



Public Employees for Environmental Responsibility

2000 P Street, NW, Suite 240 • Washington, DC 20036

Phone: (202) 265-PEER • Fax: (202) 265-4192

Email: info@peer.org • Web: <http://www.peer.org>

October 20, 2015

The Honorable Beth F. Cobert
Acting Director
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

Re: Complaint Requesting the U.S. Office of Personnel Management to Exercise Oversight Authority and Correct the Excessive and Inappropriate Use of Administrative Leave by the U.S. Chemical Safety Board

Dear Director Cobert:

By this letter, Public Employees for Environmental Responsibility (PEER) urges the United States Office of Personnel Management (OPM) to exercise its oversight authority under 5 U.S.C. § 1104(b)(2) and 5 C.F.R., Part 5 and 10 in order to correct the noncompliant use of administrative leave by the U.S. Chemical Safety and Hazard Investigation Board (CSB).

PEER makes this request for corrective intervention on behalf of our client, Dr. Daniel M. Horowitz, who has been Managing Director of CSB since 2010. He was placed on administrative leave on June 16, 2015 for 45 days pending an investigation into “possible misconduct” described within reports issued months earlier by the Republican staff of a House Committee and the Environmental Protection Agency Inspector General. Dr. Horowitz is unaware of any misconduct on his part and has never been presented with any specific allegations or even a credible theory of misconduct.

His leave has since been extended twice more: First, on July 27, 2015, his administrative leave was extended an additional 45 days from July 31, 2015. Second, on September 11, 2015 an additional period of 45 days of administrative leave was tacked on, totaling 135 days of leave, subject to even further extension. The current CSB Chair Vanessa Sutherland, who ordered the latest leave extension, has refused to identify a date when he may return to his job.

Pursuant to both OPM guidance and formal decisions by the Comptroller General, Dr. Horowitz has been subjected to both excessive and clearly inappropriate use of administrative leave.

As you know, administrative leave is the “authorized absence from duty without loss of pay or charge to leave.”¹ Agency authority to utilize administrative leave stems from the authority of Executive agencies to manage their organizations.² Although the basis of each agency’s authority to use administrative leave is broad, OPM has issued guidance to limit its use.³

This guidance provides that administrative leave should not be used for indefinite, extended, or recurring periods.⁴ Furthermore, a grant of administrative leave for a lengthier absence is only appropriate if the absence furthers an agency function.⁵ According to the Comptroller General, the use of administrative leave in order to alleviate potential workplace or morale problems is deemed *not* to further agency functions.⁶ Similarly, administrative leave fails to further agency functions when the expended funds are essentially used to pay an employee to stay at home.⁷

In addition to general limitations on the duration of administrative leave, OPM guidance specifies the circumstances under which administrative leave is appropriate. In outlining how Executive agencies may use administrative leave in dealing with potential employee misconduct,⁸ OPM directs that reliance on involuntary leave be limited to particular circumstances, such as situations where the employee poses a threat “to his own safety or the safety of others, the agency mission, or Government systems or property while the investigation is pending.”⁹

Dr. Horowitz poses no threat to safety, property or agency mission.

To the contrary, Dr. Horowitz is highly committed to the agency’s work and mission, having served there for more than 15 years, and developed or advanced many important agency programs. During that entire period, he received numerous awards and never received a performance appraisal that was less than outstanding.

In fact, Dr. Horowitz’s absence has diminished the effectiveness of the organization, as evidenced by the agency’s recent inability to either initiate or complete accident investigations. By contrast the prior year marked a period of record productivity for the CSB.

Even in cases where an agency places an employee on administrative leave to investigate an alleged incident of employee wrongdoing, the agency is enjoined to take immediate steps “to

¹ *Pay & Leave: Leave Administration*, OFFICE OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/administrative-leave/> (last visited Sept. 18, 2015) [hereinafter *Pay & Leave*].

² 5 U.S.C. § 301-302.

³ *Pay & Leave*, *supra* note 1.

⁴ *See Pay & Leave*, *supra* note 1. *See also* Satwant Singh Bajwa – Administrative Leave, B-185128, (Comp. Gen. Dec. 3, 1975); B-226397, 66 Comp. Gen. 639 (1987) (“our decisions and OPM’s guidelines limit an agency’s discretion to grant administrative leave to situations involving brief absences. Where absences are for a lengthy period of time, a grant of administrative leave is not appropriate unless the absence is in connection with furthering a function of the agency.”).

⁵ 66 Comp. Gen. 639 (1987).

⁶ *Id.*

⁷ B-236124 (Comp. Gen. Jan. 2, 1990).

⁸ *Pay & Leave*, *supra* note 1.

⁹ *See id.* *See also* 38 Comp. Gen. 203 (1958).

reduce to a minimum the period during which pay is to be continued.”¹⁰ No such steps have been taken in this instance. Nor is the duration of the investigation known. Nor is there even a specified subject matter for this investigation. Instead it is an open-ended inquiry which from its lack of defined focus can be fairly characterized as a fishing expedition.

Moreover, it cannot be argued that Dr. Horowitz has been placed on administrative leave because his presence at the CSB might compromise any investigation. By the charge given to investigators, the array of events they are supposed to examine occurred months, and in most instances, years earlier. In addition, the investigation is being conducted by contractors outside the CSB offices, including interviews of current CSB employees. Thus, Dr. Horowitz’s presence and the performance of his duties would in no way impede this already over-long probe.

The period of leave endured by Dr. Horowitz is too long and there is no applicable exception to the general rule requiring that such leave be brief. This 135-day period of leave fails to further an agency function, it does not alleviate a threat to safety because no threat to safety is at issue, and no steps have been taken to reduce the paid period while the investigation is carried out. Further, extended use of administrative leave to investigate stale allegations about an employee such as Dr. Horowitz is utterly inappropriate.

Apart from the manner and duration of the administrative leave, its origins spring from a disturbing attempt to politicize merit system personnel decisions. The leave order arose under admitted pressure from Congressional Republicans, especially the Chair and majority party members of the House Committee on Oversight and Government Reform. CSB Board Member Richard Engler, who ordered the initial administrative leave for Dr. Horowitz repeatedly spoke of this pressure “from the Hill” as a reason for his actions. Moreover, the current Chairperson Vanessa Sutherland has met several times with what she terms are the “CSB oversight committees” and emphasized the need to address their concerns.

Here, Dr. Horowitz is being punished for the perceived missteps of the former CSB Chair Rafael Moure-Eraso who resigned in March. This dynamic sets an extremely dangerous precedent of punishing a civil servant precisely because he followed the lawful orders of a presidential appointee who was his superior. In short, Dr. Horowitz is a victim of an improper politicization of the civil service. His extended leave is merely how that political interference is manifest.

Despite the political backdrop to his predicament, Dr. Horowitz has played no partisan role. He has worked at CSB for 15 years reporting to a series of Democratic and Republican agency heads. He is also a prominent and recognized chemical safety specialist responsible in whole or part for many of the Board’s most successful initiatives, such as its acclaimed safety video program and critical recommendations on refinery, fuel gas and laboratory safety.

In addition, OPM should be concerned on behalf of the taxpayer that such a small agency is wasting appropriated funds in a way which detracts from its ability to fulfill its mission – investigating the causes and identifying steps to prevent serious large-scale industrial accidents that are often fatal to workers and endanger the public. The CSB is the only Federal agency with jurisdiction over this mission. The CSB has already expended more than \$100,000 on the

¹⁰ 38 Comp. Gen. 203 (1958).

personnel investigation involving Dr. Horowitz with more to come. In addition, the entire CSB executive staff is drawing full salary while on administrative leave.

Dr. Horowitz has no desire to be paid to sit at home, and wishes to return to productive work on behalf of the agency's safety mission. Thus, for all of the above reasons, PEER asks that OPM exercise its authority under 5 U.S.C. § 1104(b)(2) and 5 C.F.R., Part 5 and 10 to correct this noncompliant use of administrative leave.

Sincerely,

Jeff Ruch
Executive Director