



MEMORANDUM

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DATE: **May 6, 2016**

FROM: Deputy Assistant Secretary for External Affairs

SUBJECT: Decision on Proposed Removal

TO: Thomas F. Sullivan
Regional Administrator, GS-0101-15
Office of the Regional Administrator – Region 8
Office of Regional Operations

In a memorandum dated March 10, 2016, Mishaela Duran notified you of her proposal to remove you from the Federal service and your position of Regional Administrator, GS-0101-15, Office of the Regional Administrator (RA) - Region 8, Office of Regional Operations, Administration for Children and Families (ACF), Department of Health and Human Services (DHHS), for (1) Unacceptable Conduct; and (2) Failure to Follow Instructions.

In the proposal, you were notified of your right to representation and your right to respond orally and/or in writing within ten (10) calendar days from the date you received the proposal notice. Additionally, you were advised of your right to review the materials relied upon to support your proposed removal which was provided to you. The memorandum also informed you that you could submit affidavits and other documentary evidence in support of your reply. You designated David H. Shapiro, Swick & Shapiro, P.C., as your representative. On March 14, 2016, your representative requested a copy of materials relied upon for the proposed removal. On March 16, 2015, a copy of the materials relied upon was faxed to your representative, and also on the same day, your representative requested an extension of time in which to respond to the proposal notice on your behalf. I granted the extension until April 11, 2016 to present the oral and/or written response. Your representative submitted a written reply on April 5, 2016.

I have carefully reviewed the proposal and all the material which formed the basis for the proposal. I have given full consideration to the written reply submitted by your attorney dated April 5, 2016, which included documents for my review and the oral reply on April 11, 2016. I find the charges, stated in the proposal are sustained and I have relied on them in making my decision. Further, it is my conclusion that the sustained charges and specifications fully warrant your removal as proposed.

Charge 1 – Unacceptable Conduct

Specification 1: I find that the evidence supports that you engaged in unacceptable conduct on February 11, 2016. In the oral response to the specification, your representative indicated that it was flawed in that it is premised upon racial offense tied to the fact that a white man had made the statements; and that your statements were in relation to the geographic area as a whole, not in relation to a particular demographic or

race of individuals. Further, in the response, your representative stated that the specification's allegations are an example of reverse racism in that offense inferred is exclusively based upon and grounded in the Respondent's race (white). In the written response, it was stated that you were speaking to an audience of mostly metro Denver residents who had enjoyed the Super Bowl and the Denver Broncos' victory. In actuality, however, you were not speaking solely to a Denver audience at the ACF Employee Appreciation Day, but rather to a national audience of more than 350 in the Humphrey Building Great Hall, plus hundreds of staff across the other nine regions. Further, although the Denver employees were in the room with you while you addressed the national audience, but you never acknowledged them or their contributions, which was the point of the address. The direction to Regional Administrators was clear in advance, emails to you from Executive Officer Valencia Townsell, and in the agenda itself, which said that each Regional Administrator will have three minutes to acknowledge regional staff. The materials relied upon show statements from employees that your remarks took a bizarre and inappropriate turn that had undertones that were interpreted as racial by members of the audience, regardless of whether that was your subjective intent. You compared the calm in Denver after the Broncos won the Super Bowl and suggested if another team won there would likely be riots, looting and imprisonment of rioters. A hallmark of leadership is sensitivity to how messages are received. The perceived racial undertones were noted based upon how the messages were received by the listeners in the room, not based upon your subjective intention. In a letter of concern from the chair of the event, the content of your remarks were described as "shocking and hurtful and unfortunately heard around the country by all our ACF staff." In sum, your conduct was inappropriate in that you failed to perceive how your comments would be received, and in your failure to address the very subject of the event, which ultimately left the Denver staff with a lower level of acknowledgement than other ACF staff. I have decided to sustain Specification 1 because I find it is supported by a preponderance of the evidence.

Specification 2: I find that the evidence supports that you engaged unacceptable conduct on January 20, 2016. In the oral response to the specification, your representative indicated that the specification was flawed because (1) you are not an expert in the topic added to the meeting agenda by Ms. Duran and where you were instructed to lead a meeting; and (2) you had expressed criticism in the meeting of the Bush Administration, not of the Obama Administration. With respect to your first argument, subject matter expertise is not required for RAs to fulfill their duties to host national leaders and facilitate their interactions with local ACF management (as was your role in this case). This function is a key role for ACF RAs. Further, regardless of communication in advance of the meeting, the evidence shows you took a hostile and confrontational tone with leadership in front of other staff during the meeting; such conduct is plainly unacceptable. With respect to your second argument, whether your hostility was directed to the current administration or its predecessor is simply not relevant; what is relevant – and what the evidence shows to be inappropriate – is the disrespect you expressed for DC-based leadership in group settings. . I have decided to sustain Specification 2 because I find it is supported by a preponderance of the evidence.

Accordingly, based on the specifications I have sustained as noted above, I find a preponderance of evidence supports a conclusion that you committed the charge of Unacceptable Conduct, and I have decided to sustain this charge.

Charge 2 – Failure to Follow Instructions

Specification 1: I find that the evidence supports that you engaged in failure to follow instructions. Your representative stated that you never received clear instruction. In the response, it was indicated that you believed that you were authorized to delegate tasks, including these specific tasks, to competent subordinates; and that the power to delegate was especially appropriate in these circumstances, since you

were recovering from major hip surgery and were not often in workplace. Further, you said you monitored and reviewed these tasks as they were performed by your subordinates, and signed off on the performance plans before they were given to staff members. Although Mr. Murray's August 21, 2016 email did not nullify the general power to delegate tasks while retaining final review and approval authority, you were given clear direction that you – not your non-supervisory support staff – were to conduct PMAPs of your six employees. Not only did you not conduct the mid-term 2015 reviews, the evidence shows that you did not even sign them. I have decided to sustain Specification 1 because I find it is supported by a preponderance of the evidence.

Specification 2: I find that the evidence supports that you engaged in failure to follow instructions on September 18, 2015, when you appointed an acting RA without approval by the Director of Regional Operations. In the response to the specification, your representative indicated that you were not insubordinate when you appointed Mr. Tom Rogers to act for you as RA. Your representative indicated that RAs were told by Ms. Duran that there was no need to obtain Director's approval to appoint an Acting RA, if the period was a few days, i.e., not for an extended period of time; and that you did not think the new guidelines had taken effect when you appointed Mr. Rogers. Contrary to your assertions in the response, the guidance on this subject was clear; if an acting RA is named, that person must be a supervisory level employee and must be approved by the Director of ORO. You failed to follow this guidance. The conversation at the RA meeting referred to in the oral response addressed a different situation, i.e., situations under which the RA did not have to name an acting RA, such as for short periods of time, but could instead simply identify people to contact for information in their absence. Naming an "acting RA," on the other hand, always requires that the guidance is followed. I have decided to sustain Specification 2 because I find it is supported by a preponderance of the evidence.

Specification 3: I find that the evidence supports that you engaged in failure to follow instruction on November 2, 2015, when you appointed an acting RA without approval by the Director of Regional Operations. In the response to the specification, your representative indicated that you were not insubordinate when you appointed Mr. Tom Rogers to act for you as RA. As noted above, the guidance on this subject was clear: if an acting RA is named, that person must be a supervisory level employee and must be approved by the Director of ORO. All acting RA appointments are to be approved by the Director of ORO. By naming an Acting RA without such approval twice, you failed to follow direction. I have decided to sustain Specification 3 because I find it is supported by a preponderance of the evidence.

Specification 4: I find that the evidence supports that you engaged in failure to follow instructions by failing to create a collaborative working environment and effectively partnering with Regional Program Managers. In the response to the specification, your representative indicated that the specification combines vague generalizations with approximately two actual concrete allegations. Your representative further stated that these alleged vague generalizations lack evidence to support them and are purely subjective; and therefore cannot be sustained. These arguments lack merit for the following reasons. First, with respect to planning, the policy states:

An advance meeting or discussion will be held with Regional Program Managers to identify any specific issues (funding, audit, policy, etc.) prior to the scheduled state/territory leadership meeting. This information will enable the RA to develop an agenda that will be relevant and specific to the state or territory leadership meeting. Working with the RPMs and OGM, the RA will compile a breakout of each ACF program and funding level in the state prior to the meeting.

Since these guidelines were established last year, you have not followed them. You have never convened the RPMs to plan a state commissioner meeting, and have never submitted a report from a state commissioner meeting. Indeed, the meeting with the Montana human services director was the first report of a formal contact with such an official that we had received since the guidelines were established. Although (as first raised in your oral response) this was not a planned meeting but an informal one, this minimal informal contact in connection with this meeting highlights your failure to carry out the formal liaison work with these state officials, work that you have not been performing. I have decided to sustain Specification 4 because I find it is supported by a preponderance of the evidence.

Accordingly, based on the specifications I have sustained as noted above, I find a preponderance of evidence supports a conclusion that you committed the charge of Failure to Follow Instructions, and I have decided to sustain this charge.

The Douglas factors consideration provides the manner in which pre-decisional analysis may fuel an actual decision regarding the discipline proposed. Therefore, I do not consider argument as evidence, my response will address those considerations only to the extent they support or refute the evidence introduced and addressed in the narrative of the proposal document.

Penalty Considerations

In deciding to effect this action rather than a lesser action I considered several factors.

- I considered the nature and seriousness of your offenses, the effect your behavior has on other employees and the organization, and the relation of your offenses to your position as a supervisor in this organization. Your misconduct is very serious and has a direct relationship to your ability to perform the duties of your position as a Regional Administrator. Your actions adversely impact the ability to plan and direct work and place a burden on others. You gave unacceptable, unprofessional and off-topic comments to a national staff audience that was dedicated to acknowledging staff achievements, which you failed to do. You also openly expressed hostility toward your immediate supervisor when she visited the Denver office, and did so in front of other employees. Your failure to follow instructions and unacceptable conduct undermines your supervisor's authority and the ability of the Agency to get its work done efficiently. Also, you are entrusted and responsible for upholding Federal regulations and ethical standards in the work place. As a supervisor, you are in a position of substantial responsibility and trust, and are held to a higher standard of conduct than other non-supervisory federal employees. It is imperative that you serve as a role model to your employees, and adhere to the DHHS Standards of Conduct, which require professionalism and courtesy to others. The nature and seriousness of these offenses are aggravating factors in that they show a pattern of disrespect to supervisors, staff and colleagues.
- I considered your job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of your position. Your position as a supervisor requires high standards of integrity and requires behavior of a professional manner. The prominence of this position raises the risk of inappropriate behavior considerably, endangering central office's relationships to our regional staff, and endangering the agency's relationship with external partners, such as state and tribal leadership. You have over 28 years of Federal service and should be aware of how to conduct yourself in the workplace. Your conduct greatly diminishes ACF confidence in your ability to effectively interact appropriately with colleagues. You have

conducted yourself in a manner that seriously impacts the Agency's ability to conduct its mission. Your failure to follow instruction and displays of unacceptable conduct resulted in an unsettling environment and, if allowed to continue, would become more devastating to the staff and erode all efforts toward functioning as a team. Indeed, your conduct represented the antithesis of the values encompassed in ACF's mission and vision statement.

- I considered your past disciplinary record. On April 26, 2015, you were issued a Decision on Proposed Suspension for failure to follow proper leave procedures for which you were suspended for fourteen (14) calendar days. On September 16, 2014, you were issued a 3-day suspension for improper conduct, which included a letter to a tribal chairman accusing him of being in "the ranks of the criminally corrupt." Your past disciplinary actions demonstrate a pattern of behavior that compromises the agency's ability to perform its mission, compromising relationships with both staff and external leaders. While not an immediate consideration for dismissal, I will add that I consider this behavior constitutes a pattern because of other past conduct. On January 14, 2008, for example, you were issued a reprimand for inappropriate conduct, specifically for sending emails to the Acting Assistant Secretary and the Director of Regional Operations that were "hostile in tone, discourteous, insulting and abusive," according to the reprimand. This tone has continued in correspondence with subsequent ACF leadership throughout the past five years.
- I considered your past work record, including length of service of 28 years and your satisfactory performance, except for unsatisfactory performance for your 2015 PMAP. I have determined that these factors mitigate your conduct somewhat, they do not completely outweigh the egregiousness of your conduct. Given your considerable position of leadership in the agency, your repeated disregard of leadership direction shows that you cannot carry out the role as regional representative of the assistant secretary in Region 8. Overall, your conduct has resulted in ACF losing trust in your judgment and your ability to work cooperatively and conduct yourself in a professional manner. We no longer have confidence in your ability to exercise good judgment or your ability to successfully lead or conduct yourself in accordance with the most basic of employee expectations and responsibilities.
- I considered the consistency of the penalty with those imposed upon other employees for the same or similar offenses, and the consistency of the penalty with any applicable Agency table of penalties. While I have had no other employees exhibit such egregious behavior, the penalty is consistent with the DHHS Guide for Corrective Action (HHS Guide for Disciplinary Penalties), which recommends a penalty within the range of a reprimand to removal for a first offense; and 14-days suspension to removal for a second offense.
- I considered the clarity with which you were on notice regarding the inappropriateness and unacceptability of your conduct in this matter. On September 18, 2015, your supervisor emailed you to inform you that you failed to follow instruction in naming an Acting RA and reported the negative impact on our operations. Your supervisor provided notice again on this matter again on October 2, 2015 and January 8, 2016. On April 15, 2013, for example, you received clear guidance from then acting assistant secretary George Sheldon to not use official letterhead to communicate your personal views and opinions of other individuals. On September 16, 2014, you were issued a 3-day suspension for improper conduct, including directly violating April 15, 2013 guidance of Acting Assistant Secretary Sheldon. On April 26, 2015, you were issued a Decision on Proposed Suspension for failure to follow proper leave procedures for which you were suspended

for fourteen (14) calendar days. On January 14, 2008 you were issued a letter of reprimand for inappropriate conduct including emails that are hostile, discourteous, insulting and abusive.

- I considered the potential for your rehabilitation and have determined that your continued misconduct, despite warnings and issuances on record, demonstrates a lack of commitment on your part to change your behavior. You demonstrated no remorse for any unacceptable conduct or failure to follow instruction. While the conduct you engaged in was clearly inappropriate to your supervisors and to many others who witnessed the behavior, you failed to acknowledge any fault or recognition of the inappropriateness of your conduct.
- I considered the adequacy and effectiveness of alternative sanctions to deter such conduct in the future, and I believe that efforts short of those decided on herein to correct your conduct have been unsuccessful. You appear to be uncooperative and unwilling to change your conduct in the office. I believe there are no alternative or lesser sanctions that are appropriate under the circumstances.

Therefore, it is my decision that, in order to promote the efficiency of the service, your employment is terminated effective immediately.

Rights

You have the right to appeal this action in only one of the following ways. Once you have elected one of these procedures, you may not change thereafter to a different procedure.

1. You may appeal your removal to the Merit Systems Protection Board (MSPB). Such appeal is to be addressed directly to the MSPB. Your appeal must be filed no later than 30 days after the effective date of this action, or 30 days after the date of receipt of this decision, whichever is later. Your appeal must be addressed to: Merit Systems Protection Board, Denver Field Office, 165 South Union Blvd., Suite 318, Lakewood, CO 80228-2211, Telephone #: 303-969-5101.

The specific requirements for filing an appeal are set forth in detail in Parts 1201 of Title 5 Code of Federal Regulations, at www.mspb.gov. Also, the MSPB regulations state that if you do not submit an appeal within the time limits set by statute, regulation or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. If you do decide to file an appeal with MSPB, you should notify the Board that the agency contact official for the purpose of your appeal is:

Julie Murphy
Director, Workforce Relations Division
Office of Human Resources
Office of Assistant Secretary for Administration
Department of Health and Human Services
200 Independence Avenue, SW, Room 801
Washington, DC 20201
Fax #: 202-401-3707
E-mail: Julie.Murphy@hhs.gov

2. If you believe this action was based on discrimination on the basis of race, color, religion, national origin, age, sex, handicapping condition, or sexual orientation, you may file a formal complaint of discrimination pursuant to the administrative EEO process. To do so, you must first consult an EEO counselor within 45 calendar days from the date you receive this decision.

3. You may seek corrective action before the US Office of Special Counsel, www.osc.gov. However, if you do so, your appeal will be limited to whether the Agency took one or more covered personnel actions against you in retaliation for making protected whistleblowing disclosures.

As stated above, once you file an appeal in **any one** of the above listed forums, you will forgo the right to otherwise challenge this removal in any of the other forums mentioned in paragraphs one through three above.

This action is processed in accordance Title 5 of the Code of Federal Regulations, Part 752, Subparts C and D.

If you have any questions concerning your rights in this matter, you may contact Susan Chaney, Lead HR Specialist, Labor and Employee Relations, Workforce Relations Division, Office of Human Resources, DHHS at 301-443-3129.



Marianne McMullen
Deputy Assistant Secretary for External Affairs
Administration for Children and Families