



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

OFFICE OF THE
GENERAL COUNSEL

Mr. Norman J. Latker
Supervisory Attorney-Advisor
Business and Administrative Law
Office of General Counsel
Department of Health, Education,
and Welfare
Washington, D.C. 20201

Dear Mr. Latker:

This is advance notice that I propose to remove you from your position of Supervisory Attorney-Advisor, GS-15, Step 7, with the Business and Administrative Law Division, Office of General Counsel, HEW, no earlier than 30 calendar days from the date you receive this notice. The reasons for this proposed action are (1) your use of Government property and funds for other than officially approved activities, (2) your use of appropriated funds to attempt to influence members of Congress to favor pending legislation, and (3) your failure to follow instructions of your supervisors.

Reason 1: Your Use of Government Property and Funds for Other than Officially Approved Activities

Specification a: On May 29, 1978, which was a Federal holiday, you had your Secretary, Mrs. Angelyn Klebanoff, come to the office for a special project. On that day you dictated to her and she typed a draft document (Tab A) on the subject of the applicability of the fourth exemption of the Freedom of Information Act to intellectual property rights in proposals pending before Federal agencies. On that day you had your Secretary send that document by special messenger at Government expense to Mr. Joseph Keyes, an attorney for the Association of American Medical Colleges (AAMC), located at One Dupont Circle, N.W., Washington, D.C. (Tab I). This material was prepared by you and used by Mr. Keyes in an amicus brief that he was preparing for AAMC to file with the U.S. Supreme Court in the case of Chrysler Corporation v. Harold Brown, _____ U.S. _____ (1978), in which the United States was a party.

In our meeting on August 23, 1979, you said, in response to my question as to the purpose of this document, that you prepared it in response to an oral request of AAMC for the Department's position on the closing of peer review meetings (Tab H). However, it is clear from the document that it is not a statement of the Department's position but rather is a legal argument drafted from the standpoint of "the Associations." (See, e.g., p. 1--"The Associations believe . . .", p. 10--"the Associations have been concerned . . .", p. 14--"the Associations believe complete 'openness' constitutes a distinct danger . . .") The conclusion of the document beginning on p. 15 makes clear that it was written as a legal brief for "the Associations," since each paragraph in the conclusion contains words such as "The Associations strongly support appellant's contention . . ." (The appellant in this case was Chrysler Corporation, and the United States and the Secretary of Defense were respondents.)

A large part of the material you prepared was used by Mr. Keyes verbatim in the brief AAMC filed with the Supreme Court on June 5, 1978 (Tab B). The position taken by AAMC in its amicus brief and the material prepared by you opposed the position of the United States (the Respondent) in this litigation before the U.S. Supreme Court. The preparation and delivery of these materials to Mr. Keyes were not part of your official duties and were not approved by any authorized official at HEW. Your Secretary, acting on your instructions, prepared these materials on official time, using Government materials and equipment, and sent them to Mr. Keyes via a messenger paid for with Government funds.

Specification b: On August 23, 1978, you instructed your Secretary to type and assemble multiple copies of a package of material (Tab C) that included (1) a draft letter urging recipients to contact their Senators in support of a bill Senators Dole and Bayh intended to introduce, (2) a draft bill entitled the "Small Business and Nonprofit Organization Patent Policy Act of 1978," and (3) a list of all 100 Senators, and the organizations and individuals in each of their States who would be interested in supporting the bill. These materials were produced and copied pursuant to your orders by your Secretary on official time

using Government facilities and materials. You took the materials with you to a meeting of the National Association of College and University Business Officers (Tab I). The preparation and distribution of these materials were not part of your official duties, were not for official purposes, and were not ordered or approved by any authorized official at HEW.

Specification c: On September 20, 1978, you instructed your Secretary through Mrs. Evelyn Blaufeld, a paralegal in your office, to xerox approximately 150 copies of a package of materials (Tab D) consisting of (1) press releases of Senators Dole and Bayh urging support for their "Small Business, Nonprofit Organization Patent Procedures Act," (2) a draft bill of the same title, (3) a section-by-section analysis of the bill, and (4) miscellaneous statements and charts in support of the bill. Pursuant to your instructions, Mrs. Blaufeld instructed your Secretary to send copies of this material to each of the individuals listed on the document at Tab E, consisting of University Patent Administrators, holders of Institutional Patent Agreements with HEW, and other organizations and individuals. Although your Secretary delayed sending these materials out after Mr. Barry Walker, an attorney on the staff of your supervisor, Mr. Bernard Feiner, questioned the propriety of that action, you later ordered her to send out the material in lots of 10 over a period of time, and on your instructions 8 of the packages were mailed under Government penalty mail on September 21, 1978 to individuals on the mailing list at Tab E (Tabs I and K). The distribution of these materials, copied and mailed at Government expense, was not part of your official duties, was not for official purposes, and was not ordered or approved by any authorized official at HEW.

Specification d: On September 27, 1978 you dictated to your Secretary and pursuant to your instructions she typed a draft letter addressed "Dear Patent Administrator" (Tab F) recommending that recipients take additional action to urge support by their Senators of the "University and Small Business Patent Procedures Act" introduced by Senators Dole and Bayh. On that day you instructed your Secretary to send

Mr. Norman J. Latker -- Page 4

the draft of that letter and 125 copies of a four page attachment (which included the names of Senators' staff persons who should be contacted) to Mr. Howard Bremer, Patent Counsel, Wisconsin Alumni Research Foundation. Your Secretary complied with your instructions (Tab I). These materials were prepared on official time with Government materials and equipment. The preparation and distribution of these materials were not part of your official duties, were not for official purposes, and were not ordered or approved by any authorized official at HEW.

In each of the above incidents you used Government property and funds for other than officially approved activities, in violation of §73.735-604 of the HEW Standards of Conduct (Tag G) which states:

(a) An employee shall not directly or indirectly use, or allow the use of Government property of any kind, including property leased to the Government, for other than officially approved activities. An employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him. For example:

(1) Only official documents and materials may be processed on Government reproduction facilities. Both supervisors and employees must assure that this rule is strictly followed

Reason 2: Your Use of Appropriated Funds to Attempt to Influence Members of Congress to Favor Pending Legislation

Specification a: The facts set forth in Reason 1, Specification b are incorporated by reference into, and made a part of this reason and specification. The preparation of the materials (Tab C) urging recipients to contact their Senators in support of the "Small Business and Nonprofit Organization Patent Policy Act of 1978" was undertaken on your orders through the use of appropriated funds. These materials were designed to be used to attempt to influence members of Congress to favor pending legislation.

Specification b: The facts set forth in Reason 1, Specification c are incorporated by reference into, and made a part of, this reason and specification. The preparation of the materials (Tab D) including press releases and related documents was undertaken through the use of appropriated funds. These materials were designed to be used to attempt to influence members of Congress to favor pending legislation.

Specification c: The facts set forth in Reason 1, Specification d are incorporated by reference into, and made part of, this reason and specification. The preparation of the draft letter and attachments (Tab F) urging recipients to take action to support the "University and Small Business Patent Procedures Act" was undertaken through the use of appropriated funds. These materials were designed to be used to attempt to influence members of Congress to favor pending legislation.

In each of the above incidents you used appropriated funds to attempt to influence members of Congress to favor pending legislation in violation of §73.735-602(b) of the HEW Standards of Conduct (Tab G) which states:

(b) An employee shall not, either directly or indirectly, use appropriated funds to influence a Member of Congress to favor or oppose legislation in violation of 18 U.S.C. 1913....

Reason 3: Your Failure to Follow Instructions of Your Supervisor

Specification a: During the week of May 15, 1978, Mr. Bernard Feiner, your then immediate supervisor, had a discussion with you concerning lobbying activities by Federal employees, which included you. He counseled you and informed you that such activities are prohibited by law and informed you, utilizing a General Counsel memorandum on lobbying activities (a copy of which he also showed or provided to you), of the kinds of activities you could and could not undertake or participate in as a Federal employee. In spite of those instructions you caused appropriated funds to be used for that purpose on August 23, 1978 when you had prepared in your office a draft letter and set of materials designed to influence members of Congress to support the Dole-Bayh "Small Business and Non-profit Organization Patent Policy Act of 1978" (Tab C) (see Reason 1, Specification b).

Specification b: On September 20, 1978, you ordered your staff to prepare and distribute to outside organizations multiple copies of a press package (Tab D) designed to elicit support for the Dole-Bayh "Small Business and Nonprofit organization Patent Procedures Act" (see Reason 1, Specification c). When Mr. Barry Walker, of Mr. Feiner's staff, discovered those materials in the offices of the Patent Branch and learned that you had ordered their reproduction and distribution, he told your Secretary that they should not be sent out and that you should talk to Mr. Feiner about the matter (Tab K). On September 20, 1978, after being informed of Mr. Walker's concerns, and after receiving instructions from Mr. Feiner on this matter not to send the materials, you ordered your Secretary to xerox and then mail the materials out in small groups of 10 at a time (Tab I).

Specification c: On September 20, 1978, when Mr. Feiner discovered that you had ordered the reproduction and distribution of the materials discussed in the preceding paragraph he specifically instructed you not to send those materials to outside organizations (Tab J). In spite of those instructions of Mr. Feiner, you did not rescind the instructions you had given to your Secretary to send out 8 copies of those materials and the same were sent out from your office the next day (Tab I).

Specification d: On September 21, 1978, you were called to the Office of Mr. Richard I. Beattie, then Deputy General Counsel of the Department and your second level supervisor, to discuss the propriety of your having ordered the reproduction of the Dole-Bayh press package referred to in Reason 1, Specification c. After you denied any intention to carry out a large mailing of those materials, Mr. Beattie told you to discontinue any use of appropriated funds for lobbying activities (Tab L). In spite of Mr. Beattie's instructions on September 27, 1978 you dictated a letter (Tab F) recommending that recipients take additional action to urge support by their Senators for the "University and Small Business Patent Procedures Act." (See Reason 1, Specification d) The letter was originally prepared for your signature and then changed to be for the signature of Mr. Howard Bremer, Patent Counsel, Wisconsin Alumni Research Foundation. You caused the draft of that letter and 150 copies of an attachment for the letter to be sent to Mr. Bremer (Tab I).

All of the facts in this Reason establish that you have repeatedly failed to follow instructions given to you by your supervisors.

Based on the above Reasons and Specifications, I am hereby proposing that you be removed from your Federal employment for the efficiency of the service.

You have the right to make a written reply to this adverse action proposal and to submit affidavits in support of your answer. You also have the right to make an oral personal reply to Mr. Frederick Bohlen, Assistant Secretary for Management and Budget (ASMB), HEW, Room 510A Humphrey Building, Telephone 245-6396. You may exercise either or both of these rights of reply. Any reply you wish to make must be submitted within fifteen (15) calendar days from your receipt of this notice. Consideration will be given to extending the time limit for good cause upon written request to me from you or your representative. A written reply should be mailed or delivered to Mr. Frederick Bohlen, ASMB, HEW, Room 510A Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201. If you wish to make

Mr. Norman J. Latker -- Page 8

an oral, personal reply, please contact Mr. Bohen or his secretary, Ms. Virginia Boldon, to make arrangements for a meeting. Before the original decision is made on this proposal, full consideration will be given to any timely reply that you or your representative make.

You have the right to be accompanied, represented, and advised by an attorney or other representative of your own choosing throughout these adverse action proceedings. However, certain employees of the Department of Health, Education, and Welfare may be disallowed from representing you. Please read the enclosed "Supplemental Explanation of Rights" for a description of those employees and for further information on your rights described in this notice. Also enclosed is a copy of Part 752 of Civil Service Regulations issued by the Office of Personnel Management (44 F.R. 47029, August 10, 1979). These regulations state the basic requirements and procedures applicable to adverse action proceedings in the Department. You and your representative (if your representative is a Department employee), if otherwise in an active duty status, are entitled to a reasonable amount of official time to review the material relied on to support the proposal to remove you, to prepare and present written and oral replies, and to secure affidavits. To arrange for such official time, you should contact me directly. If you do not understand the reasons why your removal has been proposed, contact me for further explanation. You will remain in an active duty status during the notice period of this proposal.

The material relied on to support this proposal to remove you is enclosed (Tabs A-L) for your convenience. However, the official file for this material is located in Room 5362 HEW North Building. You and your representative may review the official file in Room 5362 HEW North Building. If you wish such review, please contact me.

You may also contact Mr. Elmer L. Smith or Ms. Mary Giannola, Employee Relations Branch, Room 4352 North Building, telephone 245-7555, if you have any questions concerning

Mr. Norman J. Latker -- Page 9

your procedural rights. As soon as possible after your answer is received, or after expiration of the time limit for reply if you do not answer, you will be given a written decision.

Sincerely yours,

Darrel J. Grinstead
Assistant General Counsel
Business and Administrative
Law Division

Enclosures

Supplemental Explanation of Rights.

Part 752 of Civil Service Regulations (44 F.R. 47029).

Tab A - Draft brief on the applicability of the fourth exemption of the Freedom of Information Act to intellectual property rights.

Tab B - Association of American Medical Colleges amicus brief, Chrysler Corporation v. Harold Brown, U.S. _____ (1978).

Tab C - A draft letter urging recipients to contact their Senators in support of a bill Senators Dole and Bayh intended to introduce; a draft bill entitled the "Small Business and Nonprofit Organization Patent Policy Act of 1978; and a list of all 100 Senators and the organizations and individuals in each of their States who would be interested in supporting the bill.

Tab D - Press releases of Senators Dole and Bayh urging support for their Small Business, Nonprofit Organization Patent Procedures Act; a draft bill of same title; a section-by-section analysis of the bill; and miscellaneous statements and charts in support of the bill.

Tab E - List of University Patent Administrators, Institutional Patent Agreement Holders and 12 other individuals.

Mr. Norman J. Latker -- Page 10

Tab F - Draft letter addressed "Dear Patent Administrator" recommending that recipients take additional action to urge support by their Senators of the "University and Small Business Patent Procedures Act" introduced by Senators Dole and Bayh, plus a four page attachment (which includes the names of Senators' staff persons).

Tab G - HEW Standards of Conduct §73.735-602(b) and §73.735-604.

Tab H - Summary of August-23, 1979 meeting. Letters dated August 30, September 6 and 11, 1979 to Darrel Grinstead from Irving Kator.

Tab I - Affidavit of Angelyn Klebanoff.

Tab J - Affidavit of Bernard Feiner.

Tab K - Affidavit of Barry Walker.

Tab L - Affidavit of Richard Beattie.

Acknowledge receipt of this letter.

Signature

Date