Interagency Ethics Council Meeting January 7, 2004

Hatch Act Resources

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Federal Hatch Act Advisory: Use of Electronic Messaging Devices to Engage in Political Activity

May 30, 2002

This memorandum offers advice concerning the use of electronic messaging devices, such as computers, cellular telephones, handheld wireless E-mail devices (e.g., Palm Pilot™ and BlackBerry™), and text-messaging pagers, whether government or personally-owned, to send or deliver partisan political messages while on-duty, at the federal worksite, or in a government-owned vehicle.[1] During the last Presidential election, this issue arose in conjunction with a number of complaints filed with the Office of Special Counsel (OSC).

The Hatch Act (5 U.S.C. §§ 7321 – 7326) generally permits most federal employees to actively participate in political management and political campaigns. Employees are prohibited, however, from engaging in political activity while in uniform, on duty, in a government building, or in a government vehicle. Political activity is defined as "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 Hatch Act does not purport to prohibit all discourse by federal employees on political subjects or candidates in a federal building or while on-duty. In fact, it explicitly protects the rights of federal employees to express their opinions on political subjects and candidates both publicly and privately. 5 U.S.C. § 7323(c); 5 C.F.R. §§ 734.203(a) and 734.402(a). Thus, the Hatch Act does not prohibit "water-cooler" type discussions and exchanges of opinion among co-workers concerning the events of the day (including political campaigns).

Electronic messaging technology is often used instead of face-to-face conversation or a telephone call. The fact that a "water-cooler" type discussion takes place through the use of E-mail does not, in and of itself, transform the discussion from a protected exchange of personal opinion into prohibited political activity for purposes of the Hatch Act.

Electronic messaging technology, however, can be put to uses other than serving as an alternative mode for casual conversation. E-mail also provides employees with a means to disseminate their opinions on political subjects and candidates to a much wider audience than is possible in casual face-to-face conversation or a phone call. Federal employees can use E-mail to forward political messages to a mass audience. In short, electronic messaging technology enables employees to engage in a form of electronic leafleting or "electioneering" at the worksite which may constitute prohibited "political activity."

To determine whether a communication by E-mail falls under the Hatch Act's prohibition against on-duty political activity, relevant considerations include, but are not limited to: (1) the content of the message (i.e., is its purpose to encourage the recipient to support a particular political party or vote for a particular candidate for partisan political office); (2) its audience (e.g., the number of people it was sent to, the sender's relationship to the recipients); and (3) whether the message was sent in a federal building, in a government-owned vehicle, or when the employee was on duty.

By way of illustration, on the day before the 2000 Presidential election, a government employee, while on duty and in a government building, used his government computer to E-mail all agency employees a message captioned "URGENT! FORWARD TO UNDECIDEDS & NADERITES." The text of the message praised Presidential candidate Al Gore, and encouraged recipients to forward the message to as many other people as possible because there were "only 18 more hours to bring Nader voters to their senses and get them to vote for the ONLY candidate for President – Al Gore!!!"

OSC has concluded that this employee violated the Hatch Act when he sent this message. The content of the message explicitly encouraged its recipients to vote for Al Gore and urged others to do so. The message was sent to a mass audience, including many individuals with whom the sender had no prior acquaintance, much less personal relationship. Finally, the sender was on duty, in a government building when he sent the e-mail.[2]

By contrast, suppose that a government employee, while on duty and in a government building, used his government computer to E-mail a message to a few co-workers with whom the employee regularly engaged in friendly political debate. Assume that the E-mail was captioned "follow-up on our discussion this morning," and attached the text of a newspaper column critical of one of the Presidential candidates' tax proposals, with a statement supportive of the columnist's views.

In this instance, the content of the message expresses the sender's personal opinion about a candidate for partisan political office. It may also be true that the message is intended to encourage the recipients to support the sender's candidate of choice. Nonetheless, the audience for the message consists of a small group of colleagues with whom the sender might otherwise engage in political discourse, face to face. Thus, even though the message was sent in a government building and through use of government equipment, while on-duty, the Hatch Act was not violated because the E-mail message was simply a functional substitute for permissible face-to-face expression of personal opinion on political subjects.[3]

Ultimately, between these two extremes, there are many possible permutations. The determination whether an employee has engaged in prohibited political activity on duty or in a government building or vehicle must necessarily be made on a case-by-case basis. This advisory is intended only to outline the general considerations that apply and to alert employees covered by the Hatch Act to the fact that use of government E-mail to transmit political messages implicates the Act's prohibitions. We encourage employees to contact our office for advice about these matters as they arise.[4]

Please contact Ana Galindo-Marrone or Amber Bell at (800) 854-2824 if you have any questions.

/s/

William E. Reukauf
Associate Special Counsel
for Investigation and Prosecution

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[1] This list of electronic messaging devices is not intended to be exhaustive.

[2] We note here that the Hatch Act proscribes "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. An employee who is merely a recipient of a message such as the one described in the text does not violate the Hatch Act, even if he or she receives, retrieves or reviews the message while on duty or in a government building because retrieving or reviewing a message are not acts directed toward the success or failure of a political party, candidate or group.

[3] OSC has authority to issue advisory opinions concerning the Hatch Act. The use of government E-mail for non-work related purposes while on duty is also governed by federal regulations promulgated by the Office of Government Ethics, e.g., 5 C.F.R. § 2635.704(d), and/or agency policy. Individuals should contact the Office of Government Ethics or appropriate agency officials for advice about any such regulations or policies.

[4] In addition to implicating the prohibitions in 5 U.S.C. § 7324, E-mail messages that solicit support for political candidates or parties may, in some circumstances implicate the Hatch Act's prohibition against using official authority or influence for the purpose of affecting or interfering with the results of an election. See 5 U.S.C. § 7323(a)(1). As set forth in 5 C.F.R. §734.302 activities which fall within this prohibition include use of an official title while engaging in political activity and using official authority to coerce any individual to engage in political activity.

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Federal Hatch Act Advisory: When Does Candidacy Begin

January 10, 2001

Assistant United States Attorney
U.S. Department of Justice

Re: OSC File No. _____

Dear _____,

This letter is in response to your request for an advisory opinion concerning the Hatch Act. We understand that you are an Assistant United States Attorney and are considering submitting your name to the _____ County Republican Party in hopes of obtaining its endorsement as a candidate for the May 2001 primary for judgeship.

You describe the process you wish to participate in as a "screening process," whereby individuals who are interested in pursuing this elected position are permitted through closed meetings to set forth their legal qualifications for judgeship to committee persons and executive committee persons. Additionally, interested individuals may submit their legal qualifications in writing to committee and executive committee persons. You also explained that this process does not require a public filing of any nature or that you publicly declare your candidacy. Lastly, we understand that if you were to obtain the endorsement of the party you still would not be the designated candidate for the party because to become the party's nominated candidate you would have to file a nomination petition.

The Hatch Act (5 U.S.C. §§ 7321-7326) generally permits most federal employees to actively participate in partisan political management and partisan political campaigns. Nonetheless, a covered employee may not be a candidate for public office in a partisan election, i.e., an election in which any candidate represents, for example, the Democratic or Republican party. You indicated in correspondence to our office that under _____ law judicial candidates are permitted to cross-file, i.e., to seek the nomination of both the Democratic and Republican party. Because the election for judgeship wilt have candidates representing the Democratic and Republican parties it is a partisan election. The fact that under _____ law a judicial candidate is permitted to cross-file does not transform the election into a nonpartisan election.

Historically, the Civil Service Commission (Commission) held that "the prohibition against candidacy extends not merely to the formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy." See In re Lukasik, 3 P.A.R. 34, 35 (1969); In re Rooks, 3 P.A.R. 17, 24 (1969) (both quoting Political Activity of Federal Officers and Employees, Pamphlet 20, P. 15, a Commission publication serving as a compilation of its prior determinations). Because the Hatch Act has been interpreted to prohibit preliminary activities regarding candidacy, any action that can reasonably be construed as evidence that the individual is seeking support for or undertaking an initial "campaign" to secure nomination or election to office would be viewed as candidacy for purposes of the Hatch Act.

While we understand that the process for selection that you present for our review does not entail any type of public campaign, we have concluded that the submission of your qualifications to a local political party is an act which seeks support for nomination to office, and thus, would violate the Hatch Act. The scenario you describe requires interested parties to offer themselves as candidates for selection by the party. Once an individual places himself in a position to be nominated or endorsed by a political party, he has become a candidate for purposes of the Hatch Act. The fact that you have not filed a nominating petition or publicly declared your candidacy is not determinative.

We note that in your December 8, 2000, letter to our office you posited that Rooks and Lukasik are factually distinguishable from your situation. You explained that these cases, which also appeared in a March 19, 1999, OSC advisory opinion regarding candidacy posted on our website, involved persons who actually flied public documents and ran in primary elections. In contrast, you offer that you are not requesting to run in a primary and that the "screening process" does not entail any type of public filing.

OSC's purpose in citing Rooks and Lukasik is not to provide examples of cases concerning activity considered "preliminary activity" leading to an announcement of candidacy. Indeed, these cases involved individuals who had publicly declared their candidacies and not individuals engaged in preliminary or "testing the waters" activity. These cases are cited for the general principle articulated by the Commission that the prohibition against candidacy extends not merely to a formal announcement of candidacy but also to preliminary activity leading to such an announcement.

Next, in your December 4, 2000, letter to OSC, you stated that you reviewed the many resources our office has made available on our website regarding candidacy and prohibited activities (e.g., circulating nominating petitions, fundraising, putting a campaign committee together, etc.). You further stated that the "screening process does not require that you undertake any of the enumerated prohibited activities. However, as I am sure you understand, issues that arise under the Hatch Act are very fact specific and cover a wide array of conduct. Therefore, the information and examples presented on our website are illustrative and not an exhaustive compilation of activities prohibited by the Hatch Act.

Also, you state in your December 4 letter that you reviewed three Merit Systems Protection Board cases' to determine what the Board considers a violation of the Hatch Act. These cases are not relevant to your situation, but instead, involve persons who publicly declared their candidacies and ran in elections. As such, they are not controlling In the issuance of this advisory opinion.

To conclude, for the reasons stated above, the "screening process" you wish to participate in is prohibited by the Hatch Act, as it constitutes preliminary activity in furtherance of candidacy. Consequently, while you remain a federal employee you should not submit your qualifications to the _____County Republican Party to seek its endorsement as a judicial candidate in a partisan election. Please call me at 800-854-2824 if you have any questions.

Sincerely,

___/s/_____
Ana Galindo-Marrone
Attorney

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[1]Special Counsel v. Yoho, 15 M.S.P.R. 409 (1983), rev'd on other grounds. Special Counsel v. Purnell, 36 M.S.P.R. 274 (1988); Special Counsel v. Sims, 20 M.S.P.RE. 236 (1984); Special Counsel v. Mahnke, 54 M.S.P.R. 13 (1992).

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Federal Hatch Act Advisory: When Does Candidacy Begin

March 19, 1999

This letter is in response to your request for an advisory opinion concerning the Hatch Act. We understand that you are employed by the Defense Information Systems Agency and have been asked to address an annual political party convention, where you will introduce yourself with an eye towards a future Congressional candidacy. In your letter you pose several questions that address "testing the water" activities associated with running for office.

The Hatch Act (5 U.S.C. §§ 7321-7326) generally permits most federal employees to actively participate in partisan political management and partisan political campaigns. However, a covered employee may not be a candidate for public office in a partisan election, i.e. an election in which any candidate represents, for example, the Democratic or Republican party.

Historically, the Civil Service Commission held that "the prohibition against candidacy extends not merely to the formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy." In re Lukasik, 3 P.A.R. 34, 35 (1969); In re Rooks, 3 P.A.R. 17, 24 (1969). Because the statute has been interpreted to prohibit preliminary activities regarding candidacy, any action which can reasonably be construed as evidence that the individual is seeking support for or undertaking an initial "campaign" to secure nomination or election to office would be viewed as candidacy for purposes of the Act. Engaging in the following types of activities directed toward candidacy would violate the Hatch Act: taking the action necessary under the law of a State to qualify for nomination for election, soliciting or receiving contributions or making expenditures, giving consent to or acquiescing in such activity by others on the employee's behalf, meeting with individuals to plan the logistics and strategy of a campaign, circulating nominating petitions or holding a press conference concerning one's candidacy.

Were you to speak at a political convention and discuss your perspective on issues facing the party you Would not violate the Act. If you use this opportunity to present yourself as a candidate and begin seeking support for a nomination from the party, you would violate the Act. Also, be aware that any steps that are taken as a result of this convention, such as creating a steering committee, establishing a campaign fund, or seeking the support of the political party would be considered steps toward candidacy and thus in violation of the Act.

Commissioning a company to conduct focus groups to poll constituents on what issues are important to them would be permitted. Were you to undertake "testing the water" activities that are truly issue oriented, there would be no partisan activity for purposes of the Hatch Act and no concerns on the expenditure of funds for the activity. Conversely, if you begin a partisan campaign by polling constituents specifically on such things as recognition of, or feelings toward, you as a candidate, you would be taking steps towards candidacy in violation of the Act. Furthermore, because this activity is partisan, soliciting, accepting or receiving contributions to fund this activity would also violate the Act.

While we have tried to explain what constitutes preliminary activities toward candidacy, you can see the difficulty it presents. Informal conversation among friends, and addressing a political convention on issues do not violate the Act, but activities in which you seek support for a candidacy or have others seeking such support would violate the Act. Consequently, while you remain a federal employee, you should take great pains to avoid engaging in any of the prohibited activities listed above.

For your information I have enclosed a copy of our booklet, *Political Activity and the Federal Employee*. Please call me at 800-854-2824 if you have any questions.

Sincerely,

___/s/_____
Karen Dalheim
Attorney

Additional Resources

Case citations:

Nonpartisan election transformed to partisan: Special Counsel v. McEntee (MSPB Docket Number CB-1216-02-0007-T-1 (September 8, 2003)).

Federal employee's campaign loses its independence in designated locality: Special Counsel v. Campbell, 58 M.S.P.R. 170 (1993), aff'd sub nom, Campbell v. MSPB, 27 F.3d 1560 (Fed. Cir. 1994).

APWU Union Bulletin Board case: Burrus v. Vegliante, 336 F.3d 82 (2nd Cir. 2003).