reports of VA corruption, graft, misrepresentative reporting of veterans' waiting lists, retaliation against whistleblowers and the ultimate abuse of veterans and VA resources.

Historical Challenges to Whistleblowers

On the one hand, there is certainly both a historical and a current climate of discouragement and seeming futility in whistleblowers' attempts to report federal agency abuse and corruption and in their attempt to be made whole from retaliatory measures. The VA, of course, has been in the spotlight this summer as the poster-child for agency managerial greed, corruption, and retaliation. In July, the House of Representatives VA Committee held multiple hearings to address the widespread allegations of VA administrators "cooking the books" in vastly underreporting the wait list time for veterans to receive their scheduled treatment and care. This discovery was primarily initiated by courageous VA physicians, starting at the hospital in the Phoenix VA Health Care System. The investigation then expanded to multiple VA hospitals spanning the entire country. Multiple VA physicians, other VA whistleblowers, and whistleblower advocates testified to the Committee about the scope and the duplicity of managers' attempts to receive bloated bonuses and other performance incentives. These witnesses reported vast exaggeration of the number of VA patients who received care, as well as other abuses. Likewise, the witnesses recounted widespread efforts to retaliate against them, such as demotions, uninvited transfers, pay cuts, managerial and nursing staff retaliation in day to day activities. They also discussed other coercive measures such as requiring extended and uncompensated work hours and threats of criminal or ethical investiga-

tions against the whistleblowers.

Against this backdrop of widespread and longstanding corruption, VA whistleblowers have also had to face the harsh reality that their chances of success in seeking protection against retaliation have been – historically – slim to none. Prior to 2012, whistleblowers' protection was severely curtailed by several Federal Circuit Court of Appeals' adverse decisions, which in turn caused far more cases to be dismissed before the Merit Systems Protection Board ("MSPB") and those cases were then routinely dismissed on appeal to the Federal Circuit. These cases thwarted the original intent and meaning of the Whistleblower Protection Act of 1989. When Congress enacted the Whistleblower Protection Act, ("WPA") it specifically protected "any disclosure" of covered forms of wrongdoing, i.e.,

While there are still significant hurdles, whistleblowers should now take heart that both the legal system and the political arena are taking steps to ... protect them...

any information that an individual reasonably believes evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. See 5 U.S.C. § 2302 (b)(8). But the Federal Circuit substantially narrowed the scope of protected conduct by creating loopholes that were contrary to Congressional intent. Those decisions include: (1) *Horton v. Dep't of the Navy*, holding that disclosures to the alleged wrongdoer are not protected; (2) *Willis v. Dep't of Agriculture*, excluding from WPA protection a disclosure made as part of an employee's normal job duties; and (3) *Meuwissen v. Dep't of Interior*, holding that disclosures of information already known are not protected. These decisions greatly contributed to a legal environment heavily weighted against whistleblowers. As noted by Rep. Gerry Connolly, D-Va., in critiquing the effectiveness of

the [WPA], "federal whistleblowers [have been] at the mercy of the Federal Circuit, which had ruled against whistleblowers in an astonishing 226 out of 229 cases since 1994."

The Winds of Change: Statutory Amendments and Further Action In Light of VA Abuse

However, as Dickens wisely suggests, even the darkest times can lead to new possibilities and reasons for optimism. Even before the current VA scandal, Congress had noted the ineffectiveness of the WPA in light of the Federal Circuit's rulings and had taken important measures to address the issue. In November 2012, Congress passed the Whistleblower Protection Enhancement Act, ("WPEA") which amended the WPA and is aimed to correct the Federal Circuit's incorrect limitations of protected disclosures, to provide more procedural protections and avenues for damages for whistleblowers, and to allow whistleblowers to bring MSPB appeals to federal appeals courts in their particular jurisdiction rather than to face the historically hostile Federal Circuit.

First and foremost, the WPEA clarifies the full scope of "any disclosure" and overturns the Federal Circuit decisions to the contrary. Sections 101 and 102 clarifies that a whistleblower's disclosure does not lose protection because: (1) the disclosure was made to a person, including a supervisor, who participated in the wrongdoing disclosed; (2) the disclosure revealed information that had previously been disclosed; (3) of the employee or applicant's motive for making the disclosure; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time which has passed since the occurrence of the events described in the disclosure. Section 101(b)(2) also clarifies that a disclosure is not excluded from protection because it was made during the employee's normal course of duties, providing the employee is able to show that adverse personnel action was taken in retaliation for the disclosure.

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Whistleblower Rights (continued)

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The WPEA also provides additional damages relief available to whistleblowers subject to retaliatory investigations. Section 104(c) adds a remedy for whistleblowers subjected to retaliatory investigations by clarifying that corrective action can include "fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for" protected whistleblowing." In sum, this provides a remedy for compensatory damages, whereas past remedies for retaliatory investigations were limited to economic damages, attorney's fees, costs, and specific performance remedies such as reinstatement, withdrawal of a suspension, or modification of a retaliatory performance review.

Finally, the WPEA also provides enhanced procedural protections. As referenced earlier, whistleblowers under the WPEA can appeal an MSPB decision to any federal appeals court with jurisdiction, rather than to the Federal Circuit. This was a pilot program that was set to expire in 2014. However, this past July the House passed The All Circuit Review Extension Act, which extends the WPA and WPEA's federal appeals court review to whistleblowers for an additional three years. Hopefully, the success of such initiatives will become a permanent fixture of the WPA after 2017. Other WPEA procedural improvements include expanding the types of retaliatory actions that can be appealed to the MSPB after the whistleblower has exhausted administrative remedies before the Office of Special Counsel, ("OSC") and codifying the whistleblower's due process rights to a full and fair hearing at the MSPB by requiring the MSPB to hear the evidence that the whistleblower's protected disclosure was a contributing factor in the agency's retaliatory personnel action before hearing the agency's affirmative defense that the agency would have taken the same personnel action for lawful reasons independent

of the alleged retaliatory motivation.

Beyond the WPEA's enhanced protections, however, the current political climate and media focus on the VA scandal – fueled largely by the accuracy of whistleblower complaints – may provide additional incentive for the VA, the OSC, the MSPB, and the federal appeals courts to take current and prospective VA whistleblower claims more seriously. On August 26, the VA Inspector General's Office released a report stating that 93 VA health care sites across the country are being investigated in connection with falsifying scheduling records to hide delays in veterans' health care and "attempting to obstruct OIG (Office of Inspector General) and other investigative efforts." "These investigations confirmed wait-time manipulations were prevalent throughout" the VA health system, the report stated, and it cited a "breakdown of the ethics system" within the VA health care program. These systemic and nationwide problems with the VA were brought to light largely by the whistleblowing efforts of VA physicians.

Latest Developments and Continuing Obstacles

There are still many pitfalls to navigate in bringing whistleblower actions. The WPA and WPEA still contain a "sensitive jobs" loophole, which allows agencies to brand practically any employee position as involving sensitive and classified information. The statute then permits the agency to block any appeal of adverse personnel actions to the MSPB because of the supposedly "sensitive" nature of their job. Last September, Tom Devine, legal director for Government Accountability project, testified before a House subcommittee on the federal workforce that more agencies are exploiting and expanding the "sensitive jobs loophole" to keep government employees from speaking out about waste, fraud and abuse. "Sensitive jobs," he said, "aren't just held by the likes of NSA leaker Edward Snowden anymore. They can now include employees stocking sunglasses at military base exchanges." Fortunately,

there is a bill pending before Congress with bipartisan support to overturn a Federal Appeals Court decisions upholding the government's unrestricted ability to designate any employee position as "sensitive." Hopefully, this legislation will pass and will be yet another step into clearing agencies bureaucratic means of blocking whistleblower actions.

Moreover, regardless of the improved legal clarifications in the law, factually proving these cases is always factually arduous. VA whistleblowers should be sure they record a proper paper trail of all of their actions, whether it be reporting abuse to a supervisor, documenting falsified records, or responding to a GAO audit or investigation. A whistleblower should not be satisfied with an oral representation, they must insist – for their own protection – that all communications be appropriately documented.

In conclusion, the current probe and attempted reform of the VA (including the purging of complicit or negligent administrators, and increased hiring, retention, and funding efforts) have once again proven the efficacy of VA whistleblowers' actions. OSC has also recently approved the VA for its Whistleblower Protection Certification Program, which among other steps, requires the VA executives to attend mandatory biennial training on avoiding prohibited personnel actions and retaliation and providing adequate whistleblower protection. While there are still significant hurdles, whistleblowers should now take heart that both the legal system and the political arena are taking steps to acknowledge their efforts and to further redress and protect them in whistleblower legal proceedings. ☐

Mr. Stephen J. Stine, Esq., is an experienced civil litigator practicing in the D.C. Metro area. He has participated in several qui tam whistleblower trials involving the federal False Claims Act. Mr. Stine can be reached at his office at 703-934-4647 or by email at stine@stinelaw.com.

Legislative Update

by Kay Bulow

Pending Legislation

In September, the U.S. House of Representatives approved the following veteran's related legislation:

- HR 3593 would direct the inclusion of an outside entity — the Army Corps of Engineers — to assist in the management of VA's major facility construction efforts;
- HR 5404 would extend a number of expiring current authorities and critical programs at both the Veterans Affairs and Labor Departments;
- HR 4276 would require VA to provide reports to Congress on the pilot program for assisted living services for veterans with traumatic brain injury; and
- S 2258 would authorize a cost-of-living adjustment for disabled veterans receiving disability compensation from the Department of Veterans Affairs and other compensation for survivors of veterans who have died as a result of their service to our country.

The President signed S 2258 and HR 5404 on September 26, 2014; HR 3593 and HR 4276 are awaiting consideration in the Senate.

House Veterans Affairs Committee Hearings

November 13 - Assessing the implementation of the Veterans Access, Choice, and Accountability Act of 2014;

November 18 - VA's longstanding information security weaknesses are increasing patient wait times and allowing extensive data manipulation;

November 19 - The role of State approving agencies in ensuring quality education programs for veterans;

November 19 - Legislative hearing before Health Subcommittee on HR 4720, HR 4887, HR 4977, HR 5059, HR 5475 and HR 5484

- HR 4720 would give Medal of Honor recipients priority care;
- HR 4887 directs the Secretary of VA to develop a plan to expand the scope of VA's research and education on, and delivery and integration of, complementary and alter-

native medicine services;

- HR 4977 creates options for veterans expedited recovery Act (COVER) and establishes the veterans expedited recovery commission to:
 - * Examine the efficacy of the evidence-based therapy model used by VA for treating mental health illnesses of veterans and identify areas to improve wellness-based outcomes;
 - * Conduct a patient-centered survey within each VISN to examine the experience of veterans with VA when seeking medical assistance for mental health issues through VHA, their experience with non-VA facilities and health professionals for such issues, their preferences regarding available treatments for such issues and which methods they believe to be most effective, their experience with complementary alternative treatment therapies, and the prevalence of prescribing prescription medication among veterans seeking treatment through the VHA to address mental health issues.
 - * Examine available research on complementary alternative treatment therapies for mental health issues and identify what benefits could be made with the inclusion of such treatments.
- HR 5059 requires the Secretary of VA and the Secretary of DOD, at least annually, to each arrange for an independent third party evaluation of the VA and DOD mental health and suicide prevention programs;
- HR 5475 amends title 38 to improve care to newborn children; and
- HR 5484 directs the VA Secretary to select a VA medical center to serve as the national center for research on the diagnosis and treatment of health conditions of descendants (i.e., a biological child, grandchild or great-grandchild) of individuals exposed to toxic sub-

stances while serving as members of the Armed Services that are related to that exposure.

Go to veterans.house.gov/legislation/hearings to locate additional hearings.

Senate Veterans Affairs Committee Hearings

None scheduled. Go to www.senate.gov/pagelayout/committees/b_three_sections_with_tasers/committee_hearings.htm to find new Committee hearings.

Election Results—Possible Changes in House and Senate VA Committees

In the House Jeff Miller-R, Chairman of the full committee won reelection; Bill Flores-R, Economic Opportunity Subcommittee, Mike Coffman-R, Oversight & Investigations Subcommittee and Dan Benishek-R, Health Subcommittee and remaining members of the majority all won re-election.

Jon Runyan-R, Chairman of Disability Assistance and Memorial Affairs - did not seek re-election.

Michael Michaud-D, ranking minority member and Gloria Negrete McLeod-D did not seek re-election.

Julia Brownley-D, ranking minority member on Health Subcommittee, was re-elected in a very close contest.

On the Senate side, since the Republicans will be taking control of the Senate in January, the Chairmanship will flip. Richard Burr is the ranking Republican and could become Chairman; however, he is also ranking minority member on Senate Select Committee on Intelligence and might opt for that Chairmanship. Senators Jay Rockefeller-D and Mike Johanns-R did not seek re-election. Mark Begich-D lost his bid for re-election.

Lame Duck Session and 114th Congress

Congress reconvened after Veterans Day, November 12 and it is anticipated this session will last about a month

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Legislative Update (continued)

(Continued from page 5)

before *sine die* adjournment. Congress will be addressing issues necessary to continue operating the Government such as a continuing resolution on appropriations, providing necessary money to combat Ebola, ISIS and the Defense Authorization Act. Other must do items include extending some key tax breaks about to expire such as mortgage interest deduction, childcare tax credit and the research and devel-

opment tax credit. The President's nominee for Attorney General which will need to be confirmed by the Senate.

Freshmen members of the House and Senate have arrived in Washington DC for their orientation which includes office assignments, discussion with elected leadership regarding committee assignments and other housekeeping items.

NAVAPD will be tracking any changes in membership of the House and Senate Veterans Affairs Committees. We will also monitor Congressional actions of interest to our membership during the lame duck session. The 114th Congress will convene on January 3, 2015. ☒

The author, Kay Bulow, is owner and principal of The Bulow Group, NAVAPD's Legislative consultant.

Thank You, Donors

Every year, a few members add donations above and beyond their dues. These donations help NAVAPD to provide greater services or support special projects, such as the highly successful Washington, D.C. Summit in June. NAVAPD would like to express our appreciation to the following donors:

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NAVAPD Considering All-Electronic Delivery of Publications

NAVAPD has been serving VA Physicians and Dentists for 39 years, and much has changed in that time. One of the most dramatic has been in the ways in which written materials can be distributed. The US Mail system is no longer the only option, and the NAVAPD Board is considering a change in how it communicates with members.

There are many reasons to consider sending newsletters and other materials electronically.

1. Electronic delivery **is quicker and more accurate**. There are no printing or mail handling delays.
2. Many federal facilities **irradiate**

their mail, and this not only slows delivery, but damages the items, often to the point that they cannot even be separated to be read. Electronic delivery avoids this.

3. Electronic distribution **saves trees** since no paper is used, and also **reduces the amount of paper waste** entering landfills or recycling plants. It's good for the planet!
4. **It's less expensive**. This means that the resources of NAVAPD can be used for other things than buying paper, printing, and postage. That can mean more Summits and more resources to educate the nation's leadership in the needs, services, and values of VA physicians

and dentists.

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Please let us know RIGHT AWAY!
Thank you for supporting NAVAPD. ☺

NAVAPD's Mission and Principles

Mission

NAVAPD is dedicated to the principle that this nation's veterans, as a result of their service to our country's Armed Forces, have earned an entitlement to quality health care to meet their needs as they become sick or injured. The Department of Veterans Affairs ("VA") is that agency of government obligated to honor the Nation's contract with its deserved Veterans.

NAVAPD has as its highest priority the preservation and strengthening of the VA health care system, so that it stands ever ready to give our veterans quality medical care equal to or better than that which can be obtained elsewhere in our society.

Just as VA doctors care for those who have served, they also stand ready to treat the military and civilian casualties of future conflicts and non-military disasters.

VA health care facilities are a principal element in our national security and in our national defense, representing as they do a vast resource to back up the limited capabilities of our military hospitals.

Guiding Principles

NAVAPD shall function as the official professional organization of the VA physicians and dentists at all levels in the VA Health Care system, from the local health care facilities through VISNs to the national level.

NAVAPD shall cooperate to the maximum extent possible with official representatives of the VA, to the end that the best possible health care is provided to veteran beneficiaries.

NAVAPD shall endeavor to ensure that qualified physicians and dentists are recruited into the VA Health Care system and retained therein.

NAVAPD shall support VA physician research, participate in activities of professional organizations, continuing medical education and participation in equal partnership affiliation with medical schools.

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