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Former NIH official charges improper termination

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by **Chris Williams**
Staff Writer

July 20, 2005

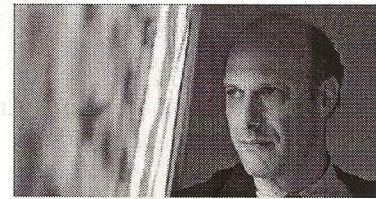
Several members of Congress have called for the National Institutes of Health to reinstate a high-ranking official, fired after bringing complaints of inappropriate behavior and scientific misconduct against his supervisors.

Dr. Jonathan Fishbein received notice on June 29 that he would be fired on July 1 from his job as director of the Office for Policy in Clinical Research Operations at the National Institute for Allergy and Infectious Diseases' Division of AIDS, a position created to ensure agency-sponsored AIDS research meets the proper safety and ethical standards. Fishbein, who lives in Potomac, has been on administrative leave since May 2004 while disputing his notice of termination.

Fishbein's termination for "poor performance" followed several complaints he filed against the division and its management, including intimidation and sexual harassment complaints of Fishbein's employees against Dr. Jonathan Kagan, the deputy director of the division.

The chairman and ranking Democrat of the Senate Finance Committee wrote to the NIH on June 30 calling Fishbein's removal disturbing.

"[It] appears to us that this termination may be an act of retaliation against an employee for complaining about the inappropriate behavior of another employee for acting on his concerns regarding research sponsored by the NIH," Sens. Ch Grassley (R-Iowa) and Max Baucus (D-Mont.) wrote in a letter to NIH Director Zerhouni. "Retaliation against an employee for reporting misconduct or voicing



David S. Spence/The Gazette

Dr. Jonathan Fishbein was fired from his job with the Division of AIDS at the National Institutes of Health on July 1, but members of Congress have now said the termination might be against the law.

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concerns is unacceptable, illegal, and violates the Whistleblower Protection Act. Moreover, it would have a chilling effect on other NIH employees who might make truthful but critical comments about the NIH."

The Office of the Inspector General for the Department of Health and Human Services, which oversees the NIH, is investigating Fishbein's allegations. Fishbein has also taken his case to the Equal Employment Opportunity Commission and the Merit Systems Protection Board. Attorneys for both sides are currently conducting depositions. The EEOC case and a hearing will likely be scheduled in the next few months. Fishbein has also taken his case to the Merit Systems Protection Board, which protects federal employees from pay and management abuses, is still reviewing the case to determine if it has jurisdiction. There is no timeframe on when a decision might come from either the board or the Office of Inspector General.

An NIH spokesperson would not comment on Fishbein's allegations other than to confirm that his employment at the agency ended on July 1.

Fishbein worked for 10 years on safety issues for the pharmaceutical consulting company PAREXEL before going to work for NIH in July 2003. Fishbein believes he was fired for doing the job the NIH hired him to do, he said in an interview last week.

"My job was to make sure that the science was performed to the highest level of scientific integrity, that patient safety was followed and that we did the utmost to maintain clinical research subject safety and to make sure that the rights of the volunteers were respected," Fishbein said.

In the first few months of his job, Fishbein raised safety concerns about several trials, including the HIVNET vaccine study in Uganda, which had been shut down for months for failing to meet proper safety standards. Fishbein said the agency rejected his concerns before he was able to inspect it and despite his protests that it was not safe.

"Political considerations took precedent over safety considerations and readiness," Fishbein said. "There is tremendous pressure to show results -- and when there is tremendous pressure to show results, corners get cut."

In early February 2004, Fishbein complained to the division's director, Dr. Edmundo Tramont, that Kagan was creating a hostile workplace for him and other employees and also physically and verbally sexually harassing female employees. In a legal deposition as part of the investigation into the allegations, Dr. Mary Anne Luzar of the division's Regulatory Affairs Branch, supported Fishbein's complaint with a detailed description of several instances of sexual harassment or intimidating behavior by Kagan.

"The NIH is an institution with a lot of wonderful research and a lot of wonderful people, but there is management that...is an old boys network," Fishbein said. "It is a serious cultural problem at NIH."

After Fishbein complained, Tramont placed Fishbein under Kagan's direct supervision. By the end of the month, Kagan had written a scathing mid-year performance evaluation of Fishbein recommending his termination.

Fishbein then filed an Equal Employment Opportunity complaint, appealing his termination. According to an Aug. 9, 2004, report by a senior adviser to Zerhouni, the notice of termination was withdrawn at the advice of a personnel specialist.

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The adviser's report, first made public this month by the Associated Press, is critical of both Fishbein and his supervisors, calling the Division of AIDS "a troubled organization."

"To have the senior management, both of the office and the division behave in this manner, spend incredible amounts of time feuding, and writing numerous long letters while seemingly being unaware of the need for appropriate behavior, decorum, and enforcement of good management practices and the rules of supervision, concerns about appearance of reprisal clearly indicate a serious problem," the report states.

Members of Congress first began investigating Fishbein's allegations in July 2004. Arlen Specter (R-Pa.), chairman of the Appropriations Subcommittee on Labor, Human Resources and Education, wrote to Zerhouni on July 3, 2004, asking Fishbein to clarify his claims.

Zerhouni's reply to Specter contradicted the facts as presented in the internal report, which had been submitted to Zerhouni just six weeks earlier. While the report said the notice of termination came after Fishbein raised his allegations against the division, Zerhouni wrote to Specter that the allegations came after notifying Fishbein of his termination.

In his Sept. 14, 2004, letter, Zerhouni wrote that Fishbein's managers "decided that he should be terminated and told Dr. Fishbein of their decision...I have been informed that, upon learning of this decision, Dr. Fishbein alleged that there were problems concerning the operations of the Division of AIDS at NIAID."

"I think this says a lot about the lack of integrity that the NIH leadership has," Specter said.

More recently, in a June 21 letter from the Senate Finance Committee, Grassley and Baucus questioned the agency's allegations of Fishbein's poor performance.

The senators wrote that "there was no documentation of Dr. Fishbein's poor performance prior to his mid-year performance evaluation in late February 2004, and the issuance of the memorandum of termination in April 2004."

In fact, Grassley and Baucus wrote, Fishbein was about to receive a \$2,500 performance award, but less than two weeks after Fishbein's complaints, Kagan recommended that the award be withdrawn.

"This raises a couple of questions," the senators wrote. "If Dr. Fishbein's job performance was so poor, why was he recommended for the award? And if his performance was not poor and merited the award, why did Dr. Kagan want to terminate him?"

Other members of Congress who have written to the NIH urging the agency to withdraw Fishbein's termination include Sen. Barbara A. Mikulski (D) of Baltimore, Rep. Steny H. Hoyer (D-Dist. 5) of Mechanicsville and U.S. Rep. Benjamin L. Cardin (D-Dist. 3) of Baltimore.

Fishbein said he feels vindicated by the internal NIH report and he is calling for the dismissal of NIH leadership.

"I am out for the restoration of my career and the restoration of my reputation."

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Fishbein said. "That's what I want and I will not stop until it's done. And along I will do everything I can to press the NIH until they are accountable for what t done. Until their act is cleaned up, they are doing a disservice and wasting hug amounts of taxpayer money."

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