



U.S. OFFICE OF SPECIAL COUNSEL

Report of Hatch Act Investigation: Facilitating Labor Union's Political Activity Through Use of "Union Official" Leave Without Pay

OSC File No. HA-17-0610 (U.S. Postal Service)

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July 14, 2017

I. INTRODUCTION

This report by the U.S. Office of Special Counsel (OSC) reflects the investigative findings in File No. HA-17-0610, a complaint of possible Hatch Act violations by the U.S. Postal Service (USPS). The complaint was submitted to OSC by Senator Ron Johnson, Chairman of the U.S. Senate Committee on Homeland Security and Governmental Affairs. Chairman Johnson initially received the allegations from a constituent and U.S. Postal Service (USPS) employee. The employee was concerned that USPS incurred unnecessary overtime costs and improperly coordinated with the National Association of Letter Carriers (NALC) when it released NALC members for several weeks of “union official” leave without pay (LWOP) to participate in the AFL-CIO’s Labor 2016 program. The Labor 2016 program sought to “elect Hillary Clinton and pro-worker candidates across the country” through door-to-door canvassing, phone banks, slate card mailings, and other get out the vote efforts.¹ NALC compensated released carriers using the Letter Carrier Political Fund (LCPF), the union’s political action committee (PAC).

OSC initiated an investigation to determine if USPS’s actions violated the Hatch Act. While the Labor 2016 program targeted multiple races across the country, OSC primarily reviewed the union official LWOP requests for the Lakeland District in Wisconsin, and the Philadelphia Metropolitan District in Pennsylvania. OSC found that NALC provided lists of letter carriers to participate in the Labor 2016 program to (b)(7)(C) (b)(6); the manager of Labor Relations (LR) for Policy and Programs and USPS’s primary liaison with NALC. (b)(6) then emailed the lists to USPS officials at lower echelons of management. These officials interpreted (b)(6):(7) communications as directives to release the carriers on union official LWOP. Local supervisors raised concerns about the impact on postal operations and objected to the release of some carriers.² Despite their objections, mid-level USPS managers, guided by (b)(6):(7) communications, instructed the local supervisors to release all listed carriers on union official LWOP so they could participate in NALC’s political activity.

OSC’s investigation did not determine that (b)(6) or other USPS officials helped NALC identify or select carriers to participate in the Labor 2016 program. The evidence also does not support a finding that (b)(6) or other USPS officials sought to assist NALC’s favored candidates in achieving electoral success. Rather, the evidence suggests that USPS’s practice was intended to engender goodwill in its working relationship with the union. The record also reflects that the NALC-USPS practice is long-standing, going back many election cycles, and perhaps started in the 1990s. USPS management is not aware of complaints or concerns about the propriety of the practice prior to 2016.

OSC concludes that USPS management took official actions to enable NALC’s political activity. These efforts constitute a systemic violation of the Hatch Act. Specifically, USPS’s practice of facilitating carrier releases for the union’s political activity resulted in an institutional bias in favor of NALC’s endorsed political candidates, which the Hatch Act prohibits. For the reasons stated above, OSC will not seek individual disciplinary action in this case. However, agency-wide corrective action is necessary.

¹ Press Release, “AFL-CIO Plans Final Ground Game for Labor 2016 Campaign,” Oct. 18, 2016, available at: <https://aflcio.org/press/releases/afl-cio-plans-final-ground-game-labor-2016-campaign> (last viewed June 14, 2017).

² The USPS Office of Inspector General investigated the financial impact the releases had on the USPS.

II. STATEMENT OF FACTS

A. The Collective Bargaining Agreement allows carriers to take leave or LWOP to conduct “union business.”

NALC represents approximately 215,000 city carriers employed by USPS. The national collective bargaining agreement (CBA) between USPS and NALC contemplates the need for union members to take time away from their official duties at USPS to work for NALC. Specifically, in Article 24 of the CBA, titled “Employees on Leave with Regard to Union Business,” Section 1 provides that “any employee on leave without pay to devote full or part-time service to the Union” shall continue to be credited with step increases and accrue retirement benefits. Section 2 states that “[f]ull and part-time employees will be granted annual leave or leave without pay at the election of the employee to attend National, State and Regional Union Conventions,” as long as the employee submits a leave request “as soon as practicable and provided that approval of such leave does not seriously adversely affect the service needs of the installation.” USPS has a separate LWOP category for union official business, identified by code 084.³ NALC compensates members who take LWOP from USPS to perform union business, contributes to the members’ retirement and other benefit plans where necessary, and reimburses carriers for leave forfeited while on LWOP status.

OSC sought a definition or a list of what kinds of activities constitute “union business” for purposes of Article 24. The Joint Contract Administration Manual (JCAM), prepared by USPS and NALC as a resource for interpreting the CBA, explains that “[t]ypes of leave for union business include: (1) leave for union employment, (2) leave for union conventions, and (3) leave for other union activities.” “Union employment” means a “full- or part-time job with the NALC—typically with a local union or the national union.” For example, some local branch presidents, so-called national business agents (NBAs),⁴ and union executives are on extended LWOP from their carrier positions and remain on USPS rolls. The JCAM further notes that requests for LWOP to attend union conventions fall into an “exception to the general rule that the granting of LWOP is at the discretion of management.” The general rule, found in Section 514.2 of the USPS Employee and Labor Relations Manual (ELM), states, “The granting of LWOP is a matter of administrative discretion and is not granted on the employee’s demand except as provided in collective bargaining agreements.”⁵

Of the third category of union business, the JCAM states “other union activities” may include a wide variety of union programs such as “legislative rallies or training seminars.” Witnesses provided examples of other union activities that are not identified in the JCAM. They discussed charity events, holiday party setup, arbitration preparation, work for internal union elections, and get out the vote activities, to include Labor 2016.

³ Other categories of LWOP include maternity, military, personal, family/medical leave, and others.

⁴ NALC’s 15 NBAs are national elected officers responsible for one of 15 geographic regions of the country.

⁵ USPS recognizes several other unions, including the American Postal Workers Union, the National Postal Mail Handlers Union, the National Rural Letter Carriers’ Association, and the Postal Police Officers Association. OSC has no evidence suggesting that any other postal union participated in Labor 2016 and did not investigate their use of union official LWOP to engage in political activity.

Eastern Area LR specialist (b) (b)(6):(b) said that generally speaking, the definition of “union activities” is construed “liberally” and means “pretty much what the union defines it to be.” Further, if a notice comes down the LR chain about a union activity, (b)(6):(b) “do[es]n’t spend a second second-guessing (b)((b)(6):(Great Lakes Area LR manager (b)(6) (b)(6); said that managers tend to take requests for union LWOP at face value and debated, “How much can I question? I don’t want to violate . . . their union rights and get a National Labor Relations Board charge against me.”

Notably, the JCAM treats “other union activities” differently from union conventions in that “[r]equests for leave to attend other sorts of NALC activities are handled under the usual leave rules.” Under Article 30 of the CBA, leave procedures are negotiated at the local level and memorialized in local memoranda of understanding (LMOUs) between USPS management and local NALC branches. For example, each local branch agrees on the timing and order in which carriers bid on vacation periods; bidding typically occurs toward the beginning of the calendar year. Further, the parties agree on the percentage of the carrier workforce, or “complement,” who can be on leave on any given day, as well as parameters for requesting unplanned, “incidental leave.”

Under Section B.20 of Article 30, LMOUs also outline whether carriers on leave for union activities are counted in that percentage if a carrier submits the leave request before the station has established its vacation schedule. Article 30, and consequently the LMOUs, are silent concerning how a request for LWOP to engage in union activities affects the percentage if requested after the vacation schedule is made. A post office operations manager (POOM) in the Lakeland District, (b)(6):(b)(7)(C) explained: “Post offices have the latitude to make local decisions and exceed that at any time That’s at their discretion.” By the same token, a manager would not violate the LMOU or the CBA by denying the request.

When requesting union official LWOP, a carrier typically presents a PS Form 3971 to (b) supervisor. For periods exceeding 30 days, ELM Section 514.51 requires the carrier to provide a “written justification and statement of reason for the desired absence.” Witnesses testified that, with the exception of full-time union officers, carriers usually request to take union official LWOP for either a few days at a time or a few hours per day over several days. (b)(6):(b) told OSC that “[t]he vast majority of that type of leave without pay comes in small chunks, like a day, two days, three days.” (b)((b)(6):(b)(LR manager for the Lakeland District, said, “We don’t normally get requests for like a week at a time, unless I’m talking about extended LWOP for a union officer position.”

If the union official LWOP request interferes with business operations, local managers try to work with union officials to address those concerns by delaying the start of the LWOP period or alternating days of LWOP with regular time rather than releasing the carrier for several consecutive days. (b)(6):(b) told OSC that situations where management denies a request for union official LWOP are “few and far between.” But many witnesses testified that they had never seen a request for union official LWOP wholly denied. (b)(6); (b)(6):(a supervisor in the Wisconsin Rapids post office, stated that “my general understanding is that union LWOP is generally approved.” (b)(6); said, “I don’t recall seeing or hearing about anybody denying a

union LWOP [request].” Likewise, (b)(6);(c) NALC’s legislative and political director, testified that “I have never heard of anybody not being . . . granted [union official] LWOP.” Generally, in cases where local management initially denies a request for union official LWOP, NALC contacts LR officials at higher echelons of USPS management—first district, then area, and finally headquarters—until the LWOP is approved, at least in part. (b)(6) told OSC that (b) office typically only gets involved with requests for union official LWOP where they have gone “through a protocol,” meaning that lower echelons of USPS and union management have failed to “work it out.”

Witnesses described a general attitude towards accommodating requests for union official LWOP in order to build goodwill. (b)(6);(c) (b)(6);(c) an LR specialist at USPS headquarters, explained that “we bargain with them,” and in evaluating requests for union LWOP, (b) reasoned: “We’re not going to pay them So if it’s not costing us anything and . . . we’re getting some goodwill out of it, why not do it?” (b)(6) called the relationship between USPS and NALC “critical to the success of the Postal Service.” Similarly, USPS’s Vice President for Labor (b)(6);(b) (b)(6) (b)(6) told OSC that its employees are its greatest commodity, so “we try to accommodate them to the degree we can” because “we need a good working relationship with them.” In other words, while the decision whether to grant or deny LWOP for union activities is within management’s discretion, USPS tries to exercise its discretion in the union’s favor where, as Philadelphia District LR manager (b)(6);(c) (b)(6) described, no “insurmountable operational condition” or “cataclysmic operational concern” exists.

The same “protocol” of petitioning higher levels of LR officials would not apply to an employee requesting a month of annual leave or personal LWOP to volunteer for a political campaign. When asked how likely it would be for (b) to intervene if such a request were denied, (b)(6) replied “about zero percent chance.” All other things being equal, (b)(6);(c) surmised that an employee requesting union official LWOP to campaign is much more likely to be released than an employee requesting individual leave for the same purpose, because for the latter, “It’s never going to get elevated that high.” And while the employee could file a grievance, “the grievance is going to be denied. That employee is not going to be released.”

Notwithstanding the typical deference given to union official LWOP requests, OSC learned of one instance where USPS management declined to accommodate requests for union official LWOP due to operational concerns. Five carriers from the Des Plaines, Illinois post office paid for a three-day union training course and submitted requests for union official LWOP approximately four days in advance. Local management denied two of the requests because of the short notice and because the required percentage of carriers were already on leave. Union officials elevated the issue to (b)(6);(c) who also noted the potential for incurring overtime costs if all five carriers were released. Ultimately, (b)(6);(c) convinced the union that because of the late notice, losing all five carriers was not feasible; instead, three were released.

B. Roughly 97 NALC members requested union official LWOP to participate in the Labor 2016 program.

According to NALC Executive Vice President (b)(6) (b)(6);(c) NALC collaborated with the AFL-CIO’s Labor 2016 program to determine which candidates to support, and “our release

program was to help get them – our – endorsed candidates elected.”⁶ NALC has participated in similar programs prior to 2016. (b)(6);(7) testified that “[w]e’ve done this for a very long time – every two years” since “at least 2006.” (b)(6);(7) who worked full time for NALC from 1994 to 2009, recalled that NALC began organizing election release programs in or around the year 2000, and (b) personally dealt with both (b)(6) and (b) predecessor, (b)(6);(b)(7);(7) in communicating lists of carriers to USPS. (b)(6);(7) who encumbered (b)(6);(7) position from 1999 to 2005, testified that NALC requested union official LWOP for this purpose during (b) tenure, and probably during the tenure of (b) predecessor as well.⁷ (b)(6);(b) told OSC that carriers have been released for election work since at least the Clinton administration.⁸ (b)(6) does not recall anyone questioning the releases before 2016, and (b) was not aware of USPS ever having done a legal or ethical review of the practice.

In a June 9, 2016 press release, NALC endorsed Hillary Clinton for President of the United States and further noted: “There is a lot a stake on Tuesday, Nov. 8—for our country, our jobs and our families. Starting in the key battleground states of Pennsylvania, Ohio, Florida, Wisconsin, and Nevada, NALC and America’s letter carriers are ready to unite behind Hillary Clinton to make this great country even greater.”

NALC described its political efforts in greater detail in the September/October issue of its newsletter, “The Postal Record,” which NALC distributes to its membership as well as LR executives at USPS headquarters. The article, titled “Trump vs. Clinton,” praised Clinton’s record and announced NALC’s support for the following candidates for U.S. Senate races in six priority “battleground states”: (1) Russ Feingold in Wisconsin; (2) Patrick Murphy in Florida; (3) Catherine Cortez Masto in Nevada; (4) Deborah Ross in North Carolina; (5) Ted Strickland in Ohio; and (6) Katie McGinty in Pennsylvania. These candidates, the article went on to say, “need help from NALC’s ground game—and we’re going all in.” Specifically, “Nearly 50 letter carriers went to work in September and another 50 will be released by Election Day . . . to unleash one of the most comprehensive electoral programs in the labor movement’s history” in coordination with the Working America Coalition (WAC), the AFL-CIO’s PAC. The article describes how “letter carriers will be going door-to-door and making calls to ensure voters support our endorsed candidates, . . . hosting telephone town halls with candidates, and communicating with fellow members about the importance of this election.” In addition, “we’re working alongside the Clinton campaign in its 11 targeted states with NALC leaders there to ensure that we help send a champion for working families to the Oval Office.”

A carrier in Wisconsin who participated in Labor 2016 told OSC that during (b) release period, (b) “did a lot of door canvassing, phone calls for volunteers, postcards, all sorts of political campaigning.” While canvassing, (b) identified which candidates the union supported,

⁶ During the relevant timeframe, (b)(6) was NALC’s Director of City Delivery and was the main liaison with USPS regarding the Labor 2016 program.

⁷ (b)(6) predecessor is deceased. (b)(6) assumed (b) current position in 2006 or 2007, and has worked for USPS since 1978. USPS informed OSC that (b)(6) has no disciplinary record.

⁸ (b)(6);(b) has worked in LR since 1986. (b) estimate concerning the timing is likely accurate in light of the Hatch Act Reform Amendments of 1993. Before then, federal and USPS employees were prohibited from taking an active part in partisan political management or partisan political campaigns, even when off duty. And NALC’s website refers to the 1993 amendments’ effect on carriers’ ability to volunteer for campaigns. See <https://www.nalc.org/government-affairs/political-activity/letter-carriers-and-the-hatch-act> (last viewed June 23, 2017).

how they stood on certain issues, and asked “if we could count on their vote.” (b) also distributed literature showing “how each candidate stood on hot labor topics” as well as which candidate the union supported. (b) recalled advocating for Clinton and “three or four different candidates.” Another Wisconsin carrier explained that (b) would share “talking points” about the candidates the union had endorsed to voters who indicated they were still undecided. Specifically, (b) would tell them why Clinton, Feingold, and Julie Lassa, a Democratic candidate for state legislature, were “better for working and middle class families” and also passed out flyers outlining those candidates’ campaign platforms.

NALC President (b)(6);(c) (b)(6);(c) ultimately decided “how large” the release program would be. Specifically, (b)(6);(c) who also serves as treasurer of the LCPF, told OSC that the release program is “funded by our political action committee. So one factor is definitely the cost.” The NALC website explains that the LCPF was “established for the purpose of electing qualified candidates who support letter carriers,” and because “**union dues can’t be used to support candidates for political office**, NALC relies 100 percent on member contributions to the LCPF, which in turn helps us support those on Capitol Hill who defend the issues that matter most to us.”⁹

1. *NALC recruited politically active carriers to participate in Labor 2016.*

NALC chose members who (b)(6);(c) described as “activists” who were “capable of doing this work” to participate in the release program in each “battleground” state. (b)(6);(c) contacted “our state chairs of our association and (b)(6);(c) for names in those areas” where the AFL-CIO “needed positions filled.” In Wisconsin, for example, (b) (b)(6);(c) was responsible for finding 20 “politically active” members to participate and submitting the list of names to (b)(6);(c) who was (b) (b)(6);(b) main contact at NALC headquarters. NALC finalized the list of carriers at the headquarters level, and then (b) (b)(6);(c) instructed the carriers to submit leave forms designating the purpose of the leave as “union official” LWOP. (b) (b)(6);(c) described the use of this code for political releases as “standard operating procedure.” Each carrier also received an email from (b)(6);(c) and a letter from (b)(6);(c) regarding their release. (b)(6);(b) email directed carriers to write “Union LWOP 084” on their leave forms, and (b) also instructed them to let (b) and their respective NBAs know if there were any problems getting management to approve the leave. (b) concluded the email by thanking members for their “hard work and dedication” and for being a “crucial part in getting letter carrier friendly candidates elected in your state.”

Likewise, (b)(6);(b) letter confirmed that the carriers had been selected for the Labor 2016 program and thanked them for their “tireless work to help elect letter carrier-friendly candidates this election season,” because “[w]ith members like you devoted full-time to our political mission, I am confident this election will produce favorable results for letter carriers.” Of the labor movement generally, (b)(6);(c) wrote, “NALC is fortunate to have the ability to release members like you with the skills, experience and commitment to influence elections,” and “[w]e have led these efforts not only in the number of members we release, but in the quality of work produced.” (b)(6);(c) who “probably did the majority of the work” preparing this letter,

⁹ “Government Affairs,” available at <https://www.nalc.org/government-affairs/political-activity> (last viewed June 20, 2017) (boldface in original).

told OSC that “We release, per capita, more people than any other union” in the AFL-CIO, and sometimes “we’ve had the most people regardless of size of union.”

NALC members in California who were selected to participate in Labor 2016 received notification from their state association president, (b)(7)(b)(6);(b)(7) via text message. After announcing: “Well things are finally moving. It is now 100% official that you are all **officially released from 10/6/16 to 11/9/16,**” (b)(6);(b)(7) instructed carriers to “[p]lease submit your 3971s to management today (or tomorrow at the latest). On the 3971 please request LWOP and put ‘Union Release 084’ on them.” (b)(7)(b)(6);(7) the area LR manager responsible for California, forwarded (b)(6);(b)(7) s notice to (b)(6) on October 3, noting, “You might want to tell the union it isn’t automatic and they should not be telling the employees they are officially released.”

When asked whether (b)(7) had any doubt that the carriers’ requests for union official LWOP would ultimately be granted, (b)(7)(b)(6);(7) responded, “I would go in with the assumption that I shouldn’t have any problems with that.” In response to the same question, (b)(6);(7) said, “No. I mean, I knew that with the sheer numbers, [it is] reasonable to expect that you’ll have issues in some places I just expected through communication whenever issues come up that we’d be able to address them, much like we always do.” (b)(6);(7) told OSC that any carriers recruited for Labor 2016 who ultimately were not released had decided they did not want to participate.

2. *After receiving lists of carriers designated to participate in Labor 2016 from NALC, (b)(6) passed the lists to area LR managers.*

USPS released participating carriers on a rolling basis between early September and the 2016 elections. In addition to carriers requesting union official LWOP at the local level, national NALC officials provided lists of participating carriers to (b)(6) at USPS headquarters. (b)(6);(7) sent the first such list on August 31, saying, “Attached are the first round of NALC labor releases. I appreciate your usual assistance regarding notification and release.” The list included the names of 35 carriers and their duty stations, as well as the “authorized dates” of their release: September 8 through November 9, 2016. With one exception (New Jersey), the home states of the carriers correspond with the “battleground states” NALC identified in its press release endorsing Clinton. When asked what “usual assistance” (b)(7) provided, (b)(6) responded: “I send notification out” saying “these people are going to request leave. Let me know if you can’t do it.’ That’s the extent of what I’ve done.”

(b)(6) explained that “the only purpose in doing that” is to have “better coordination and awareness of it” but “there’s nothing magical about going through” (b)(7) (b)(6) believes (b)(6) sending notification creates “no assumption that [the releases] are guaranteed” and that no interactions (b)(7) has had with NALC officials could have led them to reasonably believe so. For example, in response to (b)(6);(b)(7) October 3 email, (b)(6) wrote: “The National NALC understands the difference between authorization from President (b)(6);(7) and our releasing an employee from duty. The messages are confusing at best.” (b)(6) recalls then telling either (b)(6);(7) or (b)(6);(7) “you got to tell . . . your guys that this isn’t guaranteed, you know, basically that you don’t approve leave. We have to approve it.”

(b)(6);(7) told OSC that NALC provided the lists to (b)(6) “as a courtesy” so USPS can “make their people aware of it just for communication purposes and then try to avoid any issues that will come up.” If (7) did not give (b)(6) the lists, (b)(6);(7) speculated: “The next thing you know I’ve got 100 grievances because people wouldn’t be allowed off. It clogs our system . . . [and] . . . our entire dispute resolution process and our labor-management relationship’s about avoiding issues before they happen.” When asked whether giving the list to USPS makes it less likely that there will be issues releasing people, (b)(6);(7) responded, “Yes, no question.” (b)(6);(7) could recall only one other event, unrelated to election cycle releases, for which NALC also provided a list of participating carriers to USPS headquarters.

(b)(6) emailed (b)(6);(b) list to LR managers in the affected areas on September 2, writing:

The national NALC has designated the city letter carriers on the attached list to work on the NALC Labor 2016 Program. We should anticipate that the named employees will submit requests for union LWOP for the identified period. Please let me know ASAP if there is any problem with releasing these employees.

Updates to this list will be forwarded when received.

Thank you,

(b)(7)(C) (b)(6)
Manager, Labor Relations
Policy and Programs

(b)(6) relayed subsequent lists in a similar fashion. Another eight carriers in North Carolina requested to be released in mid-September. The next wave of releases started in early October, for which (b)(6);(7) emailed a list of 46 additional carriers, located in several of the “battleground” states, to (b)(6) on September 30. (b)(6);(7) wrote:

Attached is a list of additional names we would like to release to work on political campaigns for NALC from October 6, 2016 through November 9, 2016. Each individual will be provided a letter from (b)(7)(C) (b)(6);(b) stating that they are approved for release for these dates, a copy of which may be given to their manager when requesting union official LWOP. Any assistance you can provide will be appreciated.

When asked what “assistance” (7) expected (b)(6) to provide, (b)(6);(7) answered, “Just the communication, you know, as I mentioned earlier, to avoid those issues, you know, that inevitably come up if done without any communication.” (b)(6) passed the list on to relevant area LR managers, writing: “The attached list indicates additional employees the union has designated to work on the NALC Labor 2016 program. Please let me know if there are any issues with granting leave.”

On October 6, (b)(6);(f) sent (b)(6) a list of nine more carriers “we would like to release in Ohio starting October 13.” Apparently, (b)(6) overlooked (b)(6);(b) email and did not immediately forward the list to the area LR manager. Some of the carriers’ LWOP requests were not approved right away, and (b)(6) (b)(6) the NBA for Ohio, contacted the area human resources manager, asking for assistance and pointing out that “[a]ll of the above employees [sic] names have been submitted to USPS Headquarters (b)(6) (b)(6); for release.” (b)(6) also contacted (b)(6);(b) for assistance, and (b)(6);(b) suggested that (b)(6) ask NALC officials to contact (b)(6);(b). On the day the release period was to start, (b)(6);(f) told (b)(6) that NALC was “having a lot of difficulty getting these people released. The district and area say they didn’t hear anything about it. They asked (b)(6) to ask me to ask you to send them the list.”

(b)(6);(f) cited the confusion in Ohio described above as “a really good example of the reason why” NALC sent the lists to (b)(6) for dissemination. Specifically, when the carriers submitted their union official LWOP requests, local managers “were just questioning it, you know, saying ‘I don’t know anything about this.’” But “once the communication from [USPS] headquarters said, ‘hey, these are, you know, the national union gave us this list just as a courtesy and these are who they’d like to release,’ then they said ‘okay,’ . . . they were all approved.”

(b)(6) denied knowing specifically what the carriers did while on union official LWOP for Labor 2016 or that they were being paid from the LCPF. (b)(6) stated that (b)(6) knew generally that it had something to do with the election, and believed the carriers “were doing voter registration and get out the vote, and tak[ing] people to the polls.” (b)(6) also denied ever seeing (b)(6);(b) letter to carriers, and (b)(6);(f) confirmed that (b)(6) never shared it with (b)(6);(b). While (b)(6) was aware that NALC had publicly endorsed Clinton for President, and usually supports Democrats, (b)(6) reads NALC’s newsletter only “occasionally” and denied having read the “Trump vs. Clinton” article describing “NALC’s ground game.” After reading it during (b)(6) OSC interview, however, (b)(6) acknowledged that “this is, you know, somewhat consistent with . . . what I thought they were doing.”

C. Carriers in USPS’s Lakeland and Philadelphia Metro Districts were released for Labor 2016 over their local managers’ objections.

Various local managers in the Lakeland District pushed back when carriers requested union official LWOP for both the first and second waves of Labor 2016 releases. Philadelphia Metro managers also protested, but ultimately, every carrier was released.

1. In the first wave of releases under Labor 2016, USPS released two carriers in the Lakeland District despite a “huge staffing issue.”

Shortly after receiving (b)(6);(f) September 2 email, (b)(6);(b) forwarded the list of carriers to (b)(6) (b)(6);(b) LR manager for the Lakeland District, writing, “Please make sure the requests are honored.” Two of the carriers worked at the Wisconsin Rapids post office. They submitted their PS Form 3971s on September 3 requesting union official LWOP from September 8 through November 9, 2016. Postmaster (b)(6) (b)(6) initially asked (b)(6);(b) (b)(6);(f) the installation’s customer service supervisor, not to approve the requests due to the short notice and the impact

the releases would have on operations. One of the carriers notified (b) (b)(6); and (b)(b)(6);(b)(7) the NBA for Wisconsin, that (b) request was denied, and they told (b) that they would try to resolve it with USPS management. (b)(6);(b)(then advised (b)(6);(of the issue, and (b)(6);(contacted (b)(6) on September 7:

My understanding is (b)((b)(6);(b) provided a list to (b)(6) (b)(6);((or you) of city carriers who were to be released for our fall campaign. We have an issue with two carriers being granted union leave. Both were scheduled to begin their release work tomorrow Any assistance you can provide will be appreciated.”

(b)(6) communicated to USPS’s local management. Specifically, (b)(6) wrote to (b)(6);(“The NALC has reported that the two carriers from Wisconsin Rapids have not been released. Please advise.” (b)(6); forwarded (b)(6);(email to (b) LR specialist, (b)(6) (b)(6) telling (b) to “Give (b)((b)(6);(b)(a call and see why the two from Wisconsin Rapids have not been released. Let me know when they will so I can respond back to (b)(6) (b)(6) then instructed (b)(6);(b)(7) LR specialist, (b) (b)(6) “Please read below and respond to me ASAP.”

(b)(6) and (b)(6) called (b)(6);(who wanted to negotiate the requests by possibly releasing only one of the carriers, but (b)(6) told (b) that both carriers must be released. (b)(6); then informed the post office operations manager (POOM) (b)((b)(6);(b) “I received another call from (b) (b)(6) and (b) (b)(6) stating that it is coming down from Headquarters that they must be released starting tomorrow. (b) said (b) was going to send an email and include you on it. No options.” Meanwhile, (b)(6) sent an email to (b)(6);(b) and local management in Wisconsin Rapids, instructing them: “On behalf of (b)(6);(b)(7)(A/Manager Labor Relations, Great Lakes Area: The carriers on the attached list from Wisconsin Rapids are to have their requests honored and be released.” (b)(6) explained, “The boss may not always be right, but the boss is always the boss. And if I’ve got a headquarters manager of labor relations sending instructions through the proper channels down to me . . . to implement, then, in my mind, I’m going to implement those procedures.”

(b)(6);(b) continued to protest after receiving (b)(6); email, responding: “This creates a huge staffing issue at the WI Rapids Post Office. This office is already under withholding and is short staffed.¹⁰ Is there any other recourse?” (b)(6); told OSC that (b)(6);(b)(persistence made (b) think that “yes, they are having problems.” But at the same time, (b)(6); knew from past experience that “we need to honor” the requests. (b) forwarded (b)(6);(b)(concerns to (b)(6); writing, “As you can see below the office/POOM decided to push back. How would you like me to respond? I can tell them they need to backfill with CCAs during this time period.” (b)(6) replied that (b) would “talk to the union here” and noted that “[t]ypically, if there is a legitimate operational problem the NBA will offer some type of accommodation.” (b) also noted that “it seems odd that we are withholding carrier positions.” (b)(6) told (b)(6); to contact the NBA and then report back to (b)(6); but (b)(6); did not call (b)(6);(b)(7) and (b)(6); and (b)(6) both testified that they had no further communications. (b)(6);(b) followed up with (b)(6); on

¹⁰ To be “under withholding” means that the office cannot fill vacancies because another USPS facility within a 50-mile radius of Wisconsin Rapids was either closing or downsizing, and affected employees are entitled to “landing spots” within that radius.

September 12 asking if they had any options, but (b)(6); responded that (b)(6) was still waiting to hear back from (b)(6);.

(b)(6) noted that the Wisconsin Rapids post office was under withholding because “there’s an underlying problem here that has nothing to do with the union’s labor [2016 program]. It was kind of exposed.” (b)(6) explained that withholding in Wausau “was supposed to have been taken care of about six months before” the Labor 2016 releases and constituted a “violation of the contract” with NALC. Upon receiving (b)(6);(b)(6) forwarded message from (b)(6);(b)(6) contacted USPS’s manager of contract compliance, asking, “Is Wausau still under withholding? It appears so from this message. Please advise.”

Meanwhile, postmaster (b)(6) (b)(6) made a list of problems that the releases would likely cause for the Wisconsin Rapids post office. (b)(6) explained to (b)(6);(b)(6) that (b)(6) had instructed (b)(6);(b)(6) to deny the carriers’ union official LWOP requests for ten enumerated reasons, including: “We were never notified by management . . . until 16:25 yesterday”; “The union . . . still has not provided any documentation for this absence”; “This will place us over complement for prime time vacation picks per our LMOU”; and the absences would cause overtime, penalty overtime, late trips to the plant, and safety issues. (b)(6) (b)(6) another postmaster in the Lakeland District who acted as POOM while (b)(6);(b)(6) was on leave, continued to make the case for Wisconsin Rapids to the district human resources director and (b)(6);(b)(7)(C) the District manager of operations program support. (b)(6) wrote, “Wisconsin Rapids is currently at -1 to complement,” and “this will leave them a total of -3 carriers to complement.” (b)(6) predicted incurring penalty overtime as a result of releasing the carriers, and argued that it was not operationally feasible to grant both requests.

(b)(6); did not elevate (b)(6);(b)(6) concerns in light of (b)(6);(b)(6) email directing (b)(6);(b)(6) to release the carriers: “That’s the instruction we were given.” And (b)(6);(b)(6) believed that Wisconsin Rapids managers had a legitimate reason to deny the requests, at least in part, but complied because “this is a little bit different because now you’ve got area and headquarters involved and they’re pushing to have these people released.” Similarly, when asked why the Wisconsin Rapids carriers’ requests were granted in full, whereas (b)(6);(b)(6) denied two of the carriers who requested three days of LWOP to attend a union training event on short notice, (b)(6);(b)(6) responded: “I personally was dealing with this with a local union official. And it was something locally. This wasn’t a national thing from Headquarters that was being dealt with, with a national NALC representative.”

Initially, the carriers were released on a “day to day basis,” pending a response to (b)(6);(b)(6) concerns. None came, however, and the carriers remained on union official LWOP until after the election. (b)(6);(b)(6) and (b)(6);(b)(6) testified that no accommodations were made to cover for the carriers’ absence, even though “the office was already short-staffed. We did not have enough help.” (b)(6);(b)(6) reported that as a result of releasing the carriers, “Wisconsin Rapids went into both high overtime and penalty overtime rates of massive amounts for this period of time, which had significant total operating expense impact on the office.” And (b)(6);(b)(6) told OSC that the “office was under some scrutiny because of our . . . overtime percentages.”

2. *USPS's local managers in the Lakeland District also pushed back during the second wave of carrier releases for Labor 2016.*

A few additional issues arose in the Lakeland District during the second round of Labor 2016 releases, but (b)(6); and (b)(6):(b) handled them without involving district or area LR staff “because of the (b) (b)(6) email.” . . . [E]very time we push back, we get told, ‘no.’” For the second round, (b)(6); received a list of participants from (b)(6):(b)(7) the NBA, who wrote, “Here is the list NALC HQ gave to USPS HQ about a week ago.” (b)(6); then forwarded the list to the affected POOMs on October 3, instructing them, “We need to do everything we can to ensure that the folks below are allowed to be off for this duty.” Upon receiving (b)(6):(b) email, (b)(6):(b) sent the list to the postmasters under (b) supervision, telling them that the named carriers “will need to be allowed off for NALC campaign work.” (b)(6):(b) explained that, because “we had no option” when the first list came out, “we pretty much knew we were going to be releasing them.”

Nonetheless, (b)(6):(b)(c) reported to (b)(6); that a carrier in Waukesha was “having trouble getting the leave approved.” (b)(6); contacted the postmaster, who asked (b) POOM, (b)(6):(b) (b)(6) “There [sic] requesting this CCA for 30 days are you ok with that?” (b)(c) responded, “Explain to me why we are releasing people for 30 days,” and (b)(6); answered, “NALC political campaign.” (b)(c) then told the Waukesha postmaster, “Yes we have to release.”

(b)(6):(b)(c) also told (b)(6); on October 4 that a carrier in Delafield was having “trouble with LWOP approval.” Acknowledging that Delafield “is very small and we have been having a CCA issue,” (b)(6); agreed to work with the POOM. The POOM responded that “I will see what we can do but please understand the situation.” Specifically, the office only had two carriers, one of whom was already on light duty. The carrier from Delafield was ultimately released, but (b)(6); had to intervene again because the postmaster asked the carrier to work on Sundays delivering Amazon packages. Two hours after (b)(6):(b)(c) brought the issue to (b)(6):(b) attention, (b)(6); responded, “Taken care of.”

(b)(6):(b)(7) also alerted (b)(6); to issues with carriers in Neenah, Green Bay, and Marshfield who “are not being released for campaign duty.” (b)(6); wrote an email with the subject line “A MUST READ!!!!” to the Lakeland POOMs on October 6, ordering them to “have these folks released by tomorrow. This is not an issue that we want to go outside of the district.” Based on previous occasions in which pushing back had proven futile, (b)(6); knew that (b) would be expected to accommodate the requests and decided not to elevate any issues. (b) then instructed the POOMs to notify (b) and the district manager that “these folks are released for campaign duty.”¹¹ The POOM over Neenah responded, saying that “[i]t will probably cause POT [penalty overtime] in Neenah but we will release them.” And like the Delafield carrier, the postmaster in Green Bay asked the released carrier to work weekends, but (b)(6); stepped in and ensured the carrier was excused.

¹¹ The district manager did not instruct (b)(6) to obtain confirmation of the carriers’ release. Rather, (b)(6) “put that sentence in there of my own doing to prompt a response from those POOMs.”

In Marshfield, supervisor (b)(7) (b)(6):(b) requested to delay the release of a carrier by two days to October 8, because the weekly schedule already had been posted. Marshfield's LMOU provides that carriers must submit requests for incidental leave¹² before the schedule is posted for the following week.¹³ The carrier submitted (b) PS Form 3971 to (b)(6):(b) on Monday, October 3, requesting to be released Thursday, October 6. (b)(6):(b) consulted the shop steward and local branch president about delaying the start date, who "both thought that to be fair because of the short notice." Even though the carrier was scheduled to work on Friday, October 7, (b)(6):(b) ordered (b)(6):(b) at 6:53 a.m. that day to "[r]elease (b) immediately." The day before, (b)(6):(b) had participated in a weekly "performance telecon" with district management, during which someone said "if anybody was not released, make sure that we get these people released immediately."¹⁴

The Marshfield incident ultimately led to the contact with Senator Johnson's office. Initially, the constituent wrote to (b)(7) (b)(6): about the overtime the releases would generate, asking, "Who's reimbursing the company that? [T]o me if the company isn't being reimbursed it's illegal." (b)(7) (b)(6): responded:

The names were approved at the highest level of USPS management.

The endorsed candidates have proven themselves to be in agreement with the objectives that the NALC hold[s] to strengthen and protect the USPS. That really is the nature of what we're doing and since the USPS can't advocate for themselves they are allowing us to do it.

(b)(7) (b)(6): "figured that the names were given to [USPS] Headquarters . . . [and] that was something that we would do as a courtesy," but (b)(7) neither had knowledge of NALC giving USPS a list of names "nor that the names were actually approved." (b)(7) nonetheless made the claim to assure the constituent that the program "was nothing out of the ordinary" and NALC was operating "in the light of day." To (b)(7) second claim, (b)(7) (b)(6): testified (b)(7) was trying "to get across to (b)(7) that, you know, the union can do things certainly that . . . the Postal Service couldn't do. So I mean, they're not standing in our way." When asked if (b)(7) had any basis on which to believe that USPS or any employee thereof supported NALC's efforts in Labor 2016, (b)(7) admitted: "No.," "I wouldn't be at - anywhere near that level to make that kind of determination." (b)(6):(b) and (b)(6):(b) both emphatically denied that USPS had any involvement in choosing carriers to participate or candidates to endorse. (b)(6) asserted, "I didn't select anybody."

¹² "Incidental leave" refers to unplanned leave requested in addition to planned weekly vacation blocks.

¹³ Marshfield's LMOU also states that LWOP to attend "Union functions . . . counts toward total complement allowed off during that period."

¹⁴ (b)(6):(b) cannot recall who gave the instruction. Participants included the Lakeland district manager, all the Lakeland POOMs, the plant manager, and (b)(6)

3. *Over objections by local managers in the Philadelphia Metro District, USPS released carriers to participate in Labor 2016.*

Managers from three post offices in USPS's Philadelphia Metropolitan District pushed back during the second round of Labor 2016 releases, but ultimately every carrier was released. When (b) (b)(6):(b) LR specialist for the Eastern Area, received (b)(6):(b) October 2 email with the list of participating carriers, (b) sent it on to (b)(6):(b) (b)(6) LR manager for the Philadelphia Metropolitan District. (b)(6) forwarded it to the affected local managers, instructing them to code the absences as union official LWOP and to advise (b) of any issues they had with releasing the carriers. The officer in charge of the Langhorne post office responded to (b)(6) asking: "Is this an all or nothing detail with the NALC? Meaning can I release for some of the weeks and not all of them due to staffing issues?" (b)(6) answered: "All or nothing deal. Sorry, Article 24 and the NLRA kind of tie our hands on this one." The officer in charge persisted, writing back: "I understand Article 24, but by releasing this employee I will be going over authorized compliment [sic] for the time period covered."

Another manager from the Levittown post office was concerned with the effect likely overtime would have on (b) total operating expense if (b) released the carrier.¹⁵ (b)(6) replied, "I completely appreciate that. However, Article 24 and the National Labor Relations Act dictate they be released." The manager disagreed, writing: "I do not read and understand Article 24 the way you interpret it. Our Local drives leave for union activities and it states that it counts against the percentage off and we already have maximum off for that time period. My understanding is that I do not have to go above the compliment [sic] to let an employee off for union activities." The manager then offered to release the employee for the weeks during which leave slots were available. A third manager, from the Bristol post office, told (b)(6) that (b) had "serious operational concerns," because releasing the carrier would be "one above my compliment [sic]" per the LMOU.

Upon receiving the third complaint, (b)(6) forwarded the managers' concerns, along with their respective LMOUs, to (b)(6):(b) (b)(6):(b) in turn presented (b)(6) with the issues "as requested in your [October 2] message." (b)(6):(b) response did not address local managers' specific concerns, but rather pointed out to (b)(6) and (b)(6):(b) that "the Philadelphia District is 131 CCAs over the cap" and informed (b) that "at this point this is the only District having problems releasing employees." (b)(6) instructed (b)(6):(b) to work with the NBA to cover any absences where "there is a legitimate problem with releasing someone."

When asked how (b) expected (b)(6) to respond to (b) message, (b)(6):(b) told OSC: "I don't know why I even wrote that to (b)(6) to be honest. . . . I certainly knew (b) wasn't going to help me out." (b)(6):(b) went on to say that "I knew the whole time that most likely they were going to get every single person released that they wanted released," because "I don't remember ever in my 27½, 28½ years of labor relations where we didn't do that, not when it came from the headquarters level." And even though (b)(6):(b) normally would try to negotiate with the union to break up the release time by, for example, giving a steward LWOP for three days per week for

¹⁵ Generally speaking, a higher total operating expense translates into a lower national performance assessment for a manager. In USPS's pay system, salary increases are awarded based on performance.

three weeks instead of two consecutive weeks, [redacted] did not attempt to do so here because “this agreement was made at the headquarters level to release these folks.”

[redacted] responded to [redacted] as [redacted] did, because “the decision point there to me is not debatable” for two reasons. First, and seemingly most important to [redacted] was that “we don’t necessarily have a right to have” any CCAs in excess of the cap established in the CBA.¹⁶ [redacted] speculated that if USPS had denied the union official LWOP requests in those circumstances, NALC could have enforced the CCA cap, thereby jeopardizing USPS’s access to a cheaper workforce.¹⁷ Second, the excess number of CCAs in the district indicated that substitute carriers were readily available.

[redacted] forwarded [redacted] response to Philadelphia Metro District Manager [redacted] seeking [redacted] intervention. Citing [redacted] rationale concerning exceeding the CCA cap, [redacted] opined that the offices “can compensate for the absences of these employees.” [redacted] then wrote to the affected local managers, “Please ensure you’re releasing the carriers.” [redacted] told OSC that [redacted] gave this directive because the district was over the CCA cap, and because headquarters was involved, [redacted] “didn’t question it.” [redacted] also was reacting to [redacted] accusation that hers was “the only District having problems releasing employees.” Local managers ceased pushing back, and the carriers were released.

III. LEGAL ANALYSIS

Congress established USPS as “an independent establishment of the executive branch of the Government of the United States.” 39 U.S.C. § 201. Although USPS employees are not considered “federal” employees in every respect, they are subject to the restrictions of the Hatch Act. *See* 39 U.S.C. § 410(b)(1). In pertinent part, the Hatch Act prohibits covered employees from “using [their] official authority or influence for the purpose of interfering with or affecting the result of an election” and engaging in political activity while on duty or in the federal workplace. 5 U.S.C. §§ 7321(a)(1); 7324(a).

Congress has called the use of official authority prohibition the “heart” of the Hatch Act, S. Rep. No. 103-57 at 3 (1993), and its purpose is twofold. The first goal is ensuring that employees advance as a result of their own meritorious service and not because of their political loyalties. *See Civ. Serv. Comm’n v. Nat’l Assoc. of Letter Carriers*, 413 U.S. 548, 557 (1973). Second, and more relevant to this case, is that federal agencies “are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof.” *Id.* at 565. Moreover, the Court stressed that “it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.” *Id.*

¹⁶ [redacted] explained that in or around 2011, NALC agreed to let USPS hire a limited number of supplemental, non-career letter carriers (CCAs) at a lower cost than not only career city letter carriers but also the pre-2011 class of non-career carriers.

¹⁷ [redacted] pointed out that an LMOU dated before 2011 would not have taken into account the availability of CCAs. The Levittown and Langhorne LMOUs that [redacted] sent to [redacted] were signed in 2007. The Bristol LMOU is undated.

Congress adopted the political activity on duty restriction in 1993 to strengthen the law against political activity “on the clock,” while expanding federal and postal employees’ rights to be politically active as private citizens. S. Rep. No. 103-57 at 1-2 (1993). “Political activity” means “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. The term “partisan political group” means “any committee, club, or other organization which is . . . organized for a partisan purpose, or which engages in partisan political activity.” *Id.*

OSC found no evidence that individual NALC members engaged in any prohibited political activity by participating in the Labor 2016 program. Most federal and USPS employees are permitted to take an active part in partisan political management and partisan political campaigns, to include working with a PAC, as long as they do so in their personal capacities while off duty, out of uniform, and outside of the workplace. *See* 5 U.S.C. § 7323(a).¹⁸

Instead, OSC analyzed the extent to which USPS, through its practices, officially approved and supported NALC’s political activity, in violation of the Hatch Act.

A. USPS facilitated NALC’s political activity by favoring union official LWOP over other types of leave.

The Labor 2016 program was “political activity” for Hatch Act purposes. In NALC’s own words, Labor 2016 was “one of the most comprehensive electoral programs in the labor movement’s history” directed toward “ensur[ing] voters support our endorsed candidates” and “send[ing] a champion for working families to the Oval Office.” Released carriers canvassed voters in “battleground” states, promoting NALC’s endorsed candidates and asking “if we could count on their vote.” Further, carriers who participated in Labor 2016 were paid out of the LCPF, a PAC the purpose of which is to “elect[] qualified candidates who support letter carriers.” To reach as many voters as possible in 2016, NALC also partnered with WAC, the AFL-CIO’s PAC. The candidates NALC endorsed were all “candidates for partisan political office,” that is, they were seeking an “office for which any candidate is nominated or elected as representing” a political party a representative of which received votes for the office of U.S. President in 2012. *See* 5 C.F.R. § 734.101 (definitions of “political activity” and “partisan political office”). And the LCPF and WAC are “partisan political groups” because of their efforts to elect partisan political candidates in the 2016 elections, so working in furtherance of those PACs’ goals likewise constitutes “political activity” under the Hatch Act.

USPS, through (b)(6) and others in the LR workforce, facilitated NALC’s political activity by directing local supervisors to approve union official LWOP requests to participate in Labor 2016. Characterizing this political activity as union business conferred a special status on carriers’ leave requests. As discussed, USPS generally defers to union official LWOP requests and USPS management is far more likely to approve a union official LWOP request than a leave request from an individual carrier. The combination of headquarters notification regarding Labor

¹⁸ *See also* H.R. Rep. No. 103-16 at 18 (1993) (explaining that the actions of employees on LWOP to work full time for the union “do not raise concerns about the misuse of official authority” even though they continue to accrue federal retirement and other benefits).

2016 requests, and the depiction of these requests as official union business, created an environment in which USPS—as an institution—facilitated NALC’s political activity, in violation of the Hatch Act.

1. *By communicating lists of Labor 2016 participants to local managers, USPS headquarters assured that requests for union official LWOP to engage in political activity would be favored.*

By disseminating lists of Labor 2016 participants to local managers, USPS headquarters essentially guaranteed that carriers would be released to engage in political activity, without consideration of operational needs or concerns. (b)(6);() understood this as well, recognizing there was “no question” getting the carriers released would be easier if () communicated the list to (b)(6);(). In USPS’s hierarchical structure, LR officials in the field interpreted (b)(6);() communication as a directive to release the carriers without asking questions. As (b)(6) described it: “The boss may not always be right, but the boss is always the boss. And if I’ve got a headquarters manager of labor relations sending instructions through the proper channels down to me . . . to implement, then, in my mind, I’m going to implement those procedures.” (b)(6);(b) evinced the same attitude when () said, “I don’t spend a second second-guessing (b)() (b)(6);() Indeed, although managers in Ohio initially questioned the requests, once they received communication from (b)(6);() “they said ‘okay,’ . . . [and] they were all approved.” Even (b)(6);() (b)() an operations manager not in the LR hierarchy, did not want to be seen as “the only District” having trouble implementing a program that was on headquarters’ radar.

Local managers had less discretion to negotiate with the union and reach a mutually acceptable solution regarding the Labor 2016 releases, even though the requests came on short notice, and the release period was much longer than a typical tour on union business. (b)(6);() tried to mitigate the impact the releases would have on the Wisconsin Rapids post office, but (b)(6) invoking USPS headquarters, conveyed that (b)(6);() had no option but to release both carriers for two months. (b)(6);() explained that while () could negotiate with the local union concerning five carriers’ requests to attend a three-day training course because the requests came on short notice, () did not have the same latitude with respect to Labor 2016, because the latter was “a national thing from headquarters that was being dealt with, with a national NALC representative.” And even though (b)(6);(b) believed that Wisconsin Rapids had a legitimate basis for denying the requests, at least in part, () complied, because “this is a little bit different because now you’ve got area and headquarters involved and they’re pushing to have these people released.”

Similarly, in Marshfield, post office managers and the local NALC branch had agreed to delay the carrier’s release by two days to October 8, in accordance with the office’s incidental leave policy, because the weekly schedule had been posted. But because notification of the requests had come down from USPS headquarters, and because headquarters had not helped the Wisconsin Rapids post office, Lakeland District management ordered “that we get these people released immediately,” even though doing so did not comport with the LMOU provision regarding incidental leave. And in the Philadelphia Metro District, local managers asked to release carriers for Labor 2016 only during weeks in which they had not yet reached the maximum percentage of carriers off work per their LMOUs. Even though the LMOUs did not

require the carriers' release, (b)(6);(b) knew those requests were not negotiable because "this agreement was made at the headquarters level to release these folks." Indeed, (b) "knew the whole time that most likely they were going to get every single person released that they wanted released" because "it came from headquarters level." And in fact, every carrier was released except those who decided they did not want to participate.

2. *USPS's local managers favored NALC members' requests for leave to engage in political activity during Labor 2016 because the requests were characterized as union official LWOP.*

USPS managers described an institutional mindset in favor of granting requests for union official LWOP—including those involving political activity—wherever possible to foster a good working relationship with the union and, in some cases, to avoid grievances. Local managers "generally approve[]" requests for union official LWOP, or at least work with union officials to lessen the impact and satisfy both parties. This mentality appears to be so ingrained that at least one LR official claimed that granting union official LWOP for Labor 2016 was required not only by the CBA but also by federal law, unless the release would cause "cataclysmic" operational concerns. Another tried to grant union official LWOP requests in order to avoid being charged with an unfair labor practice. (b)(6) believed that USPS should have (b)(6);(b) as many people off as possible" to build goodwill during negotiations to renew the CBA and massage two contractual issues that the Labor 2016 releases had exposed. Indeed, (b) described the USPS-NALC relationship as "critical to the success of the Postal Service."

Even when local managers challenge requests for union official LWOP, higher echelons intervene to accommodate the requests. (b)(6) described a "protocol" whereby union officials raise the issue up the USPS hierarchy until the parties work it out. In turn, the pattern of granting union official LWOP discourages local managers from pushing back in the first place. Hence (b)(6);(b) plea to keep concerns over releasing the carriers during the second wave of Labor 2016 from "go[ing] outside of the district." (b)(6);(b) agreed that, because (b) concerns over releasing the Wisconsin Rapids carriers fell on deaf ears, "we pretty much knew we were going to be releasing them" for the second wave of Labor 2016.

In turn, union officials expected the requests to be approved. Even though the JCAM distinguishes requests for union activities—which fall under the normal leave rules—from requests to attend conventions, which must be granted, (b)(6);(b) (b)(6);(b) and (b) (b)(6);(b) assumed the carriers would be released for Labor 2016. And the California state association president told participating carriers it was "100% official that you are all **officially released**" before they even submitted their PS Form 3971s. In (b) (b)(6);(b) words, "they're not standing in our way."

Non-union members, or union members who support candidates other than those the union has endorsed, do not have the benefit of these considerations. An employee who, with only a few days' notice, requests one or two months of annual leave or personal LWOP to campaign for (b) or (b) candidate or party of choice "is not going to be released." And although the employee could file a grievance, (b) likelihood of success is low compared to that of a union member following the "protocol" (b)(6) described, because there is "about a zero percent

chance” (b)(6) would weigh in. Thus, the same operational concerns that a postmaster raised to (unsuccessfully) challenge a request for union official LWOP for Labor 2016 would probably be enough to justify denying another employee’s request, because “it’s never going to get elevated [to headquarters].” To have a chance of getting the time off work, the employee probably would have to request it six to nine months in advance, when the post office establishes its vacation schedule for the year.

B. USPS’s practice of favoring NALC’s political activity violated the Hatch Act.

USPS’s practice of favoring union official LWOP to engage in political activity, as implemented by (b)(6) and (b) predecessors, created an institutional bias that the Hatch Act prohibits. As a federal entity, USPS must remain politically neutral. *See* 5 U.S.C. § 7321(a)(1); *Letter Carriers*, 413 U.S. at 565. Specifically, the Hatch Act dictates that USPS official policies and practices must not favor one employee’s or group’s political activity over another’s. For example, the Hatch Act regulations contemplate that an agency may permit employees to contribute to a PAC (whether associated with a union or not) through a voluntary payroll allotment. *See* 5 C.F.R. § 734.208(c); *see also* 5 C.F.R. § 550.311(b) (providing for discretionary allotments). But an agency must afford that benefit to every employee equally, irrespective of which PAC an employee chooses to support. Similarly, agency heads have discretion to grant administrative leave to employees so they can vote in primary and general elections. *See* 5 C.F.R. §§ 301-302; CPM 2012-07.¹⁹ All employees, regardless of party affiliation or candidate preference, should be able to take advantage of that opportunity.

Here, only carriers who wanted to campaign for NALC’s endorsed candidates were given the opportunity to take several weeks of leave on short notice, over the objections of local supervisors who raised concerns about potential operational impact.²⁰ Characterizing Labor 2016 as union business created this advantage, given the institutional mindset in favor of granting union official LWOP. Thus, USPS, through (b)(6) and its longstanding practice of honoring these kinds of requests, failed to administer its programs in a politically neutral manner in violation of the Hatch Act.

The dissemination of lists of Labor 2016 participants down the LR chain of command, and the follow up directives from LR officials to approve leave requests for listed carriers, implicate the Hatch Act’s prohibition against engaging in political activity while on duty or in the federal workplace. *See* 5 U.S.C. § 7324(a)(1)-(2). The term “political activity” is construed broadly to include a “vast range” of activities. *Burrus v. Vegliante*, 336 F.3d 82, 87-88 (2003). (b)(6) and other LR officials knew generally what the Labor 2016 program entailed; (b)(6) acknowledged that the “ground game” described in “The Postal Record” article was “somewhat consistent with . . . what I thought they were doing.” (b)(6) also knew that NALC had endorsed Clinton for President in 2016 and that the union historically has supported Democratic candidates. In addition, union officials referred to Labor 2016 as a “campaign” and a “political

¹⁹ CPM 2012-07 is a memorandum from then-director of the Office of Personnel Management, John Berry, outlining the government’s “longstanding policy” of excusing employees from work so they can vote. It is available online at <https://www.chcoc.gov/content/excused-absence-voting> (last visited July 6, 2017).

²⁰ The analysis here would be the same if NALC endorsed a bipartisan list of candidates. USPS cannot provide institutional support for any partisan candidates, regardless of their political party.

campaign” in email communications with (b)(7) (b)(6) acknowledged that sending the lists ensured “better coordination and awareness” of the release program, and given USPS’s hierarchical culture, doing so amounted to assisting the union’s political activity while at work. Thus, USPS violated the Hatch Act when LR officials directed local to approve union official LWOP requests for political activity.

USPS also violated the Hatch Act’s prohibition against “us[ing] . . . official authority or influence for the purpose of interfering with or affecting the result of an election.” 5 U.S.C. § 7323(a)(1). USPS institutional practices were put in motion by (b)(6) and other USPS officials to support NALC’s efforts to elect certain candidates. As explained above, LR officials at the area and district levels interpreted (b)(6):7 emails as directives. Violations of the use of official authority provision most often occur in the supervisor-subordinate context, but such a relationship is not required. *Special Counsel v. Ware*, 114 M.S.P.R. 128 (2010). Here, because of USPS’s hierarchical culture, local officials understood the communications from a headquarters official to be mandates, and immediately took action to enforce the directives.

To be clear, OSC did not find evidence that (b)(6) sent the lists of Labor 2016 participants to local managers with the specific intent of influencing the outcome of the 2016 elections; rather, maintaining a good relationship with the union seems to have been (b) primary motivation. However, OSC concludes that USPS management took official actions with the intent of enabling NALC’s political activity, and with a clear understanding of what that activity involved. The collective involvement of USPS management in the Labor 2016 program constitutes a systemic violation of the Hatch Act.

C. Disciplinary action is not warranted in this case, but OSC recommends that USPS take institutional corrective action.

When OSC determines that a Hatch Act violation has occurred, OSC may seek disciplinary action and corrective action. *See* 5 U.S.C. § 1216(c). Penalties for Hatch Act violations include “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.” 5 U.S.C. § 7326. If OSC determines that disciplinary action is warranted, it generally brings a written complaint to the Merit Systems Protection Board (MSPB). *See* 5 U.S.C. § 1215(a)(1). When determining the appropriate penalty for a Hatch Act violation, the MSPB looks to the factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). *See Special Counsel v. Lewis*, 121 M.S.P.R. 109, ¶¶ 21-23 (2014). A review of the relevant *Douglas* factors indicates that disciplinary action is not warranted in this case, but OSC recommends that USPS take corrective action to prevent more Hatch Act violations from occurring in the future.

1. Disciplinary action against (b)(6) is not warranted because significant mitigating circumstances exist.

Notwithstanding OSC’s conclusion that (b)(6):7 as well as other USPS officials—violated the Hatch Act, a number of facts weigh against taking disciplinary action against (b)(6). Significantly, USPS has a long history of allowing NALC to use union official LWOP to engage

in political activity. Indeed, this “standard operating procedure” has been in place since at least the 1990s, long before (b)(6) assumed (b) position in 2006 or 2007. (b)(6) testified that (b) received lists of participants from NALC and passed them on to LR managers in the field during (b) tenure in (b)(6);(b) role, and (b)(6);(b) recalls working with (b)(6);(b) immediate predecessor, (b)(6);(b)(7)(c) about the program when (b) worked for NALC. This was a practice (b)(6) inherited, and OSC found no evidence that anyone questioned or evaluated its propriety until 2016. And OSC acknowledges that the custom under scrutiny here was a matter of first impression for our office. Under *Douglas*, the MSPB will consider the clarity with which (b)(6) had been warned about the conduct in question or any rules (b) might be violating by engaging in it. 5 M.S.P.R. at 305. Given these circumstances, it would be unreasonable to discipline (b)(6) for continuing the practice simply because (b) encumbered the position when someone happened to question it.

Of equal significance is (b)(6);(b) motivation for disseminating the lists of Labor 2016 participants to local managers—engendering goodwill with the union. OSC found (b)(6);(b) testimony regarding (b) reasons for facilitating the requests for union official LWOP to be credible, and other witnesses echoed this sentiment. While (b)(6) knew the purpose of Labor 2016, OSC found no evidence that political considerations informed (b) actions. Rather, maintaining a good relationship with NALC during contract negotiations, as well as bolstering USPS’s bargaining position concerning exceeding the CCA cap and the Wausau withholding issue, seem to have been (b) primary concerns. The first *Douglas* factor indicates that an employee’s reasons for engaging the activity at issue should be considered when determining the appropriate penalty for a violation. *See Douglas*, 5 M.S.P.R. at 305 (placing significance on whether the employee acted maliciously or for personal gain, and whether the violation was inadvertent). (b)(6);(b) motivation, coupled with the precedence upon which (b) acted, further suggest that disciplinary action is not warranted.

Other *Douglas* factors address an employee’s capacity for rehabilitation. *See* 5 M.S.P.R. at 305. Relevant considerations include the extent to which (b) was on notice of the rules (b) violated when engaging in the activity at issue, as well as the employee’s disciplinary history. *See Lewis v. Dep’t of the Air Force*, 28 M.S.P.R. 483, 487 (1985) (a good work record indicates possibility of rehabilitation); *Tallis v. Dep’t of the Navy*, 20 M.S.P.R. 108, 111 (1984) (lack of prior notice suggests potential for rehabilitation). (b)(6) has been a USPS employee for almost 40 years, and in that time (b) has not been subject to disciplinary action. And in both (b) OSC interview and the USPS Office of Inspector General interview, (b)(6) stated that if OSC told USPS that the practice violated the Hatch Act, the practice would change. (b) long, unblemished career and (b) willingness to comply with OSC’s recommendations indicate that additional violations are unlikely.

All things considered, disciplinary action is not warranted in this case. Thus, OSC will issue (b)(6) a warning letter advising (b) not to repeat the conduct described in this report. With regard to the other managers and the institutional violation of the Hatch Act, USPS indicates that it will consider OSC’s recommendations and modify its practices to ensure compliance with the Hatch Act.

2. *USPS must reevaluate its practices to neutralize the advantage NALC's political efforts received in 2016 and in past election years.*

USPS must take affirmative steps to prevent future Hatch Act violations. First, to ensure that it is administering its programs in a politically neutral manner, USPS should exclude political activity, as defined by the Hatch Act, from the acceptable uses of union official LWOP. As discussed in this report, USPS's practice of facilitating union official LWOP for NALC's Labor 2016 program—even when it conflicted with operational needs—gave the appearance that USPS favored or supported the union's endorsed candidates. As discussed, Labor 2016 was not an activity paid for out of the union's general fund. Instead, NALC was required to use the LCPF—a distinct incorporated entity organized for a political purpose—to compensate the carriers who participated. Officially characterizing NALC's political activity as “union business” affords this distinct, partisan activity with official advantages and benefits that should be reserved for other union business, such as training and conferences.

Second, USPS management should not require or suggest that union members be released to engage in political activity. Rather, USPS should implement a “hands off” approach to a union's political activity. The postal unions and individual employees and members are permitted, and should be encouraged, to maintain PACs, endorse candidates, and enlist union members to support their electoral agendas on their own time. But USPS headquarters, area LR managers, and district LR managers should not enable a union's political activity through practices that create institutional biases for certain candidates.

IV. CONCLUSION

OSC identified institutional Hatch Act issues not exclusively attributable to any one employee, so disciplinary action is not appropriate in this case. But USPS must prevent future violations through changes in its practices regarding union official LWOP. OSC already has communicated the need to take corrective action to USPS, and agency representatives appear ready to take the steps necessary to comply with the Hatch Act. OSC asks USPS to notify OSC of its corrective action plan no later than **August 31, 2017**. OSC attorneys are available to assist USPS in its efforts to take corrective measures.