U.S. OFFICE OF SPECIAL COUNSEL
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February 25, 2000

Re: OSC File No. AD-99-0156

In your letter dated May 5, 1999, you asked that we further review the circumstances under which the Hatch Act Reform Amendments of 1993 (Reform Amendments), at 5 U.S.C. § 7324(b), requires a Presidential appointee subject to Senate confirmation (a PAS employee) to provide reimbursement for the use of government telecommunications equipment in connection with political activity. In particular, you have asked whether there is a *de minimis* rule that applies to the use of government phones by PAS employees for local telephone calls that may involve, at least in part, a political activity.

In conducting our review, we have examined the language of the statute, its legislative history, the regulations issued by the Office of Personnel Management, and past practice, including the policies expressed in memoranda issued by successive Counsels to the President before the Reform Amendments. We have also considered issues of enforcement that bear upon the question you have raised. On the basis of this review, we have concluded that the Hatch Act does not require PAS employees to reimburse the government for the cost of incidental local phone calls or fax transmissions that may be associated with political activity.

Section 7324(b) of the Reform Amendments states that PAS employees and employees paid from an appropriation for the Executive Office of the President may engage in political activity while on duty, in government rooms or buildings, while in uniform and while using a vehicle owned or leased by the government. This section of the Act goes on to provide, however, that "the costs associated with that political activity may not be paid for by money derived from the Treasury of the United States."

The issue you have presented raises the question of the scope of the phrase "costs associated with" political activity. Read most broadly, this statutory provision could suggest that a PAS employee who engages in political activity while in a government

room or building must reimburse the U.S. Treasury for such items as the cost of electricity, heat, and wear and tear on furniture. Indeed, an argument could be made that a PAS employee should reimburse the Treasury for a portion of his or her salary earned while engaged in such political activity.

We have concluded that such requirements could lead to absurd and, in effect, unenforceable results. Thus, using well-established rules of statutory construction, we have concluded that the phrase "costs associated with" political activity should not be read to have absurd or impractical consequences. Merrill Lynch, Pierce, Fenner & Smith v. Lauer, 49 F.3d. 323, 326-327 (7th Cir. 1995).

In its regulations implementing the Reform Amendments, the Office of Personnel Management (OPM) has attempted to address these issues of practicality arising out of the statutory prohibition against use of funds from the U.S. Treasury for political activity. Thus, 5 C.F.R. § 734.503(a), provides that "costs associated with political activity do not include any costs the Government would have or have incurred regardless of whether the activity was political."

OPM's commentary on its regulations explicitly provides that the costs referred to in this provision—which the government would have incurred, whether or not a PAS employee had engaged in political activity—would include an employee's salary and the value of the employee's office space. OPM illustrates this point in Example 1 of section 734.503, explaining that a Secretary of an agency who holds a political reception in her office is not required to reimburse the Treasury for *de minimis* costs associated with the use of the office.[1]

OPM has advised us that it interprets its regulations to also impose an implicit *de minimis* rule for costs associated with similar expenses, such as lights, heat and local telephone calls. Thus, a PAS employee who engages in political activity in a

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1 OPM's regulations elsewhere explicitly provide a *de minimis* rule for costs associated with mixed travel, i.e., travel involving official and political activity. Section 734.503(c)(6) states that when a minor, clearly incidental, percentage of a mixed trip is either political or official, the whole trip should be treated as if it were wholly of the type represented by the substantial portion, and the balance should be treated as a nonreimbursable *de minimis* expense. Similarly, example 2 in this section suggests that when a sound system is used for a single event, which involves both official and political business, there is no need to allocate the costs. The cost for the sound system should be borne by the group who is the primary user of the equipment. The group whose use is *de minimis* is not required to reimburse.

government building or office, or in a government vehicle, is not required to reimburse the Treasury for such expenses.

An agency's interpretation of its own regulations "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (citations omitted). Here, OPM's interpretation of its regulations authorizing the incidental use of government phones for local calls that may have a political purpose is reasonable, as it is consistent with the history and purposes of the Hatch Act, as well as with similar provisions governing the use of appropriated funds, and policies issued by successive Counsels to the President prior to the Reform Amendments.

Additionally, our review has led us to conclude that the legislative history of the Reform Amendments supports OPM's interpretation. The House Report on H.R. 20, which contained language virtually identical to the final version of section 7324, stated that while "[t]he policy is that taxpayers should not pay for these political activities," "the Committee [does not expect] the cost of each incidental political phone call to be reimbursed by the government." H.R. Rep. 16, 103rd Cong., 1st Sess., at 22 (1993). "On the other hand," the Committee explained, "if a Government office is turned into a political boiler-room, all costs associated with that activity should be reimbursed."

Further, OPM's regulations are consistent with many agency policies concerning the use of government phones to make local calls for personal reasons. Thus, notwithstanding the statutory prohibition on use of agency funds for purposes other than those for which they were appropriated, many federal agencies have policies that permit their employees to use telephones and fax machines to make local calls on an incidental basis for personal purposes. (See, e.g., Department of Justice Regulations on "Personal use of Government property," 28 C.F.R. § 45.4). Additionally, the Federal Chief Information Officers Council's, "Recommended Executive Branch Model Policy/Guidance On 'Limited Personal Use' of Government Equipment," which authorizes employees the limited personal use of Government office equipment, has been adopted by several agencies including the Social Security Administration and the Department of Agriculture. Under OPM's regulations, a similar rule applies with respect to the use of such resources by PAS employees for political purposes.

This rule is consistent with the advice given by the Counsels for the President in the Reagan, Bush and Clinton Administrations. Prior to the Reform Amendments, the Hatch Act contained no limitations on the political activity of PAS employees and employees of the Executive Office of the President. As a matter of practice, however, successive Counsels to the President issued instructions that generally prohibited the use of government resources for such activity, but permitted the de minimis use of

government phones for local calls. Memorandum from C. Boyden Gray, Counsel to the President to the White House Staff (November 27, 1991); Memorandum from Peter J. Wallinson, Counsel to the President, to the White House Staff (August 14, 1986). Similar advice was given to the White House Staff by Counsel Lloyd Cutler, after the Reform Amendments were enacted. Memorandum from Lloyd Cutler, Special Counsel to the President, to the White House Staff (April 6, 1994).

Moreover, OPM's interpretation of its regulations is supported by practicality and enforcement concerns. Both the Department of Veterans Affairs and OPM have observed that the administrative expenses involved in calculating the costs of local calls would greatly exceed the actual cost of the local phone call. Thus, a rule requiring PAS employees to reimburse the government for incidental local phone calls would actually result in a greatly increased cost to the Treasury for expenses that are only incidentally associated with political activity.

Finally, we are advised that phone calls often have mixed purposes—both official and political. Requiring agencies to track and apportion costs for mixed calls, would be impractical. Nor could OSC effectively enforce such requirements.

In short, on further review, we have concluded that there is a *de minimis* rule concerning expenses incurred when a PAS employee makes local telephone calls (or faxes), or uses a copy machine or printer in connection with political activity. A good rule of thumb for applying this principle would be to consider agency policies regarding the use of such resources on an incidental basis for personal reasons. Further, as the legislative history discussed above suggests, it would not be appropriate for a PAS employee to use government resources on a recurring non-incidental basis to engage in political activity. PAS employees who do so should reimburse the government for such use.

Sincerely,

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for Prosecution