UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 203

Docket No. CB-1216-08-0006-T-1

Special Counsel,

Petitioner,

v.

David Briggs,

Respondent.

August 21, 2008

Mariama Liverpool, Esquire, Washington, D.C., for the petitioner.

Ed Yankovich, Grindstone, Pennsylvania, for the respondent.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The respondent has filed a petition for review of the initial decision in which an administrative law judge ordered his removal for violating the Hatch Act. For the reasons stated below, we GRANT the respondent's petition and AFFIRM the initial decision AS MODIFIED by this Opinion and Order. The respondent's employing agency is ORDERED to REMOVE the respondent from his federal position.

BACKGROUND

¶2 The Office of Special Counsel (OSC) filed a disciplinary complaint with the Board, alleging that the respondent, a coal mine inspector in the Mine Safety

and Health Administration (MSHA) of the U.S. Department of Labor, had violated the Hatch Act by continuing his candidacy for partisan political office after becoming a federal employee. Complaint at 1-3, Complaint File, Tab 1; *see* Complaint File, Tab 4 at 3. OSC asked in the complaint that the respondent be removed for this violation. Complaint at 4.

¶3 The respondent filed an answer to the complaint, but did not do so until after the 35-day regulatory deadline for doing so had passed. Complaint File, Tab 4; *see* 5 C.F.R. § 1201.124(c) (a respondent in an OSC disciplinary action case may file an answer within 35 days of the date of service of the complaint); 5 C.F.R. § 1201.4(i) (defining "service" as the process of furnishing a copy of a pleading to Board officials and/or another party). After providing the respondent with an opportunity to show cause for the apparent untimeliness of his answer, and after considering the respondent's response and OSC's submission regarding the timeliness issue, the administrative law judge who was assigned to the case found that the answer was untimely filed; he found further that the respondent had failed to show good cause for the untimeliness; and he therefore declined to consider the answer. Complaint File, Tabs 5, 6, 7, 9; Initial Decision at 3-8, Complaint File, Tab 10. He also found, in his initial decision on the complaint, that OSC had proven that the respondent had violated the Hatch Act, and that the penalty of removal was reasonable. Initial Decision at 8-11.

¶4 The respondent has filed a timely petition for review of the initial decision, arguing that his answer should be considered; that the Hatch Act does not prohibit a candidacy such as his, since it began before he became a federal employee; and that the penalty of removal is too severe. Petition for Review (PFR) at 1-2, PFR File, Tab 1. OSC has filed a timely response to the respondent's petition. PFR File, Tab 5.

ANALYSIS

¶5 We need not address the respondent's argument that his answer to the complaint should have been considered. Even if that answer were considered, it would be clear, as explained further below, that the respondent violated the Hatch Act.

Merits

¶6 OSC alleged in its complaint that the respondent became a Democratic candidate for Schuylkill County (Pennsylvania) Township Supervisor on or about March 4, 2007; that this was a "partisan political office" for purposes of the Hatch Act; that the respondent won the primary on May 15, 2007, and therefore became a candidate for the same office in the general election; that he became an MSHA employee on or about June 24, 2007; that this employment caused him to be an "employee" subject to the restrictions of 5 U.S.C. § 7323(a)(3); and that he failed to withdraw as a candidate despite warnings provided to him by his employing agency and repeated oral and written warnings by OSC. Complaint at 1-3.

¶7 The respondent has denied none of the allegations described above, either in his answer to the complaint or elsewhere in the record. Moreover, because the Democratic Party nominated a candidate – the respondent himself – for the office to be filled by that election, that office clearly was "a partisan political office." *See* 5 U.S.C. § 7322(2) (defining "partisan political office" as "any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected . . ."). In addition, nothing in the record suggests that the respondent's MSHA position is excluded from coverage under the Hatch Act. *See* 5 U.S.C. § 7322(1) (defining "employee," for purposes of 5 U.S.C. chapter 73, subchapter III, as generally including a person employed in an Executive agency or in a position within the competitive service).

¶8 The respondent acknowledges that he would not be permitted to enter a race for partisan political office after becoming a federal employee. PFR at 1; Complaint File, Tab 4 at 3. He argues, however, that he was entitled under the Hatch Act to continue the candidacy he started before beginning his federal employment. *Id.* We disagree. The plain language of 5 U.S.C. § 7323(a)(3) indicates that that section prohibits an employee from being a candidate for partisan political office at any time while he is covered by the Hatch Act, and not just from becoming one while he is an employee. That is, it provides that an "employee" may not "run for the nomination or as a candidate for election to a partisan political office . . . ." 5 U.S.C. § 7323(a)(3). Furthermore, the Board's predecessor, the U.S. Civil Service Commission, has specifically held that candidacy for partisan political office is prohibited even when the respondent was not a federal employee until after the candidacy began. *In re Grauman*, 1 P.A.R. 809, 815 (1960); *In re Purcell*, 1 P.A.R. 323, 323-24 (1947).[1]

¶9 By continuing his candidacy after he became a federal employee subject to Hatch Act restrictions, the respondent in this case was "run[ning] as a candidate for election . . . ." We agree with the administrative law judge, therefore, that the respondent's continued candidacy following his appointment to his MSHA position falls within a category of actions prohibited by the Hatch Act.

¶10 Finally, even if the argument addressed above could be said to support a finding that the respondent did not intend to violate the Hatch Act, we note that an employee's intent is not relevant to the issue of whether the Act was violated. *Special Counsel v. Alexander*, 71 M.S.P.R. 636, 646 (1996), *aff'd sub nom. Alexander v. Merit Systems Protection Board*, 165 F.3d 474 (6th Cir.), *cert.*

[1] While the Civil Service Commission's interpretations of the Hatch Act are not binding on the Board, the Board looks to them for instruction. *Special Counsel v. Bradford*, 69 M.S.P.R. 247, 249 (1995).

denied, 528 U.S. 809 (1999). It is instead relevant to the penalty determination. *Id.*

¶11 We find, in light of the foregoing, that the respondent violated the Hatch Act, specifically 5 U.S.C. § 7323(a).

Penalty

¶12 A respondent who has been found to have violated the Hatch Act has the burden of presenting evidence showing that the Act's presumptive penalty of removal should not be imposed. *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, ¶ 17 (2006). The respondent in this case has failed to make this showing.

¶13 The respondent argues that he should not be removed because the township in which he holds office has no coal mines, mine owners, or mine employees, and his actions therefore present no conflict of interest. PFR at 1-2. He also asserts that he earns little money as an elective officeholder, and will need to find other employment if he loses his MSHA job. *Id.* at 2. The Board has consistently held, however, that active candidacy in a partisan election is a serious and conspicuous violation of the Hatch Act. *Alexander*, 71 M.S.P.R. at 647-48; *Special Counsel v. Sims*, 20 M.S.P.R. 236, 241 (1984); *see also Alexander* 165 F.3d at 483 (concurring in the Board's holding that candidacy was a serious offense). Moreover, nothing in the Hatch Act provisions relevant here indicate that candidacy that otherwise would be prohibited under 5 U.S.C. § 7323 is permitted when the duties of the employee's elective office are not in direct conflict with the duties of his appointive office.

¶14 The Board also has held that a Hatch Act violation generally "warrants removal if it occurred under circumstances demonstrating a deliberate disregard of the Act." *Special Counsel v. Malone*, 84 M.S.P.R. 342, ¶ 39 (1999). Here, the respondent seems to argue that he should not be removed because he had a good faith belief that his continued candidacy would not violate the Hatch Act. That is, he submits a copy of a letter in which an OSC employee stated that the Act did not prohibit covered federal employees from holding public office; he asserts that

he spoke "with a lawyer, a highly respected political leader, and the union" regarding the matter; he seems to imply that those individuals did not believe his continued candidacy would violate the Act; and he states that he still has "not seen the proper language for this type of action to be taken against me." PFR at 1, 4, 43.

¶15 As we have indicated above, however, the respondent has not challenged the accuracy of OSC's assertion that he failed to withdraw as a candidate despite warnings provided to him by his employing agency and repeated oral and written warnings by OSC. In fact, he specifically acknowledges that, as alleged in OSC's complaint, his assistant district manager and his field office supervisor both instructed him to withdraw his candidacy, and he acknowledges that he failed to do so. PFR at 40; *see* Complaint at 2. Furthermore, the OSC letter the respondent has submitted does not indicate that an individual is entitled to continue his candidacy following his appointment to a federal job covered by the Hatch Act. It begins with a statement that the letter was sent in response to a question as to "whether the Act would prohibit an elected official from accepting employment with a federal agency." PFR at 4. This situation is quite different from that of the respondent, who was still a candidate at the time he became a covered federal employee. The OSC letter also includes a statement that "a covered employee may not be a candidate for public office in a partisan election . . . ." PFR at 4.[2]

¶16 Under the circumstances of this case, we agree with the administrative law judge that removal is warranted. *See Special Counsel v. Simmons*, 90 M.S.P.R.

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[2] The date and addressee information have been redacted from the OSC letter. PFR at 4. The letter does not appear to be a response to a request for advice about the respondent's own situation, however. The respondent does not allege that it was such a response, and the OSC attorney's use of feminine pronouns in referring to employee rights suggests that the situation of another employee (i.e., a female employee) prompted the inquiry to which the attorney was responding. *See id.*

83, ¶ 14 (2001) (the Board concurred in the administrative law judge's finding that continued candidacy, in the face of warnings that the activity violated the Hatch Act, warranted removal).

ORDER

¶17 Accordingly, the Mine Safety and Health Administration, U.S. Department of Labor, is ORDERED to remove the respondent from his coal mine inspector position. The Office of Special Counsel is ORDERED to notify the Board within 30 days of the date of this Final Decision and Order whether the respondent has been removed as ordered.

¶18 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, sections 1201.113(c), 1201.125(b) (5 C.F.R. §§ 1201.113(c), 1201.125(b)).

notice to the respondent regarding your further review rights

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.