



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-202893

July 22, 1986

The Honorable John D. Dingell
Chairman, Subcommittee on
Oversight and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

This is in response to your letter dated January 21, 1986, in which you asked whether applicable laws and regulations were met in the recent involuntary retirement of the Director of the Office of Enforcement Programs, Economic Regulatory Administration (ERA) and his subsequent rehiring as a part-time employee. You referred to your letter of the same date to the Secretary of Energy concerning this matter.

For the reasons which follow it appears that the involuntary retirement of [REDACTED] following the abolishment of his position as Director, Office of Enforcement Programs, and his subsequent rehiring by the ERA as an Attorney-Adviser, grade GS-15, with an intermittent appointment not to exceed 6 months, do not violate applicable laws and regulations.

Background

Based on the materials that we have obtained, the essential facts are as follows. By memorandum dated December 23, 1985, the Acting Administrator, ERA, requested approval from the Director of Administration, Department of Energy (DOE), for a consolidation and reorganization of the ERA. This reorganization included the abolishment of the Office of Enforcement Programs which was headed by [REDACTED]. By memorandum also dated December 23, 1985, the Director of Personnel, DOE, recommended to the Executive Personnel Board that the request of the Acting Administrator, to abolish the position of Director, Office of Enforcement Programs encumbered by [REDACTED] be approved. The Executive Personnel Board recommended approval of this action on December 30, 1985.

By letter dated December 31, 1985, the Director of Personnel notified [REDACTED] of the Executive Personnel Board determination that his position was "surplus to the executive needs of the Department of Energy." Additionally, [REDACTED] was informed that:

"[T]he final phases of your executive responsibilities will be completed on January 31, 1986, at which time your position will be abolished and you will be separated from your position.

"This action constitutes an involuntary separation for the purpose of entitlement to a discontinued service annuity * * *."

[REDACTED] responded to this notification on December 31, 1985, tendering his resignation effective January 3, 1986, with an application for an immediate retirement annuity. By memorandum dated January 6, 1986, and effective that date, the Acting Administrator of the ERA appointed Mr. James Solit as Acting Director of the Office of Enforcement Programs, such appointment to "continue until the proposed organization plan is approved by M&A [Office of Management and Administration]." By personnel action effective January 8, 1986, [REDACTED] was given an intermittent appointment not to exceed 6 months to the position of Attorney-Adviser by the Acting Administrator, ERA. It is reported that the ERA reorganization was approved on January 9, 1986, by Mr. Harry Peebles, Director of Administration, with the concurrence of Mr. Joseph Salgado, the Under Secretary.

We have received a copy of the explanation dated February 14, 1986, furnished by Marshall A. Staunton, Acting Administrator of the ERA to the Secretary of Energy, and forwarded to you under cover letter dated February 21, 1986, by the Secretary of Energy. Mr. Staunton's explanation for the reorganization of the ERA, the abolishment of the Office of Enforcement Programs and the subsequent rehiring of Mr. Landesman is summarized below, and, while more detailed, is not in conflict with information gathered earlier.

The Acting Administrator reports that the initial impetus for the January 1986 reorganization came from the

departures of both the Chief Counsel and Deputy Chief Counsel of the Office of Judicial Litigation in January 1986 and September 1985 respectively. Several options were reportedly considered by the ERA including promoting managers from within the ERA, recruiting outside DOE, and recruitment from the Office of General Counsel. However, it was felt that "none of these options addressed the continually changing character of litigation work of the ERA and the need to integrate more closely the work of the administrative litigation lawyers with Federal court efforts." Therefore, ERA decided to combine the judicial and administrative litigation functions under one manager in a new Office of the Solicitor. The reported advantages to this consolidation are that:

"All administrative and judicial litigation is being managed by a single senior career official who is able to coordinate strategies and tactics of such litigation, ensure consistency of positions and maximize the efficient use of all existing legal staff."

This resulted in the merger of the Office of Judicial Litigation and the Office of Administrative Litigation into the new Office of the Solicitor.

Abolishment of Office of
Enforcement Programs

It was against this background of the merger of the Offices of Judicial and Administrative Litigation that management discussions reportedly "were held concerning the changing nature of the workload within the Office of Enforcement Programs" headed by [REDACTED]. The explanation provided for the abolishment of the position of Director of the Office of Enforcement Programs and the reassignment of the functions and staff to other ERA managers was as follows:

"* * * This office was responsible for directing the prelitigation program, providing litigation support, and performing certain post-order responsibilities. The prelitigation case work has been steadily declining. In April 1981, the ERA prelitigation inventory consisted of over 1,400

cases. In June 1984, the total was about 230. Currently, there are 64 total cases in working inventory. Of that number only 12 are actually in audit with most of the balance in some stage of document preparation. It was obvious that as the number of cases declined, the resources required declined as well and that at some point the prelitigation work would not be sufficient to warrant a separate management organization. Such a separate organizational entity not only requires management and administrative overhead; it also tends to restrict the use of some individuals who, for at least part of their time, could be better utilized in other functions.

* * * * *

"To be sure, the staff working on the completion of cases in prelitigation will continue to work on those cases as long as necessary. However, since these cases are nearing completion, employees can now be more easily reassigned to either litigation or litigation support work as their prelitigation case work is completed.

"The prelitigation, litigation support and document review functions were reassigned to the Office of the Solicitor. Sufficient staff will work on audit cases as long as necessary and then will be assigned other duties within that office.

"The remaining functions in the Office of Enforcement Programs were assigned to the Office of Management and Information Systems * * *."

Rehiring of [REDACTED]

In the memorandum of February 14, 1986, the Acting Administrator of the ERA provided the following explanation for the rehiring of [REDACTED] as an Attorney-Adviser on an intermittent basis for a period not to exceed 6 months:

"* * * The reason he was hired back on a temporary basis * * * was to allow [REDACTED] to continue providing assistance in the stripper well and entitlement settlement negotiations. This is an unprecedented endeavor to negotiate a sizeable settlement with a large number of interest groups representing the Department, state governments, and private industry. [REDACTED] was one of the principal architects of this settlement proposal and is important to our continued efforts to complete these negotiations.

"While he is not the sole negotiator, he is certainly a significant contributor to the negotiation of a settlement of this magnitude. [REDACTED] duties are considerably different under this temporary appointment. He has no supervisory or other program responsibilities. His only duties are to assist in the conduct of settlement negotiations. I do not believe that it was in the best interest of productivity or effective management to maintain an entire organization in order that a single person could finish negotiations commenced earlier when reasonable alternatives existed to permit his continued assistance in this matter.

* * * * *

"[REDACTED] is on an excepted appointment not to exceed six months. He was hired back at a lower salary which is reduced by the amount of his retirement annuity. He receives no accrued leave and no health insurance or life insurance except through his retirement. He is on an intermittent work schedule, working only when we request his services. The appointment results in a financial hardship for [REDACTED] and his family, and the taxpayers are the beneficiaries of his personal commitment.

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██████████ is performing a discrete task which offers benefits to the public but also those injured by oil overcharges."

This explanation is not inconsistent with the materials obtained prior to the preparation of the February 14, 1986, memorandum by the Acting Administrator.

Discontinued Service Retirement

The "discontinued service" retirement annuity is authorized by 5 U.S.C. § 8336(d), which provides, among other categories, that an employee over 50 years of age with 20 years of service who is separated involuntarily, except by removal for cause on charges of misconduct or delinquency, is entitled to an immediate Civil Service retirement annuity.

The Office of Personnel Management is vested with exclusive authority to adjudicate Civil Service retirement annuity claims, subject only to administrative appeal to the Merit Systems Protection Board and further judicial review by the United States Court of Appeals for the Federal Circuit. See 5 U.S.C. § 8347(b) and (d). Under implementing regulations issued by the Office of Personnel Management, an agency may apply to that Office for an advance decision where doubt exists as to whether a proposed separation would qualify an employee for a discontinued service retirement. See paragraph S11-3, subchapter S11 of Federal Personnel Manual Supplement 831-1.

Our Office informally contacted the professional staff of the Office of Pay and Benefits Policy, Office of Personnel Management (OPM) and we were advised that the Department of Energy had not sought an advance advisory opinion from OPM as was its right had it felt that doubt existed as to whether ██████████ qualified for a discontinued service retirement. On the basis of the facts available to our Office, the circumstances of ██████████ discontinued service retirement and reemployment as an intermittent appointee not to exceed 6 months were informally related to the career staff of the Office of Pay and Benefits Policy, OPM. The OPM staff were not surprised that DOE did not elect to submit the question of Mr. Landesman's retirement for advance opinion as they did not feel any reasonable doubt existed as to his eligibility.

As indicated above, the Office of Personnel Management has exclusive jurisdiction for administering matters arising under the civil service retirement system and the authority to adjudicate all claims arising thereunder. See Thomas C. Collins, 61 Comp. Gen. 127, 129 (1981).

Therefore, we could not overturn the annuity granted to [REDACTED]. In any event, the actions taken with regard to him, as explained by ERA, appear justified. In view of the programmatic considerations recited in the February 1986 ERA memorandum, discussed previously, we cannot say that the reorganization which caused [REDACTED] job to be abolished was illegal or improper. Likewise, the explanation provided by ERA for rehiring him as a temporary employee seems valid on its face and not inconsistent with the abolishment of [REDACTED] former position.

We trust that the above information serves the purpose of your inquiry. As agreed with your staff, this letter will be available for general release in 30 days unless it is released by your office at an earlier time.

Sincerely yours,

for Milton J. Jastor
Comptroller General
of the United States