



April 8, 2013

Hon. Virginia Seitz
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Hon. Susan Tsui Grundmann
Member and Chairman
Merit Systems Protection Board
1615 M Street, N.W.
Washington, DC 20419

Hon. John Berry
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, DC 20415-1000

RE: REQUEST FOR ADVISORY OPINION

Dear Honorable Seitz, Tsui Grundmann, and Berry:

We write on behalf of Cause of Action, a nonprofit, nonpartisan government accountability organization that fights to protect taxpayer interests when executive branch discretion threatens it. For several months, Cause of Action has been investigating issues relating to the Hatch Act and we seek clarification concerning the interpretation and enforcement of this important law.

I. Guidance Is Needed to Determine When a Subordinate Employee Is Liable for Participating in a Superior Employee's Political Activity and When Reimbursement Is Necessary for the Costs Associated with that Participation.

The U.S. Office of Special Counsel (OSC) recently stated that a subordinate employee did not violate the Hatch Act after engaging in activity at the direction of a Cabinet Secretary, a Presidentially-appointed and Senate Confirmed (PAS) officer, who was later found to have

violated the Hatch Act. OSC instead characterized the subordinate employee's actions as "costs associated" with the Secretary's political activity, rather than as a separate Hatch Act violation. Nevertheless, OSC requested reimbursement for those associated costs, suggesting that the subordinate employee did in fact participate in political activity in violation of the Hatch Act.

In another instance, OSC determined that reimbursement for employee costs associated with the Secretary's political activity was unnecessary because the Secretary engaged in that political activity in her personal, rather than official, capacity. OSC appears to inconsistently interpret the Hatch Act—requiring reimbursement for employee costs associated with political activity when the activity was performed in an official capacity, but not requiring reimbursement when the activity was performed in a personal capacity. Such an interpretation seems to be based on a distinction without a difference.

A. It Is Unclear Whether a Subordinate Employee Engages in Political Activity When Acting at the Direction of a Superior Employee Later Found to Have Violated the Hatch Act.

On August 23, 2012, OSC issued a report finding that Department of Health and Human Services (HHS) Secretary Kathleen Sebelius committed two violations of the Hatch Act¹ 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, 2012.²

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.³ While OSC has since reported that "HHS sought and received reimbursement for those costs," OSC did not disclose what these additional expenses concerned or who reimbursed them.⁴ 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.⁵

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 HHS Office of Intergovernmental and External Affairs (IEA), traveled to and attended the HRC Gala along with Secretary Sebelius.⁶ The HRC Gala was subsequently

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

² See U.S. OFFICE OF SPECIAL COUNSEL, NO. HA-12-1989, REPORT OF PROHIBITED POLITICAL ACTIVITY UNDER THE HATCH ACT (Aug. 23, 2012), available at <http://www.osc.gov/documents/hatchact/Hatch%20Act%20Report%20on%20HHS%20Secretary%20Kathleen%20Sebelius.pdf>.

³ *Id.*

⁴ *Id.*

⁵ U.S. OFFICE OF SPECIAL COUNSEL, *supra* note 2, at 4.

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"].

reclassified by HHS as a political event.⁷ Accordingly, HHS sought and received reimbursement from the DNC for the costs associated with AJ Pearlman's travel and participation at the HRC Gala while on duty, which constituted the additional expenses OSC mentioned in its August 23, 2012 report.⁸

5 U.S.C. § 7324(a) states that "[a]n employee may not engage in political activity . . . while the employee is on duty." Political activity is defined as activity directed at the success or failure of a political party, candidate for partisan political office, or partisan political group.⁹ 5 U.S.C. § 7326 further states that "[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 because she participated in activity, at the direction of Secretary Sebelius, which was later reclassified as political.¹⁰

On February 15, 2013, Erica S. Hamrick, Deputy Chief of the Hatch Act Unit at OSC, wrote to Cause of Action finding "no evidence that Ms. Pearlman participated in any political activity at the HRC gala."¹¹ OSC found "that Ms. Pearlman travelled to Charlotte and attended the HRC gala solely to provide official staff support to Secretary Sebelius at the event."¹² OSC concluded, "HHS sought reimbursement for Ms. Pearlman's travel expenses because they were costs associated with Secretary Sebelius's political activity, not because she engaged in any political activity."¹³

On Friday, February 22, 2013, Cause of Action staff met with Congressional Affairs Director Adam Miles and Hatch Act Unit Chief Ana Marrone of OSC (February 22nd meeting). During the February 22nd meeting, Cause of Action probed OSC's reasoning in concluding that AJ Pearlman did not violate the Hatch Act. Ms. Marrone, echoing OSC's February 15, 2013 position, stated that Pearlman's travel expenses were costs associated with Secretary Sebelius's political activity and that Pearlman herself did not engage in any political activity. Ms. Marrone stated that OSC enforces a policy that all costs associated with political activity must be reimbursed to the government.

As Cause of Action stated during the February 22nd meeting, the law does not distinguish "costs associated with political activity" from the general rule concerning engagement in political activity.¹⁴ Ms. Marrone even acknowledged during the meeting that there have been no Merit Systems Protection Board (MSPB) cases or other guidance documents bifurcating from the definition of political activity those costs associated with the political activity which themselves do not constitute "engagement" in that political activity. Accordingly,

⁷ *Id.*

⁸ *Id.*

⁹ 5 C.F.R. § 734.101.

¹⁰ Pearlman Complaint, *supra* note 6.

¹¹ Letter from Erica S. Hamrick, Deputy Chief of the Hatch Act Unit, OSC, to Cause of Action staff (Feb. 15, 2013).

¹² *Id.*

¹³ *Id.*

¹⁴ *See* 5 U.S.C. §§ 7323-24.

rather than conflating Pearlman's violation with the Secretary's by considering it an associated cost of political activity, OSC should have found that two separate violations of the Hatch Act occurred at the HRC Gala.

Further, OSC had discretion to request reimbursement to the Department of the Treasury for Pearlman's activity.¹⁵ If Pearlman's activity was not political, as OSC suggests, then OSC could have chosen not to request reimbursement to Treasury. But OSC *did* request reimbursement for Pearlman's activity.¹⁶ During the February 22nd meeting, Cause of Action explained its position that a request for reimbursement of political costs performed by a federal employee most reasonably implied that the federal employee engaged in prohibited activities, otherwise the cost would not need to be reimbursed. It undisputed that (1) AJ Pearlman was acting at the instruction and supervision of Secretary Kathleen Sebelius, (2) Secretary Sebelius engaged in prohibited activity, and (3) AJ Pearlman's activity had to be reimbursed. It is therefore reasonable to conclude that (4) AJ Pearlman engaged in prohibited political activity.

For OSC to argue otherwise implies that AJ Pearlman's activity was not "an activity directed toward the success or failure of a . . . candidate for partisan political office[.]"¹⁷ But OSC already foreclosed any such showing by requesting—and securing for the government—the reimbursement of associated costs. Pearlman's activities in support of Secretary Sebelius did constitute activity directed toward the success or failure of a candidate for partisan political office, independent of what Ms. Pearlman intended. It seems entirely appropriate for OSC to determine that Pearlman's preparation of Sebelius for campaign-related political activity while on duty and while using federal resources violates the letter and spirit of the Hatch Act.¹⁸ Otherwise, subordinate employees will be encouraged to assist in prohibited political activity since their actions will at most be considered "costs associated" with the PAS officer's Hatch Act violation.

OSC responded in the February 22nd meeting by stating that it would be unfair to claim that AJ Pearlman violated the Hatch Act because Pearlman acted in an official activity at an event that was only later was reclassified as political. But the same is true of Secretary Sebelius. Cause of Action agreed that punishing Pearlman would be unfair but contended that the law subjects her to liability because she was acting at the instruction of a Cabinet Secretary who broke the law. Moreover, 5 U.S.C. § 7324 prohibits political activity without specifying an intent requirement. Therefore, it is irrelevant to a finding of a Hatch Act violation whether Sebelius or Pearlman intended to engage in political activity.

¹⁵ See 5 U.S.C. § 1212 (setting forth OSC's broad powers and functions); 5 C.F.R. § 734.503.

¹⁶ U.S. OFFICE OF SPECIAL COUNSEL, *supra* note 2, at 4.

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

¹⁸ 5 U.S.C. § 7324.

B. It Is Unclear Whether Reimbursement Is Necessary for the Costs Associated with a Subordinate Employee's Preparation of a Superior Employee for Engagement in Political Activity in a Personal Capacity.

It is appropriate for OSC to require reimbursement for the costs associated with a subordinate employee's preparation of a PAS officer for participation in political activity. In determining whether reimbursement is required, however, OSC makes an artificial distinction between political activity performed by the PAS officer in a personal capacity and political activity performed by the PAS officer in an official capacity.

To illustrate, according to a travel schedule prepared by HHS employees for Secretary Sebelius, Sebelius spoke at a "Political Event with Senator [Sherrod] Brown" on Thursday, February 23, 2012 from 5:45 p.m. to 7:00 p.m. in Cleveland, Ohio¹⁹ and on Friday, February 24, 2012 from 5:00 p.m. to 5:55 p.m. in Columbus, Ohio.²⁰ This schedule, as well as briefing materials prepared for the events, was sent from Georgette Lewis at HHS to several HHS employees.²¹ Before Sebelius spoke at these events, federal HHS employees, including Emily Barson, Kate Wolff, Keri Kohler, Ann Widger, and Subhan Cheema, discussed the Secretary's scheduled speaking events, stating that an employee "has also heard from Sen. Brown's office on the OSU event[.]"²²

According to an e-mail exchange between Kate Wolff of HHS and the Sherrod Brown campaign, Sebelius "attended the event in her personal capacity."²³ 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."²⁴

In its February 22, 2013 meeting with OSC, Cause of Action raised the question as to why taxpayer funds were originally spent for political events and why federal employees were allowed to prepare the Secretary for these political events. More pointedly, Cause of Action asked OSC whether it requested reimbursement for Emily Barson, Kate Wolff, Keri Kohler, Ann Widger, and Subhan Cheema's costs associated with political activities. OSC could not answer.

Considering that OSC required reimbursement for AJ Pearlman's travel expenses, one would expect OSC to likewise require reimbursement for the cost of those HHS employees who prepared Sebelius to participate in the Sherrod Brown campaign. In fact, this is precisely what Ms. Marrone stated to Cause of Action during the February meeting. In this case, however, OSC

¹⁹ "Secretary Kathleen Sebelius Travel Schedule" (OGC0138) (produced via FOIA to Cause of Action).

²⁰ *Id.*

²¹ E-mail from Georgette Lewis, HHS, to Kate Wolff, HHS, et al. (Feb. 23, 2012, 14:18 EST) ("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.") (OGC043) (produced via FOIA to Cause of Action).

²² E-mail from Emily Barson, IEA, HHS, to Kate Wolff, Office of the Sec'y (OS), HHS (Jan. 19, 2012, 12:12 EST) (OGC0114) (produced via FOIA to Cause of Action).

²³ E-mail from Kate Wolff, OS, HHS, to Kimberly Padilla (Kimberly@sherrodbrown.com) (Feb. 27, 2012 12:14 EST) (OGC032) (produced via FOIA to Cause of Action).

²⁴ E-mail from Kate Wolff, OS, HHS, to Kimberly Padilla (Kimberly@sherrodbrown.com) (Mar. 9, 2012, 10:37 EST) (OGC031) (produced via FOIA to Cause of Action).

implicitly determined these activities did not constitute costs associated with political activity and therefore did not seek reimbursement. OSC qualified Secretary Sebelius's participation in the Sherrod Brown campaign as "mixed travel" – which requires a separate analysis for Hatch Act purposes. A PAS employee can participate in political activity while on duty (mixed travel) as long as the political portion of the trip is reimbursed.²⁵ However, this fact does not change the conclusion that political activity – and employee costs associated with that activity – would need to be reimbursed - regardless of whether it occurred during the actual travel or whether it occurred in preparation for the travel. If Sebelius was on mixed travel, then she would need to seek reimbursement for all political activity occurring during her trip. Accordingly, if an aide was helping her during the political portion of the trip, then the costs associated with that person's work would need to be reimbursed to Treasury, and should probably be considered a separate Hatch Act violation.

There is no difference between the activities of AJ Pearlman at the HRC Gala and the activities of the HHS employees assisting with the Sherrod Brown campaign. The only distinction is that Sebelius acted in a personal capacity, rather than in an official capacity, when campaigning for Sherrod Brown. There appear to be inconsistent interpretations by OSC: on one hand, OSC requested reimbursement for employee costs associated with political activity when the activity was official, while on the other hand, OSC did not request reimbursement for employee costs associated with political activity when the activity was personal.

The concern is that OSC's interpretation of costs associated with political activity forges a distinction without a difference and one that may dilute the effectiveness of the Hatch Act as a deterrence device. OSC should require reimbursement for costs associated with political activity regardless of whether the political activity was performed in an official or personal capacity. Otherwise, the message is sent that agency Secretaries and other PAS officers are encouraged to have taxpayer-funded subordinates prepare them for political activity.

II. Guidance Is Needed to Determine Whether Hatch Act Enforcement is Properly Based upon How Observers Subjectively Interpret Political Statements.

On September 5, 2012, Cause of Action wrote to Calvin L. Scovel, the Inspector General (IG) for the U.S. Department of Transportation (DOT), requesting that he investigate Deputy Associate Administrator for Aviation Safety John Hickey for potential Hatch Act violations.²⁶ Cause of Action found evidence that Mr. Hickey told subordinate employees working at the Seattle Flight Standards District Offices that it was likely the FAA's budget would be cut if Republicans won control of Congress and that such cuts could include furloughs or a reduction in force, but that the FAA's budget would not be cut if the Democrats controlled Congress.²⁷

²⁵ See U.S. Office of Special Counsel, *OSC Advisory Regarding Mixed Travel by Presidentially-Appointed / Senate Confirmed (PAS) Employees*, (Oct. 6, 2011), available at <http://www.osc.gov/documents/hatchact/federal/Advisory%20on%20Mixed%20Travel%20%2010%206%2011.pdf>.

²⁶ Letter from Cause of Action to Calvin L. Scovel III, IG, DOT (Sept. 5, 2012), at 1.

²⁷ *Id.*

On March 1, 2013, OSC wrote to Cause of Action in response to the letter sent to the DOT IG.²⁸ OSC found no Hatch Act violation by Mr. Hickey because

A majority of the individuals interviewed testified that they did not perceive Mr. Hickey's statements to be an attempt to garner support for the Democratic Party or any of its candidates or to garner opposition to the Republican Party or any of its candidates. Rather, they perceived his statements to be for the purpose of providing FAA employees with information about possible budget scenarios. Therefore, there is insufficient evidence to conclude that Mr. Hickey violated the Hatch Act by directing, requesting, or suggesting that employees vote for any political party or candidate for partisan political office during the May 23 meeting.²⁹

No guidance appears in MSPB decisions or elsewhere that political activity is defined by how third parties perceive that activity. Even if perception were the correct standard to be applied, it appears that OSC determined that the application of the perception standard is based on the "majority of the individuals interviewed[.]" That is to say, OSC balanced the perceptions of those interviewed in determining that no Hatch Act violation occurred.

OSC's judgment here seems arbitrary especially when Cause of Action pointed the DOT IG to e-mails where a DOT employee stated that he or she perceived Mr. Hickey's remarks as follows: "In short if the Republicans win office our jobs may be effected (furloughs) if the Democrats win office then our jobs would not be effected."³⁰ Clearly some DOT employees perceived Mr. Hickey to have made partisan political statements; additionally, the Supervisor of the Seattle Flight Standards District Office found Mr. Hickey's comments "inappropriate at best" and found that "more than a few employees took umbrage that a person in such an elevated position in the agency would make those remarks."³¹ The regional Supervisor also found "that more than one employee's perception was that Mr. Hickey was essentially telling them how to vote if they wanted to keep their job."³²

Not only does OSC's judgment need to be reviewed as (1) applying an individual perception test in determining whether a Hatch Act violation occurred and (2) using a majority of the individuals interviewed balancing test in making that determination, but OSC's decision (3) to not issue a warning letter to Mr. Hickey and (4) to not assess whether Mr. Hickey's statements constituted a threat of retaliation also needs to be reviewed.

III. Guidance Is Needed as to the Proper Payee for Reimbursements.

²⁸ Letter from Treyer Mason-Gale, OSC, to Cause of Action (Mar. 1, 2013), at 1-2.

²⁹ *Id.* at 2.

³⁰ E-mail from [Redacted] to [Redacted] (May 24, 2012, 10:53 EST), available at <http://causeofaction.org/2012/09/05/faa-hatch-act-investigation-documents/> (labeled as "Exhibit 2") [emphasis added].

³¹ *See id.* at "Exhibit 3."

³² *Id.*

In both of the cases concerning HHS Secretary Kathleen Sebelius where reimbursement was requested by OSC, HHS was the agency reimbursed. However, it is not clear that the reimbursement of expenses to a federal agency like HHS, versus the Department of the Treasury, is 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.”³³

No documents exist at HHS reflecting reimbursement to the Treasury. In fact, Sebelius’s own staff communicated with the DNC to obtain checks made out to HHS.³⁴ Moreover, Friends of Sherrod Brown wrote its \$327.18 reimbursement check to HHS, not the Treasury.³⁵ 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.”³⁶

This discrepancy was raised during Cause of Action’s February 22, 2013 meeting with OSC. OSC took the position that government money is government money, dissolving any distinction between HHS and Treasury. Moreover, OSC explained that HHS placed reimbursement funds into a “lock box.” However, Cause of Action discussed the Anti-Deficiency Act to illustrate the idea that Congress has indicated that federal dollars are not fungible between agencies or within departments.³⁷ Cause of Action also explained that Congress would not specify reimbursement to Treasury in the Hatch Act if costs were not required to be specifically reimbursed to Treasury.

Furthermore, HHS’s placement of reimbursed taxpayer funds into a “lock box” may be inappropriate and guidance on this issue is necessary.

IV. Ethics Training Concerning Costs Associated with Political Activity Is Necessary.

During the February 22, 2013 meeting, OSC discussed the deterrent function of its prosecution of Hatch Act violations, suggesting that recommending an enforcement action against AJ Pearlman would not deter Hatch Act violations. To the contrary, the fact that Pearlman was not punished sends the message that federal employees, acting at the instruction of a department head, are not responsible for that department head’s impermissible acts. Cause of Action explained that by enforcing the law against Pearlman (recognizing that only the President could enforce the law against his Secretary) OSC would send the message that the Hatch Act

³³ 5 C.F.R. § 734.503 (emphasis added).

³⁴ 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>.

³⁵ Check from Friends of Sherrod Brown to HHS. (Mar. 15, 2012) (produced via FOIA to Cause of Action).

³⁶ Letter from Kathleen Sebelius, Sec’y, HHS, to Carolyn Lerner, Special Counsel, OSC (Sep. 7, 2012), at 1-2.

³⁷ See 31 U.S.C. §§ 1341; 1501-1519 (prohibiting the “making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law”).

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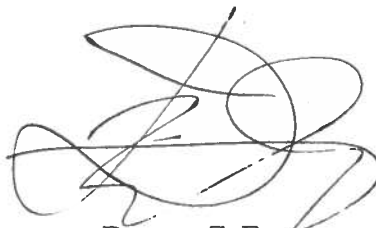
covers activities associated with political activity, especially when in the service of PAS employees.

Independent of whether AJ Pearlman engaged in political activity under the law, it is not clear what a federal employee's ethical responsibility is when a supervisor violates the Hatch Act during that employee's support, in an official capacity, of the supervisor. Cause of Action brought this issue before OSC and also asked OSC what an employee in AJ Pearlman's situation should have done as an ethical matter, noting that no records were produced to Cause of Action regarding whether AJ Pearlman approached the Designated Agency Ethics Officer (DAEO) of HHS concerning the Secretary's political activity.

Without ethics guidance on this question, the message is that a federal employee in Pearlman's situation has no special duty to act. One could imagine that an employee in Pearlman's situation could have affirmatively informed the HHS DAEO of a Hatch Act violation by the Secretary as well as seek guidance on how to cure any potential personal violation. It would seem reasonable that federal employees funded by American taxpayers ought to be vigilant in objecting to the actions of their supervisors when those supervisors violate the law, especially when those supervisors are cabinet Secretaries.

I sincerely hope that guidance can be provided on the questions raised herein. If you have any questions about the issues raised in this letter, please feel free to contact Staff Attorney Robyn Burrows via e-mail (Robyn.Burrows@causeofaction.org) or telephone at 202-499-4232.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Epstein', with several loops and flourishes.

DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR

cc: Hon. Darrell E. Issa, Chairman, Committee on Oversight & Government Reform, U.S. House of Representatives [Via Mail]

Hon. Elijah Cummings, Ranking Member, Committee on Oversight & Government Reform, U.S. House of Representatives [Via Mail]

Carolyn Lerner, Special Counsel, Office of Special Counsel [Via E-mail at clerner@osc.gov]

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Ana Marrone, Chief, Hatch Act Unit, Office of Special Counsel [Via E-mail at
amarrone@osc.gov]

Treyer Mason-Gale, Attorney, Hatch Act Unit, Office of Special Counsel [Via E-mail at
tmason-gale@osc.gov]

Encl.: Letter from Erica S. Hamrick, Deputy Chief of the Hatch Act Unit, OSC, to Cause of
Action staff (Feb. 15, 2013).

Letter from Treyer Mason-Gale, OSC, to Cause of Action (Mar. 1, 2013).

OSC Advisory on Mixed Travel (Oct. 6, 2011).



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

February 15, 2013

Mr. Daniel Epstein
Cause of Action
1919 Pennsylvania Avenue, N.W., Suite 650
Washington, DC 20006

Re: OSC File No. HA-13-1730

Dear Mr. Epstein:

This letter is in response to a complaint your organization filed with the U.S. Office of Special Counsel (OSC) alleging that U.S. Department of Health and Human Services (HHS) employee A.J. Pearlman violated the Hatch Act. OSC is authorized to investigate alleged violations of the Hatch Act, pursuant to 5 U.S.C. § 1216(a)(1). Specifically, you allege that Ms. Pearlman violated the Act when she accompanied HHS Secretary Kathleen Sebelius to a February 25, 2012, Human Rights Campaign (HRC) gala in Charlotte, North Carolina. OSC has investigated Secretary Sebelius's and Ms. Pearlman's attendance at the HRC gala, and as explained below, we have concluded that Ms. Pearlman did not violate the Hatch Act.

The Hatch Act, 5 U.S.C. §§ 7321-7326, governs the political activity of federal executive branch employees, and it prohibits most employees from, among other things, engaging in political activity while on duty, in a federal room or building, while wearing an official uniform or insignia, or using a government vehicle. 5 U.S.C. § 7324(a). Political activity is defined as activity directed at the success or failure of a political party, candidate for partisan political office, or partisan political group. 5 C.F.R. § 734.101.

As you are aware, last year OSC concluded that Secretary Sebelius violated the Hatch Act when she spoke at the February 25, 2012, HRC gala. Specifically, OSC concluded that Secretary Sebelius violated the Act's prohibition against using her official authority or influence to affect an election when she endorsed the candidacies of Lieutenant Governor Walter Dalton and President Barack Obama while speaking in her official capacity as HHS Secretary. See 5 U.S.C. § 7323(a)(1). HHS originally had classified Secretary Sebelius's appearance at the HRC gala as official. However, after she made these partisan political statements, HHS changed the classification of her appearance from official to political. And although the Hatch Act does not prohibit Secretary Sebelius from engaging in political activity while on duty,¹ the costs associated with such political activity may not be paid with U.S. Treasury money. 5 U.S.C. § 7324(b). Therefore, in accordance with the law, HHS sought reimbursement from the

¹ The Hatch Act does not prohibit certain employees appointed by the President, by and with the advice and consent of the Senate, such as Secretary Sebelius, from engaging in political activity while on duty. 5 U.S.C. § 7324(b)(2).

U.S. Office of Special Counsel

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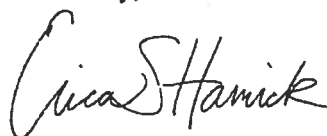
appropriate political entity for the costs associated with Secretary Sebelius's attendance at the HRC gala.²

One of the costs associated with Secretary Sebelius's political activity was HHS employee A.J. Pearlman's travel expenses. OSC's investigation found evidence that Ms. Pearlman travelled to Charlotte and attended the HRC gala solely to provide official staff support to Secretary Sebelius at the event. Had the Secretary's attendance at the gala been a planned political appearance, Ms. Pearlman would not have attended the event to perform official duties as an HHS employee. Thus, OSC concluded that the travel expenses of Ms. Pearlman were not costs that the government would have otherwise incurred if the HRC gala had been classified as political prior to the event. Accordingly, HHS sought reimbursement from the appropriate political entity for those costs.

Although OSC concluded that Ms. Pearlman's travel expenses needed to be reimbursed to the U.S. Treasury, OSC found no evidence that Ms. Pearlman participated in any political activity at the HRC gala. To the contrary, Ms. Pearlman engaged in official activity at an event where Secretary Sebelius appeared in her capacity as HHS Secretary. HHS's subsequent reclassification of Secretary Sebelius's appearance as political does not change the fact that Ms. Pearlman performed her official duties supporting the Secretary at an official event.

In sum, HHS sought reimbursement for Ms. Pearlman's travel expenses because they were costs associated with *Secretary Sebelius's* political activity, not because she engaged in any political activity. As there is no evidence that Ms. Pearlman violated the Hatch Act, OSC is closing its file in this matter. If you have any questions regarding this matter, you may call me at (202) 254-3673.

Sincerely,



Erica S. Hamrick
Deputy Chief
Hatch Act Unit

² Costs associated with a political activity are deemed not to be paid with money derived from the U.S. Treasury if the Treasury is reimbursed for the costs within a reasonable period of time. 5 C.F.R. § 734.503(a). In addition, costs associated with a political activity do not include any costs that the government would have incurred regardless of whether the activity was political, such as: the compensation and expenses of any government employee that is required in the performance of his or her duties to accompany or assist the person engaging in the political activity; and the cost of special security arrangements for the person engaging in the political activity. 5 C.F.R. § 734.503(b)(3)-(4).



U.S. OFFICE OF SPECIAL COUNSEL
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March 1, 2013

Mr. Daniel Epstein
Executive Director
Cause of Action
2100 M St., N.W.
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VIA E-MAIL: Daniel.Epstein@causeofaction.org

Re: OSC File Nos. HA-12-3384 & HA-12-3385

Dear Mr. Epstein:

This letter is in response to a complaint you filed with the United States Department of Transportation (DOT) Office of Inspector General (OIG) alleging that Federal Aviation Administration (FAA) employees John Hickey and Raymond Towles violated the Hatch Act during a meeting with subordinate employees on May 23, 2012. We understand that at the time of the May 23 meeting, Mr. Hickey was the FAA's Deputy Associate Administrator of Aviation Safety, and Mr. Towles was the FAA's Deputy Director of Flight Standards Field Operations. Because the United States Office of Special Counsel (OSC) has exclusive jurisdiction to investigate allegations of political activity prohibited by the Hatch Act, see 5 C.F.R. § 732.102(a), DOT OIG forwarded your complaint to our office. We reviewed this matter and, as described below, we have closed the above-referenced files without further action.

The Hatch Act, 5 U.S.C. §§ 7321-7326, governs the political activity of federal civilian executive branch employees, including employees of the FAA, in order to protect the federal workforce from partisan political influence. While most employees are permitted to engage in a variety of political activities, they are prohibited from, among other things, engaging in political activity while they are on duty, in a federal room or building, wearing an official uniform or insignia, or using a government vehicle. 5 U.S.C. § 7324(a). "Political activity means an activity directed toward the success or failure of a political party, candidate for a partisan political office or partisan political group." 5 C.F.R. § 734.101. This includes activity where an individual presents wholly factual information but with the purpose of generating support or opposition to a political party, candidate for partisan political office, or partisan political group. See Burrus v. Vegliante, 336 F.3d 82, 84 (2d Cir. 2003); cf. U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers, 413 U.S. 548, 566 (1973) (stating that one objective of the Hatch Act was "to make sure that Government employees would be free from . . . express or tacit invitation to vote in a certain way . . .").

Employees also are prohibited from using their official authority or influence to interfere with or affect the results of an election. 5 U.S.C. § 7323(a)(1). Activities that violate this provision include, but are not limited to, using one's official title while engaging in political

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activity, using one's official authority to coerce any person to participate in political activity, and soliciting uncompensated volunteer services from a subordinate for any political purpose. See 5 C.F.R. § 734.302(b). Put another way, this provision prohibits an employee from using their official authority or influence while engaging in political activity.

You alleged that a meeting on May 2, 2012, Messrs. Hickey and Towles told subordinate employees of the Seattle Flight Standards District Office (FSDO) that the election of Republican candidates in the then-upcoming 2012 presidential and congressional elections would be detrimental to their job security. You stated that Mr. Hickey, in particular, told the employees that Republican politicians wished to cut the FAA's budget, while Democratic politicians intended to keep the FAA budget at the same or similar levels as in recent years. Additionally, you alleged that in stating that any cuts in the FAA's budget would lead to furloughs, job losses, and pay reductions amongst FAA employees, Mr. Hickey indicated that the assembled FAA employees should vote for Democratic candidates in order to preserve the FAA budget and, consequently, their jobs and pay.

Our investigation found evidence that Mr. Hickey told subordinate Seattle FSDO employees that it was likely the FAA's budget would be cut if Republicans won control of Congress and that such cuts could include furloughs or a reduction in force, but that the FAA's budget would not be cut if the Democrats controlled Congress. A majority of the individuals interviewed testified that they did not perceive Mr. Hickey's statements to be an attempt to garner support for the Democratic Party or any of its candidates or to garner opposition to the Republican Party or any of its candidates. Rather, they perceived his statements to be for the purpose of providing FAA employees with information about possible budget scenarios. Therefore, there is insufficient evidence to conclude that Mr. Hickey violated the Hatch Act by directing, requesting, or suggesting that employees vote for any political party or candidate for partisan political office during the May 23 meeting.

Additionally, our investigation did not find any evidence that Mr. Towles made any statements concerning any political party, candidate for partisan political office, or partisan political group. Therefore, there is no evidence to conclude that Mr. Towles engaged in political activity when speaking with Seattle FSDO employees during the May 23 meeting.

Based on the preceding, we have closed our files in this matter without further action. If you have additional questions regarding this case, please contact me at (202) 254-3678 or tmason-gale@osc.gov.

Sincerely,



Treyer Mason-Gale
Attorney, Hatch Act Unit



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October 6, 2011

**OSC Advisory Regarding Mixed Travel by Presidentially-Appointed /
Senate Confirmed (PAS) Employees**

OSC offers the following guidance regarding high-level political appointees' participation in political events during trips that also include official business.

The Hatch Act ("The Act") prohibits federal executive branch employees from engaging in political activity while on duty, in the federal workplace, in uniform, or in a vehicle owned or leased by the federal government. 5 U.S.C. § 7324(a). However, the Act exempts from this prohibition those employees who are deemed to be on duty at all times and who are appointed by the President with Senate confirmation (PAS). 5 U.S.C. § 7324(b). As a caveat to this exemption, the Act provides that the costs associated with these employees' political activity may not be paid for with money derived from the United States Treasury. 5 U.S.C. § 7324(b)(1). As a result, in cases involving mixed travel, that is, when an exempt employee attends both official and political events during the same trip, agencies must apportion the travel costs between the federal government and the relevant political organization or candidate, and ensure that the Treasury is appropriately reimbursed. Below, we offer step-by-step advice for agency ethics officials to use when addressing this issue.

A. Who Is Exempt?

A PAS employee whose duties and responsibilities continue outside normal duty hours and while away from the normal duty post may engage in political activity on the job or while in a federal workplace, provided the costs are not paid for by money derived from the Treasury.¹ 5 U.S.C. § 7324(b)(1)-(2). Note that not all PAS employees fall under the exemption. Specifically, the exemption applies only to a PAS "whose position is located within the United States and who determines policies to be pursued by the United States in relations with foreign powers or in the nationwide administration of Federal laws." 5 U.S.C. § 7324(b)(2)(B)(ii).

The legislative history of § 7324(b) of the Hatch Act explains that this exemption was intended to apply only to "high-level political appointees." House Committee on Post Office and Civil Service, *Federal Employees Political Activities Act of 1993, Report to Accompany H.R. 20, 103rd Cong.* (H.R. Rep. No. 103-16) (1993) pp. 22-23 ¶ 25 and pp. 26-27. This narrow

¹ Even though exempt employees are permitted to engage in political activity while on duty or in the federal workplace, they remain subject to the Hatch Act's other prohibitions. These include the prohibition against using their official authority or influence to affect the result of an election; soliciting, accepting, or receiving political contributions; being candidates for partisan elections; and soliciting or discouraging the political activity of someone who has business pending before their agencies. See 5 U.S.C. 7323(a).

exemption was created to ensure that high-level PAS employees, who are considered to be on duty and on-call by the President at all times, would be able to engage in political activity if the activity was not paid for with funds from the U.S. Treasury. *Id.* at 22.

B. What Constitutes a “Political” Event?

The Hatch Act regulations define “political activity” as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101. Thus, any event that meets this definition is a political event, and the costs of attending the event may not be paid for with funds from the U.S. Treasury. It is not always clear whether an event is official or political. However, OSC has identified multiple factors to consider when determining whether an event is political for purposes of the Hatch Act.² When making this determination, officials should consider the following factors.³

1. Identify the type of event, e.g. ribbon cutting, grant announcement, etc;
2. Ascertain whether candidates (including incumbents seeking reelection) will be present and what their role will be;
3. Determine who will be speaking at the event and the target audience. If party officials will be speaking to known donors, for example, then the event is most likely a political one;
4. Assess the relationship, if any, between the event and official agency business;
5. Determine who invited the agency official to attend and who is organizing the event (e.g., congressional office, campaign staff, other agency officials, political party, etc.). If, for example, the request came from a campaign manager or the event is being organized by a party organization, then the event is likely to be political;
6. Ask whether a candidate’s request is a reason for the agency official to attend the event;
7. Determine whether the event was scheduled prior to the candidate’s involvement, or vice versa. If the employee planned to attend before the candidate became involved, then it is more likely to be of an official nature;
8. Inquire about the agency official’s motivation for attending the event;
9. Consider the frequency of similar types of events during non-election years and whether agency officials participated in such events in those years;
10. Consider the proximity of the event to the date of the election. Events with candidates that take place two weeks before an election are more likely to be for political purposes than events that occur, for example, eight months before an election.

² We understand that in the past, some agencies have utilized a “reasonable relation” standard set forth in an opinion from the Department of Justice’s Office of Legal Counsel to determine whether an event is official or political for purposes of cost allocation. *See* 6 Op. Off. Legal Counsel 214 (1982). However, that opinion applies only to mixed travel by the President and the Vice President, who are specifically exempt from all of the Hatch Act’s prohibitions because they have dual roles as the heads of both the executive branch and their political party. *See* 5 U.S.C. § 7322(1). Other federal employees, including high-level political appointees, have only official functions and are subject to the Hatch Act. Thus, the standards articulated in the Act and its attendant regulations dictate what constitutes “political activity” for these individuals.

³ This list is illustrative and is by no means exhaustive. In some cases, one or more of these considerations may not apply, and depending on all the circumstances, some may be more useful than others in classifying an event. Other facts peculiar to a particular event may tend to indicate the nature of the event, and they should be considered as well.

11. Find out whether the event is open or closed to media. An event that is open to the media is more likely to be political than one that is closed to the press.
12. Review the PAS's prepared remarks if he or she plans to speak at the event. In addition, after the event, agency ethics officials should review the PAS's actual remarks, as well as remarks made by other speakers, to assess whether the remarks were political in nature.

These factors are intended to help determine whether the official aspect of an event is bona fide or merely a pretext for helping a candidate or political party. Consider the following examples:

A. A staffer from Representative X's reelection staff contacts a Cabinet Secretary's scheduler asking whether the Secretary can attend an event with the Representative in his district in October 2012. The staffer suggests either a ribbon-cutting at a new facility that is related to the Cabinet Department's mission or a panel discussion on Department-related issues before the party's county committee. Because the media will be present, the staffer also asks if the Secretary would make remarks about the Representative's successful efforts to pass legislation in an area germane to the Department's mission. When the scheduler e-mails the Secretary to see whether she will attend, the Secretary replies: "I would be happy to help out Representative X because he is facing a tough race and the administration would not want the opposing party to take over that seat. Please work out a time for me to visit his district in October; maybe there is a grant announcement I could make there?"

This example illustrates an event that should be classified as political. Even though the proposed event will likely involve matters related to the Department's work, several facts signify that the real reason for holding the event is to further the Representative's campaign and not to advance the Department's mission. First, plans for the event were initiated by a campaign staffer, not the Representative's congressional office, indicating that official congressional business is not the focus of the event. Second, the staffer has not finalized plans for the event; rather, the agenda is still up in the air and may even include meeting with a partisan political group. This suggests that the primary reason for the event is to create an opportunity for voters to see the Representative with the Secretary in the month before the election and that the substance of the event is secondary. Third, the remarks that the staffer asks the Secretary to make before the press would highlight the Representative's achievements rather than administration goals or successes. Making such remarks, even though somewhat related to the Department's mission could be construed as an endorsement of the Representative's candidacy, particularly in light of the fact that it was the campaign that suggested the content of the remarks. Finally, the Secretary's response to her scheduler makes clear that she is willing to appear at any kind of event with Representative X so that he retains his seat in the upcoming election. Given the Secretary's motivation, it would be inappropriate to schedule an "official" event with the Representative in response to the campaign staffer's request.

B. Representative Y represents a district located on the U.S. border with Mexico; addressing illegal immigration is one of her top priorities. Throughout her term, she has proposed earmarks to help her district deal with the problem and has encouraged local law enforcement officials to apply for grants from the pertinent government agency. In order to bring attention to her positions on the subject, she has always asked the PAS in charge of the

agency to make grant announcements in person with her, and the PAS has done so twice in the past two years. Now, Representative Y is up for reelection. Due to the voters' strong opinions on the issue of illegal immigration, the race is very contentious. The agency has decided to award another grant to a sheriff's office in Representative Y's district, and once again she has asked the PAS to appear in person to make the announcement sometime in October through mid-November 2012. When the PAS's scheduler forwards the request from Representative Y's congressional office, the PAS responds: "I will if my schedule permits. The issue is very hot right now, so please arrange my travel if at all possible."

This event can be classified as official. Even though Representative Y is up for reelection in a contentious race, other factors tend to show that the request concerns a bona fide official event. First, the request originated with the congressional staff, unlike example A above. Second, unlike the previous example, the invitation is for a specific event rather than one that has not yet been planned. Third, although the congressional aide has suggested that the announcement take place in October 2012, the e-mail also indicates that the event will be just as important to Representative Y in mid-November, i.e., after the election. Finally, making grant announcements in this district is something that the PAS historically has done, even outside of the election season. This, coupled with the PAS's motivations for attending, i.e., to address a "hot" issue, shows that the PAS has the administration's policy goals in mind when agreeing to travel to Representative Y's district. Thus, despite the fact that the event will be open to the press, it can be classified as official.

An event may not fit neatly into one of these hypothetical scenarios. Because the circumstances of events under consideration will vary widely, agency officials should evaluate them on a case-by-case basis.

C. What Is the Formula for Apportioning Costs Incurred During Mixed Travel?

The costs associated with an exempt employee's attendance at a political event during a mixed trip may not be paid using funds from the United States Treasury. See 5 U.S.C. § 7324(b)(1). If ethics officials conclude that the employee will be attending both official and political events during a single trip, then the employee must ensure that government funds are not used to finance the political portion of the trip.

The Hatch Act regulations state that for activity related to federal elections, the method of allocation is set by the Federal Election Campaign Act or the Presidential Election Campaign Fund Act, as appropriate, and Federal Election Commission regulations. 5 C.F.R. § 734.503(d). For all other elections, such as gubernatorial or local races, agencies should follow the formula set forth in the Hatch Act regulations, pursuant to which costs must be apportioned according to the time spent at each event.

To determine what portion of the travel costs must be reimbursed to the Treasury under the Hatch Act formula, one must first calculate the "total activity time" by adding the time spent at

official events to the time spent in political meetings, receptions, and rallies.⁴ 5 C.F.R. § 734.503(c)(1). Then, multiply the percentage of the total activity time spent engaging in political activity by the total travel cost to reach the amount for which the relevant campaign or political party is responsible.⁵ Id.

Costs associated with traveling to political events are deemed not to be paid for using Treasury funds if the Treasury is reimbursed “within a reasonable period of time.” 5 C.F.R. § 734.503(a). Neither the Hatch Act nor the pertinent regulations state what amount of time is “reasonable.” However, it is important to obtain reimbursement as soon as possible because campaign committees could dissolve before agencies invoice them, making it impossible to recoup the costs from the campaign. Thus, OSC recommends that agencies seek reimbursement within 30 days of the event, which corresponds to a typical credit card billing cycle. If the campaign does not repay the Treasury, then ultimately the traveler is responsible for reimbursing the cost of his or her attendance at a political event.

As always, OSC is available to assist agency ethics officials when considering the issues discussed here. Please call (202) 254-3650 or (800) 85-HATCH to speak with a Hatch Act attorney.

⁴ “Total activity time” does not include time spent actually traveling, in private study, or resting. 5 C.F.R. § 734.503(c)(1).

⁵ Total travel cost does not include employee salaries or the travel expenses of any other government employee who is “required in the performance of his or her duties to accompany or assist the person engaging in the political activity,” such as a personal security detail. See 5 C.F.R. § 734.503(b).