



May 6, 2021

The Honorable Henry Kerner
U.S. Office of Special Counsel
1730 M Street, NW, Suite 218
Washington, DC 20036

Dear Special Counsel Kerner:

I am writing on behalf of the Project On Government Oversight (POGO) to raise concerns regarding the Office of Special Counsel (OSC) singling out Lynne Patton, a former regional director of the Department of Housing and Urban Development (HUD), for her violation of the Hatch Act. Although OSC told news media that 17 members of the Trump administration violated the Hatch Act, Ms. Patton, who is Black, is the only member OSC levied penalties against.¹

In April, OSC announced the resolution of a complaint it had filed with the Merit Systems Protection Board (MSPB) against Ms. Patton for violating the Hatch Act, which prohibits misuse of a government position to influence an election. The announcement drew attention because Ms. Patton had been a relatively high-level official during the Trump administration; though not a presidential appointee, she had served as a political appointee in the Senior Executive Service. The substance of OSC's complaint was that Ms. Patton misused her position to create a video for the Republican National Convention featuring residents of a HUD housing project. A few months after leaving government in January, Ms. Patton signed a settlement agreement with OSC that bars her from federal employment for four years and requires her to pay a \$1,000 fine.²

There is no doubt that Ms. Patton committed the alleged violation, and POGO supports vigorous Hatch Act enforcement. However, the circumstances surrounding OSC's complaint against Ms. Patton raise a question as to whether OSC is treating offenders equally. During the Trump administration, OSC accused 17 political appointees of violating the Hatch Act but sought penalties against only one of them—Ms. Patton, a Black woman. I urge you to reflect on whether OSC has adequate training and systems in place to prevent implicit bias from influencing its enforcement of the Hatch Act and other laws.

At POGO, we have turned this same lens inward and are thinking about ways that we, ourselves,

¹ Benjamin Kail, “‘Optics are just terrible’; Why was Lynne Patton, a Black former Trump official, barred from government work while White House aides dodged discipline?,” *MassLive*, April 11, 2021. <https://www.masslive.com/politics/2021/04/optics-are-just-terrible-why-was-lynne-patton-a-black-former-trump-official-barred-from-government-work-while-white-house-aides-dodged-discipline.html>

² Office of Special Counsel, “Former High-Ranking HUD Official Disciplined for Hatch Act Violation,” Press Release, April 6, 2021. <https://osc.gov/News/Pages/20-15-HUD-Hatch-Act-Discipline.aspx>

can be better watchdogs by prioritizing diversity, equity, and inclusion. We have brought in consultants to audit our organizational culture, and they have examined both our internal systems and our outward-facing activities. One thing this process has taught me is that everyone is susceptible to implicit bias, and overcoming it requires conscious effort.

Government officials need to do their own searching ethical inventory and come up with new systems to guard against the destructive effects of implicit bias. There are systems and processes that our government is implementing unfairly, often unintentionally. Unconscious biases can influence the government's decisions and reactions to different groups. Only when officials become aware of the biases and undertake deliberate efforts to learn can they eliminate this influence.

The necessary transformation must begin with the government's internal watchdogs, who should lead by example. In OSC's case, Congress has baked diversity, equity, and inclusion into the agency's mission: The prohibited personnel practices law assigns discrimination to OSC's purview.³ Although OSC relies on the Equal Employment Opportunity Commission to investigate employment discrimination complaints, the statutory language establishes OSC as a guardian of government ethics and equity.⁴

Alarm bells should have gone off when your office contemplated seeking penalties against Ms. Patton after having refrained from asking the Merit Systems Protection Board (MSPB) to impose penalties on any political appointee for two decades. The unusual nature of this action should have prompted an internal review of past requests for penalties and an evaluation to assess whether implicit bias may have influenced this case. Instead, an OSC spokesperson recently argued that the office lacks the "bandwidth" to review past cases.⁵

POGO examined every annual report that OSC has submitted to Congress in its 42-year history to look for comparable examples. These reports highlighted investigations of various high-level officials and advised Congress of OSC's Hatch Act enforcement activities. OSC reported no other attempt to seek penalties in the last 20 years against an official who, like Ms. Patton, was a political appointee not named by the president.⁶ OSC sought penalties against three employees in high-level positions more than 20 years ago, but it is unclear if two of them were political appointees.⁷ The third was clearly a political appointee not named by the president: William

³ 5 U.S.C. § 2302(b).

⁴ Although OSC defers to the Equal Employment Opportunity Commission for the factual inquiry, OSC expressly reserves the power to pursue disciplinary action against officials who discriminate unlawfully. *Memorandum of Understanding Between U.S. Office of Special Counsel And Equal Employment Opportunity Commission*, January 14, 2014. <https://www.eeoc.gov/mou/memorandum-understanding-between-us-office-special-counsel-and-equal-employment-opportunity>

⁵ Benjamin Kail, "Optics are just terrible" [see note 1].

⁶ Office of Special Counsel, Annual Reports to Congress. <https://osc.gov/Resources/Pages/Reports.aspx>

⁷ Office of Special Counsel, *1980 Annual Report of the Special Counsel* (1980), 15. <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%201980%20Annual%20Report%20to%20Congress.pdf>; Office of Special Counsel, *A Report to Congress from the U.S. Office of Special Counsel for Fiscal Year 2000* (2000), 18. <https://osc.gov/Documents/Resources/Congressional%20Matters/Annual%20Reports%20to%20Congress/FY%2000%20Annual%20Report%20to%20Congress.pdf>

Yellowtail, who is Native American.⁸

OSC argues that the reason it has not sought penalties against more of the political appointees it has accused of Hatch Act violations is that many of them are political appointees who were named by the president, and it lacks the authority to seek penalties against those officials.⁹ This argument does not hold up to scrutiny. Although an exception in the law bars OSC from seeking penalties against Senate-confirmed presidential appointees—in those cases the office is limited to asking the president to consider taking corrective action—the exception does not apply to other presidential appointees, such as White House staffers.¹⁰ OSC is free to file a complaint against any of them and ask the MSPB to impose penalties that can include reprimand, a ban on future federal employment in any non-presidentially appointed position for up to five years, and a civil penalty of up to \$1,125 per violation.¹¹

When Citizens for Responsibility and Ethics in Washington sued OSC for refusing to file a complaint with the MSPB against then-presidential advisor Kellyanne Conway, OSC countered by vaguely mentioning constitutional principles and relying primarily on a law it claimed exempts White House staffers from employment-related penalties.¹² Unfortunately, the court threw out the case on procedural grounds and never addressed OSC’s argument.¹³ More recently, OSC told a reporter for *MassLive* that constitutional principles dictate that the president is the lone official authorized to take corrective action against presidential appointees.¹⁴

The problem with both the statutory and the constitutional arguments is that other officials *have* imposed penalties on presidential appointees for conduct related to their employment.¹⁵ For example, ethics officials fined presidential appointee Jared Kushner twice and presidential appointee Ivanka Trump once for missing financial disclosure deadlines under the Ethics in Government Act.¹⁶ The Justice Department is currently seeking a \$50,000 fine against a former

⁸ Office of Special Counsel, *A Report to Congress from the U.S. Office of Special Counsel for Fiscal Year 2000*, 17 [see note 7]; Bill McAllister, “EPA suspends top official in Colo.,” *Denver Post*, April 29, 2000.

<https://extras.denverpost.com/news/news0429b.htm>

⁹ Benjamin Kail, “‘Optics are just terrible’” [see note 1].

¹⁰ 5 U.S.C. § 1215(b).

¹¹ 5 U.S.C. § 7326; 5 C.F.R. § 1201.126; Merit Systems Protection Board, “Civil Monetary Penalty Inflation Adjustment,” 86 Fed. Reg. 7797, February 2, 2021 (explaining that the \$1,125 fine is applicable to penalties authorized under 5 U.S.C. § 7326). <https://www.govinfo.gov/content/pkg/FR-2021-02-02/pdf/2021-00932.pdf>

¹² The law that OSC claimed exempted White House staffers from employment-related penalties is 3 U.S.C. § 105. Office of Special Counsel, “Memorandum in Support of Defendants’ Motion to Dismiss,” April 20, 2020, 24, 37. <https://www.citizensforethics.org/wp-content/uploads/legacy/2019/12/2020-4-20-10-1-Mem-in-Support-of-MTD.pdf>

¹³ *Citizens for Responsibility and Ethics in Washington v. U.S. Office of Special Counsel, et al.*, Civil Action No. 19-3757 (JEB), Mem. Op., August 6, 2020. <https://www.citizensforethics.org/wp-content/uploads/legacy/2019/12/2020-8-6-15-Mem-op.pdf>

¹⁴ Benjamin Kail, “‘Optics are just terrible’” [see note 1].

¹⁵ The Justice Department’s Office of Legal Counsel has also explained that 3 U.S.C. § 105 does not exempt White House appointees from the Hatch Act’s coverage. Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House Office, slip op., at 9 n.4, January 20, 2017. <https://www.justice.gov/sites/default/files/opinions/attachments/2018/08/06/2017-01-20-anti-nepo-stat-who.pdf>

¹⁶ Anita Kumar and Ben Weider, “Jared Kushner fined again for late ethics form, Ivanka Trump fined too,” McClatchy, October 3, 2017. <https://www.mcclatchydc.com/news/politics-government/white-house/article176849096.html>; 5 C.F.R. § 2634.704.

presidential appointee under that same law for allegedly failing to file a financial disclosure.¹⁷ That appointee, who denies the allegation, is Omarosa Manigault Newman—another Black female political appointee.

Even if OSC were correct in saying that it can't file MSPB complaints against presidential appointees, that still would not resolve the issue. OSC has not explained why, out of 17 Trump administration appointees the office accused of violating the Hatch Act, Ms. Patton was the only one to receive a penalty. A spokesperson for the office told *MassLive* that Ms. Patton was “unlike the other appointees” in the Trump administration who violated the Hatch Act because she was not appointed by the president.¹⁸ But she actually was not alone in that distinction. OSC found a Hatch Act violation by Jacob Wood, who worked for the Office of Management and Budget as a political appointee not named by the president.¹⁹ OSC did not pursue sanctions against Mr. Wood.

The universe of Hatch Act violators may be even larger than just those officials OSC has accused of violating the Hatch Act. If implicit bias is at play, it could be impacting OSC's screening of complaints for investigation. We do not know how many other complaints may have been lodged against political appointees not named by the president over OSC's 42-year history; however, OSC could track this data and could choose to share anonymized statistics.

Given the circumstances, I believe OSC needs to be more responsive than it has been to concerns about Ms. Patton's case. As long as your office exercises significant discretion over which Hatch Act cases to pursue, it is important that you establish policies that ensure enforcement is equitable and reasonably transparent.

I am happy to hear your thoughts and talk through next steps.

Sincerely,



Danielle Brian
Executive Director

¹⁷ *United States v. Omarosa Manigault Newman*, Case 1:19-cv-01868, Complaint, June 25, 2019.

<https://storage.courtlistener.com/recap/gov.uscourts.dcd.208668/gov.uscourts.dcd.208668.1.0.pdf>

¹⁸ Benjamin Kail, ““Optics are just terrible”” [see note 1].

¹⁹ Letter from Ericka Hamrick, Deputy Chief, Hatch Act Unit, Office of Special Counsel to Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington, November 30, 2018.

<https://www.citizensforethics.org/wp-content/uploads/legacy/2018/11/CREW-ltr-re-10-complaints.pdf>; Committee on Oversight and Reform, U.S. House of Representatives, 116th Congress, 2d Session, *United States Government Policy and Supporting Positions* (December 2020), 5. <https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf>