



**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation

**The Inspector General**

Office of Inspector General  
Washington, DC 20590

March 23, 2011

The Honorable Darrell Issa  
Chairman  
U.S. House Committee on Oversight and Government Reform  
United States House of Representatives  
Washington, DC 20515

The Honorable John Mica  
Chairman  
U.S. House Committee on Transportation and Infrastructure  
United States House of Representatives  
Washington, DC 20515

The Honorable Charles E. Grassley  
Ranking Member  
U.S. Senate Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairmen Issa and Mica and Ranking Member Grassley:

Thank you for your November 12, 2010, letter requesting that we review the circumstances surrounding the departure from office of Fred Weiderhold, Amtrak's former Inspector General. As agreed with your staff, we examined whether Amtrak violated the Inspector General Act when it did not notify Congress 30 days prior to Weiderhold's departure; notification is required when an Inspector General is removed or transferred. This review was within our jurisdiction because Amtrak is a U.S. Department of Transportation grant recipient.<sup>1</sup>

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<sup>1</sup> Inspector General Act of 1978, 5 U.S.C. App 3 § 4(a)(5): "It shall be the duty and responsibility of each Inspector General . . . to keep . . . the Congress fully and currently informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on

If "removal" is defined using Federal Civil Service employment law—the approach recently taken by the Court of Appeals for the D.C. Circuit<sup>2</sup>—Weiderhold's departure would not constitute a removal unless Amtrak's actions were sufficiently coercive to render Weiderhold's decision to leave office involuntary. In our review, we did not find this level of coercion. We note, however, that basing an analysis on Federal employment law may frustrate the intended purpose of the 30-day notice requirement to allow Congress to inquire into whether an Inspector General is departing for legitimate reasons. Further, although Amtrak may not have been required to send notice of Weiderhold's departure, the Board may not have given adequate consideration to Congress' role as a stakeholder in matters involving Inspectors General.

To conduct our review, we examined more than 6,700 pages of documents and interviewed eight individuals cognizant of the circumstances surrounding Weiderhold's departure: Fred Weiderhold, former Amtrak Inspector General; Thomas C. Carper, Chairman of the Board; Donna McLean, Vice Chairman; Nancy A. Naples, Board member; Joseph H. Boardman, Amtrak President and Chief Executive Officer; Eleanor D. Acheson, Vice President, General Counsel and Corporate Secretary; Joe McHugh, Vice President, Government Affairs and Corporate Communications; and J. Steven Patterson, Partner, Hunton & Williams, retained as counsel to Amtrak's Board.

## BACKGROUND

Amtrak is a designated Federal entity (DFE) and is, therefore, required under the Inspector General Act to establish and maintain an Office of Inspector General (OIG).<sup>3</sup> At the time of Weiderhold's departure, Amtrak's Chairman was the head of the entity and had the authority to hire and remove Amtrak's Inspector General.<sup>4</sup>

Prior to 2008, the Inspector General Act required the head of a DFE to “promptly communicate in writing the reasons for any such removal or transfer to both Houses of the Congress.”<sup>5</sup> In 2008, Congress determined it was necessary to strengthen the independence of the various Offices of Inspector General and passed the Inspector General Reform Act of 2008,<sup>6</sup> which included a new, more detailed, provision:

If an Inspector General is removed from office or is transferred to another position or location within a designated Federal entity, the head of the designated Federal entity shall communicate in writing the reasons for any

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the progress made in implementing such corrective action." Amtrak received \$1,488,000,000 in Federal funds in FY 2009; \$1,555,000,000 in FY 2010; and \$2,203,000,000 in FY 2011.

<sup>2</sup> *Walpin v. Corp. for Nat'l & Cmty. Servs.*, 630 F.3d 184 (D.C. Cir. 2011).

<sup>3</sup> 5 U.S.C. App 3 §§ 8G(a)(2), 8G(b).

<sup>4</sup> According to Carper, Amtrak's Board now serves as the head of the entity.

<sup>5</sup> Inspector General Act of 1978, 5 U.S.C. App 3, as amended by the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515.

<sup>6</sup> Pub. L. No. 110-409, 122 Stat. 4302.

such removal or transfer to both Houses of Congress, not later than 30 days before the removal or transfer. Nothing in this subsection shall prohibit a personnel action otherwise authorized by law, other than transfer or removal.<sup>7</sup>

Senator Joseph Lieberman, Chairman of the Senate Committee on Homeland Security and Governmental Affairs<sup>8</sup> and a chief sponsor of the legislation, explained that the 30-day notice requirement "would give [Congress] time to consider whether the administration was improperly seeking to displace an Inspector General for political reasons because the [Inspector General] was, in effect, doing his or her job too well."<sup>9</sup> The 30-day notice requirement, therefore, was intended to protect Congress' established interest in an effective and independent Inspector General.

## **FACTS SURROUNDING WEIDERHOLD'S DEPARTURE**

In early 2009, there was significant tension in the relationship between Amtrak and its Office of Inspector General. In February, unbeknownst to the Board, Weiderhold retained the services of a law firm to "review and analyze several Amtrak policies and practices relating to oversight of OIG audit, investigations and operations." From Amtrak's perspective, tensions came to a head that month when Boardman objected to Amtrak OIG's role with respect to \$450 million provided to Amtrak under ARRA<sup>10</sup> for security funding.<sup>11</sup> Boardman stated this was a "watershed moment" after which he told the Board "either [Weiderhold] goes or I go."

The Board's initial response to Boardman's concerns was to speak to the Inspector General of the Department of Transportation (DOT) and the Chair of the Council of the Inspectors General on Integrity and Efficiency (CIGIE). The Board's goal was for one of them to mediate the disagreements between Amtrak and its Inspector General. Board members told us that they concluded that neither the DOT Inspector General nor CIGIE would be willing to assume that role. Subsequently, the Board decided to pursue the possible separation of Weiderhold. They advised us that they decided not to involve Amtrak management officials because they did not want the issue to distract the company. As a result, on April 1, 2009, the Board retained Patterson to advise them concerning the potential separation of Weiderhold.

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<sup>7</sup> 5 U.S.C. App 3 § 8G(e).

<sup>8</sup> This committee has jurisdictional responsibility over the Inspector General Act.

<sup>9</sup> 154 CONG. REC. S10,055 (2008).

<sup>10</sup> The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115.

<sup>11</sup> According to Boardman, Amtrak OIG did not sufficiently advise Amtrak of its efforts with respect to obtaining the funds and sought to manage how the funds were spent.

The Board, with advice from Patterson, decided to allow Weiderhold to choose between accepting a separation agreement, in which he would resign as Inspector General and receive a severance package, or having a 30-day notice letter sent to Congress. Relying on Patterson's advice, the Board believed that presenting Weiderhold with these options did not trigger the 30-day notice requirement. Patterson advised that there was no need to send the letter unless Weiderhold chose not to accept the separation agreement. Patterson based his conclusion on a plain reading of the statute and discussions with his team at Hunton & Williams, which included an employment attorney.

Prior to meeting with Weiderhold, the Board considered contacting key stakeholders in Congress to let them know "that the Board is going to have a heart to heart discussion with our [Inspector General]," which will "cover some practices that the [Inspector General] has been engaging in that the Board is dissatisfied with."<sup>12</sup> The Board decided not to reach out to Congress until after Weiderhold was provided the opportunity to choose between the separation agreement and removal. The Board believed that if Weiderhold decided to accept the separation agreement, a prior disclosure that it was considering removing him would unnecessarily embarrass him, affect his reputation, and negatively impact his potential for future employment.

In anticipation of the Board's meeting with Weiderhold, Patterson prepared notebooks for the Board members, which included talking points for the meeting, several documents related to the separation agreement, and a draft 30-day notice letter. Patterson also prepared a notebook for Weiderhold, which included a summary of the terms of proposed separation, a summary of payout elements, the separation agreement, and a resignation letter.

On Wednesday, June 17, 2009, the first day of a scheduled Board meeting, Boardman, Carper, McLean, Naples, and Patterson met at 3:20 p.m. in executive session with Weiderhold. Weiderhold stated that as soon as he saw Patterson, he knew this was an "exit meeting" because the Board had previously used Patterson to remove Amtrak executives.

As planned, Carper began to read the prepared talking points contained in the Board members' notebooks. After Carper read the first two or three introductory talking points, and before he could explain that the Board had prepared a 30-day notice letter, Weiderhold interrupted.<sup>13</sup> Weiderhold stated to us that he spoke for several minutes, advising that Amtrak had serious problems that needed to be addressed regardless of whether or not he served as Inspector General. The others present at the executive session could not recall specifically what Weiderhold said during the meeting, but do

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<sup>12</sup> Talking points included in Amtrak Board Members' executive session binder.

<sup>13</sup> None of the Board members recall exactly how many of the talking points Carper read, but the consensus was that Carper was interrupted early on when he was thanking Weiderhold for his years of service to Amtrak.

recall Weiderhold stating that he understood what was happening, wished to retire, and served at the pleasure of the Chairman.

After Weiderhold finished speaking, he shook hands with the Board members and reiterated his intent to exercise his retirement options. Boardman wanted to ensure that Weiderhold understood what was happening, and informed Weiderhold that the Board was prepared to send a 30-day notice letter to Congress if he chose not to accept the separation agreement.<sup>14</sup>

Following the meeting, Weiderhold had several discussions with Patterson, during which they discussed the separation agreement and press release. Weiderhold suggested a few non-substantive changes, which Patterson made.

On June 18, 2009, Weiderhold signed the separation agreement and faxed it to Patterson. At 2:50 p.m. the same day, the Executive Committee of the Board met again in executive session and adopted a resolution accepting Weiderhold's resignation and approving the separation agreement. Amtrak also issued its prepared press release announcing Weiderhold's retirement. Because Weiderhold ultimately agreed to the separation agreement, the Amtrak Board did not send a 30-day notice letter to Congress.

## **ANALYSIS OF THE FACTS**

Under the Inspector General Act, the head of a DFE must notify both Houses of Congress in writing at least 30 days before removing or transferring the Inspector General.<sup>15</sup> It is undisputed that no notice was provided to Congress prior to the Board's June 17, 2009, meeting with Weiderhold; therefore, whether the Inspector General Act was violated turns on whether the Board's actions with respect to Weiderhold constituted a "removal" or "transfer."

Weiderhold's departure was clearly not a transfer. Accordingly, our review focused on whether his departure constituted a removal. The term "removal" is not defined in the statute or legislative history. It is, however, a term commonly used and analyzed in Federal Civil Service employment law.

There are significant public policy arguments against using a Federal employment law definition of removal in interpreting the Inspector General Act. Federal employment law is concerned with balancing the rights of employees and agencies, while the Inspector

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<sup>14</sup> According to McLean and Patterson, as he was leaving Weiderhold stated something to the effect of "I only ask that you let me retire," which Boardman misheard as "I only hope that you'll let me reach higher." McLean and Patterson state that this misunderstanding prompted Boardman to respond that they were prepared to send a 30-day notice letter.

<sup>15</sup> 5 U.S.C. App 3 § 8G(e).

General Act is aimed at protecting Congressional prerogatives. However, the only Federal appellate court opinion to analyze the 30-day notice requirement analyzes the term "removal" using Federal Civil Service employment law.<sup>16</sup>

In *Walpin v. Corporation for National and Community Service*, Gerald Walpin, former Inspector General for the Corporation for National and Community Services (CNCS), argued that the President violated the Inspector General Reform Act when he did not send notice to Congress 30 days before he was put on paid administrative leave.<sup>17</sup> Walpin sought a writ of mandamus ordering CNCS to reinstate him as Inspector General. The District Court dismissed the Complaint, finding that Walpin failed to satisfy the requirements for mandamus relief.<sup>18</sup> The D.C. Circuit affirmed the judgment.<sup>19</sup> Both Courts found that Walpin failed to prove that the President had a clear duty to send a 30-day notice letter because, at least under a Civil Service employment law analysis, paid administrative leave is not considered a removal.<sup>20</sup>

The question in *Walpin*, whether paid administrative leave constitutes removal,<sup>21</sup> is very different from whether offering the choice between resignation or removal constitutes removal. In addition, that case analyzed the requirements for mandamus relief. Nonetheless, the U.S. Court of Appeals for the D.C. Circuit, which would be the controlling Circuit with respect to any questions relating to the Amtrak Inspector General and most other Inspectors General, used Civil Service employment law to determine what constitutes a removal for purposes of triggering the 30-day notice requirement.

Under Civil Service employment law, "removal" is defined as the "involuntary separation of an employee from employment with an agency."<sup>22</sup> Resignations are presumed to be voluntary, but this may be rebutted if the employee demonstrates the resignation was a result of coercion by the agency.<sup>23</sup> Typically, this involves misleading the employee or failing to give adequate time to consider the decision.

Based on our review, the facts of Weiderhold's departure would not appear to be an involuntary separation under Federal employment law. Weiderhold stated that he

<sup>16</sup> *Walpin*, 630 F.3d 184 (D.C. Cir. 2010).

<sup>17</sup> 718 F. Supp.2d 18 (D.D.C. 2010).

<sup>18</sup> *Id.* at 19.

<sup>19</sup> 630 F.3d at 188.

<sup>20</sup> 718 F.Supp.2d at 23-24; 630 F.3d at 187.

<sup>21</sup> Senator Jon Kyl addressed this issue when he introduced his floor amendment adding the sentence "[n]othing in this subsection shall prohibit a personnel action otherwise authorized by law, other than a transfer or removal." He explained that his amendment addressed the scenario where an Inspector General is "fired for very good reasons" and was intended to ensure that the President/head of the entity was not restricted from taking official action against an Inspector General during the 30-day notice period. See S. 2324, 110th Cong., 154 CONG. REC. 3327 (2008).

<sup>22</sup> 5 C.F.R. § 432.103(f); see also 718 F. Supp.2d at 23-24.

<sup>23</sup> *Parrott v. Merit Systems Protection Board*, 519 F.3d 1328, 1332 (Fed. Cir. 2008), citing *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1328-9 (Fed. Cir. 2006); *Statts v. United States Postal Service*, 99 F.3d 1120, 1124 (Fed. Cir. 1996).

understood the separation agreement, that he had adequate time to consider the agreement, and that he was neither threatened nor coerced when offered the separation agreement.

According to Weiderhold, the separation agreement was a standard executive severance agreement that has been afforded to 90 to 100 percent of former Amtrak executives. He advised that he had previously seen and was "very familiar" with these types of agreements. In fact, he stated that prior to becoming the Amtrak Inspector General, he had written severance agreements, including most of the language in the agreement he signed. He also acknowledged that he was aware he had a right to seek counsel, but that he did not believe it was necessary to do so.

On its face, there appears to be some time pressure involved in this matter, as the Board informed Weiderhold it needed his decision quickly. Although the interviewees' memories varied, the general consensus was that Weiderhold had 1 or 2 days to make his decision. Weiderhold advised Patterson almost immediately after the June 17, 2009, executive session that he was likely to accept the offer. The following day, Weiderhold signed the agreement.

The separation agreement, however, states that Weiderhold had 21 days to consider the agreement and 7 days to revoke after signing. When asked if he or anyone at Amtrak raised this discrepancy, Weiderhold stated the matter was "moot" because he was ready to sign the agreement. Further, Weiderhold signed a waiver stating that he freely and voluntarily elected to execute the agreement before the 21-day consideration period.

Weiderhold signed the separation agreement within a day, did not request additional time,<sup>24</sup> and stated he had received sufficient time to make his decision.

Finally, Weiderhold acknowledged that he understood he had an alternative to resignation—to allow Amtrak to initiate a removal for cause. That the alternative was unpleasant or less desirable does not itself make the resulting resignation an involuntary act within the meaning of Federal employment law.<sup>25</sup>

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<sup>24</sup> Patterson stated that he would have advised the Amtrak Board to provide additional time if Weiderhold had requested additional time.

<sup>25</sup> *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) ("[W]here an employee is faced merely with the unpleasant alternatives of resigning or being subject to removal for cause, such limited choices do not make the resulting resignation an involuntary act."); *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984) ("The fact that an employee is faced with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives does not make an employee's decision any less voluntary.").

## CONCLUSION

If removal is defined by Federal employment law, as the Court of Appeals decision suggests, the Amtrak Board's actions in proceeding without sending a 30-day notice letter did not violate the Inspector General Act. However, relying on Federal employment law may frustrate the Inspector General Act's intended purpose of allowing Congress the opportunity to inquire into the underlying reasons behind an Inspector General's departure.

Amtrak does not appear to have given adequate consideration to Congress' role as a stakeholder with respect to Inspectors General.<sup>26</sup> Although the Board was aware of congressional interest and considered consulting with Congress prior to its decision, it elected not to and treated the decision to replace its Inspector General in the same manner as any other Amtrak Senior Executive. While Amtrak's concern for Weiderhold's reputation may be admirable, competing public policy considerations do not appear to have been given adequate weight.

Inspectors General have reporting responsibilities to both the head of their agency or DFE *and* Congress. Congress, therefore, is entitled to be kept well informed of the departure, or the possibility of departure, of an Inspector General—whether it be for "doing his or her job too well" or "for very good reasons." To ensure that Congress is informed of Inspectors General departures, Congress may wish to consider defining "removal" or expanding those situations in which notice is required.

We appreciate the cooperation of Mr. Weiderhold and Amtrak during this review. If I can answer any questions or be of further assistance in this matter, please contact me at (202) 366-1959 or Chief Counsel, Omer G. Poirier, at (202) 366-8820.

Sincerely,



Calvin L. Scovel III  
Inspector General

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<sup>26</sup> In his September 24, 2010 letter to Congress, Carper acknowledged that his "handling of the IG's resignation and [his] interface with [Amtrak OIG] prior to [Weiderhold's] departure were less than optimal" and that he "regret[s] that [he] did not keep [Congress] informed in a more timely manner about [Amtrak's] concerns with prior OIG management and [his] vision for improving the function of the OIG."