Marcus v. United States Environmental Protection Agency, 92-TSC-5 (ALJ Dec. 3, 1992)

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: December 3, 1992

CASE NO.: 92-TSC-5

In the Matter of:

WILLIAM L. MARCUS, PH.D.,
Complainant,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Appearances:

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Michael Kohn, Esq.
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For Complainant

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U.S. Environmental Protection Agency
401 M Street, S.W.
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For Respondent

Before David A. Clarke, Jr.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Toxic Substances Control Act, 15 U.S.C. § 2622; the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); the Clean Air Act, 42 U.S.C. § 7622; the Solid Waste Disposal Act, 42 U.S.C. § 6971; the Water Pollution Control Act, 33 U.S.C. § 1367; and the Comprehensive Environmental Response,

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Compensation and Liability Act, 42 U.S.C. § 9610, and under the regulations found at 29 C.F.R. Part 24.

A hearing was held on July 14 through 17 and August 4 and 5, 1992, in Washington, D.C. The parties were

represented by counsel and were given an opportunity to present evidence and arguments. The record closed on October 19, 1992, with receipt of post hearing submissions from the parties.

Contentions of The Parties

Dr. William Marcus (Complainant) alleges that he was subjected to a hostile work environment and later terminated because of a memo he drafted and released that warned of potential harm from the use of fluoride, contrary to the U.S. Environmental Protection Agency's official position concerning the safety of fluoride use.

The U.S. Environmental Protection Agency (E.P.A.) (Respondent) contends that it terminated Dr. Marcus after an investigation by the Inspector General's office, which alleged that Dr. Marcus was (1) using official information for private gain; (2) engaging in private business activities that resulted in or created the appearance of a conflict of interest; (3) failing to follow established leave procedures; and (4) failing to obtain administrative approval for outside employment. E.P.A. contends that while it was aware of Dr. Marcus' controversial memo, it was not a factor in the decision to terminate Dr. Marcus, employment.

Statement Of The Case

Dr. William Marcus was employed as an environmental toxicologist by the U.S. Environmental Protection Agency for approximately eighteen years, ending on May 13, 1992. Dr. Marcus has a Ph.D. in pharmacology, with a subspecialty in toxicology. He also has a post doctorate degree in teratology and is one of approximately three hundred board certified toxicologists in the United States. (Tr. at 444, 456-58, 448.) While employed by E.P.A., Dr. Marcus served in various positions in the Office of Toxic Substances and as Branch Chief in the Office of Drinking Water. (Tr. at 446-47.) In addition, he received two bronze medals from E.P.A. for distinguished service. (Tr. at 451-52.) In the early 1980's, Dr. Marcus became a Senior Science Advisor

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within the Criteria and Standards Division of the office of Drinking water, at a grade 15 level. (Tr. at 448.)

In addition to being employed at E.P.A., sometime around 1983 or 1984 Dr. Marcus began to engage in outside work as a consultant in civil cases dealing with toxic chemical substances. In conjunction with this activity Dr. Marcus provided expert testimony for a fee at depositions and trials.

At about the same time he began outside work, Dr. Marcus met with Dr. Joseph Cotruvo (his immediate supervisor), Victor Kimm (Deputy Ethics Official for the Office of Drinking Water and Dr. Cotruvo's immediate supervisor), Dr. Arnold Kuzmack (Director, Program Development and Evaluation Division), and Donnell Nantkus (the Alternate Agency Ethics Official, Office of General Counsel) to discuss his outside employment. As a result of meetings with the these E.P.A. officials, Dr. Marcus believed he had "blanket approval", to be a paid expert witness in litigation matters outside of his employment with E.P.A. (Tr. at 461-65; Cl. Ex. 156.)

E.P.A. was aware of Dr. Marcus' outside activities. Dr. Marcus would occasionally meet with Mr. Nantkus to describe anticipated testimony to determine whether there were any improprieties. (Tr. at 470.) Additionally, Dr. Cotruvo received a complaint about Dr. Marcus' testimony sometime prior to June, 1987, and approached Dr. Marcus for a response. (Tr. at 472-74.) Moreover, on August 4, 1989, Dr. Cotruvo received a phone call from an attorney representing a litigant against whom Dr. Marcus was testifying; Dr. Cotruvo told the caller about the parameters of Dr. Marcus' authority to testify, as established by E.P.A. supervisors, and suggested she call Mr. Nantkes for specifics. (Tr. at 475-76; Cl. Ex. 51.)

Dr. Marcus, official job title at E.P.A. was "Toxicologist," and his "Organizational Title" was "Senior Science Advisor." (Tr. at 971-77; Cl. Ex. 65.) However, Dr. Marcus adopted the title "Chief Toxicologist," without explicit E.P.A. approval. Dr. Marcus frequently used this title in both the E.P.A. workplace and his private consulting business. (Tr. at 363-64; Cl. Ex. 8; Tr. at 839-40 and 850; Res. Ex. 3, tab 5.) The fact that Dr. Marcus was using the title of "Chief Toxicologist" was known to E.P.A. supervisory personnel including Dr. Cotruvo and Mr. Kimm. (Tr. at 466-67; Cl. Ex. 8.) The

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record does not reflect any effort on their part to curtail the use of this title by Dr. Marcus prior to the issuance of his fluoride memo. (Tr. at 841)

During this same time period, E.P.A. moved its facilities to the newly constructed Waterside Mall complex. Because many employees complained that materials in the new building were causing adverse health effects, E.P.A. allowed some employees, including Dr. Marcus, to work at home.

As Dr. Marcus' consulting business progressed, the line between his official E.P.A. responsibilities and his consulting business blurred. For example, while Dr. Marcus introduced his expert testimony by claiming that he was appearing as a private individual and not on behalf of E.P.A., he sometimes used the term "we" as if he were speaking for the Office of Drinking Water. (Tr. at 845.)

In 1985 Dr. Marcus went to his supervisor, Dr. Cotruvo, and questioned the scientific responsibility of a background document being used by E.P.A. to regulate fluoride use. (Tr. at 485.) In the years that followed, Dr. Marcus' interest in fluoride research remained acute because of its peripheral relationship to osteosarcoma, a bone cancer he was researching. (Tr. at 492-94.)

In 1988, Dr. Marcus was hired to give expert testimony in the civil case of *Ableman v. Velsicol Corp.*, wherein it was alleged that use of chlordane in a pesticide had caused human illness and death. (Tr. at 478-79.) On April 12, 1988, attorneys from Spriggs, Bode, & Hollingsworth, the law firm representing the pesticide manufacturer, complained to E.P.A. that during the trial Dr. Marcus was using confidential information, which he had obtained through his official position at E.P.A. (Cl. Ex. 155 and 158.) Because of this complaint, E.P.A.'s Office of the Inspector General (Inspector General) initiated an investigation into Dr. Marcus' outside employment activities. (Cl. Ex. 155 and 158.)

The investigation remained open for three and one half years. At times the investigation was very active, with Special Agents Tracy Connell or Lori Fairchild interviewing individuals and/or receiving information from various private law firms. (Cl. Ex. 155.) At other times the investigation was dormant, with six periods of approximately two months or greater having no

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activity at all. (*Id.*) Dr. Marcus was not aware of the investigation.

On May 1, 1990, Dr. Marcus submitted a memo to Alan Hais (his immediate supervisor and the Acting Director of the Criteria & Standards Division) outlining in great detail a potential for widespread adverse affects that fluoride use may have upon the general public. (Tr. at 500; Cl. Ex. 56.) When Dr. Marcus perceived that E.P.A. was ignoring this highly critical memo, he released the memo to Dr. Robert Carton, an E.P.A. environmental scientist and union representative who was interested in the fluoride controversy. (Tr. at 500-01.)

Dr. Carton released the memo to William Reilly (Administrator of E.P.A.), the press, and various citizen's groups. (Tr. at 369.) The memo received widespread public attention and was featured in a July 1990 television documentary, hosted by Roberta Baskin, questioning fluoride safety. In the documentary, Michael Cook (Director, Office of Drinking Water and Dr. Marcus, second line supervisor) was interviewed. (Cl. Ex. 202.) During the program, Dr. Marcus' memo was used to directly refute the E.P.A. position expressed by Mr. Cook. (Tr. at 502, Cl. Ex. 202.)

On July 27, 1990, Dr. Edward Ohanian, Chief of the Health Effects Branch, circulated a memo to Margaret Stasikowski (Director of Criteria Standards Division and Dr. Marcus, immediate supervisor). (Cl. Ex. 63.) The memo complained of Dr. Marcus, fluoride memo and the impact of the Roberta Baskin show. (*Id.*) Dr. Ohanian stated that Dr. Marcus' memo "sends the wrong message to the public and scientific community" and "created some chaos and turmoil." (Tr. at 938-40; Cl. Ex. 63.) Dr. Ohanian's memo was also sent to Michael Cook (Stasikowski's supervisor, who had been interviewed on the television documentary), Peter Cook (Michael Cook's assistant) and

Alan Hais. (Cl. Ex. 63.)

Shortly thereafter, Dr. Marcus' supervisor asked him to prepare weekly activity reports and meet regularly with her. (Tr. at 888-90.) He was instructed to recertify his inability to work in the Waterside Mall complex. He was instructed to inform E.P.A. management of, and seek prior approval for, all occasions when he was to appear as an expert witness in matters outside his employment with E.P.A. (Tr. at 508-10.) Ms. Stasikowski limited Dr. Marcus' official duties to the least controversial

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chemicals. (Tr. at 524.) She also forbade Dr. Marcus from working on fluoride related matters during E.P.A. hours. (Tr. at 880-85.) Dr. Marcus was no longer given assignments reviewing his colleagues, work. (Tr. at 524-25.) Also, Dr. Marcus' request for administrative leave to speak before the American Chemical Society was denied. (Tr. at 505-07.)

These changes, according to Ms. Stasikowski, were instituted shortly after she was appointed Division Director in June of 1990. (Tr. at 890-93.) She stated that the changes were made to enable her to learn more about her subordinates' performance and better manage the division. (*Id*.)

On August 28, 1990, Mr. Michael Cook sent a memo to Dr. Marcus concerning outside employment. The memo began, "[a]s you know, you have had blanket approval to engage in outside employment as an advisor and expert witness on the health effects of toxic substances." (Tr. at 508-09; Cl. Ex. 66.) Mr. Cook then went on to say, "I am withdrawing my approval of your outside employment." (*Id*.)

On October 2, 1990, Special Agent Fairchild and Special Agent Francis Kiley (Special Agent in charge of the Washington, D.C. field office and Fairchild's supervisor) met for the first time with Michael Cook and Peter Cook. (Tr. at 742-44.) During this meeting Dr. Marcus' involvement in the fluoride controversy was discussed. (*Id*.)

Shortly thereafter, the tenor of the Inspector General's investigation changed. After having remained dormant for six months, from March to September of 1990, no month passed from that time forward without investigative activity by Special Agents Fairchild and/or Kiley. (Cl. Ex. 155.)

In November 1990, Ms. Stasikowski drafted a memo that accused Dr. Marcus of aberrant and violent behavior, such as carrying a firearm and threatening E.P.A. staff. (Cl. Ex. 73.) Ms. Stasikowski informally circulated the memo to supervisory personnel, including the Assistant Administrator of E.P.A., and to security. (Cl. Ex. 73; Tr. at 528-34; Tr. at 958-62.) Ms. Stasikowski formed this opinion of Dr. Marcus from statements she heard second hand; when she later came to know Dr. Marcus through work experiences, she realized that this description of Dr. Marcus was incorrect. (Tr. at 866-69 and 961-62.) However, she

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did not approach the Assistant Administrator or other E.P.A. personnel to correct her earlier misstatements. (Tr. at 961-62.)

On May 28, 1991, the Honorable Paul McGuckian, Associate Judge for the Sixth Judicial Circuit of Maryland, wrote to E.P.A. Administrator Reilly. (Tr. at 863-64 and 727.) In his letter Judge McGuckian complained of improprieties by Dr. Marcus, who had testified two weeks earlier at a trial over which Judge McGuckian presided. (Tr. at 863-64 and 727; Res. Ex. 4.) Special Agent Fairchild referred the matter to the State's Attorney for Frederick County, Maryland, who declined to prosecute. (Tr. at 726-30; Cl. Ex. 155; Res. Ex. 3, tab 11.)

On September 25, 1991, Special Agent Fairchild interviewed Dr. Marcus. (Tr. at 783-84.) Dr. Rufus Morrison, an E.P.A. ecologist and union steward, attended the meeting. (*Id*.) Special Agent Fairchild presented Dr. Marcus with a list of dates, each of which were purported to represent a work day when he was appearing as a paid witness while his timecards indicated that he was either on E.P.A. time or using sick leave. (Tr. at 783-86.) When asked by Special Agent Fairchild to explain these discrepancies, Dr. Marcus responded that there must be an error, that the timecards

should indicate that annual leave was taken, and that he had no objection to paying back any salary not due him. (Tr. at 576-78; Tr. at 334-38.)

On November 7, 1991, the Inspector General concluded its investigation of Dr. Marcus and released its report. (Res. Ex. 3.) The report charged that Dr. Marcus did not receive approval for his outside work; failed to report financial gain from his outside work; falsely described his E.P.A. duties and responsibilities; released confidential information; and misused leave. (Res. Ex. 3.)

The Inspector General's report was based, in part, on the results of interviews with E.P.A. personnel and others. Special Agents Fairchild and Kiley shredded all investigation notes made contemporaneously during interviews. (Tr. at 99.) The destruction of this evidence occurred on the authority of an erroneously issued closing report and while Special Agent Kiley was aware of an ongoing Wage and Hour Investigation, a Freedom of Information Act (FOIA) request by Dr. Marcus and his attorney, an administrative proceeding for the removal of Dr. Marcus, two Capital Hill inquiries into possible whistleblower violations by

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E.P.A., and questions to Administrator Reilly concerning the Marcus firing. (Tr. at 213-26.) The handwritten notes were destroyed on March 25, 1992, in violation of E.P.A. FOIA Regulations at 40 C.F.R. Part 2.111 (a). (Joint Stipulations.)

On January 13, 1992, Ms. Stasikowski, relying upon the Inspector General's report, proposed that Dr. Marcus be fired; she listed five charges against Dr. Marcus. (Res. Ex. 2.) On May 13, 1992, Dr. Davies concurred with Ms. Stasikowski and terminated Dr. Marcus, employment with E.P.A. (Res. Ex. 1.) Of the five charges made by Ms. Stasikowski, Dr. Davies found that four were substantiated. (Tr. at 1015-16.) The four charges, or reasons for dismissal, were:

1. Using official information for private gain;

3. Engaging in private business activities that result in or create the appearance of a conflict of interest;

4. Failing to follow established leave procedures;

5. Failing to obtain administrative approval for outside employment.

(Res. Ex. 1 and 2; Tr. at 825-26, 1015-16.) Charge number two, Conduct Which Is Generally Criminal, Infamous, Dishonest or Notoriously Disgraceful, was not used as a reason for dismissal. (Res. Ex. 2, p. 4.)

Dr. Davies testified that his decision to terminate Dr. Marcus, employment was based on the evidence contained in the Inspector General's report; the accompanying transmittal memo from Special Agent Kiley; the material submitted by Paul A. McGuckian, Associate Judge for the Sixth Judicial Court of Maryland; Ms. Stasikowski's memo *Proposed Removal*; and an interview with Dr. Marcus. (Tr. at 1013-15 and 1043-46.) Dr. Davies also testified that if one or two of the charges were found not to be substantiated, he would have to reconsider his decision to terminate Dr. Marcus, employment. (Tr. at 1064.)

Dr. Davies testified that while he was aware of Dr. Marcus' activities concerning fluoride, and while he was "bothered" by congressional interest and inquiry caused by Dr. Marcus, views,

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they in no way influenced his decision to terminate Dr. Marcus' employment. (Tr. at 1050-52.)

Between 1984 and January 13, 1992, Dr. Marcus was not disciplined by E.P.A. for (1) using official information for private gain; (2) engaging in private business activities that result in or create the appearance of a conflict of interest; (3) failing to follow established leave procedures; and (4) failing to obtain administrative approval for

outside employment. (Tr. at 574 and 325.) Dr. Davies testified that he was not aware of the extent of Dr. Marcus, outside consulting activities until receipt of the Inspector General's report in 1991. (Tr. at 1045- 46.)

Applicable Law

In an alleged retaliatory adverse action case, such as this, the employee bears the ultimate burden of proof that intentional discrimination has occurred. *Dean Darty*, No. 82-ERA- 2, slip op. at 6-7 (Sec'y of Labor, April 23, 1983) *citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). In such cases, the employee must initially present a *prima facie* case showing that (1) she or he engaged in protected activity, (2) the employer was aware of such activity, and (3) the employer took adverse action against the employee. *McDonell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1972).

If the employee establishes a *prima facie* case, the employer must rebut the presumption of retaliatory action by articulating a legitimate, nondiscriminatory reason for the adverse action. *Dean Darty*, at 8; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Should the employer successfully rebut the employee's *prima facie*, case, the employee must present evidence showing that the employer's proffered reason is a pretext. *Dean Darty*, at 8; *Burdine*, at 253. In order for the employee to meet this burden, the employee must prove by a preponderance of the evidence that a retaliatory reason more likely than not motivated the employer or that the employer's proffered explanation is not credible. *Dean Darty*, at 8; *Burdine*, at 256.

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Discussion

Dr. Marcus' evidence established a *prima facie* case. It showed that he had engaged in protected activity, that his employer was aware of this activity, and that adverse action was taken against him. In rebuttal, E.P.A. presented evidence that it terminated Dr. Marcus, employment for four reasons, none of which included Dr. Marcus' fluoride activities. The four reasons, identified as charges by Dr. Davies, must be considered to determine if they are legitimate reasons for terminating Dr. Marcus' employment, or as Dr. Marcus contends, pretexts.

Charge No. 1: Using Official Information For Private Gain:

Dr. Davies and Ms. Stasikowski cited E.P.A. regulations at 40 C.F.R. §§ 3.103 (b) and (d) (1) as the framework for deciding whether Dr. Marcus violated official policy. To review the reasons offered for dismissal, Dr. Marcus' conduct must be scrutinized against these regulations, which read as follows:

> Employees may not use their official positions for private gain or act in such a manner that creates the reasonable appearance of doing so.
>
> Employees therefore must not:
>
> (b) Use information acquired through EPA duties that has not been made available to the general public to further their private interests;
>
> (d) Take any action, whether specifically prohibited or not, which would result in or create the reasonable appearance of:
>
> (1) Using public office for private gain . . . .

The cited subsections cover two separate situations. The first, § 3.103 (b), prohibits using information that is not available to the general public for private gain. This regulation, as applied to Dr. Marcus, does not necessarily prohibit the use of official information. Rather, permissibility is determined by whether the information is available to the general public.

The second, § 3.103 (d) (1), is a catchall provision that is somewhat vague and could be interpreted to cover a myriad of

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activities. The E.P.A. Office of General Counsel has interpreted this regulation to prohibit accepting payment for any article or appearance, including testimony, that focuses specifically on the employee's official duties or on the responsibilities, policies and programs of the E.P.A. (Res. Ex. 3, tab 58, p. 3 and tab 57.)

Dr. Davies referenced examples of alleged wrongdoing in his memo entitled Final Decision on the Notice of Proposed Dismissal. These examples constituted the basis of his determination that Dr. Marcus had used official information for private gain.

In example number one, Dr. Davies alleged that an October 11, 1986, letter, which Dr. Marcus wrote to an attorney soliciting private employment as an expert witness, gave the impression that Dr. Marcus had access to and use of restricted information through his position at E.P.A. In that letter, Dr. Marcus referred to two chlordane studies, which were classified by the E.P.A. Office of Pesticide Programs as "Confidential Business Information" (CBI). (Res. Ex. 3, tab 5.) In his letter, Dr. Marcus stated that he had access to the "summaries" of the studies, which were not "CBI," and that he would be sending them to Attorney Tippit. (*Id.*) At the end of the letter, Dr. Marcus listed his fee schedule as an expert witness. (*Id.*)

Dr. Marcus' letter did not refer to his employment at E.P.A. The letterhead listed Dr. Marcus' name, that he was "Board Certified" and a "Consulting Toxicologist," and his home address. The letter offered the nonconfidential summaries of the studies, not the studies themselves. The summaries were available to the general public. (Tr. at 563-64.) Therefore, Dr. Marcus neither used nonpublic information nor solicited payment for information that focused specifically on his official duties or on the responsibilities, policies and programs of the E.P.A. Accordingly, this allegation is not substantiated.

In example number two, Dr. Davies alleged that Dr. Marcus impermissibly attended an E.P.A. Reference Dose Group (RfD) meeting concerning the chemical chlordane, in that he was not a member of the group and not assigned to work with chlordane, and that Dr. Marcus' purpose was to use official knowledge that he gained at this meeting for his own private gain.

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At the hearing, Dr. Marcus produced an E.P.A. manual listing "William Marcus, Ph.D. (OW)" as an Office of Drinking Water representative to the RfD group. (Tr. at 552-54; Cl. Ex. 137.) Dr. Marcus also produced the minutes on E.P.A. letterhead of an RfD meeting which stated that chlordane was discussed by the group and that Dr. Marcus was present. (Tr. at 563-64; Cl. Ex. 9.)

In regard to section 3.103 (b), Dr. Davies did not allege that the information Dr. Marcus obtained at the RfD meeting was not available to the public. Therefore, the allegation that Dr. Marcus used nonpublic information regarding chlordane for private gain is not substantiated. In regard to section 3.103 (d) (1), Dr. Davies did not allege that the chlordane information focused specifically on Dr. Marcus' official duties or on the responsibilities, policies and programs of E.P.A. Accordingly, this allegation is not substantiated.

In example number three, Dr. Davies alleged that Dr. Marcus had used an abstract of the Yonamura study in paid testimony, but because Dr. Marcus had not filed a FOIA request he must have obtained the study through his work as an E.P.A. employee, violating E.P.A. regulations at 40 C.F.R. § 3.103 (b), (d) (1). The Inspector General's report stated that the Yonamura study did not contain confidential business information and was available to the general public. (Res. Ex. 3, tab 9.)

Dr. Davies assumed that because there was no FOIA request on file, Dr. Marcus must have either gone directly to the Information Services Branch or accessed the information through another E.P.A. employee. This assumption is pure conjecture and speculation, and as such can not support the decision to terminate Dr. Marcus, employment.

(Res. Ex. 2, p. 3.)

Additionally, I credit Dr. Marcus' testimony that the Yonamura study was used by the RfD group to support certain regulatory conclusions, and that the information is available to the general public. Finally, the Yonumura abstract is not a decision making process or procedure. Accordingly, this allegation is not substantiated.

In example number four, Dr. Davies alleged that a document Dr. Marcus used, Addendum to the Health Assessment Document for Trichlorethylene, which was stamped "do not cite or quote," had

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limited public access. (Tr. at 1019-21.) Dr. Marcus produced the document at trial. (Cl. Ex. 134.) The document had been circulated for peer review to scientists outside the E.P.A., with no prohibition against redistribution, and is available to the general public through the National Technical Information Service at the price of $30.95. The "do not cite or quote" notation means that the document should not be cited as authority in scholarly writings or presentations. This document is available to the public; therefore Dr. Marcus did not violate section 3.103 (b). Additionally, the document did not focus specifically on Dr. Marcus' official duties or on the responsibilities, policies and programs of E.P.A.; therefore, Dr. Marcus did not violate § 3.103 (d) (1). Accordingly, this allegation is not substantiated.

The next cited example is number six. In this example Dr. Davies alleged that a French scientific document, which Dr. Marcus translated for use during private testimony in the case of *Carroll v. Litton Systems, Inc.*, was not generally available to the public. At the hearing, Dr. Marcus testified that the document was first published in 1897 and is available at the public library. (Tr. at 633-35.) This document is public information and does not focus specifically on Dr. Marcus, official duties or on the responsibilities, policies and programs of E.P.A. Accordingly, this allegation is not substantiated.

As demonstrated by the above analysis, the five examples relied on by Dr. Davies to support the first of his four reasons for terminating Dr. Marcus, employment are not supportable in fact or law.

Charge No. 2: Conduct Which Is Generally Criminal, Infamous, Dishonest or Notoriously Disgraceful:

Dr. Davies reviewed this charge made by Ms. Stasikowski in her memo entitled Proposed Removal. He found that Dr. Marcus' actions did not sustain this charge. Therefore, he did not rely on it to support his decision to terminate Dr. Marcus' employment.

Charge No. 3: Engaging In Private Business Activities That Result In Or Create The Appearance Of A Conflict Of Interest:

Section 3.103 (d) (1), as discussed previously, prohibits

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accepting payment for any written article or appearance, including testimony, that focuses specifically on the employee's official duties or on the responsibilities, policies and programs of the E.P.A. (Res. Ex. 3, tab 58, p. 3 and tab 57.)

Dr. Davies cited the E.P.A. regulations at 40 C.F.R. § 3.103 and explained that this section, as applied to Dr. Marcus, prohibits him, when testifying as a private citizen, from discussing the E.P.A. regulatory decision making processes, policies and the employees involved in such activities. (Res. Ex. 1, p. 4.)

Example number one contained two allegations against Dr. Marcus. First, Dr. Davies alleged that Dr. Marcus misrepresented his position and authority at E.P.A. by referring to himself as the "Chief Toxicologist" for the Office of Drinking Water, for the purpose of bolstering his stature as a paid witness. Dr. Marcus' E.P.A. position description lists his job title as Toxicologist and his organizational title of position as Senior Science Advisor. (Cl.

Ex. 65, p. 5.) At the hearing, Dr. Marcus explained that he adopted the "Chief Toxicologist" title with the informal permission of his immediate supervisor, Dr. Cotruvo, and that E.P.A. personnel were aware of his use of the title "Chief Toxicologist" for several years. (Tr. at 454-55.)

The "Chief Toxicologist" title was adopted by Dr. Marcus and was not assigned to him by the agency. Therefore, Dr. Marcus represented himself by a title that was not his position of record at E.P.A. However, it is not uncommon in Government offices for employees to adopt unofficial job titles with the actual or tacit approval of their supervisors. That appears to have been the case in this instance. I credit Dr. Marcus' testimony in this regard.

Second, Dr. Davies alleged that Dr. Marcus gave the impression he was appearing as a representative of the E.P.A. when he was deposed in the case of *Kanode v. Trans-Tech, Inc*. In his deposition, Dr. Marcus testified that he signed off on the "DWEL" for trichloroethylene, and that he agreed with the finalization because it was a good compromise based on the data. (Res. Ex. 3, tab 25, p. 152.) Additionally, Dr. Marcus testified that "DWELs" are part of a Health Advisory; that the Health Advisory is revisited every three years; that if significant new data is developed, the Health Advisory is redone; and that Dr.

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Marcus would participate in that process. (*Id*. at p. 153.)

Since Dr. Marcus discussed his specific duties regarding the "DWEL" for trichloroethylene and the promulgation of Health Advisories during his testimony as a paid witness, Dr. Marcus accepted payment for an appearance that focused specifically on his official duties or on the responsibilities, policies and programs of the E.P.A. Therefore, he violated section 3.103 (d) (1). Accordingly, this allegation against Dr. Marcus is substantiated.

In the next example given, labeled Examples 2 & 3, Dr. Davies made three allegations. First, he alleged that Dr. Marcus began his deposition in the case of *Ableman v. Velsicol Chemical Corp*. by mischaracterizing E.P.A. ethics regulations and falsely stating that he had authority to testify as a private citizen. In his testimony, Dr. Marcus began with the following disclaimer:

> For the record, I am here as a private individual. My opinions are strictly those of a private individual and do not necessarily represent those of my employer, the United States Environmental Protection Agency.

(Res. Ex. 3, tab 28, p. 9.) When asked to explain this statement, Dr. Marcus testified:

> As part of the agreement I have with my employer, when I engage in outside employment I am to do it as a private citizen and to include as part of the record that it is strictly my personal opinion. (*Id*. at p. 9.)

As will be discussed later, the evidence shows that Dr. Marcus did have administrative approval to appear as a paid witness. Therefore, the allegation that Dr. Marcus mischaracterized E.P.A. ethics regulations and falsely stated that he had authority to testify as a private citizen is not substantiated.

Second, Dr. Davies alleged that Dr. Marcus described E.P.A. procedures and policies and related a discussion between E.P.A. and Velsicol Corporation employees in his testimony in the deposition in the case of *Ableman v. Velsicol Chemical Corp*. In his testimony, Dr. Marcus discussed he following topics:

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- E.P.A.'s investigation of the problems of pesticide application;
- his duties at E.P.A. regarding evaluating the allowable levels of chlordane and heptachlor, when airborne;
- his E.P.A. duties concerning chlordane and heptachlor use as termiticides;
- that E.P.A. had compelled Velsicol to provide test information concerning exposure for crawl space homes

and for slab-based homes;

- that he was involved in work that established the E.P.A. standard for cyclodienes and that Velsicol withdrew its product from the market when it learned that E.P.A. was preparing to suspend its approval of the product; and that E.P.A. had concluded that chlordane and heptachlor are animal carcinogens.

(Res. Ex. 3, tab 28, pp. 107-10, 114-15, 148, 152-53, 170-73, 182-83.)

It appears that Dr. Marcus testified about his specific duties or about the responsibilities, policies and programs of the E.P.A. Therefore, he violated § 3.103 (d) (1), and this allegation against him is substantiated.

Third, Dr. Davies alleged that Dr. Marcus, in his deposition testimony in the case of *Abelman v. Velsicol Chemical Corp*., consistently used the term "well in discussing E.P.A. policies and procedures, for the purpose of conveying the impression that he was testifying as an official E.P.A. representative. In his testimony, Dr. Marcus discussed evaluating chlordane and heptachlor. He said:

> Remember, we are strictly the Office of Drinking Water and we don't ordinarily, unless specifically requested, make some conversions; but, if say you would like to know, I would be happy to try.

(Res. Ex. 3, tab 28, p. 115.) In addition, when testifying about how he formed the conclusion that Velsicol had decided to withdraw its chemical from the market rather than have it

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suspended by E.P.A., Dr. Marcus said:

> What happened at EPA was we, "we" being the Office of Drinking Water and my responsibility, were in the midst of writing or revising our standards. As part of my responsibility, I was to keep track of the ongoing actions in the chemicals we have already had . . . .[1]

(Res. Ex. 3, tab 28, p. 173.)

In his testimony, Dr. Marcus used the pronoun "we" as if he were speaking for the E.P.A. Such statements were probably intended to bolster his credibility and authority as an expert witness. In this regard, as well as because Dr. Marcus' testimony concerned his specific duties and the responsibilities, policies and programs of the E.P.A., Dr. Marcus violated § 3.103 (d) (1). Accordingly, this allegation is substantiated.

In example number four, Dr. Davies alleged that in his testimony in the case of *Brushel v. Alternate Energy Resources, Inc*., Dr. Marcus discussed his regulatory responsibilities and represented himself as a representative of the E.P.A. In his testimony, Dr. Marcus referred to an E.P.A. regulation that had been proposed but not yet promulgated. (Res. Ex. 3, tab 29, p. 66.) In addition, Dr. Marcus used the pronoun "we" in describing the Office of Drinking Water's responsibilities concerning health advisories. (Res. Ex. 3, tab 29, p. 66.)

A review of his testimony indicates that Dr. Marcus used the pronoun "we" as if he were speaking for the E.P.A. Such statements would likely bolster his credibility and authority as an expert witness. In this regard, as well as because Dr. Marcus, testimony concerned his specific duties and the regulatory responsibilities, policies and programs of the E.P.A., Dr. Marcus violated § 3.103 (d) (1). Accordingly, this allegation is substantiated.

In example number five, Dr. Davies alleged that in his testimony in the case of *Weir v. Exxon Corp*., Dr. Marcus discussed internal E.P.A. processes and procedures about regulatory actions in which he had participated when working in the Office of Drinking Water. In his deposition, Dr. Marcus discussed benzene in drinking water and his role in drafting the

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E.P.A. regulatory proposal covering that subject. (Res. Ex. 3, tab 32, p. 62.)

E.P.A. regulatory proposal covering that subject. (Res. Ex. 3, tab 32, p. 62.)

A review of his testimony indicates that Dr. Marcus discussed his specific duties and the responsibilities, policies and programs of the E.P.A. Therefore, Dr. Marcus violated § 3.103 (d) (1). Accordingly, this allegation is substantiated.

In example number six, Dr. Davies stated that he was unable to locate an E.P.A. document to which Ms. Stasikowski had referred in her memo entitled Proposed Removal, and therefore he did not have the "document of prime importance in this charge." Dr. Davies then alleged that since Dr. Marcus had consistently crossed the line between expressing a private opinion and being an employee of E.P.A., Dr. Marcus had committed a general violation of § 3.10 (d) (1).

In this example, Dr. Davies found, despite the lack of any evidence to substantiate the specific charge proposed by Ms. Stasikowski, that a violation occurred. Since there is no basis given to support this allegation, it is without substance and not sufficient to support the termination decision.

In example number seven, Dr. Davies made two allegations. First, he alleged that in Dr. Marcus' deposition testimony in the case of *Carroll v. Litton Systems, Inc*., he discussed E.P.A. procedures, internal deliberations and policy development.

In the deposition, Dr. Marcus stated that there had been a disagreement between the Office of Drinking Water and the Office of Pesticide Programs concerning the handling of a case involving arsenic. The disagreement was eventually resolved in favor of Dr. Marcus' office. (Res. Ex. 3, tab 34, p. 52.) Since this testimony focused on Dr. Marcus, duties and the resolution of an intra-agency dispute, it constituted a violation of section § 3.103 (d) (1). Therefore, this allegation is substantiated.

Second, Dr. Davies alleged that Dr. Marcus had relied on documents that contained nonpublic information when testifying privately. The only document presented by E.P.A. that related to the case of *Carroll v. Litton Systems, Inc*. was the *Addendum to the Health Assessment Document for Trichlorethylene*. That document, as discussed earlier in this opinion, is for sale through the National Technical Information Service, and therefore

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it is available to the general public. Therefore, Dr. Marcus' use of this document was not a violation. Accordingly, this allegation is not substantiated.

As demonstrated by the above analysis, six of the nine allegations relied on by Dr. Davies to support the second of his four reasons for terminating Dr. Marcus' employment are supportable in law and fact.

Charge No. 4: Failing To Follow Established Leave Procedures:

Dr. Davies alleged that the Inspector General's report documented a pattern by Dr. Marcus, during the period from 1988 to January 1990, of misusing sick leave and not taking annual leave while engaging in paid employment as an outside consultant. The Inspector General's report cited eight specific instances of alleged leave abuses, as follows:

First, the Inspector General's report stated that on May 23, 1988, Dr. Marcus took eight hours of sick leave while in Dallas, Texas, on private business, and that when interviewed by Special Agent Fairchild, Dr. Marcus said that the records were in error and should indicate that annual leave was taken and that he had no objection to paying back any salary not due him. (Tr. at 752; Res. Ex. 3, tab 11, p. 4; Res. Ex. 3, p. 13.)

The timecard for that period is not accurate, in that the cumulative totals for the two week pay period, which show the amount of sick and annual leave charged against Dr. Marcus' account, do not reconcile with the leave reported used for each individual work day. The timecard reported that eight hours of sick leave were used on May 23, 1988, and that forty-eight hours of sick leave were used during the entire two week pay period; however, the cumulative totals showed that thirty-four hours of sick leave were charged against Dr. Marcus' account for the pay period. (Cl. Ex. 210, p. 6.) Additionally, the timecard reflected that no annual or compensatory leave was used during the pay

period; however, thirty-four hours of annual leave and fifteen hours of compensatory leave were charged against Dr. Marcus' account. (Cl. Ex. 210, p. 6.) Therefore, while sick leave was reported as being used, annual and compensatory leave were charged against Dr. Marcus' account. Accordingly, the timecard is not accurate and does not prove an abuse of leave

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procedures.

Second, the Inspector General's report stated that on July 11, 1988, Dr. Marcus signed an affidavit relating to private business but did not take leave. (Res. Ex. 3, p. 13.) When interviewed by Special Agent Fairchild, Dr. Marcus said that he signed the affidavit after work hours. (Tr. at 753; Res. Ex. 3, tab 11, p. 4.) The E.P.A. offered no evidence that the affidavit was signed during work hours. Dr. Marcus' explanation is plausible. Accordingly, this allegation is not substantiated.

Third, the Inspector General's report stated that on November 3, 1988, Dr. Marcus used sick leave wile attending a deposition in Baltimore, Maryland. (Res. Ex. 3, pp. 13-14.) When interviewed by Special Agent Fairchild, Dr. Marcus stated that the records were in error and should show annual leave and that he would have no objection to paying back any salary not due him. (Tr. at 753; Res. Ex. 3, tab 11, p. 4.)

The timecard reflected that six hours of annual leave were used during the two week pay period, but eleven hours of annual leave were charged against Dr. Marcus' account. (Cl. Ex. 210, p. 4.) Therefore, the timecard is not accurate. However, while the timecard may be supportive of Dr. Marcus, claim that he used annual leave and that the timecard is incorrect, there were only five hours of annual leave that were charged against Dr. Marcus' account for the pay period and which were not reported as used for any specific day. Therefore, while it appears that there was not enough unaccounted annual leave to establish that Dr. Marcus had taken annual leave for the day in question, the inaccuracy of the timecard renders it unreliable. Such evidence is inadequate to support this allegation.

Fourth, the Inspector General's report stated that on February 21, 1989, Dr. Marcus did not take leave while at a deposition in Rockville, Maryland. (Res. Ex. 3, p. 14.) Additionally, the report stated that Special Agent Fairchild showed him his timecard, which indicated that he did not take leave. (Res. Ex. 3, tab 11, p. 4.) Also, the report stated that Dr. Marcus said that the record was in error and should reflect annual leave and that he did not object to paying back any salary not due him. (Res. Ex. 3, tab 11, p. 4.)

Special Agent Fairchild testified at the hearing that she

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showed Dr. Marcus the timecard, that the timecard indicated that Dr. Marcus had used sick leave, and that Dr. Marcus stated it should be annual leave. (Tr. at 753-54.) The timecard was not introduced into evidence. Special Agent Fairchild's hearing testimony contradicted the Inspector General's report. Therefore, the reliability of the Inspector General's report is in question, and Dr. Davies' reliance on this example was misplaced.

Fifth, the Inspector General's report stated that on March 17, 1989, Dr. Marcus signed an affidavit relating to his private business but did not take leave. (Res. Ex. 3, p. 14.) When interviewed by Special Agent Fairchild, Dr. Marcus said that he signed the affidavit after work hours. (Res. Ex. 3, tab 11, p. 4.) Dr. Marcus, timecard reported no leave taken for the pay period but showed sixteen hours of annual leave charged against his account. (Cl. Ex. 210, p. 3.) Therefore, sixteen hours of leave were used sometime during the two week pay period. Therefore, the timecard is not accurate. Additionally, Dr. Marcus, explanation is plausible, whereas E.P.A. has offered no evidence that the affidavit was signed during work hours. Accordingly, this allegation is not substantiated.

Sixth, the Inspector General's report stated that on August 9, 1989, Dr. Marcus was attending a deposition in Washington, D.C., which started at 3:15 p.m., but he did not take leave. (Res. Ex. 3, p. 14.) The report also indicated that when interviewed by Special Agent Fairchild, Dr. Marcus said that his normal work day was from 6:30 a.m. to 4:00 p.m., that the leave records were in error and should indicate that two hours of leave were taken, and that he

had no objection to paying back any salary not due him. (Res. Ex. 3, tab 11, p. 4; Tr. at 754.)

The record reflects that there were two timecards for this pay period. (Tr. at 301 and 733-34.) One timecard reported that four hours of annual leave were taken for the day in question, while the other timecard reported that four hours of sick leave were taken. (Cl. Ex. 210, p. 2.) The hours of sick and annual leave reported on both timecards do not equate with the total number of hours charged against Dr. Marcus' account. (*Id*.) Therefore, the accuracy of the timecards is in doubt.

Additionally, neither timecard referenced the other timecard, and the Inspector General's report did not note the

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existence of two timecards.

Seventh, the Inspector General's report stated that on August 10, 1989, Dr. Marcus was at a deposition in Washington, D.C., which ended at 10:26 a.m., but that his timecard did not reflect that he took leave. (Res. Ex. 3, p. 14.) Special Agent Fairchild testified that she showed Dr. Marcus his timecard, that he said it was in error and should reflect that two hours of annual leave had been taken, and that he did not object to paying back any salary not due him. (Tr. at 754-55; Res. Ex. 3, tab 11, pp. 4-5.) Two timecards existed for this pay period, and both indicated that three hours of annual leave had been taken, from 7:00 a.m. to 10:00 a.m. (Cl. Ex. 210, p. 2.)

The timecards contradict the Inspector General's report in that they reflect that annual leave was taken. I credit the timecards as the being the best evidence and find that this allegation is not supported by the credible evidence.

Eighth, the Inspector General's report stated that on January 12, 1990, Dr. Marcus signed a sworn statement in Los Angeles, California, but that his timecard did not reflect that he had taken leave. (Res. Ex. 3, p. 14.) Special Agent Fairchild testified that when interviewed, Dr. Marcus told her that he was in California all day, that he should have taken annual leave, and that he was willing to amend his timecard or pay nine hours back to the Government. (Tr. at 755; Res. Ex. 3, tab 11, p. 5.)

The timecard reported that no annual leave was taken on any specific day during the two week pay period; however it also showed that eight hours of annual leave were charged against Dr. Marcus' account for sometime during this pay period. (Cl. Ex. 210, p. 1; Tr. at 297-99.) Therefore, the accuracy of the timecard is in doubt and cannot be used to support the allegation.

As demonstrated by the analysis above, on six of the eight days of alleged leave abuse, the timecards do not appear to accurately report leave taken by Dr. Marcus. on the one occasion when a timecard was not produced, the testimony of Special Agent Fairchild contradicted the Inspector General's report. On another occasion, a timecard contradicted the Inspector General's report. On the two days where it was alleged that Dr. Marcus

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signed an affidavit during work hours, E.P.A. offered no evidence to show that the signing occurred during work hours. Considering the nature of the evidence, I find that the timecards relied on by the Inspector General, and subsequently by Dr. Davies, were of questionable accuracy and therefore not sufficient to support the decision to terminate Dr. Marcus' employment.[2] Moreover, Dr. Marcus, willingness to repay salary if leave records are inaccurate is not viewed as an admission of wrongdoing, but rather a willingness to make restitution if warranted.

Accordingly, I find that this charge is not substantiated in law or fact.

Charge No. 5: Failing To Obtain Administrative Approval For Outside Employment:

Dr. Davies alleged that Dr. Marcus failed to follow the procedures outlined in 40 C.F.R. § 3.508 and Appendix A, which require an employee, prior to engaging in outside employment, to request administrative approval in writing, addressed to the Deputy Ethics Official, and sent through the employee's supervisors. In making this charge, Dr.

Davies stated that while evidence existed that Dr. Marcus properly obtained approval for two instances of outside employment, thirty-eight subsequent instances occurred in which Dr. Marcus did not follow E.P.A. procedures. In addition, Dr. Davies determined that the memo from Michael Cook stating that Dr. Marcus had "blanket approval" was merely Mr. Cook's impression that Dr. Marcus had approval. (Res. Ex. 1. pp. 7-8.)

In the termination notice, Dr. Davies stated that Dr. Marcus' meeting with Dr. Cotruvo, Mr. Kimm, Dr. Kuzmack and Mr. Nantkus, and the approval given as a result of that meeting could not be blanket approval because the General Counsel does not have authority to grant administrative approval for outside employment; such approval may only be granted by an "appropriate Deputy Ethics Official," which is the head of an office within E.P.A. (Res. Ex. 1., pp. 7-8.)

Mr. Michael Cook is the Director for the Office of Drinking Water, in which Dr. Marcus was employed. According to Dr. Davies' interpretation of E.P.A. rules, it appears that Mr. Cook would have authority to grant blanket approval. Since the record

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contains a memo from Mr. Cook, dated August 28, 1990, stating that Dr. Marcus "had blanket approval to engage in outside employment as an advisor and expert witness on the health effects of toxic substances" and that "I am withdrawing my approval," the inference is that Dr. Marcus did have blanket approval to testify as an expert witness. (Tr. at 508-09; Cl. Ex. 66.)

On April 8, 1988, Special Agent Connell interviewed Dr. Arnold Kuzmack concerning whether Dr. Marcus had obtained administrative approval for outside activities. (Tr. at 718-720; Cl. Ex. 156.) In a report written six days later, Special Agent Connell stated that Dr. Kuzmack provided her with copies of memoranda from Dr. "Marcus to Ethics Officers requesting permission to engage in outside employment." (Cl. Ex. 156.) The report that contained Dr. Kuzmack's statements and the memoranda by Dr. Marcus seeking permission for outside activities were not included in the Inspector General's report. (Tr. at 719-20.)

Dr. Marcus believed that he had blanket approval and acted in accordance with that belief for many years without objection from his supervisors, although he did consult on occasion with Mr. Nantkus.

Considering the conduct of the parties and Mr. Cook's memo revoking blanket authority, I find that Dr. Marcus did have blanket authority to engage in outside employment as an advisor and expert witness. Accordingly, charge number four is not substantiated and does not support the termination of Dr. Marcus' employment .

Conclusion

The decision to terminate Dr. Marcus' employment was based on four charges of wrongdoing. Three of the charges, "Using Official Information For Private Gain," "Failing To Obtain Administrative Approval For Outside Employment" and "Failing To Follow Established Leave Procedures" are not supportable in fact or law and do not support the termination.

The one remaining charge, "Engaging In Private Business Activities That Result In Or Create The Appearance Of A Conflict Of Interest" is supportable, in that Dr. Marcus misrepresented his position and authority by referring to himself as "Chief Toxicologist"; he appeared as a paid witness on matters that

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focused specifically on his official duties and on the responsibilities, policies and programs of the E.P.A.; and he testified about intra-agency matters. Having found that Dr. Marcus committed these infractions, the question arises as to whether this conduct was sufficient to support Dr. Davies' decision to terminate Dr. Marcus' employment.

Evidence was presented at the hearing concerning disciplinary actions taken by E.P.A. against several employees who committed offenses similar to those committed by Dr. Marcus. In 1987, an employee who misstated

qualifications on an application for employment and who made false statements in an official investigation was suspended for three days. (Tr. at 794.) In 1988, an employee who falsified timecard signatures and fraudulently accrued 102 hours of overtime was suspended for one day. (Tr. at 794.) In 1988, an employee who fraudulently altered timecards by adding overtime hours and deleting sick leave and who forged signatures on timecards was suspended for seven days. (Tr. 795.) Of particular interest, in 1991, an employee charged with engaging in private business activities which resulted in or gave the appearance of a conflict of interest was suspended for fifteen days.[3] (Tr. at 796-97.)

Except for new employees still on initial probation, no evidence was presented that any E.P.A. employee had been dismissed for infractions similar to those committed by Dr. Marcus. (Tr. at 798.) Dr. Davies testified that he had previously discharged only one employee. (Tr. at 1070-71.) Moreover, Dr. Davies testified that that termination decision had been based on continued nonperformance by the employee. (*Id.*)

This evidence of prior disciplinary actions by E.P.A. suggests that the disciplinary action taken against Dr. Marcus was extreme and not consistent with discipline previously given to employees who had committed similar violations of E.P.A. regulations.

The record reflects that scientists at E.P.A. began to oppose the agency's fluoride position during the mid 1980's. (Tr. at 360.) During this time Dr. Marcus enjoyed a reasonably stable working environment at E.P.A. However, after he issued his fluoride memo in 1990, critical of E.P.A.'s fluoride policy, his situation began to change.

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Dr. Marcus' memo was recognized by one EPA supervisor as creating some "chaos and turmoil." (Tr. at 938-40; Cl. Ex. 63.) It was described by an E.P.A. scientist as a "bombshell" in the fluoride-cancer controversy. (Tr. at 365.) It brought into question the accuracy of a major government study and questioned the conclusions of that study. (Tr. at 365.) It had an immediate impact within the scientific community, as well as with the general public. It was featured on a television news program and in newspapers. The public, press and congressional reactions to the memo were such that E.P.A. supervisory personnel became agitated and wanted the matter quieted. (Tr. at 953-54, 1048, 1050, 432.)

It was in this atmosphere that Dr. Marcus, immediate supervisor requested, for the first time, that Dr. Marcus begin preparing weekly activity reports and meet regularly with her. He was instructed, for the first time, to recertify his inability to work in the E.P.A. building in the Waterside Mall. His blanket authority to engage in outside employment was revoked. His duties were limited to studying the least controversial chemicals regulated by E.P.A., and his immediate supervisor took the unprecedented action of forbidding him from engaging in any further fluoride research during E.P.A. working hours. In addition, he was no longer given assignments reviewing colleagues, scientific work and his request for administrative leave to speak before the American Chemical Society was denied. On May 13, 1992, Dr. Marcus' employment with E.P.A. was terminated on the basis of the previously discussed four charges.

Because three of the four charges against Dr. Marcus are not supportable in fact or law and therefore do not support the termination decision; and because no other E.P.A. employee who committed violations similar to those committed by Dr. Marcus was fired from her or his employment at E.P.A. and considering the treatment Dr. Marcus received from his supervisors before and after he issued his fluoride memo, I conclude that the reasons given for Dr. Marcus, firing were a pretext and that his employment was terminated because he publicly questioned and opposed E.P.A.'s fluoride policy. This action by the agency constitutes a wrongful termination of Dr. Marcus, employment under applicable law.[4] Relief is warranted.

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Relief

Dr. Marcus requests the following relief:

- Reinstatement to the position of Senior Science Advisor (GS-15) and all lost wages and benefits (including interest on all lost earnings);
- Compensation for emotional distress and loss of professional reputation;
- A prohibition against future termination, demotion, involuntary transfer or other adverse actions, except for good cause shown;
- All attorney fees and costs;
- Compensatory damages as compensation for harassment;
- Require that the Decision and Order be prominently posted at all E.P.A. job sites and be circulated to all E.P.A. employees;
- Enjoin E.P.A. from taking any future retaliatory action against Dr. Marcus;
- Exemplary damages; and
- Reimbursement for all lost benefits (such as health care, retirement and life insurance costs) that Dr. Marcus was required to pay as a result of his termination.

Because I find that E.P.A. violated the Federal employee protection provisions under which this case arose, Federal regulations at 29 C.F.R. § 24.6 (a) require that I recommend an order that will remedy the violation.

The Federal employee protection provisions require that affirmative action be taken to abate the violation, including reinstatement of the complainant to his former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment. 29 C.F.R. § 24.6 (b) (2).

In addition, Federal regulations provide that the Secretary of Labor may, where appropriate, order the employer to provide compensatory damages to the complainant. § 24.6 (b) (2).

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Dr. Marcus testified that the preparation for bringing this case "disrupted" his home life; that his children are considering changing their plans for attending college because of the added financial burden during this period of unemployment; and that his wife is a "physical wreck." (Tr. at 648.) In addition, he testified that he has gained weight, has an increased problem controlling his blood pressure, that his stomach is in an "uproar," and that he gets "feelings of great depression." (Tr. at 649.)

He also testified that on November 19, 1990, Mr. Hais ordered him to meet with the Inspector General, and at the same time Special Agents Kiley and Fallan approached Dr. Marcus and physically grabbed his elbow. (Tr. at 527 and 781.) Dr. Marcus further testified that the aggressive and intimidating treatment by the Special Agents made him feel like a criminal being taken into custody, as well as angry, upset and indignant. (Tr. 781 and 527-28.) Additionally, evidence shows that Ms. Stasikowski drafted a memo, accusing Dr. Marcus of violent and aberrant behavior, and circulated it to several of his supervisors at E.P.A., potentially harming Dr. Marcus' reputation. (Tr. at 528- 34 and 958-62; Cl. Ex. 73.)

In regard to exemplary damages, the Safe Drinking Water Act, 42 U.S.C. § 300J-9 (i) (2) (B) (ii), and the Toxic Substances Control Act, 15 U.S.C. § 2622 (b) (2) (B), contain specific language giving discretionary power to award exemplary damages in appropriate circumstances. The other employee protection laws are silent on this matter.

Exemplary damages are designed to serve as an example, or warning, to others not to engage in outrageous or illegal conduct. *Smith v. Wade*, 461 U.S. 30, 45-49 (1983), *citing* Restatement (Second) of Torts, 908 (1) (1977). I see no reason to award such damages in this case. However, a copy of the Decision and Order shall be provided to all of Dr. Marcus' supervisors within E.P.A. and shall be prominently posted within the agency for a period of not

less than thirty days.

Compensatory damages are another matter. The mental and physical anguish that Complainant has suffered for the last eleven months as a result of job termination together with the potential damage to his personal and professional reputations warrant a monetary award. 29 C.F.R. § 24.6 (b) (2).

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Federal regulations also require that, at the request of the complainant, a sum equal to the aggregate amount of all costs and expenses (including attorney and expert witness fees) reasonably incurred by the complainant in connection with bringing the complaint, as determined by the Secretary, be assessed against the employer. § 24.6 (b) (3). Accordingly, Dr. Marcus is directed to present an itemized list of all costs and expenses that he reasonably incurred bringing and maintaining the complaint in this proceeding.

ORDER

Wherefore, it is ORDERED that:

1. E.P.A. shall reinstate Dr. Marcus to his former position of Toxicologist, GS-15, and Senior Science Advisor in the Criteria and Standards Division, Office of Drinking Water;

2. E.P.A. shall provide back pay, including interest, to Dr. Marcus, from May 13, 1992, to the date of reinstatement. Monies earned by Dr. Marcus during this time period shall be offset from back pay owed to Dr. Marcus by E.P.A.;

3. E.P.A. shall reimburse Dr. Marcus for any fringe benefits that were included in his salary before termination and that were borne out of pocket during the period of termination. In all respects, E.P.A. shall make Dr. Marcus whole, including restoration of retirement benefits;

4. Interest shall be paid at a rate equal to the coupon issue yield (as determined by the Secretary of the Treasury) of the average accepted auction price at the last auction of fifty-two week U.S. Treasury bills. 28 U.S.C. § 1961 (a);

5. E.P.A. shall pay to Dr. Marcus the sum of fifty thousand dollars ($50,000.00) as compensatory damages;

6. E.P.A. shall not take any adverse actions against Dr. Marcus, including but not limited to: termination of employment, demotion or involuntary transfer, without good cause shown; and

7. E.P.A. shall post a copy of the Decision and Order in a prominent place in E.P.A. headquarters for a period of not

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less than thirty days. A copy of this Decision and Order shall be placed in Dr. Marcus' personnel file and distributed to all persons who exercise supervisory control over him.

DAVID A. CLARKE, JR.
Administrative Law Judge

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[ENDNOTES]

[1] The entire statement made by Dr. Marcus is not quoted here Because it was not provided in the Inspector General's report, which contained only excerpts of the deposition transcript.

[2] The Inspector General submitted Dr. Marcus' leave records to Federal authorities for prosecution on the issue of alleged leave abuse. on June 6, 1991, the Public Integrity Section of the U.S. Department of Justice declined to

pursue prosecution because

> The available evidence shows that of the twenty-two known days in which Marcus testified at a trial or a deposition, he failed to take leave for only one of those days. The value of that one day of leave is below our threshold for prosecution.

(Res. Ex. 3, tab 60; Tr. at 740.)

Moreover, on March 12, 1992, the Investigation Division of the Office of the Inspector General declined to pursue prosecution under the Program Fraud Civil Remedies Act because the timecards were not sufficient to support charges when neither Dr. Marcus' timekeeper nor his immediate supervisor could recall "telephonic leave requests over three years ago." (Cl. Ex. 177; Tr. at 737-38.) These two instances of declined prosecution suggest that the Inspector General was aware of the lack of evidence supporting its claim that Dr. Marcus engaged in a pattern of abusing leave procedures. (Res. Ex. 1, p. 6.)

[3] That employee, an Environmental Engineer GS-14, received remuneration to speak on behalf of a commercial chemical company at a public meeting; the employee introduced himself as a representative of E.P.A. (Cl. Ex. 211, p. 239.) In the proposed disciplinary memo, the E.P.A. supervisor made four charges against the employee and proposed a sixty day suspension. (*Id*.)

[4] In so finding, I do not credit the testimony of Ms. Stasikowski and Dr. Davies that Dr. Marcus, fluoride activities played no role in the decision to terminate Dr. Marcus' employment.

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