



February 4, 2013

VIA FAX & CERTIFIED MAIL

The Honorable Darrell E. Issa
Chairman
Committee on Oversight & Government Reform, U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515
Fax: (202) 225-3974

Re: Congressional Oversight into the U.S. Office of Special Counsel Is Needed

Dear Chairman Issa:

We write on behalf of Cause of Action, a nonprofit, nonpartisan government accountability organization that fights to protect economic opportunity when federal regulations, spending, and cronyism threaten it. We want to share our findings, culled from documents obtained via the Freedom of Information Act (FOIA) over a sixteen month period, concerning the need for oversight of the Office of Special Counsel's (OSC), particularly concerning its enforcement of the Hatch Act. Because your Committee has jurisdiction¹ over the Hatch Act, we believe these findings are relevant to the effective oversight of the operations of the federal government.

In brief, Cause of Action found: (1) In its investigation of Health and Human Services (HHS) Secretary Kathleen Sebelius, OSC failed to disclose that the Democratic National Committee (DNC) reimbursed the political expenses of both Sebelius and her aide, AJ Pearlman, which implies that AJ Pearlman violated the Hatch Act by engaging in political activity while on duty. Moreover, the OSC indicated these expenses were reimbursed to Treasury, when in fact DNC wrote its checks directly to HHS; (2) OSC did not consider that Secretary Sebelius and her staff's participation in support of Senator Sherrod Brown may raise Hatch Act concerns; (3) OSC failed to investigate potential Hatch Act violations arising from a White House Blue Room event sponsored by the Democratic National Committee (DNC), despite its review of your letter to White House Counsel Kathryn Ruemmler; (4) While OSC is currently investigating Department of Interior Secretary Ken Salazar for violating the Hatch Act, any disciplinary recommendations

¹ As the chief investigative body of the House, the Oversight Committee may investigate "any matter" at "any time" pursuant to House Rule X. See Rules of the House of Representatives, Rule X, cl. 4(c)(2). See also *Activities of the House Committee on Government Reform and Oversight*, H. Rept. 104-874, 104th Cong. at 12 (1997).

may have no effect due to Salazar's impending departure from the Administration; and (5) OSC appears to lack clear guidelines for taking disciplinary action against federal employees that violate the Hatch Act. In addition to these concerns regarding OSC's enforcement, records revealed that Special Counsel Carolyn Lerner used a private e-mail account to conduct official agency business.

Finding: *OSC failed to disclose that the Democratic National Committee (DNC) reimbursed the political expenses of both Sebelius and her aide, AJ Pearlman and did not disclose that the DNC submitted reimbursements to HHS, not the U.S. Treasury*

On August 23, 2012, the U.S. Office of Special Counsel (OSC) published a report concluding that Department of Health and Human Services (HHS) Secretary Kathleen Sebelius committed two violations of the Hatch Act² by making political comments in support of the election of Barack Obama as President of the United States and the election of Walter Dalton as Governor of North Carolina while speaking in her official capacity before the Human Rights Campaign (HRC) Gala in Charlotte, North Carolina on February 25, 2012.³

On July 18, 2012, nearly five months after Sebelius spoke at the HRC Gala, OSC notified HHS that additional expenses arising from Sebelius's appearance at the HRC Gala had yet to be reimbursed.⁴ While OSC has since reported that "HHS sought and received reimbursement for those costs," OSC has failed to disclose precisely who reimbursed those additional expenses.⁵ OSC further indicated that Sebelius may have arranged for the Democratic National Committee (DNC) and/or the Obama for America campaign to reimburse HHS for additional expenses but provided no details on any transactions between HHS and any non-governmental entity.

Cause of Action obtained records revealing that on February 25, 2012, between the hours of 1:00 and 9:00 P.M. EST, in Charlotte, North Carolina, AJ Pearlman, on duty as a federal employee at the Office of Intergovernmental and External Affairs at HHS, traveled to and attended the Human Rights Campaign (HRC) Gala along with HHS Secretary Kathleen Sebelius, which was reclassified by HHS as a political event.⁶ HHS sought and received reimbursement from the DNC for AJ Pearlman's costs associated with travel and participation at the HRC Gala while on duty, which constituted the additional expenses OSC mentioned in its August 23, 2012 report.⁷

² 5 U.S.C. § 7323 (hereinafter "Hatch Act").

³ See U.S. Office of Special Counsel, Memorandum, *Report of Prohibited Political Activity under the Hatch Act*, OSC File No. HA-12-1989, (Aug. 23, 2012), available at <http://www.osc.gov/documents/hatchact/Hatch%20Act%20Report%20on%20HHS%20Secretary%20Kathleen%20Sebelius.pdf>.

⁴ *Id.*

⁵ *Id.*

⁶ See OSC Complaint Against AJ Pearlman and Enclosures, available at <http://causeofaction.org/wp-content/uploads/2013/01/OSC-Complaint-AJ-Pearlman-1-30.pdf> [hereinafter "Pearlman Complaint"].

⁷ Pearlman Complaint, *supra* note 6.

As you know, 5 U.S.C. 7324(a) states “[a]n employee may not engage in political activity . . . while the employee is on duty.” 5 U.S.C. § 7326 states, “[a]n employee or individual who violates section 7323 or 7324 shall be subject to removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.” On January 29, 2013, Cause of Action filed an OSC complaint against AJ Pearlman based on facts OSC was made aware of before August 23, 2012.⁸

Furthermore, HHS’s advance of funds for Sebelius’s activity may constitute a loan financed by the federal government to a federal official for purposes of affecting the election of a Presidential candidate in violation of federal law.⁹ Moreover, it is not clear that the DNC’s reimbursement of expenses to HHS, versus the U.S. Treasury Department, was appropriate. Federal regulations state that “[c]osts associated with a political activity are deemed not to be paid for by money derived from the Treasury of the United States **if the Treasury is reimbursed for the costs** within a reasonable period of time.”¹⁰ It is therefore puzzling that in response to OSC’s report, Secretary Sebelius stated, “any potential violation of section 7324(b) was corrected when the U.S. Treasury was reimbursed for the expenses for the trip”¹¹ – when no documents exist at HHS reflecting reimbursement to Treasury and when Sebelius’s own staff communicated with DNC to obtain checks made out to HHS.¹²

Finding: *OSC did not consider that Secretary Sebelius and her staff’s participation in support of Senator Sherrod Brown may raise Hatch Act concerns.*

According to a travel schedule prepared by HHS employees for Secretary Sebelius, Secretary Sebelius spoke at a “Political Event with Senator Brown” on Thursday, February 23, 2012 from 5:45 p.m. to 7:00 p.m. in Cleveland, Ohio¹³ and on Friday, February 24, 2012 from 5:00 p.m. to 5:55 p.m. in Columbus, Ohio.¹⁴ This schedule, as well as briefing materials prepared for the events, was sent from Georgette Lewis at HHS to several HHS employees, with the following reminder: “**This briefing book and schedule are sensitive and confidential and should never be shared outside this list. Any printed copies of the schedule should be shredded when they are no longer in use.**”¹⁵ Before Sebelius spoke at these events, federal HHS employees, including Emily Barson, Kate Wolff, Keri Kohler, Ann Widger, and Subhan

⁸ Pearlman Complaint, *supra* note 6.

⁹ 18 U.S.C. § 595 (2011) (Prohibiting “a person employed in any administrative position by the United States...in connection with any activity which is financed in whole or in part by loans or grants made by the United States... [from using] his official authority for the purpose of interfering with, or affecting, the nomination or the election of any candidate for the office of President...”).

¹⁰ 5 C.F.R. 734.503. [emphasis added].

¹¹ Letter, Kathleen Sebelius, Sec’y, Dep’t Health & Human Services, to Carolyn Lerner, Special Counsel, OSC (Sep. 7, 2012) at 1-2.

¹² See Pearlman Complaint, *supra* note 6; See also Federal Election Commission, *In the matter of Andrew Tobias and the Democratic National Committee*, MUR No. Unassigned (2013), available at <http://causeofaction.org/wp-content/uploads/2013/01/FEC-Complaint-re-DNC.pdf>.

¹³ “Secretary Kathleen Sebelius Travel Schedule”, OGC0138 (produced via FOIA to Cause of Action), attached at Exhibit 1.

¹⁴ *Id.*

¹⁵ E-mail, Georgette Lewis (HHS) to Kate Wolff (HHS), *et al.* (Feb. 23, 2012 14:18 EST), OGC043 (produced via FOIA to Cause of Action) [emphasis in original], attached at Exhibit 1.

Cheema, discussed the Secretary's scheduled speaking events, stating that an employee "has also heard from Sen. Brown's office on the OSU event[.]"¹⁶

According to an e-mail exchange between Kate Wolff of HHS and the Sherrod Brown campaign, Sebelius "attended the event in her personal capacity."¹⁷ Several days after that exchange, Ms. Wolff asked the Sherrod Brown campaign staff to "request reimbursement for a portion of the Secretary's travel costs for her recent trip to Ohio where she participated in political activities in her personal capacity benefiting the Senator's campaign."¹⁸ But this raises the question as to why taxpayer funds were originally spent for a political event and why federal employees were allowed to prepare the Secretary for these political events. Moreover, while federal law states that "[c]osts associated with a political activity are deemed not to be paid for by money derived from the Treasury of the United States if the Treasury is reimbursed for the costs within a reasonable period of time[.]" Friends of Sherrod Brown wrote its \$327.18 reimbursement check to HHS, not the U.S. Treasury.¹⁹

Political activity is defined as "an activity directed toward the success or failure of a . . . candidate for partisan political office[.]"²⁰ It seems entirely appropriate for OSC to assess whether the HHS employees' preparation of Kathleen Sebelius for campaign-related political activity while on duty and while using federal resources violates the letter and spirit of the Hatch Act.²¹ Otherwise, OSC is sending the message that agency Secretaries are encouraged to be prepared for political activity happening in their personal capacities by taxpayer-funded subordinates.

Finding: *OSC failed to investigate potential Hatch Act violations arising from a White House Blue Room event sponsored by the Democratic National Committee (DNC), despite its review of your letter to White House Counsel Kathryn Ruemmler.*

OSC records produced to Cause of Action reveal that on July 12, 2011, OSC Special Counsel Carolyn Lerner received a copy of your July 11, 2011 letter to White House Counsel Kathryn Ruemmler, where you expressed concern that the Hatch Act may have been violated if the President and Democratic National Committee solicited donors and raised campaign funds using official federal resources.²²

¹⁶ E-mail from Emily Barson (HHS/IEA) to Kate Wolff (HHS/OS) (Jan. 19, 2012, 12:12 EST), OGC0114 (produced via FOIA to Cause of Action), attached at Exhibit 2.

¹⁷ E-mail from Kate Wolff (HHS/OS) to Kimberly Padilla (Kimberly@sherrodbrown.com) (Feb. 27, 2012 12:14 EST), OGC032 (produced via FOIA to Cause of Action), attached at Exhibit 3.

¹⁸ E-mail from Kate Wolff (HHS/OS) to Kimberly Padilla (Kimberly@sherrodbrown.com) (Mar. 9, 2012 10:37 EST), OGC031 (produced via FOIA to Cause of Action), attached at Exhibit 3.

¹⁹ Check from Friends of Sherrod Brown to Dep't of Health and Human Servs. (Mar. 15, 2012), attached at Exhibit 4.

²⁰ 5 C.F.R. § 734.101; 5 U.S.C. § 7323

²¹ 5 U.S.C. § 7324.

²² Letter, Darrell Issa, Chrmn. H. Comm. Oversight & Gov't Ref., to Kathryn Ruemmler, White House Counsel, (July 11, 2011) at 4.

Records reveal that William Miles, of the Democratic staff of the House Oversight Committee, forwarded your letter to Adam Miles, of the OSC staff, who sent a copy to Carolyn Lerner, Mark Cohen, and Ana Marrone of OSC.²³ Ms. Lerner acknowledged the receipt of the letter to her staff on July 12, 2011, but made no substantive comments. Ten days later, on July 22, 2011, in response to a *Politico* article entitled “Campaigning from the White House” – which mentions your July 11, 2011 letter – Ms. Lerner responded to her staff, “Let’s have a few quotes ready in case of press calls today. I have to go back to the dentist this am but hope to be in by 10:00 or 10:30.”²⁴ This e-mail appears to be the end of Ms. Lerner’s attention to the matter.

In response to Cause of Action’s FOIA requests concerning the White House Blue Room event discussed in your letter and any subsequent investigations, OSC did not claim a FOIA exemption for any documents produced, or which existed but were withheld. As such, because no responsive records existed, it is apparent OSC determined not to conduct any investigation into potential Hatch Act violations relating to the White House Blue Room event. Yet, under federal statute, “the Special Counsel shall . . . conduct an investigation of **any allegation concerning – (1) political activity prohibited under subchapter III of chapter 73, relating to political activities by Federal employees[.]**”²⁵

Finally, records reveal that Ms. Lerner often used a private e-mail account to conduct official agency business via “Carolyn Lerner <c.lerner@[redacted].com>.”²⁶ The address was withheld from production pursuant to Exemption 6 of FOIA, which excludes from disclosure, “personnel and medical files and other similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.”²⁷ Nevertheless, the address domain “.com” indicates a commercial e-mail address rather than a government address, which typically uses the domain “.gov.”

Finding: *While OSC is currently investigating Department of Interior Secretary Ken Salazar for violating the Hatch Act, any disciplinary recommendations may have no effect due to Salazar’s impending departure from the Administration.*

On October 29, 2012, Cause of Action filed a Hatch Act Complaint with OSC alleging Secretary Salazar violated the Hatch Act by appearing in his official capacity in support of President Barack Obama’s reelection at presidential campaign rallies in Colorado in October 2012.²⁸ On November 29, 2012, Cause of Action confirmed that OSC opened an investigation into Salazar and as of January 17, 2013 that investigation had not yet been completed.²⁹

²³ E-mail from Adam Miles to Carolyn Lerner, Mark Cohen & Ana Marrone (July 13, 2011, 14:54 EST), attached at Exhibit 5.

²⁴ E-mail from Carolyn Lerner, Special Counsel, OSC, to Adam Miles, staff member, OSC, (July 22, 2011, 8:11 EST), attached at Exhibit 6.

²⁵ 5 U.S.C. § 1216 (emphasis added).

²⁶ E-mail from Carolyn Lerner, Special Counsel, OSC, to Adam Miles, staff member, OSC, (July 22, 2011, 8:11 EST), attached at Exhibit 6.

²⁷ 5 U.S.C. § 552(b)(6) (2012).

²⁸ OSC Complaint Against Secretary Ken Salazar, (Oct. 29, 2012), *available at* <http://www.scribd.com/doc/111707591/Salazar-OSC-Complaint>.

²⁹ E-mail from [Redacted], Hatch Act Unit, OSC to Cause of Action staff, (Jan. 17, 2013, 12:07 EST), attached at Exhibit 7.

However, because Secretary Salazar is stepping down from his position in March 2013, any post-hoc disciplinary recommendations by the OSC would devalue the role of Hatch Act enforcement as both a deterrent to improper activity and a signal of the accountability.

Finding: *OSC appears to lack clear guidelines for taking disciplinary action against federal employees that violate the Hatch Act.*

On August 7, 2009, OSC determined that a U.S. Department of Justice employee engaged in prohibited political activity while on duty in the federal workplace.³⁰ However, even though OSC determined a Hatch Act violation occurred, OSC elected to not pursue disciplinary action against the employee, issued a warning to the employee, and closed the file.³¹ On February 17, 2011, the OSC determined that a Department of Justice employee's prohibited political activities did occasion OSC's filing a complaint with the U.S. Merit Systems Protection Board (MSPB) for disciplinary action.³² No public documents exist that can allow a federal employee, much less the public, to determine whether these were the same or different employees or whether the prohibited political activity in 2011 was more or less egregious than the 2009 violation.

Federal law³³ provides discretion to the Special Counsel to "determine[] that disciplinary action should be taken" concerning prohibited political activity.³⁴ However, when the OSC fails to establish clear guidelines that allow the public to ascertain what activities rise to the level of disciplinary action and which do not, the ability for ethics laws to deter conduct are minimized. To illustrate, the August 7, 2009 matter mentioned above involved a Department of Justice employee who used a government e-mail account, while at work, to send photographs directed at the failure of a political candidate,³⁵ but the OSC decided to not take disciplinary action, whereas a May 31, 2011 decision by the MSPB reveals that the OSC did decide to take disciplinary action when a Department of Health and Human Services employee "received an e-mail on her government computer asking her to contribute to the Presidential campaign of Barack Obama, and used her government computer while on official duty to make a financial contribution to that campaign."³⁶

Conclusion

The issues raised in this letter signal the importance and need for your leadership in conducting oversight over OSC's investigations and enforcement of the Hatch Act. Should you

³⁰ Letter from Anne Wohlfeld, Congressional Affairs Liaison, Office of Special Counsel, to the Honorable Roscoe G. Bartlett (Aug. 11, 2009), attached at Exhibit 8.

³¹ Letter from Mariama Liverpool, Senior Attorney Hatch Act Unit, Office of Special Counsel, to [redacted] (Aug. 7, 2009) at 1-2, attached at Exhibit 8.

³² See Press Release, *Office of Special Counsel Files Hatch Act Complaint Against Department of Justice Employee*, (Feb. 17, 2011), available at http://www.osc.gov/documents/press/2011/pr11_04ha.pdf.

³³ 5 U.S.C. § 1215.

³⁴ 5 U.S.C. § 1216(a).

³⁵ Letter from Mariama Liverpool, Senior Attorney Hatch Act Unit, Office of Special Counsel, to [redacted] (Aug. 7, 2009) at 1-2, attached at Exhibit 8.

³⁶ *Special Counsel v. Karen Casey*, M.S.P.B. CB-1216-10-011-T-1 (May 31, 2011).

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have any questions, comments, or concerns, please do not hesitate to contact me
(Daniel.Epstein@causeofaction.org) at 202-499-4232. Thank you for your attention to this
matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Epstein', written over a horizontal line.

DANIEL EPSTEIN
EXECUTIVE DIRECTOR

cc: Hon. Elijah Cummings, Ranking Member, Committee on Oversight and Government
Reform, U.S. House of Representatives

Encl.: Exhibits 1-8