



U.S. Chemical Safety and Hazard Investigation Board

Confidential Memorandum

DELIVERED VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

To: Daniel Horowitz, PhD

Cc: Jeff Ruch
Executive Director, Public Employees for Environmental Responsibility (PEER)

From: Vanessa Allen Sutherland *VAS*
Chairperson and CEO

Date: June 21, 2018

Subject: Decision on Proposed Removal

The purpose of this memorandum is to notify you that I sustain the Notice of Proposed Removal to remove you from your position as Managing Director, Chemical Safety and Hazard Investigation Board ("Agency" or "CSB") and from the Federal Service, effective June 22, 2018. We have conducted several attempts through outside counsel and through Office of Human Resources to address the issues in the Notice of Proposed Removal by reaching an equitable settlement. The parties have been unable to reach an agreement on a settlement.

Having diligently reviewed (1) the Notice of Proposed Removal issued to you on November 16, 2015 by Member Kristen Kulinowski ("Notice") and (2) the oral and written replies provided by you to me on December 4 and 11, 2015 ("reply"), I find that, although you may have faced internal or external challenges while in your role, those challenges are not a shield from the consequences of behaviors detailed in the Notice. The facts of the Notice and supporting documentation cause me to believe that you would not be able to work with the staff or be in a supervisory role due to certain conduct by you. The affidavits provided by two CSB Board members who note your prior performance and your ability to follow direction do not, and should not, imply that a temporary Senior Executive Service/GS-15 employee has no accountability for any and all action(s) he/she takes as long as those actions are sanctioned by a supervisor. Full and proper consideration have been given to the reply that you furnished, which is reflected in my more detailed decision below. I propose this action in accordance with Title 5, Code of Federal Regulations, Part 752, Subpart D.

Background

You held the position of Special Assistant to the Board from approximately May 2000, to approximately June 2002, when you became Director of Public and Congressional Affairs, a position you held to approximately July 2010, when you became Managing Director for the Agency. You have continuously served as the Agency's Managing Director since your appointment to that position.

Following the Environmental Protection Agency ("EPA") Office of Inspector General's ("OIG") commencement of an investigation in the fall of 2012 into allegations that the Agency learned the identities of whistleblowers within the Agency, several subsequent oversight and conduct allegations facing the CSB arose. The EPA OIG was driven to use its authority under Section 5(d) of the Inspector General Act of 1978 to issue a seven-day letter to CSB, which was sent to the attention of the House Committee on Oversight and Government Reform, citing that CSB was not cooperating with the EPA OIG in the whistleblower investigation. The House Committee subsequently began investigating the seven-day letter allegations, given the perceived gravity of a seven-day letter. The House Committee's review resulted in the publication on June 19, 2014 of a Staff Report titled "Whistleblower Reprisal and Management Failures at the U.S. Chemical Safety Board," which concluded that both you and the former Chairperson Rafael Moure-Eraso created a toxic work environment.

Approximately ten months later, the EPA OIG opened a second investigation into CSB into allegations that you and other senior CSB officials conducted Agency business on personal e-mail accounts in violation of the Federal Records Act, the implementing National Archives and Records Administration regulations and an Executive Memorandum. EPA OIG published a report to the President on January 16, 2015, which revealed that you conducted official CSB business on personal email systems that did not preserve those communications on an appropriate agency recordkeeping system.

The CSB then commenced its own administrative investigation in these matters to review the allegations of misconduct raised by the House Committee's Staff Report and the EPA OIG report. During the administrative investigation, the CSB placed you on administrative leave as of June 16, 2015, while the investigation was being completed.

I joined the Agency on August 11, 2015 at which time I was briefed on the status of the administrative investigation that was underway. I urged internal and external leads on the investigation to work as thoroughly and expediently as possible to resolve this matter. During that process, I determined that given the seriousness of the allegations, the long-standing open status of the issues and the importance of determining the outcome fairly and objectively, it was prudent for the Agency to have two reviewers who were new to the Agency objectively evaluate the evidence gathered during the administrative hearing process. Given the involvement of current and prior Board members in many of the issues under investigation, I chose to have the two newest Board members, myself and Member Kulinowski, review the results of the administrative investigation and the events that led to it.

On November 16, 2015, CSB Board Member Kristen Kulinowski completed and delivered a Notice of Proposed Removal to you via Electronic Mail and Federal Express mail, proposing to remove you from your Managing Director position and from the Federal service.

In December 2015, you provided me with a written reply and oral response to the Notice and various related supporting documentation. I received and reviewed all responses because I had no direct history with the events. Having reviewed the Agency's administrative hearing materials and your responses, I now have the unfortunate and unpleasant task of sustaining the Notice.

Before responding to the rebuttal of the charges and specifications, I will respond generally to the three initial contentions that you raised.

I. Cited Actions Were Directed or Approved by Prior CSB Chair

You provided an affidavit in which you highlighted that "virtually all of the actions of Dr. Horowitz cited in the proposal were undertaken either at the direction of or with the full knowledge and approval of the former Chairperson. . ." Given the ethical and legal obligations applicable to Federal employees to preserve the public trust, it cannot stand as a conclusion that a civil servant is immune from discipline for following the orders of a presidential appointee as your reply indicates. Your reply describes the orders as "lawful orders" and "lawful directions," which appears to have been of some debate at the time that they were followed. Civil servants have well-established responsibilities not only to follow the law but also to be mindful of the ethical implication and appearances of their behaviors. An inference that civil servants cannot or should not be disciplined because they were following orders is no more nuanced or appropriate than your inference that sustaining the Notice would "send the unmistakable signal. . .that [employees] may be subjected to later discipline by" a Chairperson's successors. Federal employees (especially at the seniority level of Dr. Horowitz) are held to high standards and for good reason.

II. Conduct Unbecoming Masks Lack of Identified Misconduct

I respect your assertion that the term "conduct unbecoming" may be seen as vague; however, the Agency disagrees with the assertion that the standard is being used to "transform otherwise blameless behavior after-the-fact as 'conduct unbecoming.'" The Notice cites facts demonstrating that the employee committed the general misconduct alleged. Your December 2015 reply stated that Dr. Horowitz engaged in certain conduct but that "virtually all of the actions" were directed or approved by the prior Chairperson. (An affidavit from Chairperson Moure-Eraso was attached to your reply.) Incorporating the statements from the administrative investigation, the Notice established that the employee committed misconduct and that misconduct could reasonably be deemed to have detracted from the Federal employee's character and reputation within and outside of the Agency. As mentioned above, Federal employees have several basic obligations of public service, which may be deemed conduct unbecoming of a Federal employee when the obligations are breached. (See 5 C.F.R. § 2635.101 - Basic obligation of public service)

III. Dr. Horowitz Is Being Punished for Simply Doing His Job

The Agency concurs with your broad point that Federal managers must make difficult personnel decisions, which may not be warmly received or universally accepted. Federal managers are supposed to manage staff based on changing events, actions of subordinates and other personnel factors. The Agency encourages accountability in performance and does not believe that managers should be punished for doing a good job. The Agency does not believe that Dr. Horowitz was punished for simply doing his job.

Charge 1: Conduct Unbecoming a Federal Employee

Specifications 1 and 2

I uphold the charges in Specifications 1 and 2, which should have been collapsed into a single specification. The administrative record, via multiple interviews and document collection, support the allegations that Dr. Horowitz knew “that Mr. Lau had manipulated Vantage’s report to reach that conclusion” i.e. the conclusion that “senior leadership” was faulted for certain problems, even if Dr. Horowitz learned that he had manipulated the findings from the actual email search that was conducted. Multiple employees’ separate recollections and evidence corroborated retaliatory personnel acts involving employees.

Despite being asked by the Chairperson to take additional action against John Lau, Dr. Horowitz was instructed and proceeded with this action. Specification 2’s reference to the “chilling effect your overall conduct had on employee morale and on employee willingness to express disagreement with you” is supported in the record produced by the Agency.

Specifications 3-4

I do not sustain this specification because Federal employees do not enjoy an expectation of privacy in their government email and government assets. Thus, the email of an employee and agency records may be searched to review possible violations of agency policy or law.

Specifications 5-6

I sustain the allegations in both specifications.

Specifications 7-8

I sustain the specifications in the Notice.

Specification 9

I sustain the allegations in the Notice.

Specification 10

This Specification alleges a numerous management decisions constituting neglect of duties as Managing Director. I sustain the allegation from the Notice.

I have considered the seriousness and nature of your behavior. The administrative record and documentation was persuasive when collectively evaluated with the administrative investigation file and your reply. We are called on to execute a safety mission to protect people and the environment, distinguished by independence, integrity and credibility. This does not mean the

absence of discourtesy, discipline or disorder, rather these are concepts to address the needs of the agency and its staff while maintaining the public trust. Co-workers, stakeholders and especially management officials (knowing that we may not always agree with them) must follow internal policies, regulations and ethics standards, to promote the efficiency of the service and good stewardship of the agency.

I also considered the job level and type of employment of the Managing Director position. Unprofessional, intentional behavior and misconduct, including conduct unbecoming of a Federal employee, are described in the administrative record and House and Oversight Government Reform documents. The agency Managing Director position that Mr. Horowitz executed is a prominent, senior and influential position within the CSB, which requires both internal and external stakeholders to have trust and respect in the position. The relationship between your actions and your ability to carry out your responsibilities in appropriate, effective manner are severely compromised. As the Managing Director, you hold a position vital to the interests and operations of the agency. Being able to work with all or the majority of the board members and the staff is critical to the success of the Managing Director. The role was supervisory in nature and requires contact with the public, the media and members of Congress. The title and role held prominence within and outside of the Agency. Thus, the position was seen as a key management, high level, executive position, presumably with autonomy and supervisory responsibility. I considered whether the position requirements, the misconduct, the reputational impact of the misconduct and the relationships with the employees of the CSB would allow the work to be completed effectively.

I have considered the erosion of supervisory confidence and trust as the Managing Director role requires significant autonomy, supervisory responsibility and staff and management trust. You held a position that is the role of a convener and consensus builder who can persuade people with respect and trust. Your administrative interview and reply highlight that even before the Notice was issued, it was difficult to effectively manage the Agency.

I have considered the notice of warning about the misconduct and whether Dr. Horowitz as a temporary SES or GS-15 Managing Director received direct and indirect feedback about allowable Federal personnel practices, appearance of ethical improprieties and personnel management. Consultants, employees, the EPA Inspector General and Congressional oversight committees provided concerns and potential actionable steps. Thus, there was notice about the unbecoming conduct.

A long investigation was conducted, necessary evidence reviewed, the seriousness of the misconduct evaluated, the job level and type of employment considered and just cause for disciplinary action established.

In deciding the appropriate administrative response, I considered years of service and lack of a disciplinary record; however, I can find no sufficiently mitigating factors that would support a lesser penalty. I concur with the proposing official's penalty analysis and key factors she articulated in the Notice. I independently find (a) the tenor and content of the reply from December 11, 2015 is reflective of the types of unbecoming conduct or intimidating behavior alleged by agency employees in their interviews, as evidenced by the tone at the end of the

meeting transcript and (b) stating that executing virtually all orders of a Chairperson irrespective of the potential outcome should exempt a Federal employee from present or future disciplinary action does not demonstrate the nuance, ethical fortitude and executive-level presence needed for a Managing Director position.

Based on the administrative documentation and transcripts available, you would no longer be able to carry out the duties that are essential to the Managing Director or other roles at the CSB. If placed in an alternative Washington, DC-based Congressional, Public and Board Affairs role, as your reply suggests, the relationships with stakeholders with whom you would need to work are those who have cited his alleged misconduct in media publications or requested formal investigations or expressed concerns about it. The public trust aspect of Federal employment is critical to being able to represent the agency effectively.

To promote the efficiency of the Federal service, it is my decision to remove you from Federal service.

This action is taken under the provisions of 5 CFR 752, Subpart B.

Rights and Procedures

You have the right to appeal this decision to the Merit Systems Protection Board (MSPB). An appeal to the MSPB must be filed no later than 30 calendar days after the effective date of the action being appealed, or 30 calendar days after the date of the appellant's receipt of the agency's decision, whichever is later. If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

Your appeal must be in writing and give reasons for contesting the action, together with a copy of the notice of proposed action, the agency decision being appealed and, if available, the SF-50 or similar notice of personnel action. No other attachments should be included with the initial appeal. A copy of the appeal form may be found at <http://www.mspb.gov/appeals/forms.htm> or you may submit an appeal via the internet at <https://e-appeal.mspb.gov/>. A copy of the MSPB's regulations concerning appeals is available at <http://www.mspb.gov>. If you would like a paper copy of the MSPB's regulations concerning appeals, or if you have any questions, please contact Beth Poore, Human Resources Specialist at (303) 969-7230.

Your appeal should be addressed to:

Merit Systems Protection Board
1901 S. Bell Street, Suite 950
Arlington, Virginia 22202
Phone: (703) 756-6250
Facsimile: (703) 756-7112

If you decide to file an appeal with the MSPB, you should notify the MSPB that the Agency's point of contact official for the purpose of your appeal is:

Ms. Kara Wenzel, Attorney-Advisor
U.S. Chemical Safety and Hazard Investigation Board
1750 Pennsylvania Avenue, N.W.
Suite 910
Washington D.C. 20006
Phone: (202) 261-7625
Email: kara.wenzel@csb.gov

You may seek corrective action before the Office of Special Counsel, www.osc.gov. If you do so, however, your appeal will be limited to whether the Agency took one or more covered personnel actions against you in retaliation for making protected whistleblowing disclosures. You will be forgoing the right to otherwise challenge this removal.

If you believe that you have been unlawfully discriminated against, you may contact an EEO counselor within 45 calendar days of the effective date of this action to file a complaint of discrimination. Please note that in accordance with 29 C.F.R. §1614.302, you may not initially file both a mixed case EEO complaint and an MSPB appeal on the same matter; whichever is filed first shall be considered an election to proceed in that forum.


Chairperson and CEO

6/21/2018
Date