



U.S. OFFICE OF SPECIAL COUNSEL

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Washington, D.C. 20036-4505

The Special Counsel

November 8, 2017

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-17-1431

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213(e)(3), I am forwarding a report from the Environmental Protection Agency (EPA) based on disclosures of wrongdoing at EPA's Office of Civil Rights (OCR), Washington, D.C. The Office of Special Counsel (OSC) has reviewed the agency report and provides the following summary of the report, whistleblower comments, and OSC's findings.¹ The whistleblower, Ms. Susan Lees, a former EPA information technology specialist, who consented to the release of her name, alleged that OCR has routinely failed to process cases in a timely manner in violation of Equal Employment Opportunity Commission (EEOC) regulations.

Ms. Lees' allegations were referred to EPA Administrator Scott Pruitt for investigation pursuant to 5 U.S.C. § 1213(c) and (d). EPA's Region III Regional Judicial and Presiding Officer investigated the matter, and Acting Deputy Administrator Michael P. Flynn was delegated the authority to review and sign the report. On September 20, 2017, Mr. Flynn submitted the report to OSC. Ms. Lees provided comments on October 6, 2017.

The agency substantiated Ms. Lees' allegations. The investigation revealed that, dating back to at least fiscal year 2011, OCR has systematically failed to issue Final Agency Decisions (FADs) within the 60-day timeframe specified in EEOC regulations. *See* 29 C.F.R. § 1614.110. Indeed, since 2011, it has taken OCR on average 491 days to issue FADs. The investigation further determined that the failure to satisfy the 60-day

¹ The Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, he is required to advise the appropriate agency head of his determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(c)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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timeframe could subject EPA to default judgments issued by the EEOC. The investigation asserted that this delay was not the result of misconduct, waste, fraud, or gross mismanagement, but was due to systemic process issues concerning the drafting, reviewing, and issuance of FADs. Notably, OCR's FAD issuance process featured ten distinct steps with multiple levels of management review. This extensive management review frequently delayed processing when supervisory attorneys determined that supplemental investigations were needed for cases.

The investigation recommended the allocation of additional resources to OCR to review pending cases in an expeditious manner to reduce the FAD backlog. In addition, it recommended the revision of FAD drafting and review procedures, the creation of FAD templates to accelerate processing, and a broad review of OCR's resource requirements. Mr. Flynn noted that these recommendations were adopted and are currently being implemented.

In her comments, Ms. Lees disputed the assertion that no gross mismanagement occurred. She noted, "Gross mismanagement means a management action or inaction which creates a significant adverse impact upon the agency's ability to accomplish its mission."² Ms. Lees explained that, by EPA's own admission, OCR has experienced serious uncorrected issues with FAD issuance since at least 2011. She asserted that the failure to correct this action "appears to constitute gross mismanagement," and called attention to serious OCR process deficiencies and the consequences of these shortcomings.

OSC has reviewed the original disclosure, the report, and Ms. Lees' comments. OSC has determined while the report meets all statutory requirements, the finding that gross mismanagement did not occur is unreasonable. Ms. Lees' comments are particularly compelling, as they highlight that the agency's conclusions regarding gross mismanagement appear at odds with the evidence adduced in the investigation. Notably, OCR's mission involves protecting EPA employees from discrimination. By allowing a highly inefficient process to remain uncorrected over a period of at least six years, while thereby adversely affecting the statutory and due process rights of EPA employees, OCR has engaged in management inaction that has a deleterious effect on its ability to accomplish its mission. While EPA has made positive steps to remediate these issues, the established history of delays and their potential consequences are troubling.

As required by 5 U.S.C. § 1213(e)(3), OSC has sent a copy of this letter, an unredacted version of the agency report, and Ms. Lees' comments to the Senate Committee on Environment and Public Works and the House Committee on Science, Space, and Technology. OSC has also filed a copy of the letter to the President, a

² See *Carolyn v. Dept. of Interior*, 63 M.S.P.R. 684, 691 (1994), citing *Nafus v. Dept. of Army*, 57 M.S.P.R. 386, 393 (1993); *White v. Dept. of Air Force*, 63 M.S.P.R. 90, 95 (1994).

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redacted report, and the whistleblower comments in our public file, which is available at www.osc.gov. This matter is now closed.

Respectfully,



Henry J. Kerner
Special Counsel

Enclosures