



## Commissioned Officers Association of the U.S. Public Health Service

Gerard M. Farrell  
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Executive Director

27 September 2011

The Honorable Daniel R. Levinson  
Inspector General  
Department of Health and Human Services  
William J. Cohen Building  
330 Independence Avenue, S.W.  
Washington, D.C. 20237

Dear Mr. Levinson:

The Commissioned Officers Association of the U.S. Public Health Service (COA) requests a formal investigation by your office into the legality of decisions announced earlier this year by the Department of Health and Human Services (DHHS) that PHS Commissioned Corps officers would be subject to furlough without pay in the event of a government shutdown. Existing law appears to make such a policy illegal.

Having exhausted all other means of recourse without any substantive response, this association has no alternative but to request intervention by the Office of the Inspector General. COA is non-profit, professional membership organization of active duty, retired, and reserve officers of the PHS Commissioned Corps organized under section 501c(6) of the IRS tax code.

The reasons for our request are as follows: On April 5, 2011, a message was sent from the Deputy Surgeon General to all non-HHS Commissioned Corps Liaison Officers that, in the event of a government shutdown (anticipated for Friday, April 8, 2011) "OMB and DOJ have recently ruled that Corps officers cannot be exempted from furlough based solely on their status as active duty members of a Uniformed Service." The Deputy Surgeon General noted that this represented "a significant change in the legal analysis regarding whether the Commissioned Corps is exempt from furlough." [Enclosure 1]

Later that same day, HHS Secretary Kathleen Sebelius sent a memorandum to all HHS employees informing them that in the event of a government shutdown "some (HHS) employees will be furloughed and unable to work." [Enclosure 2] That memorandum was immediately followed by another from the Deputy Surgeon General informing PHS Commissioned Corps officers that the Secretary's message applied equally to PHS officers. [Enclosure 2] This was again a significant change from the last time a government shutdown took place in 1995/6 when no PHS officers were furloughed; and in fact, they were required to report for duty to keep essential government functions operating during the government shutdown at that time. We are aware of no changes, or new statutes since 1996 that would have altered this finding.

On April 6<sup>th</sup>, COA received word that an email reportedly circulating the upper echelons of DHHS from a Richard Turman, Principal Deputy Assistant Secretary for Financial Resources at HHS, stated that PHS officers will not be considered essential personnel during a furlough.

Discussions with senior Commissioned Corps leadership on 6 April provided no insight on the reasons for the abrupt change in policy or legal status and directed us to the HHS Office of General Counsel (OGC) from which office we understood these changes to be emanating.

There followed a series of telephone calls and email exchanges on 6 April with Ms. Bahar Niakan, Mr. Jeff Davis, and CDR Keian Weld in OGC. [Enclosure 3] The last we heard from OGC was Mr. Davis' email in which he wrote that we were "referred to (OGC) in error.... HHS has no authority to provide legal assistance or advice to anyone outside the agency...."

Following the exchange with OGC on 6 April, COA sent a letter to Secretary Sebelius requesting both an explanation of the reasons for the change in the Corps' status and a reversal of that change. [Enclosure 4] In that letter, we pointed out that the DHHS decision contradicted the information posted on the OPM website (to which the Secretary directed employees for additional information).

To date, COA has received no reply to our 6 April letter to Secretary Sebelius.

On April 7<sup>th</sup>, after more email exchanges [Enclosure 5] and a telephone conversation with the Surgeon General, VADM Benjamin sent out another communication to all PHS Commissioned Corps officers. [Enclosure 6] The Surgeon General's memo further confounded the situation since neither we, nor any other relevant source has ever heard of any situation where uniformed commissioned officers could be held on active duty but unpaid. The law is clear on this point. There is ample precedent. If an officer is on active duty then an officer is entitled to pay.

On the morning of April 8<sup>th</sup>, the deputy director of OMB was quoted on the radio as saying that all members of the uniformed services would remain on duty in the event of a shutdown – again contradicting the directives issued by DHHS officials.

As we all know, April 8<sup>th</sup> came and went without a government shutdown and DHHS appears content to let the matter rest.

On 3 May, I was able to have a conversation with Messer's Jonathan Rackoff and Sam Berger in the Office of Management and Budget (OMB) General Counsel's Office. These gentlemen informed that OMB's role in the foregoing was "to assist agencies in updating shutdown plans." They went on to say that any "decisions (with respect to agency employees) were owned by the agencies" and not OMB. Clearly, the intent here was to distance OMB from any accountability for the findings proclaimed by DHHS.

Subsequent attempts to determine the Corps' status in the event of a government shutdown and the legal underpinnings for that status have yielded no results. No office within HHS will respond to our inquiries and we are unable to obtain any further response from OMB. Discussions with senior officials in the Office of the Assistant Secretary for Health in late June on this matter were unresponsive to the issue and unproductive.

But the potential for another threat of a government shutdown still exists and we remain concerned on multiple levels by the Department's continued lack of responsiveness to our legitimate and appropriate inquiries.

First, there is the clear evidence that uniformed service officers, by law and precedent, cannot be furloughed without pay. The actions announced by DHHS were and remain illegal. The PHS Commissioned Corps is the only one of the seven federal uniformed services told they were subject to furlough without pay in the event of a government shutdown.

Next is the matter of the obvious attempt by every government official involved to avoid or deny any accountability for these decisions. HHS blames OMB; OMB blames HHS.

Finally, there is the total lack of transparency on this matter at all levels within DHHS. A fact thoroughly inconsistent and at odds with the President's many directives regarding transparency in government. We have many anecdotal reports of government officials being under "gag orders" to prevent any discussion of this matter.

The actions of the Department of Health and Human Services have resulted in a serious further erosion of morale and loss of confidence in HHS leadership within the PHS Commissioned Corps which can only have a deleterious effect on employee performance throughout the entire Department.

The Commissioned Officers Association therefore requests an immediate and thorough investigation of the Corps' status as a uniformed service within the federal government and in particular the Corps' status in the event of a government shutdown due to failure to enact a budget or provide annual appropriations.

Sincerely yours,

A handwritten signature in black ink, appearing to read "G. M. Farrell", with a long horizontal line extending to the right.

Gerard M. Farrell  
Executive Director

Enclosures

Cc: Assistant Secretary for Health  
Surgeon General