



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

May 10, 2021

Ms. Danielle Brian
Executive Director
Project on Government Oversight
1100 G Street NW, Suite 500
Washington, D.C. 20005

Dear Ms. Brian:

As the highest-ranking career official at the U.S. Office of Special Counsel (OSC) responsible for Hatch Act enforcement, I am responding to your letter to Special Counsel Henry J. Kerner, dated May 6, 2021, concerning our handling of the case involving Ms. Lynne Patton and your allegation that the outcome of OSC's enforcement was the product of unconscious bias. It is important to me, given my role at OSC and my previous experience as Vice Chairman of the Merit Systems Protection Board (MSPB), that OSC pursues fair and equitable enforcement of all the statutes Congress entrusted to OSC, based on evidence adduced in the course of investigations.

OSC's approach in Ms. Patton's case was, in all respects, consistent with our approach to every Hatch Act case and particularly those involving the other individuals appointed to political positions during President Donald Trump's term in office and referenced in your letter. Of those 17 individuals who OSC concluded violated the Hatch Act, 12 committed first offenses. As regularly happens in first offense cases, OSC issued warning letters and obtained voluntary remedial action. By contrast, Ms. Patton again violated the Hatch Act even after receiving from OSC a warning letter involving two separate violations, leaving us with no choice but to pursue disciplinary action from the appropriate authority, which in her case was the MSPB. In the four remaining cases, all of which involved proven and often repeated violations by a presidential appointee confirmed by the Senate (PAS) or a high-level White House official, OSC also pursued redress through the appropriate channel, either by submitting a report to the President or pursuing corrective action.

OSC's role under the Hatch Act is to serve as a prosecutor, not a decision-maker. OSC has no authority to impose penalties, but rather, must seek remedies for Hatch Act violations either from the independent, quasi-judicial MSPB in the case of most federal employees, including most political appointees like Ms. Patton, *see* 5 U.S.C. § 1215(a), or from the President in the case of violations committed by PAS and high-level White House officials.¹ The Hatch Act thus creates

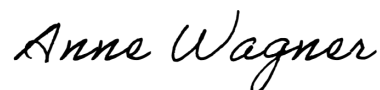
¹ *See* 5 U.S.C. § 1215(b). The Hatch Act expressly requires that OSC submit a report to the President recommending disciplinary action in the case of PAS officials. OSC has reasonably interpreted the Hatch Act to require reports to the President, rather than petitions to the MSPB, for violations by high-level

a two-tiered system of enforcement whereby disciplinary action against PAS and White House offenders is dependent on the President's willingness to impose it. We understand that the Hatch Act's statutory structure can lead to a perception of unequal enforcement, but it is up to Congress to address any such disparity.²

In any event, OSC's handling of the Hatch Act complaints about Ms. Patton was consistent with our evidence-based treatment of all such complaints and not based on her race, sex, or any other protected characteristic. We opened an investigation for each of the multiple complaints that we received alleging Hatch Act violations by Ms. Patton. In each instance, the evidence showed that Ms. Patton had violated the Hatch Act. Ms. Patton initially received a warning letter from OSC, involving two separate violations, calling on her to cease her unlawful political activity. OSC initiated disciplinary proceedings only after Ms. Patton continued to openly engage in activity that violated the Hatch Act. Not long after the filing of our petition with the MSPB, Ms. Patton, who was represented by counsel, agreed to the terms of a settlement, which was then approved by an MSPB administrative law judge.

OSC's mission makes all of us particularly aware of the many ways in which prohibited practices, including unlawful discrimination, may be manifested, either explicitly or implicitly. Consequently, we take very seriously concerns about our handling of our investigation and prosecution authority. But we have no hesitation in standing behind our handling of Ms. Patton's case against unfounded charges of racial bias or other impropriety.

Sincerely,



Anne M. Wagner
Associate Special Counsel

White House officials. While I recognize that you disagree with OSC's interpretation of the law, we have long recognized this statutory distinction as based on the President's powers under Article II of the U.S. Constitution, in particular, through the Appointments Clause and Take Care Clause.

² You cite the imposition of financial penalties for failure to file financial disclosure forms as undermining OSC's constitutional and statutory arguments regarding our authority to pursue disciplinary action. However, those penalties arise under a different statutory scheme, 5 U.S.C. App 4 § 104(a)(1), authorizing the Attorney General to bring a civil action in federal district court for any covered individual who falsifies or fails to file a financial disclosure form. The *court* may assess a penalty in any amount not to exceed \$50,000. In any event, although imposing a fine arguably does not implicate the President's constitutional authority of appointment, under the bifurcated structure of 5 U.S.C. § 1215, OSC is not permitted to send a report to the President and simultaneously file a complaint with the MSPB to fine that same official.