



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHAIRMAN

April 5, 2022

Senator Richard Burr
U.S. Senator for North Carolina
217 Russell Senate Office Building
Washington, DC 20510
c/o matt_mimnaugh@help.senate.gov

Dear Senator Burr:

Thank you for your commitment to ensuring proper oversight of the Federal Mine Safety and Health Review Commission ("FMSHRC"). I welcome this opportunity to inform your committee of matters of serious concern that have kept me extraordinarily busy in the fifteen months since I took over from Commissioner Marco Rajkovich as FMSHRC Chair. As many of the matters discussed below are the subject of pending administrative and criminal investigations by the Office of Personnel Management (OPM) and the FBI, some of the information is necessarily preliminary. As soon as these investigations are complete, I welcome the opportunity to respond in greater detail.

President Trump appointed me a FMSHRC Commissioner on March 14, 2019, and President Biden appointed me as its Chair on January 20, 2021. As you know, FMSHRC is an independent agency whose primary function is the adjudication of mining health and safety cases arising under the Mine Act, 30 USC § 801 *et seq.*, first at the administrative judge ("ALJ") level and then on review before a Presidentially appointed Commission. One Commissioner is chosen by the President to serve as Chair, and the Mine Act states that the "Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission." 30 USC § 823(b)(2). FMSHRC's most recent organizational charts are attached (Doc. No. 1).

For 45 years, the Mine Act has been consistently interpreted to mean that the Chair has authority over issues of personnel, procurement, and other internal administrative governance, while all Commissioners serve in an equal capacity in their appellate review function. In one of his final acts as Chair, Rajkovich directed Mary Lu Jordan (who has served on the Commission since 1994, with almost 15 years as Chair) and former Acting Chair Michael Young (who served as Commissioner from 2003-2020 and is now an ALJ) to prepare "position descriptions" delineating the division of authorities and responsibilities between the Chair and the other Commissioners. Rajkovich made final edits to these documents before directing Judge Young to transmit them to me by e-mail on January 29, 2022. They are attached. (Doc No. 2).

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I accepted Rajkovich, Jordan and Young’s consensus view of the division of authority between Chair and the Commissioners because it comports with my predecessors’ historic practice, including Rajkovich himself. And I have done my best to adhere to that shared view throughout my tenure as Chair, despite the tremendous challenges FMSHRC has most recently faced which I will now describe per your request that I explain my recent actions.

When I took over from Commissioner Rajkovich as Chair, he suggested to me that I read a document he had authored, dated April 14, 2020. (Doc. No. 3). To my astonishment, it was, in essence, a 35-page confession of how former-Chair Rajkovich had secretly set up what he termed “The Network”—a group of 70 individuals whose specific identities he has kept hidden, but who appear to include former clients of Rajkovich’s law firm¹ — to subvert federal hiring practices by outsourcing the selection of a new FMSHRC Chief ALJ, a senior official with supervisory authority over all ALJs and trial level operations. The April 14 document reveals Rajkovich and FMSHRC General Counsel Michael McCord (who was also the agency’s Designated Agency Ethics Officer (DAEO)) had committed multiple prohibited personnel practices and serious ethical violations during the hiring process. They also apparently involved themselves in the ALJ assignment of a significant case (*Jones Brothers*) that Rajkovich and his law firm had litigated, and from which he was strictly recused. They appear to have communicated with the assigned judge about potential reassignment of the case. The corruption and impropriety detailed in the April 14 document forcefully shook my confidence in McCord.

Soon after taking responsibility for the administrative operations of the agency in my capacity as Chair, I discovered it had been seriously mismanaged for at least the last few years, primarily by Executive Director Lisa Boyd and McCord, both long-tenured employees who report directly to me as Chair and do not hold statutory or appointed office. As a result, I made the decision to hire a Senior Executive Service Chief Operating Officer (COO) with a background in personnel management, procurement practices, and investigation. She was directed to access information necessary to ensure the agency’s policies and practices meet government standards.² COO Leslie Bayless onboarded on October 25, 2021 and quickly uncovered what appears to be seriously unethical and criminal misconduct by both Boyd and McCord that occurred during the terms of my predecessor Chairs Rajkovich and Althen, sometimes with their collaboration or express approval. She began in early December 2021 to refer evidence of such misconduct to FMSHRC’s human resources service provider at the time, Bureau of Fiscal Service, Administrative Resource Center (“BFS/ARC”).

Examples of the type of criminal and unethical activity that McCord and Boyd apparently engaged in under prior administrations include: millions of dollars in improper contracting and procurement; abuse of a pandemic relief program costing the government hundreds of thousands of dollars; individual time-card fraud; and various attempts to avoid discovery and disclosure of these

¹ In one instance, slightly shy of six months into his term as Chair, Rajkovich wrote to a top executive of Alliance Resource Partners soliciting recommendations for Chief ALJ, beseeching him that “[w]e have a once-in-a-while opportunity to place a good person in a pivotal position that could last for several years... I look forward to hearing from you.” ([American Oversight](#) at p. 67 of the 221 page .pdf). Rajkovich apparently received over \$5,000 for [representing](#) a mining subsidiary of Alliance prior to his Senate confirmation.

² In September 2021, Rajkovich challenged my authority to hire a COO. I responded with an offer to mediate “the history and current practice with respect to the Chair’s role as administrator of the agency (including precedents set in your administration),” but he declined.

illegal activities. In one instance, six days after I had been made Chair and without my knowledge or approval, Rajkovich approved approximately \$20,000 in benefits to Boyd in a fraudulent abuse of a pandemic relief program. At the recommendation of BFS/ARC, Mrs. Bayless began to refer evidence of misconduct to the FBI, who are coordinating with the Fraud and Public Corruption Section of the D.C. U.S. Attorney's Office.

It was in this context that I repeatedly instructed McCord to enforce ethical standards in the Office of the General Counsel (OGC), especially among a small fraction of staff attorneys under his supervision who had been derelict in their duties. McCord resisted and over several days in early February was not available during work hours. So, on February 9, 2022, I asked Boyd to provide me his recent leave records. They revealed he had apparently committed individual leave fraud on three separate recent occasions. Alarmed by the totality of his conduct, I later that day confidentially directed McCord in writing to thereafter allow me to select from among the rotating pool of available staff attorneys that he would assign to each new case.³ Due to a complete loss of trust in McCord and in anticipation of his absence, I gave my subsequent direction that OGC stop producing advisory memos and instead allow each Commissioner's individual staff counsel to produce the advisory memos. Both of these directions to McCord were countermanded by Rajkovich and Althen and neither has taken effect.

COO Bayless and I believe that Boyd informed McCord that his leave records were being examined, because the very next day, on February 10, McCord stopped taking direction from me and instead began taking direction from the two other Commissioners. At some point in the next few days, without first consulting me or Bayless, Rajkovich contacted BFS/ARC asserting authority to halt the investigation into McCord. Unfortunately, citing political uncertainty, BFS/ARC indefinitely suspended their investigations into Boyd and McCord. Mrs. Bayless quickly retained substitute HR services from the OPM. As a result of Rajkovich's interference, investigations were delayed for a month but have since resumed. Following OPM's recommendation, McCord and Boyd were placed on administrative investigative leave on March 12, 2022. Ten days later, we implemented OPM's recommendation to extend such leave for both subjects another 30 days.

Throughout my tenure as Chair, Commissioner Rajkovich has repeatedly attempted to evade accountability, thwart outside investigations, and shield McCord and Boyd, all while spurning any attempts to cooperate or resolve their apparent concerns. These include but are not limited to Rajkovich's attempts to prevent the hiring of COO Bayless in September 2021 and his improper communication with BFS/ARC directing them to stop their nascent investigations. In another attempt to shield themselves from accountability, on February 15, 2022, Commissioners Rajkovich and Althen sent a letter to your Senate HELP Committee on newly created stationery that purports to have come from an "Office of Commissioners," which they claim has administrative control over the agency. ("Feb. 15 Letter"). There has never been any such department or office at the Commission, and it is deceptive for them to represent to the HELP Committee that such an office exists and that they represent it. Your

³ The six OGC staff attorneys play a limited role in the Commissioners' independent decisional processes. They produce first drafts of purely advisory case memoranda, which are then reviewed and approved or revised by the General Counsel prior to circulation to the Commissioners. The advisory memos do not in any way control case processing or outcomes and every Commissioner has an individual counsel to prepare their own research and advisory memoranda. No part of the OGC attorneys' production of these memos is governed by or referenced in official agency rules, 29 C.F.R. 2700, or other formal policy. Commissioners are free to reject the research and recommendations in these memos and very often do. The process is not always followed, as described in a report McCord prepared in early 2021 documenting his admitted failure to prevent Commissioner Althen from improperly "circumvent[ing] the OGC review process" in a particular case, available on request.

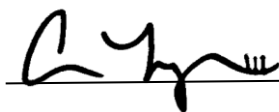
HELP Committee serves an invaluable oversight function over federal agencies, so I am confident it will not assist any effort to impede OPM or FBI investigators.

Contrary to the wild hyperbole in my fellow Commissioner's March 17, 2022 follow-up to the Feb. 15 letter, the Commission is neither "paralyzed," nor is it unable to perform its mission. Indeed, the new policies of which the Feb. 15 complained were never actually implemented, pursuant to my direction to the Deputy General Counsel to continue selecting OGC attorneys to draft advisory memos for her approval. Regrettably, even though they consented to this interim arrangement in writing, my fellow Commissioners withheld this key fact from their letters to your HELP committee. I assure you Commission decisions and orders continue to issue in ordinary course [at the trial and appellate level](#).

Despite the complaints set forth in their letters to the HELP Committee, Rajkovich and Althen do not appear to want an actual resolution to the issues they raise. Three times since he first attempted to intervene in my efforts to hire the COO in September of 2021, I have offered to mediate with Rajkovich the issue of the division of authority between Chair and Commissioners. Every time he declined. On March 15, 2022, Rajkovich, Althen and I met with two senior officials of the Department of Justice's Office of Legal Counsel. Senior counsel in that office offered to resolve our dispute in a formal opinion letter, to be issued only after all three Commissioners agreed to be bound to the process and submitted written argument and documentation. I agreed to participate in the process, but Rajkovich and Althen declined.

Though the various pending criminal and administrative investigations described herein constrain me from going into greater detail at this time, I am available and willing to meet with you or your staff to discuss any remaining inquiries. I trust you share my desire to see all ongoing investigations proceed without interference. And I respectfully request that you and your colleagues will support the continued repair and improvement of this independent agency so vitally important to the health and safety of our nation's miners.

Sincerely,

A handwritten signature in black ink, appearing to read "Arthur Traynor", is written over a horizontal line.

Arthur Traynor, Chair
FMSHRC

cc: Senator Patty Murray, Chair of the HELP Committee