



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE COMMISSIONERS

Sent USPS Priority Mail Express

February 15, 2022

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

Re: Request for Investigation

Dear Chairwoman Murray:

The undersigned serve as Commissioners of the Federal Mine Safety and Health Review Commission. The Commission functions as an appellate body reviewing decisions rendered by its individual Administrative Law Judges. Under the Federal Mine Safety and Health Review Act of 1977 (the "Mine Act") 30 U.S.C. §823, and amendments, all Commissioners play an equal role in making decisions, prescribing rules of procedure for the decision-making process and appointing employees. The Mine Act provides for five Commissioners. However, currently, there are only three Commissioners. The third is Chair Arthur R. Traynor III.

Unfortunately, we find it necessary to report actions of Chair Traynor that substantially undercut the ability of the Commission to perform its statutory functions. His most recent activity has gone far beyond any understanding of proper conduct, including his threat of suspension and termination of the Commission General Counsel. We find it imperative to provide this information to those exercising oversight of the Commission and to request an investigation.

From the outset of his tenure, Chair Traynor has viewed his powers as "administrative" head to be sweeping and extensive and has impeded the functioning of the Commission. A complete listing of arbitrary actions, including delaying issuance of decisions, would require a longer letter.

To place the role of the Commissioners in perspective, the Commission must handle many administrative tasks in operating the agency. For those tasks, the President designates a Chair and, pursuant to the Mine Act, the Chair is responsible for “the administrative operations of the Commission.” 30 U.S.C. §823(b)(2). These duties relate to the smooth running of the agency. These administrative functions are distinctly different, however, from the decision-making process involving all Commissioners.

An important part of the Commission’s decision-making process is the assignment of each incoming case to a specific staff attorney. The assigned attorney’s job is to assist all Commissioners in all aspects of the process of reaching and issuing a decision. The attorney engages in an in-depth review of all aspects of the case, prepares an initial advisory memorandum assessing the positions of the parties and reviewing applicable case law. The attorney also responds to questions from the Commissioners. Finally, the attorney ordinarily prepares an initial draft decision reflecting and integrating the views of the Commissioners.

The Commission has long had a standard unbiased process for the assignment of case attorneys. The Commission General Counsel assigns a staff attorney to a new case. Notably, Michael McCord, the Commission General Counsel, is a Career SES employee who has served for nearly twenty years in that capacity and his service is marked by his leadership, intelligence, and integrity. This procedure allows the General Counsel, who is the most knowledgeable of each staff attorney’s expertise and workload, to make assignments. Critically, it also avoids any possibility that any one Commissioner could hand-pick a lead attorney and work with that attorney to affect the outcome of a case.

On February 9, 2022, in the culmination of an increasing interference in the work of the Office of the General Counsel (OGC), Chair Traynor sent General Counsel McCord an e-mail arbitrarily and unilaterally changing the long-established Commission procedure without any discussion with other Commissioners—and worse, deliberately demanding secrecy. Chair Traynor stated that he now assumed the responsibility for assigning attorneys and would personally assign the lead attorney in every case. Such a procedure could result in a biased process that would pressure OGC attorneys to agree with Chair Traynor’s own personal opinion on a case or face discipline or even possibly a finding of unethical conduct.

Incredibly, Chair Traynor forbade and threatened Mr. McCord from disclosing this arbitrary change of established Commission procedures. In part, the e-mail states:

This e-mail and the existence of this policy are **completely confidential** – only you and I know about it. **You are directed to maintain that confidentiality for the duration of your employment with the Commission.**

This is a very high priority for the agency, so I am taking the extraordinary step of providing notice of penalties for violation. **A first offense for failure to follow these directions and/or failure to keep**

them confidential is a 13-day suspension. The second offense will result in termination.

See Attachment.

Thus, Chair Traynor intentionally threatened Mr. McCord with punishment up to and including discharge if he informed other Commissioners of this arbitrary change to a long-established Commission procedure. That effort to change established Commission procedure, without notice or discussion, and to veil such arbitrary action from other Commissioners is unconscionable. Worse, it is especially reprehensible that it included a threat of reprisal against the agency's long-serving and distinguished General Counsel.

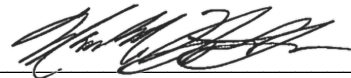
Being a small agency, we do not have an agency Inspector General, therefore, we request that you initiate an independent investigation into this matter as soon as possible.

Because we are working remotely, we provide our government cell phone numbers, Marco Rajkovich (202)-604-6647 and William Althen (202)-507-1280. We welcome and look forward to your 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 Shelly Moore Capito
Senator Rand Paul
Arthur R. Traynor III, Chair of FMSHRC

Attachment

From: Arthur Traynor <atraynor@fmshrc.gov>
Sent: Wednesday, February 09, 2022 8:54 AM
To: Michael McCord <mmccord@fmshrc.gov>
Subject: Procedure for OGC Attorney Case Assignment

Michael,

Upon receiving notice of a new case and prior to having any communications with anyone about OGC attorney case assignment, you will send me an e-mail with a brief description (2-3 sentences) of the nature of the case and a list of OGC attorneys with, for each listed attorney, a list of the cases or major projects that attorney is actively handling.

I will select from that list the appropriate attorney to assign to the case and transmit to you my selection in writing and you will promptly make the assignment, notifying the selected OGC attorney and the rest of the parties that customarily receive notice.

You will not make, revoke or change an OGC attorney case assignment without my prior written (e-mail) authorization.

This e-mail and the existence of this policy are completely confidential – only you and I know about it. You are directed to maintain that confidentiality for the duration of your employment with the Commission.

This is a very high priority for the agency, so I am taking the extraordinary step of providing notice of penalties for violation. A first offense for failure to follow these directions and/or failure to keep them confidential is a 13 day suspension. The second offense will result in termination.

If any portion of these instructions is unclear or you perceive a putative need to make an interpretive judgment call, you are directed to seek clarification from me before taking any action.

I had preferred to handle this another way and am open to your suggestions as to how my concerns might be sincerely addressed. But to be clear the procedure and directions outlined in this e-mail are immediately final and binding.

Please confirm receipt.

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