



## FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE COMMISSIONERS

*Sent via USPS Priority Mail Express*

March 17, 2022

The Honorable Patty Murray, Chair  
U.S. Senate Committee on Health, Education, Labor & Pensions  
428 Senate Dirksen Office Building  
Washington, DC 20510

Re: Update on Federal Mine Safety & Health Review Commission

Dear Chairwoman Murray:

On February 15, 2022, we wrote to you to report actions of Chair Traynor that substantially undercut the ability of the Commission to perform its statutory functions. Since that letter, Chair Traynor's activities have continued to go far beyond any understanding of proper conduct.

On March 10, 2022, we were informed by Leslie Bayless<sup>1</sup> that Chair Traynor had initiated investigations of the Commission General Counsel and Executive Director and both were placed on Administrative Leave. They have served the Commission for more than twenty years. Chair Traynor did not consult with either of us in advance of these actions. Moreover, Chair Traynor refused to discuss these matters and, via e-mail, refused to identify any allegations against the individuals or even the purpose of such investigations.

The Mine Act is very clear that "The Commission shall appoint such employees as it deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and general pay rates." 30 U.S.C. §823(b)(2)(emphasis added). As we noted in our previous letter, the Chair's duties are limited to the day-to-day administrative functions of the agency. We are not aware of any other investigation and suspension of *any* Executive level employee

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<sup>1</sup> Bayless was appointed by Chair Traynor as Chief Operating Officer.

in the 45-year history of the Commission.

The suspension of two key Executive level employees has wreaked havoc with the ability of the Commission to conduct its business. It is unconscionable that the Chair unilaterally took this action without any advance consultation with the other Commissioners.

On March 15, 2022, Chair Traynor proposed that the Commission send the question of the division of powers between the Chair and full Commission to the Department of Justice Office of Legal Counsel for an opinion that would bind the Commission. He said the "White House" suggested that action and referred the Commission to Neil Kinkopf in the Department of Justice Office of Legal Counsel. After that, the Commissioners participated in a teleconference where Mr. Kinkopf brought Christopher Schroeder, Assistant Attorney General of the Office of Legal Counsel, into the conversation with us.

Mr. Kinkopf informed us that, under this Office of Legal Counsel process, we would have to accept, in advance, his new opinion as binding upon the Commission. The undersigned could not agree to request, or obtain, an opinion under those conditions. The Office of Legal Counsel has previously issued an opinion on the division of responsibilities between a Chairperson and a "board." That opinion fully supports the powers of the full Commission.<sup>2</sup>

With a precedential opinion already in hand, we could not agree to such a process culminating in a binding decision in light of this and several other factors.

First, we understand that the Commission General Counsel, Michael McCord, has filed multiple claims against Chair Traynor pursuant to the Whistleblower Act and No Fear Act. Apparently, those matters are now before the U. S. Office of Special Counsel for investigation. We have not seen Mr. McCord's complaint. However, we know that Chair Traynor unilaterally instigated changes to the Commission's case handling process. In doing so, he instructed Mr. McCord not to inform anyone (which certainly includes us) of the changes, telling him that he would be suspended or discharged if he did inform anyone.

Second, Chair Traynor has informed us that he has started or sought to start an investigation of Mr. McCord. Further, Chair Traynor suspended Mr. McCord pending the investigation.<sup>3</sup> We have not seen Chair Traynor's filing, but we must presume those

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<sup>2</sup> The opinion is entitled, "Division of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole," dated June 26, 2000. That opinion fits squarely with the key issues raised at our Commission. In fact, under the statute governing the Chemical Safety and Hazard Investigation Board, the Chairman had executive as well as administrative powers. The Chair of this Commission does not.

<sup>3</sup> The suspension was for 10 days that will terminate on March 20. We have no idea what Chair Traynor intends to do at that point.


matters are before some government entity.<sup>4</sup> Additionally, he has sent e-mails to staff members that contain, at least implicit, threats of disciplinary action if they do not adhere to his instructions. His actions, including his repetitious statements/suggestions that he is solely in control of all personnel matters and Commission policies have injected a feeling of fear throughout the Office of the General Counsel. As a result, fearfulness now permeates the Office of General Counsel, and the work of the Commission has become paralyzed.

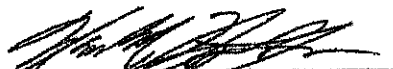
Finally, we initially brought matters to your attention and investigation as an appropriate oversight committee. Accordingly, we deemed the proposed interjection of a pre-agreed binding process by the Office of Legal Counsel to be a detrimental interference with these other proceedings.

In summary, as of this date, Chair Traynor has suspended the General Counsel and Executive Director pending an investigation for reasons unknown to us by some authority not identified to us. Meanwhile, the General Counsel has brought a claim against the Chair. Although we have not seen the complaint, we believe it will likely involve Chair Traynor's unilateral change of decision-making processes, his direction to the General Counsel not to tell us of the change, and his warning that the General Counsel would be fired if he did so. As noted above, these actions and the pervasive fear that Chair Traynor has brought to agency employees have caused the Commission's work to grind to a virtual halt.

As noted in our previous letter, we are working remotely, so please contact us on our government cell phones (Marco Rajkovich-- (202)-604-6647 and William Althen-- (202)-507-1280) for further inquiries.

Respectfully,

  
William I. Althen  
Commissioner

  
Marco M. Rajkovich, Jr.  
Commissioner

Cc: Senator Richard Burr  
Senator John Hickenlooper  
Senator Mike Braun  
Senator Mitch McConnell  
Senator Joe Manchin  
Senator Shelley Moore Capito  
Senator Rand Paul  
Arthur R. Traynor III, Chair of FMSHRC

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<sup>4</sup> Chair Traynor also has suspended Executive Director Lisa Boyd. He did not consult with us and has not informed us of a reason. We have no idea of the basis for that suspension.