

## **Cheri Cannon discusses the latest in the VA SES firings in the Washington Examiner.**

Veterans Affairs executive defends pace of agency discipline in scandal

By Mark Flatten

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A top Department of Veterans Affairs official is pushing back against congressional criticism that the agency is too slow to fire corrupt managers. Sloan Gibson, deputy VA secretary, said the agency is moving as quickly as the law allows in getting rid of executives responsible for widespread falsification of patient records to hide long wait times. Gibson's statement was issued late Tuesday after bipartisan criticism that the disciplinary steps are too little, too late. The use of bogus patient appointment lists has been confirmed nationwide, but no one has been fired over the scandal. Four senior executives have been "proposed" for removal from federal service, but they remain on the payroll. "VA announced disciplinary actions against four individuals, consistent with the law that Congress just passed," Gibson said. He was referring to a law signed in August that Congress intended to make it easier for the VA secretary to discipline members of the Senior Executive Service, the top tier of the agency's career civil service management. "If Congress wants VA to implement a different law, it should pass one," Gibson said. "Until then, VA will use the authority it has been given fully and responsibly to protect the health, safety and well-being of our nation's veterans while at the same time ensuring that disciplinary actions are based on the best possible evidence from entities such as the inspector general, the Office of Special Counsel, and the Justice Department so that these actions stick." The scandal over falsified wait times broke in April. Since then, the VA inspector general has confirmed the practice is nationwide, "systemic" and potentially criminal. While the initial allegations surfaced in Phoenix, the IG investigation into phony wait lists has spread to at least 93 facilities nationwide. Seventeen criminal referrals were made by the IG, but the Justice Department refused to prosecute. Even Sharon Helman, the former director of the Phoenix hospital where the scandal erupted, remains on paid administrative leave. Former VA Secretary Eric Shinseki announced in May that Helman had been targeted for firing, but that action has not become final and agency officials refuse to discuss her status. The new law gave the VA secretary enhanced power to fire or discipline members of the SES. It also shortened the time frame for appeals, giving the employee seven days to challenge an adverse action to the Merit Systems Protection Board. An MSPB judge then has 21 days to render a final verdict on whether the discipline should be overturned. The judge's decision cannot be appealed. The law also changed pre-termination procedures,

giving the secretary the discretion to fire senior executives at will. Whether that change is legal is in dispute, said Cheri Cannon, a former federal personnel lawyer who now represents government workers challenging adverse decisions. A 1985 U.S. Supreme Court decision held that most government employees have a property right to their jobs. That means that before they can be fired, they are entitled to due process, meaning essentially a right to respond to the charges against them. The old policy at VA had been to give an employee 30 days to respond before a termination became final. New procedures implemented since the bill was signed shortened that to five days. Since the right to respond is a constitutional issue, it cannot be wiped away by changing the law, Cannon said. Gibson's statement seems to suggest the agency is trying to work around that legal land mine by creating a new, shorter pre-termination procedure. VA officials would not clarify or explain Gibson's statement

Wednesday. "Somebody over there has made the recognition that the critics of the law are correct to the extent of the pre-deprivation due process, so they are giving them this right to reply," Cannon said of the VA policy. "They are trying to address the constitutional concerns. They recognize that it could be challenged and they are trying to mitigate that," Cannon said. Of the four proposed terminations announced in recent weeks, one of the senior executives had already announced his retirement. Another landed a job as a top procurement manager at the Department of Energy, but that offer was revoked after a scathing IG report and subsequent inquiries from the Washington Examiner

. Rep. Jeff Miller, chairman of the House Committee on Veterans' Affairs and primary author of the new accountability provisions, said he is impatient with the slow pace at which top VA officials are being held accountable for their unethical and illegal conduct. The Florida Republican said the way VA is implementing the new law gives managers who should be fired outright the opportunity to resign or retire without any consequences or negative inferences on their resumes. "By creating an added appeals process in which VA employees are given advance notice of the department's plans to fire them, VA appears to be giving failing executives an opportunity to quit, retire or find new jobs without consequence — something we have already seen happen in recent weeks," Miller said. "If any current laws or regulations are impeding the department's ability to swiftly hold employees accountable, VA leaders must work with Congress so those laws and regulations can be changed," he added.