



U.S. OFFICE OF SPECIAL COUNSEL

Memorandum

U.S. Office of Special Counsel

Reply to Administrator Doan's Response to the Special Counsel's Report
of Prohibited Political Activity under the Hatch Act
OSC File No. HA-07-1160 (Lurita A. Doan)

June 8, 2007

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On May 18, 2007, the United States Office of Special Counsel (OSC) issued its Report of Prohibited Political Activity under the Hatch Act (hereinafter "Report") concluding that Ms. Lurita A. Doan, the Administrator of the General Services Administration (GSA) violated the Hatch Act. Specifically, the Report concluded that during a January 26, 2007, meeting, Ms. Doan solicited the political activity of over thirty of her subordinate employees when she asked "How can we help our [Republican] candidates?"

In her June 1, 2007, Response to OSC's Report (hereinafter "Response"), Administrator Doan does not dispute any of the facts evidencing that she solicited the political activity of her subordinates. Instead, Ms. Doan tries to shift the focus of this matter and minimize her illegal activity by arguing: (1) OSC's investigative process was unfair; (2) OSC's Report omitted facts favorable to Administrator Doan; and, (3) any violation by Administrator Doan was merely *de minimis* because she solicited the political activity of her political appointees, not career civil servants. As shown below, each of her arguments is demonstrably flawed.

I. OSC's Investigative Process Was Objective, Impartial And Conducted In A Fair Manner

As detailed in the Report, OSC received a complaint from the GSA's Office of the Inspector General alleging that Administrator Doan violated the Hatch Act by soliciting her subordinate employees to participate in political activity during a meeting held at GSA headquarters on January 26, 2007. Upon receipt of the complaint, OSC conducted an objective, independent, and impartial investigation into the allegations that Administrator Doan engaged in prohibited political activity. Specifically, OSC interviewed twenty-one of the thirty-six political appointees who attended the January 26 meeting, during which the alleged prohibited political activity occurred.¹ OSC also interviewed the invited guest speaker, Mr. J. Scott Jennings, the White House's Deputy Director of the Office of Political Affairs. Finally, OSC interviewed Administrator Doan for nine hours over two days, thus, allowing Ms. Doan ample time to describe what happened at the January 26 meeting and to present any exonerating evidence on her behalf. Each interview was electronically recorded to preserve accurately the testimony of each witness, and each witness testified under oath. With the exception of Administrator Doan, Mr. Jennings and one additional witness, each of the above interviews was conducted prior to Administrator Doan's March 28, 2007, testimony

¹ Based on documentation provided by the GSA, a total of forty individuals attended the January 26 meeting. However, according to a March 7, 2007 email, two of the "attendees" were at GSA's Willow Woods VTC Center and merely created the "video bridge" for the January 26 meeting. The email explains that after establishing the video conference and ensuring that all parties were electronically present, these two employees turned down the volume to the meeting and did not listen to the presentation. (A copy of the March 7, 2007, email is available upon request.) In addition, two other general schedule employees merely were in attendance for the purpose of operating the videoconference equipment at GSA headquarters and were not invited to attend the event. Thus, the audience of the January 26 meeting consisted of thirty-six political appointees.

before the House of Representatives Committee on Oversight and Government Reform (hereinafter "House Committee"). During this investigation, OSC also reviewed over 1100 pages of documentary evidence.

Despite OSC's comprehensive and impartial investigative efforts, Administrator Doan challenges the integrity of the process.² Specifically, Administrator Doan speculates that the testimony provided by GSA witnesses during our investigation was impacted by the media reports and the House Committee's earlier questioning of GSA witnesses concerning the January 26 meeting. With respect to Administrator Doan's speculation that the media impacted the testimony of the witnesses, OSC notes that the vast majority of witnesses acknowledged during their OSC interview that they had read things in the newspaper that they felt were either incorrect or that they did not recall hearing during the January meeting. For example, at least one news source reported that there was a discussion during the January 26 meeting of how to exclude Speaker Pelosi from the San Francisco federal building opening. However, with the exception of two attendees, every witness testified that they did not hear any statements to that effect and some affirmatively testified that such statements were not made. Thus, it is unlikely that the witnesses' testimony was swayed by the media reports.

Similarly, Ms. Doan's speculation that the "suggestive and leading" questioning techniques by the House Committee impacted the witnesses' testimony during OSC's investigation is unlikely and unsubstantiated. Based on Congressional reports, it appears that the House Committee interviewed seven witnesses, whereas OSC interviewed three times that amount. Consequently, the testimony obtained from two-thirds of OSC's witnesses could not have been impacted by the House Committee's questioning. In addition, OSC interviewed at least one of the seven witnesses prior to their House Committee interview. Finally, the witness interviews conducted by OSC averaged approximately ninety minutes to two hours, whereas the House Committee interviews averaged approximately thirty minutes. Thus, OSC was able to fully explore each of the witnesses' memories concerning Administrator Doan's statements and the events surround her making such statements.

In summary, Administrator Doan's allegations that the integrity of OSC's investigation process was compromised are unfounded and based on speculation. Ms. Doan has been provided a full and fair opportunity to be heard and address the allegations made against her. Her attack on the fundamental fairness of this process appears to be an attempt by Ms. Doan to shift the focus from her illegal activity to the actions of others.

² Administrator Doan also objects to OSC focusing on Administrator Doan comments in its report and not focusing on Mr. Jennings' PowerPoint presentation. OSC's Report is silent with respect to the legality of Mr. Jennings' presentation because that matter is still under investigation by this office and it would be improper to comment on an ongoing investigation.

II. Administrator Doan's Allegation That OSC's Report Omits Facts Is Unfounded

Administrator Doan does not dispute or challenge the veracity of the facts contained in OSC's Report. In her Response, Administrator Doan attacks OSC's Report by claiming that it omitted certain information. As briefly addressed below, the facts that Administrator Doan objects to being omitted from OSC's Report are irrelevant and immaterial with respect to whether she violated the provisions of the Hatch Act.

A. Administrator Doan objects that OSC's Report did not describe in detail all of the "time consuming issues" that were on her mind when she attended the January 26 meeting.³ OSC's Report does not mention these details because they are unrelated and irrelevant to what took place during the January 26 meeting or what Administrator Doan said during the meeting. Whatever distractions or decisions Administrator Doan faced immediately prior to or after the January 26 meeting are immaterial and provide no defense to her solicitation of political services during the meeting.

B. Administrator Doan objects because OSC's Report did not contain additional reasons as to why she could not remember more about Mr. Jennings' PowerPoint presentation. OSC's Report listed five reasons that the Administrator gave as to why she could not remember more details about his presentation.⁴ Nevertheless, Administrator Doan objects to OSC's failure to mention that she has less than two years remaining in her tenure and, despite the emphasis put on the 2008 elections during Mr. Jennings' PowerPoint presentation, Administrator Doan felt the 2008 elections were "a long way off." These two additional justifications as to why she allegedly cannot remember the PowerPoint presentation are arguably irrelevant in light of the undisputed testimony by multiple witnesses that immediately after the presentation, Administrator Doan posed the question "What can we do to help our candidates?" - a question she does not deny asking and a question which was undeniably related to the subject matter of the PowerPoint presentation.

³ Specifically, Administrator Doan objects to OSC's failure to describe in detail the document production response she was preparing in response to a House Committee request, that this was the first time she and her staff had to prepare such a response and the fact that she had to submit this response to the Office of Management and Budget prior to her submission to Congress. See, Response, page 5.

⁴ Specifically, the report states:

Ms. Doan alleged that she was not paying attention during Mr. Jennings' presentation for the following reasons: she dislikes PowerPoint presentations; she was uninterested in the topic; she does not care about polls; and, she felt the presentation had nothing to do with her or what she does on a daily basis at GSA. Lastly, Administrator Doan testified that she was on her Blackberry (personal digital assistant device) reviewing emails during Mr. Jennings' presentation and only periodically looked up and down.

C. In her Response, Administrator Doan attacks OSC's Report because it fails to mention that Administrator Doan received approximately 220 emails in the 48 hours prior to the January 26 meeting. As meticulously detailed in our Report, OSC attempted to corroborate Administrator Doan's assertion that she was on her blackberry during the January 26 meeting. Although Administrator Doan provided OSC with extensive documentation concerning her email activity, none of the documentation establishes that she read, sent, composed, deleted or moved any emails during the January 26 meeting. Administrator Doan does not dispute this conclusion but objects that OSC's Report did not mention that she had received 220 emails in the 48 hours prior to the meeting. Analogous to the documentation described in OSC's Report, Ms. Doan's alleged backlog of emails does not provide any evidence showing that Administrator Doan sent, read, composed, deleted, or moved any of these emails during the January 26 meeting. Moreover, it is very misleading for Ms. Doan to state that she had a "backlog" of over 220 emails in her inbox when a careful review of these emails reveals that over 120 of these "backlog" emails were either: (1) an electronic confirmation that someone had accepted a meeting invitation; or (2) a copy of an email that Administrator Doan sent to herself at the same time she sent it to someone else. (See documentation of Administrator Doan's email activity attached as Exhibit 3).

D. Administrator Doan also objects to OSC's failure to credit or discuss an email that she received after the January 26 meeting. In our Report, OSC explains that it was unable to corroborate Administrator Doan's testimony regarding the San Francisco building because:

not one of the attendees interviewed by OSC testified that the Administrator asked Mr. Jennings about how GSA could help the cabinet liaison understand that the San Francisco federal building opening is the perfect event for President Bush to attend. In addition, none of the witnesses testified that Mr. Jennings advised Ms. Doan that GSA should submit a "white page" or "one-pager" about the San Francisco building. Indeed, none of the witnesses, including Mr. Jennings, testified that (s)he remembered any comments about GSA's cabinet liaison or any reference to a written briefing, "white paper," or "one-pager" for the White House.

See, Report, page 7-8. In her Response, Administrator Doan objects that OSC failed to mention an email from Peter Stamison which states:

Lurita, thanks for expressing my (and I'm sure the other RAs) exasperation (during today's call) in not getting the WH to recognize all the good GSA does around the country for the Nation's taxpayer and federal agencies and that we are as successful as we are because we are following the President's agenda. He and his Administration are NOT getting proper recognition for this IMHO . . . pgs.

See, Response, attachment 6. OSC did not include Mr. Stamison's email in the Report because it does not corroborate Doan's testimony that she inquired about the GSA cabinet

liaison or her testimony that Mr. Jennings responded by advising GSA to submit a "white paper" or "one pager" for the White House. Indeed, even Ms. Doan admits in her Response that the email does not track her testimony. Although Mr. Stamison's email suggests that Administrator Doan expressed concern that the White House was not getting credit for GSA's actions, it is unclear as to what Ms. Doan said or the context in which this issue was raised. Moreover, Mr. Stamison's message refers to a statement Administrator Doan made "during today's call," not during the brown bag luncheon. Consequently, we are unable to determine whether Administrator Doan expressed her dissatisfaction at the January 26 brown bag luncheon meeting or during a telephone call.

E. Finally, in her Response, Administrator Doan mischaracterizes the testimony she gave to OSC in an unsuccessful attempt to deflect responsibility for her previous misleading statements that the adverse witnesses were "poor to totally inferior" performers. First, the Administrator tries to distance herself from this statement by claiming that the issue of the potential witness bias was first raised by OSC. See, Response, page 9. Although it is irrelevant who brought up the issue of potential bias, Administrator Doan's representation is false. Specifically, OSC asked:

Mr. Molteni: We have testimony, we have evidence that suggests a Hatch Act violation based upon words that have been attributed to you. What we want to do is make sure you have this opportunity to provide us with evidence to the contrary or evidence that you feel that exonerates you

--

Ms. Doan: Okay, I understand.

Mr. Molteni: -- if we were to look solely at the evidence that's been provided up to now.

Ms. Doan: Well, first, I'd like to say that there are a lot of false allegations going on there.

* * *

And I will tell you, at least for the names of the people that appeared in the papers, there's not a single one of those who did not have somewhere in between a poor to totally inferior performance,

* * *

I don't want to begin to speculate how this could have come up, but I do find it highly disturbing that some of the most vocal proponents or the most articulate speaking out against me are also the people who are people I've either moved on or they are, I don't want to say permanently demoted but they're kind of, until extensive rehabilitation of their performance occurs, they will not be getting promoted and they will not be getting bonuses or special awards or anything of that nature.

(See transcript of OSC's interview of Administrator Doan attached as Exhibit 4, pages 000375-000380).

Second, Administrator Doan claims that she testified during her OSC interview "that she believed some appointees did have reason to be biased, principally based on

dissatisfaction with performance evaluation ratings.” See, Response page 10. With the exception of one named employee, Administrator Doan never testified to OSC investigators that any of the appointees were dissatisfied with their performance evaluations. More importantly, Ms. Doan never testified that she thought the witnesses were biased against her based on their dissatisfaction with performance evaluation ratings. Indeed, OSC requested copies of the performance evaluations and disciplinary records of all appointees who attended the January meeting in an attempt to determine whether any of the witnesses were “poor to totally inferior” performers as Administrator Doan alleged. (See most recent performance ratings for the Schedule C and non-career SES employees who attended the January 26, meeting attached as Exhibit 5).

With respect to the one employee that Administrator Doan claims was a poor performer and decided to leave GSA because the employee did not like her performance rating, OSC notes that that not only did this employee’s performance evaluation contain praise for her contribution as a valued member of the management team, but GSA issued a press release in early January, prior to the brown bag luncheon, in which Administrator Doan praises the employee for her tremendous contributions to GSA and characterizes her as a “true leader” in her field of government work. (See GSA press release dated January 11, 2007, attached as Exhibit 6).

As set forth in OSC’s Report, the Administrator’s previous testimony that the adverse witnesses were “poor to totally inferior” performers is not supported by any documentary evidence. Thus, it appears that the Administrator is now attempting to alter her testimony and argue that the witnesses were biased against her not because they were poor performers but because they were dissatisfied with their level 3 “meets performance expectations” evaluation ratings. This new argument appears to be an attempt by the Administrator to defend herself from the question raised in OSC’s Report as to whether she purposefully misled OSC when she mischaracterized the most vocal witnesses as “poor to totally inferior performers.”

III. Administrator Doan Unsuccessfully Argues That Asking “What Can We Do To Help Our Candidates?” To Over Thirty Subordinate Employees Is Not A Solicitation Of Political Activity Or At Best Is A Mere De Minimis Violation

Administrator Doan argues that the Special Counsel erroneously concluded that posing the question “How can we help our candidates” to an audience of subordinate employees is political activity. Her challenges to this legal conclusion, however, are flawed and not supported by law.

Doan initially challenges OSC’s conclusion on the basis of three facts: (1) the January 26 meeting was not hers; (2) she did direct or invite individuals to attend; and, (3) she did not review Mr. Jennings’ PowerPoint presentation prior to the meeting. These facts, however, provide no defense to her prohibited solicitation of political activity. Regardless of who organizes a meeting, who invites or directs employees to attend a meeting, or a meeting’s presentation topic, the head of an agency is never permitted, with

respect to political candidates, to pose the question, "How can we help our candidates?" before an audience of subordinate employees.

Ms. Doan also attempts to dismiss her illegal activity by arguing her question was directed at Mr. Jennings, not her subordinate employees. First, she presents no evidence to support her assertion. Second, we note that the Administrator has maintained throughout this investigation that she does not recall asking such a question. Thus, we find it incredible that she claims to know to whom she directed the question, while maintaining that she does not recall asking the question. Lastly, assuming *arguendo* that Administrator Doan directed the question to Mr. Jennings, she posed the question in terms of how can "we" help our candidates, not how can "I" help. Thus, as the head of GSA, it was implicit in her question that by using the term "we" she was asking on behalf of GSA and the audience that was present. Therefore, even under her own version of the facts, she was committing her subordinates to helping Republican candidates.

Administrator Doan attempts to minimize her solicitation of political services by arguing that the discussions which followed her solicitation do not demonstrate an effort to help political candidates. First and most important, Administrator Doan violated the Hatch Act when she asked "How can we help our candidates?" to an audience consisting of over thirty of her subordinate employees. No additional political brainstorming was necessary to establish she violated the Act; the political discussion which immediately followed simply provides further corroborating evidence that Administrator Doan solicited her subordinates to engage in political activity.

Second, OSC disagrees with Ms. Doan's allegation that the discussion which followed did not demonstrate an effort to help political candidates. As fully detailed in OSC's Report, immediately after Administrator Doan asked how can we help our candidates, Mr. Peter Stamison, the GSA Regional Administrator for Region 9, spoke up concerning a new environmental "green" federal building that was to be opened in San Francisco. Mr. Stamison stated that Speaker Nancy Pelosi was going to be attending the groundbreaking ceremony and emphasized we need to get "our [Republican] people" to attend the event. Apparently following Mr. Stamison's idea of getting more Republican officials to GSA ceremonies, Administrator Doan then discussed the opening of a federal courthouse in Miami that former President Clinton might be attending and emphasized the importance of having Senator Mel Martinez attend the event. Mr. Jennings interrupted the conversation and indicated that the discussion needed to be "taken off-line."

Despite her arguments to the contrary, the discussion between Mr. Stamison and Administrator Doan evidences a discussion akin to "political brainstorming" on how to help the Republican Party and Republican candidates. The purpose of the discussion was to emphasize the importance of ensuring that Republican public officials attended GSA events. Indeed, the discussion emphasized trying to get arguably the two highest ranking Republican National Committee (RNC) members to attend the events: the President, who is the unofficial head of the RNC, and Senator Mel Martinez, the RNC's co-chair. Moreover, Administrator Doan unconvincingly characterizes her statements regarding the

importance of having Senator Martinez attend the Florida courthouse opening as nonpartisan in nature. After Mr. Stamison's comment emphasizing we need to have "our people" attend GSA openings, Ms. Doan's silence with respect to the importance of Democratic Senator Bill Nelson's attendance at the Miami ceremony speaks volumes.

Finally, what is most troubling about Administrator Doan's Response is her attempt to minimize the seriousness of her Hatch Act violation. Specifically, Administrator Doan argues that even though the intent of the Hatch Act is to protect federal employees from express or tacit invitation to perform political chores to curry favor with their supervisors, her alleged violation is minimal because she solicited her political appointees, not career civil servants, and "one may assume, any such political activity likely would be in line with 'their own political beliefs.'" It is appalling for Ms. Doan, the highest-ranking official at GSA, to argue that her solicitation of political services was not so egregious because it was directed at her subordinate political appointees as opposed to her subordinate career civil servants. The Hatch Act protects all federal employees from the inherently coercive request by a supervisor to engage in political activity, irrespective of whether an employee is a career civil servant or political appointee. The law is unequivocal on this point and provides no exception which would allow a federal official to treat their political appointees differently from their career civil servants. Moreover, as the Administrator of GSA, Ms. Doan should be setting an example for her subordinates, and certainly, she should not be soliciting ideas from them as to how to use the resources of the federal government to benefit political parties or partisan candidates.

Congress enacted the Hatch Act out of a conviction "that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine."⁵ Thus, Congress never intended for a supervisor to solicit or receive volunteer services from a subordinate, even if the supervisor believes that the subordinate is prone to engage in such political activity and the activity "likely would be in line with their own beliefs."

Conclusion

To conclude, Administrator Doan had an opportunity to respond to OSC's Report finding that she violated the Hatch Act. Rather than taking the opportunity to present exonerating evidence, Administrator Doan does not dispute any of the facts in OSC's Report establishing she engaged in prohibited political activity and instead resorts to raising red herrings with respect to OSC's investigation and Report.

⁵ Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).