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June 23, 2016

**VIA ELECTRONIC MAIL**

Jeh Johnson  
Secretary  
Department of Homeland Security  
301 7th Street SW, Mail Stop 0150  
Washington, DC 20528-0150

Dear Secretary Johnson:

Thank you for your February 22, 2016, letter regarding the Department of Homeland Security's (DHS) use of paid administrative leave. Your response shows that with prolonged and intense scrutiny and oversight, the Department has successfully reduced the number of employees on extended administrative leave. However, questions remain about how the Department is ensuring adequate visibility into component use of administrative leave and the extent to which component policies are consistent with Department-wide guidance. In addition, new allegations regarding the use of administrative leave for a top Department official merit continued oversight.

As you know, in October 2014, the Government Accountability Office (GAO) issued a report that raised serious concerns about the use of paid administrative leave among 24 federal agencies from Fiscal Years 2011 to 2013.<sup>1</sup> In that report, GAO found that DHS had placed 71 employees on paid administrative leave for one year or more. Given the significant costs to the taxpayer for salaries and benefits paid to these federal workers for not working, Chairman Issa and I wrote to you on October 21, 2014, and asked several questions regarding the Department's administrative leave policy. We also requested data, such as the number of DHS employees on

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<sup>1</sup> U.S. Gov't Accountability Office, GAO-15-79, *Federal Paid Administrative Leave: Additional Guidance Needed to Improve OPM Data* (2015).

paid administrative leave, the cost to the agency, and how many employees were on administrative leave for a year or more, among other things.<sup>2</sup>

The Department responded on January 17, 2015. However, DHS' explanation of the reasons for extended periods of paid leave for more than a year for 88 employees were too broad and vague to assess whether other actions might have been more appropriate.<sup>3</sup> DHS failed to explain how it met applicable OPM authority to use administrative leave "for those rare circumstances" in which the employee "may pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests," or how its actions were consistent with the numerous GAO decisions cited in my letter limiting administrative leave to brief duration. DHS also failed to explain why such extended amounts of time were needed to conduct investigations into security, misconduct, or fitness for duty issues. As such, I wrote again on October 19, 2015, asking for the same detailed narrative of the circumstances surrounding each employee's paid leave.<sup>4</sup> In order to avoid any further misunderstanding about the expectation for the content of this narrative, further guidance on what it should include was provided:

- A full explanation of why reassignment to other duties or another location was not an appropriate alternative,
- In cases of misconduct, the specific misconduct alleged and/ or under investigation,
- In cases of fitness-for-duty examination, the specific medical issues that prevented the employee from remaining safely in the workplace, and
- In security cases, the specific security concerns or incidents at issue, among other things.

In addition, the letter asked for a detailed update on the outcome of the effort to strengthen internal controls.

DHS responded on February 22, 2016,<sup>5</sup> and provided data on cases of paid administrative leave for more than one year from 2011 to 2015. For the 88 employees, previously reported as having been on leave for more than a year, 85 are no longer on administrative leave—the cost to the department for these employees doing no work was \$14,508,949.<sup>6</sup> Yet, a new set of employees crossed the one-year threshold in Fiscal Year 2015—this new set of 27 employees has

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<sup>2</sup> Letter from Charles E. Grassley, Ranking Member, U.S. Senate Comm. on the Judiciary, Darrell Issa, Chairman, House Comm. on Oversight and Gov't Reform, to Jeh Johnson, Sec'y, U.S. Dep't. of Homeland Sec. (Oct. 21, 2014).

<sup>3</sup> See Letter from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary (Jan. 17, 2015) and Letter from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary (Nov. 2, 2015).

<sup>4</sup> Letter from Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary to Jeh Johnson, Sec'y, U.S. Dep't of Homeland Sec. (Oct. 19, 2015).

<sup>5</sup> Letter from Russell C. Deyo, Under Sec'y for Mgmt., U.S. Dep't of Homeland Sec., to Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary (Feb. 22, 2016).

<sup>6</sup> This includes employees of both DHS and the DHS Office of Inspector General.

cost the Department and the taxpayers an additional \$4,311,303.<sup>7</sup> The Department reported ten cases that still remain open past one year (two of these cases are DHS-OIG employees). The running tab on for these ten employees is \$2,205,685.<sup>8</sup>

While the Department appears to have curtailed somewhat its use of extended administrative leave, among the reports were several extreme cases. For example, the data showed that a Border Patrol Agent was placed on administrative leave for misconduct and a subsequent investigation for a total of 9,736 hours, with an approximate total cost to the agency of \$545,156. The circumstances justifying this length of leave were not provided.<sup>9</sup> Among the open cases as of the end of Fiscal Year 2015, there was a FEMA Civil Rights Specialist who had been placed on administrative leave for “Financial Unsuitability” for a total time of 4,040 hours. The estimated amount paid was \$122,751. The agency noted that the circumstances were not present that would have allowed that employee to be placed on indefinite suspension or reassigned to another position requiring access to FEMA systems or facilities, without more explanation.

The lack of specificity surrounding individual cases of paid administrative leave persists throughout the data. For example, the data include several cases where employees were “ordered to undergo fitness for duty examination,” but do not provide any further explanation of what medical issues prevented the employee from remaining in the workplace, which was specifically requested. Moreover, there were several instances in which an employee was ordered to undergo treatment, but the data do not explain the length of the treatment and the treatment process. Likewise, in security cases, the data do not provide a full explanation of who determined that the employee posed such a threat and on what basis that determination was made. The data also do not include a full and detailed explanation justifying the length of administrative leave, specifically including the relevant dates involved, when determinations were made, and by whom. Lastly, the information fails to provide the alternatives to administrative leave that were considered in each case. Without collecting this information, it is unclear how the Department is conducting appropriate oversight over the use of extended administrative leave by its components and ensuring that components are taking appropriate actions to curtail the use of such leave consistent with OPM guidance.

Thus, the information provided by the Department still fails to respond with the level of specificity requested in the letter of October 2014 and the renewed request from October 19, 2015. Without this information, I still cannot fully understand the circumstances in which DHS has been placing employees on administrative leave. It also suggests that the Department itself

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<sup>7</sup> DHS reported that one case was not an administrative leave situation but rather a retroactive reinstatement with back pay and benefits. That case is not included in these numbers.

<sup>8</sup> The Department’s response is as of February 9, 2016.

<sup>9</sup> The employee was reportedly placed on administrative leave in FY 2009 and was then removed in FY 2014. The agency did not provide any information explaining the five-year gap.

lacks visibility into the circumstances and causes of extended periods of administrative leave, which calls into question its ability to further reduce the incidence of extended administrative leave.

In terms of agency policies and procedures, the Department's response of February 22, 2016, states that component heads have been instituting internal controls, but does not specify what these controls are.<sup>10</sup> Of particular concern is component record keeping procedures, as DHS has acknowledged that certain decisions may not have been documented in the past—which is substantiated by the lack of detail in the data as described above. Yet, the latest response does not outline what controls components have been instituted to ensure proper documentation going forward.

A March 2016 GAO report about DHS' administrative leave policies and procedures issues confirms the problems with lack of data and sufficient internal controls at the Department regarding the use of paid administrative leave.<sup>11</sup> The new GAO report found that inefficient agency procedures specifically resulted in lengthy administrative leave times. GAO determined the total cost to the agency of extended administrative leave from Fiscal Years 2011 to 2015 was \$19,844,299.<sup>12</sup> The report cites as an example a case where an employee was placed on administrative leave after exhibiting hostile behavior at work and ordered to take a fitness-for-duty medical exam. The employee was on leave for 20 months while his medical exams were rescheduled and there was miscommunication regarding his medical records.<sup>13</sup> In addition to such individual cases, GAO found that the new administrative leave policy as a whole does not address how DHS will evaluate the effectiveness of the policy, share related lessons, or share results. The report also noted that components were moving towards conforming to DHS' new department-wide policy. However, it remains unclear how component policies differ from the DHS policy and what is being done to ensure conformity.

These circumstances confirm the need for the Administrative Leave Act of 2016, bipartisan legislation that I introduced along with Senators Tester, Johnson, and Carper.<sup>14</sup> The legislation was approved by unanimous voice vote by the Senate Homeland Security and Governmental Affairs Committee. Consistent with the pressing need to apply these reforms to DHS, the bill was also introduced as an amendment to the DHS Accountability Act of 2016 by Senators Tester and Lankford, and again, unanimously approved.<sup>15</sup> The decrease in cases of extended administrative leave at the Department substantiate that attention and oversight can

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<sup>10</sup> Letter from Russell C. Deyo, Under Sec'y for Mgmt., U.S. Dep't of Homeland Sec., to Charles E. Grassley, Chairman, U.S. Senate Comm. on the Judiciary (Feb. 22, 2016).

<sup>11</sup> U.S. Gov't Accountability Office, GAO-16-342, *Administrative Leave: Evaluation of DHS's new Policy Can Help Identify Progress toward Reducing Leave Use* (2016).

<sup>12</sup> *Id.* at 9.

<sup>13</sup> *Id.* at 13.

<sup>14</sup> S. 2450, 114th Cong. (2016).

<sup>15</sup> S. 2976, 114th Cong. (2016).

help reduce the abuse of administrative leave. The legislation will institutionalize this attention and enhance internal controls at the Department that are needed to systematically address administrative leave across the agency.

The necessity is also demonstrated by recent press reports that suggest the Department may be using administrative leave in order to avoid difficult personnel situations. In particular, there have been allegations that the former head of security for the Transportation Security Administration has been placed on administrative leave pending reassignment. This was confirmed by Administrator Neffenger at a hearing held before the House Homeland Security Committee on May 25, 2016.<sup>16</sup> Representative Walker specifically asked whether the use of administrative leave was consistent with departmental guidance that requires managers to determine whether the continued presence of the employee in the work place may pose a threat to the employee or others, result in loss or damage to government property, or otherwise jeopardize legitimate government interests.<sup>17</sup> Where such a risk does not exist, the employee should remain in the workplace.<sup>18</sup> Administrator Neffenger did not explain how the employee posed a threat, but rather stated it was used to effectuate a leadership change.<sup>19</sup> This would appear inconsistent with both departmental and OPM guidance regarding the appropriate use of administrative leave.

In order to better understand this situation and how DHS is ensuring continued oversight over the proper use of administrative leave at its components, please provide additional information on the following:

1. Please provide further details—either in writing or a briefing to my staff—on the seven DHS employees who are currently on administrative leave for more than a year and the Department’s plans to return such employees to work or initiate appropriate personnel actions.<sup>20</sup> Please provide the level of specificity originally requested in October 2014 and again in October 2015. It is inadequate to merely state, for example, “reassignment was not appropriate” without any explanation as to what reassignment was considered and why such reassignment was deemed inappropriate.
2. Please provide the current policies and procedures that each individual component follows with respect to the use of administrative leave, if the interim DHS policy is not the only policy used.

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<sup>16</sup> *TSA Airport Screening, Hearing Before the H. Comm. on Homeland Security*, 114th Cong. (2016).

<sup>17</sup> *Id.*

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

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

<sup>20</sup> This does not include the two employees at the Office of Inspector General who will be addressed directly with that office.

3. What is DHS doing to ensure that components are following DHS policy and what is the agency's timeline for ensuring consistent policy?
4. Please provide the agency's timeline for implementing the recommendation included in the March 2016 GAO report.
5. Please provide current record-keeping requirements and procedures with respect to the use of administrative leave and explain how these procedures will rectify the issue of component heads not adequately documenting their decisions with respect to such leave.
6. Please explain how the medical treatment process operates for "fitness-for-duty" cases and how DHS ensures that medical appointments are booked in a timely fashion and are not rescheduled resulting in an unduly lengthy period of administrative leave.

Thank you in advance for your cooperation with this request. Please number your responses according to their corresponding questions and respond no later than July 8, 2016. If you have questions, please contact DeLisa Lay of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley  
Chairman  
Committee on the Judiciary

cc: The Honorable Patrick Leahy  
Ranking Member  
Senate Judiciary Committee