UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 98

Docket No. CB-1216-08-0025-T-1

Special Counsel,

Petitioner,

v.

Jon Greiner and

Ogden City, Utah,

Respondents.

November 30, 2011

Mariama Liverpool, Esquire, and Peta-Gay Irving, Esquire, Washington, D.C., for the petitioner.

Bryan M. Scott, James C. Bradshaw, Michael T. Holje, and Stanley J. Preston, Esquires, Salt Lake City, Utah, for the respondents.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member
Vice Chairman Wagner issues a dissenting opinion.

OPINION AND ORDER

¶1 The respondent[1] has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative law judge. For the reasons explained below, we DENY the petition for review. We AFFIRM the initial decision as modified by this Opinion and Order, and ORDER the respondent Ogden City to remove respondent Greiner from his employment with the Ogden City Police Department (OPD). This is the Board's final decision in this matter. 5 C.F.R. §§ 1201.125(c)(5), .126(b).

BACKGROUND

¶2 The petitioner filed a complaint for disciplinary action against the respondent, alleging that the respondent violated the Hatch Act by running as a candidate in a partisan political election while employed in a local government executive agency "in connection with programs that are financed, in whole or in part, by loans or grants made by the United States Department of Justice" (DOJ). Complaint File (CF), Tab 7 at 1-2. The petitioner charged the respondent with violating 5 U.S.C. § 1502(a)(3) and 5 C.F.R. § 151.121(c). *Id*. at 2. The petitioner requested the respondent's removal. *Id*. at 2-3.

¶3 In support of its complaint, the petitioner alleged the following facts: The respondent has been principally employed as the Chief of Police for the OPD, an Ogden City executive branch agency, since at least 1995. CF, Tab 47, Memorandum at 7-8. The respondent was a Republican candidate for election to the Utah State Senate between March 17, 2006, and November 2006.[2] *Id*. at 6-7.

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[1] There are two respondents in this appeal, Jon Greiner and Ogden City, Utah. Complaint File, Tab 7 at 1. For the sake of clarity, we have used the term "respondent" in the singular and, unless otherwise noted, the term refers to respondent Greiner. We recognize, however, that both respondents have joined in the petition for review and are advancing the same arguments.

[2] The respondent's candidacy ceased when the general election occurred on November 7, 2006.

During the period of the respondent's candidacy, the OPD received funding from six DOJ federal grants: (1) A Universal Hiring Program (UHP) Grant, CF, Tab 37, Subtabs 8-20; (2) a Community Oriented Policing Services Interoperable Communications Technology (Interoperable) Grant, *id*., Subtabs 21-39; (3) a 2005 Edward Byrne Memorial Justice Assistance (Byrne) Grant, *id*., Subtabs 41-52; (4) a 2006 Byrne Grant, *id*., Subtabs 53-62; (5) a 2003 Bulletproof Vest Partnership (BVP) Grant, *id*., Subtabs 64-66, 68; and (6) a 2006 BVP Grant, *id*., Subtabs 64-68. CF, Tab 47, Memorandum at 12. The respondent's service as Chief of Police involved significant duties related to the federal grants during the period of his candidacy. *Id*. at 8-22. The respondent was aware that his candidacy violated the Hatch Act, both from various grant-related documents that he signed and from the petitioner's warnings to him during his candidacy. CF, Tab 7 at 5-8, Tab 37, Subtab 23 at 26-27, Subtab 25, Subtab 69 at 16-18, Subtabs 70, 78-79, Tab 47 at 22-24. Despite the petitioner's admonishments to either withdraw from the election or resign from employment with the OPD, the respondent did neither. He proceeded with his candidacy, won the general election, and was sworn into office. CF, Tab 7 at 7, Tab 37, Subtab 79 at 1, Tab 47 at 7, 24.

¶4 The parties stipulated to many of the factual allegations underlying the complaint. CF, Tab 38 at 5-7. Nevertheless, the respondent challenged the complaint on several grounds. He contested the merits of the complaint, asserting that his employment as Chief of Police was not sufficiently connected with the federal grants to sustain the petitioner's charge, i.e., arguing that any connection that he had with the grants was de minimis. CF, Tab 49 at 45-56. The respondent further argued that, even if the petitioner were to establish that he violated the Hatch Act, removal is inappropriate in this case. *Id*. at 60-64. The respondent

also argued that the complaint is barred by the statute of limitations. *Id*. at 61 n.12.[3]

¶5 After a hearing, the administrative law judge issued an initial decision finding that the respondent committed the charged violation and that the violation warrants his removal. CF, Tab 64, Initial Decision (ID) at 2, 20. She discussed the respondent's involvement in the grants at issue and found that his duties and undertakings were such that he was employed "in connection" with them for purposes of the Hatch Act. ID at 6-8, 16-17 & nn.12, 13. In other words, the administrative law judge found that the respondent's connection to the grants was not de minimis. ID at 17 & n.13. She also found that the petitioner's complaint was not time barred by the applicable statute of limitations, ID at 13-14 & n.9, and that the respondent failed to establish that the removal penalty was not warranted, ID at 17-20.

¶6 The respondent has filed a petition for review, arguing that the administrative law judge prevented him from fully presenting his case at the hearing and that her conduct of the hearing demonstrated her bias in favor of the petitioner. Petition for Review File (PFR File), Tab 1 at 2-3. The respondent also argues: (1) The administrative law judge improperly denied his request for several material witnesses to testify at the hearing, *id*. at 3-6; (2) the administrative law judge improperly denied his motion to compel; (3) the petitioner's complaint was barred by the statute of limitations, *id*. at 21-22; (4) the administrative law judge erred in finding that his connection to the federal grants was not de minimis, *id*. at 8-18, 22; and (5) the administrative law judge

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[3] The respondent also argued that the OPD is not an executive branch agency of Ogden City, CF, Tab 49 at 40-45, and he raised certain constitutional challenges to the Hatch Act and its application in this case, *id*. at 57-60. The administrative law judge found that the OPD is an executive branch agency of Ogden City, CF, Tab 64 at 14-15, but she did not explicitly address the respondent's constitutional claims. Nevertheless, the respondent has not raised either issue on petition for review, and we therefore do not address them further.

erred in her penalty analysis, *id*. at 18-21. The petitioner has filed a response, addressing the respondent's arguments and arguing that the petition for review should be denied for failure to meet the review criteria. PFR File, Tab 3.

ANALYSIS

Conduct of the Hearing

¶7 On petition for review, the respondent argues that the administrative law judge conducted the hearing in a biased manner that prevented him from fully presenting his case. PFR File, Tab 1 at 2-3. However, we find that the respondent fully presented his case in several written submissions and in his closing argument. CF, Tabs 48, 49, 52, 63; October 22, 2009 Hearing Transcript (Tr. 2) at 225-34. Thus, the respondent has not explained how the administrative law judge's conduct of the hearing prejudiced his substantive rights. *See Dooley v. Office of Personnel Management*, 22 M.S.P.R. 577, 580 (1984). To the extent that the respondent is arguing that the administrative law judge was biased, we find that her case-related rulings did not evince "a deep-seated favoritism or antagonism that would make fair judgment impossible" so as to warrant a new adjudication. *Bieber v. Department of the Army*, 287 F.3d 1358, 1362-63 (Fed. Cir. 2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

Rulings on Witnesses

¶8 The respondent argues that the administrative law judge abused her discretion in denying eight of his proffered witnesses and in not affording him the opportunity to question those witnesses that the petitioner deposed. PFR File, Tab 1 at 3-6. However, the respondent has not identified any additional material testimony that these witnesses would have provided beyond the unrebutted testimony of Ogden City Chief Administrative Officer John Patterson and the respondent himself. *See Roth v. U.S. Postal Service*, 54 M.S.P.R. 290, 295 (1992) (a judge has broad discretion to exclude testimony that would be irrelevant or overly repetitious); 5 C.F.R. § 1201.41(b)(8), (10); *see also*

Karapinka v. Department of Energy, 6 M.S.P.R. 124, 127 (1981) (a procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights). In addition, our review of the initial decision does not reveal any instance in which the administrative law judge relied on an adverse inference from the deposition testimony.

Motion to Compel

¶9 The respondent argues that the administrative law judge improperly denied as untimely his motion to compel evidence regarding advisory opinions and settlements in similar cases. PFR File, Tab 1 at 6-8; CF, Tabs 33, 36, 42. Whatever the merits of the respondent's argument on review, it is not properly before the Board because the respondent failed to object to the administrative law judge's ruling below. *See Brown v. U.S. Postal Service*, 64 M.S.P.R. 425, 429 (1994).

Statute of Limitations

¶10 The respondent renews his argument that the petitioner's complaint was barred by the statute of limitations. PFR File, Tab 1 at 21-22. For the reasons explained in the initial decision, the administrative law judge correctly found that the complaint was not time barred. ID at 13-14. We are unpersuaded that *Ripp v. Dobbs House, Inc.*, 366 F. Supp. 205, 213 (N.D. Ala. 1973), a case involving a private right of action under federal discrimination statutes, provides more appropriate guidance than Board precedent directly on point. *See, e.g., Special Counsel v. Purnell*, 37 M.S.P.R. 184, 192, 227 (1988), *aff'd sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989). Furthermore, the appellant has not alleged that he was prejudiced by the delay, *see Special Counsel v. West*, 18 M.S.P.R. 519, 522-23 (1984), and the Board has previously found that even greater delays in bringing disciplinary actions under 5 U.S.C. § 1215 were not unreasonable, *Special Counsel v. Santella*, 65 M.S.P.R. 452, 465-66 (1994)

(3-year delay was not unreasonable); *Purnell*, 37 M.S.P.R. at 226 (3 1/2-year delay was not unreasonable).

De Minimis Rule

¶11 Early in the history of the Hatch Act, the Board's predecessor agency, the Civil Service Commission, set forth two principles for use in determining whether an individual's principal employment is "in connection with" federally financed activity for jurisdictional purposes under 5 U.S.C. § 1501(4):

> **1. General Rule of [54 Stat.767 § 12(a)] Jurisdiction**
>
> An officer or employee of a State or local agency is subject to the Act if, as a normal and foreseeable incident to his principal position or job, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not.
>
> **2. Secondary Rule of Jurisdictional Limitation**
>
> An employee of a State or local agency is not within the "principal employment" requirement of Section 12(a) of the Hatch Act, if the only duties in respect to any activity financed in whole or in part by Federal loans or grants which he performs as a normal and intended incident of his principal job or position, are so inconsequential in comparison with other duties of his said job or position as to make applicable the maxim *de minimis non curat lex*.

In re Todd, 2 P.A.R. 49, 50-51 (1943).[4] It appears to be undisputed that, as OPD Chief of Police, the respondent performed grant-related duties as a normal and foreseeable incident to his employment. The respondent argues, however, that the Hatch Act does not apply to him because his duties in that regard were de minimis, thus placing him within the secondary rule of jurisdictional limitation. PFR File, Tab 1 at 8-18, 22. He argues that the instant case is relevantly similar to *Special Counsel v. Perkins*, MSPB Docket No. CB-1216-04-0017-T-1 (Initial

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[4] The citation "P.A.R." refers to the "Political Activity Reporter," which contains the decisions of the Civil Service Commission, the Board's predecessor agency, concerning the Hatch Act. Although the 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).

Decision, Sept. 13, 2005), *aff'd*, 102 M.S.P.R. 236 (2006) (Table), in which the administrative law judge found that the respondent's connection to federal funding was de minimis at best.[5] *Id*. at 10. For the following reasons, however, we find that the administrative law judge in this case correctly determined that that the de minimis rule does not apply. ID at 16-17.

¶12 The respondent argues that he spent a minimal amount of time on federal grant-related activities, and that less than one percent of the OPD's budget came from the federal grants. PFR File, Tab 1 at 11, 16-18. The respondent is correct that these matters might be relevant to the de minimis issue.[6] *See Brooks v. Nacrelli*, 331 F. Supp. 1350, 1354 (E.D. Pa. 1971) (the de minimis rule applied where the defendants' employing agency received only $252.00, or 0.025 percent of its total budget, from federal aid); *Todd*, 2 P.A.R. at 52 (the de minimis rule applied where the respondent spent only about 0.1 percent of his time on federally funded programs). However, they are not dispositive. *See In re Palmer*, 2 P.A.R. 590, 595 (1959) (the significance of an individual's responsibility for federally funded activities is not measured exclusively or primarily by the amount of time involved); *In re Moore*, 2 P.A.R. 530, 531-32 (1959) (the Hatch Act applied even though federal aid constituted a minor part of the employing agency's funding and a "very small" part of the respondent's time was devoted to federally aided projects). Therefore, in reaching our decision, we have considered all of the facts and circumstances relevant to the significance of the appellant's grant-related duties. For the following reasons, we agree with the

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[5] The Board is not bound by initial decisions, and they have no precedential effect. *See, e.g., Roche v. Department of Transportation*, 110 M.S.P.R. 286, ¶ 13 (2008), *aff'd*, 596 F.3d 1375 (Fed. Cir. 2010). The Board, therefore, is not bound by *Perkins*.

[6] Although the federal grants in question might have amounted to a small percentage of the OPD's overall budget for any given year, in absolute terms they totaled over $1,000,000. CF, Tab 37, Subtab 15 at 2, Subtab 25 at 2, Subtab 50 at 2, Subtab 57 at 2, Subtab 66 at 1. We do not think that this is a "minimal" disbursement from the Federal Treasury.

administrative law judge that this evidence establishes that the respondent's grant-related duties were not de minimis.

¶13 First, the record shows that the respondent played a vital role in securing and maintaining the grants at issue. The respondent criticizes much of the petitioner's documentary evidence in this regard on the basis that it predates his political candidacy, in some cases by several years. PFR File, Tab 1 at 11. However, these documents have significance beyond the dates that they were created because they established a substantial relationship between the respondent and DOJ in connection with several of the grants that continued throughout the period of the respondent's candidacy. Specifically, the respondent attested to the accuracy of the information in the applications for the UHP Grant, the Interoperable Grant, and the 2005 and 2006 Byrne Grants, he certified the OPD's compliance with the conditions of the grant awards, and he held himself out to DOJ as a point of contact, authorized representative, or individual with programmatic authority with respect to each of these grants in his capacity as Chief of Police. CF, Tab 37, Subtab 10 at 3, 5, Subtab 11 at 6, Subtab 13, Subtab 15 at 2, Subtab 23 at 22-27, Subtab 25 at 2, Subtab 43 at 5-6, Subtab 49 at 1, Subtab 53 at 8-9, Subtab 56 at 1, Subtab 57. In making these representations to DOJ, the respondent took on responsibilities that continued at least until the end date of the awards, each of which covered at least some period of the respondent's March 17 to November 7, 2006 candidacy. CF, Tab 37, Subtab 15 at 2, Subtab 35, Subtab 48 at 2, Subtab 57 at 2; Tr. 2 at 63 (testimony of the respondent). Notwithstanding any actual duties that the respondent's obligations may have required during this period, his overall accountability for the OPD's compliance with the grant requirements established a substantial connection between his principal employment and the grants. *See Palmer v. United States Civil Service Commission*, 297 F.2d 450, 454 (7th Cir. 1962) (the de minimis rule was inapplicable where, among other things, the respondent initially approved the

project plans and reports for federal aid projects and had legal responsibility for the projects).

¶14 Second, the record shows that the respondent performed affirmative and substantial grant-specific duties during the period of his candidacy. The respondent requested and received a 6-month extension of the Interoperable Grant award period, thus substantially altering the terms of the award. CF, Tab 37, Subtabs 34, 35. He also filed two quarterly program performance reports relating to the Interoperable Grant, *id*., Subtabs 36, 37, and he accepted the 2006 Byrne Grant and bound the OPD to its conditions, *id*., Subtab 57. The respondent minimizes the significance of these actions, characterizing them as "perfunctory."[7] PFR File, Tab 1 at 11-12, 15. DOJ, however, seems to take them rather seriously. If the respondent or some other authorized individual had not taken these actions, the OPD would have been ineligible to receive funding under the grants. *See* DOJ Office of Justice Programs Financial Guide 2006, Part II, Ch. 2, Part III, Ch. 11, *available at* http://www.ojp.usdoj.gov/archives/archives.htm (follow 2006 OJP Financial Guide hyperlink); *see also* 28 C.F.R. §§ 66.40(b), .43(a). The respondent was also named as the point of contact on an October 26, 2006 performance report for the 2005 Byrne Grant, which was after the petitioner notified him of his Hatch Act violation. CF, Tab 7 at 5, Tab 37, Subtab 49; Tr. 2 at 75 (testimony of the respondent).

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[7] The dissent also seeks to minimize the significance of the respondent's grant-related actions during his 8-month candidacy, asserting that respondent "had no role in the management of federal funds" and suggesting that his official actions were mere "paperwork requirements." The respondent's grant-related duties from March 17 to November 7, 2006, however, had significant effects on the Interoperable Grant, the 2005 Byrne Grant and the 2006 Byrne Grant. Neither the respondent nor the dissent disputes the extensive factual findings of the administrative law judge regarding the respondent's grant-related duties. *See* ID at 16-17. Further, whether the respondent personally managed or administered grant funds during the candidacy period, regardless of its length, is not significant in light of his authority and accountability for compliance with grant requirements of the UHP, Interoperable and Byrne Grants during his candidacy.

¶15 The parties have submitted a large amount of detailed argument regarding the connection, or lack thereof, between the respondent's routine duties as Chief of Police and the actual operations funded by the grants. PFR File, Tab 1 at 12-16, 22, Tab 3 at 21-28. In particular, the respondent's involvement with the BVP Grants was more attenuated than his involvement with the other grants and any connection between the BVP Grants and his employment would appear to be based on the respondent's general managerial authority over the OPD. CF, Tab 37, Subtabs 1-2. *See generally In re Capps*, 3 P.A.R. 235, 237 (1973) (the respondent's employment was in connection with federal funding because it involved supervisory and policy-level responsibility for programs receiving federal grants or loans); *In re Sheridan*, 2 P.A.R. 309, 313 (1948) (as Executive Director, the respondent had a connection with the general business affairs of an agency receiving federal funding). However, a point-by-point analysis of the respondent's routine duties is unnecessary to resolve the de minimis issue in this case because the respondent's specific and substantial responsibilities and actions regarding the UHP, Interoperable, and Byrne Grants established the requisite connection between those grants and his principal employment. *See* 5 U.S.C. § 1501(4). The respondent points out that he did not manage or administer any of the grants, but the fact that the respondent himself did not perform such duties is immaterial to the de minimis issue. PFR File, Tab 1 at 11-13, 16; *see Sheridan*, 2 P.A.R. at 313.

¶16 Although we are not bound by the *Perkins* initial decision, we have considered it and do not find it persuasive. The instant case is distinguishable from *Perkins*, in which the respondent did not authorize the payment of federal funds or approve initial contracts with the federal government. *Perkins*, Initial Decision at 16. In addition, the employing agency in *Perkins* instituted its Hatch Act compliance program prior to the date of the respondent's alleged violations, *id*. at 2, 6-7, whereas the compliance program in this case was not instituted until

after the violation had already occurred, CF, Tab 37, Subtab 73; Tr. 2 at 22-23 (testimony of Mr. Patterson).

¶17 We agree with the dissent that the Hatch Act is a penal statute and that it should therefore be read strictly in favor of the respondent. However, we do not agree that a narrow reading of the Hatch Act authorizes a broad application of the de minimis doctrine, which has no basis in the statutory text and is entirely a judicial invention. The rule of lenity only applies if, after considering the text, structure, history, and purpose of a penal statute, there remains a grievous ambiguity or uncertainty such that the Board must guess as to what Congress intended. *See Barber v. Thomas*, 130 S. Ct. 2499, 2508-09 (2010). There is no such ambiguity or uncertainty here. We therefore think it improper to apply the de minimis rule except in cases in which it was clearly meant to apply, i.e., cases in which the respondent's connection with federal funding was "inconsequential" or "trifling." *Todd*, 2 P.A.R. at 51. For the reasons explained in the initial decision, we agree with the administrative law judge that this is not such a case:

> [The respondent] applied for federal grants on behalf of Ogden City and OPD; signed or initialed certifications and Assurances for the grants, and accepted programmatic and financial responsibility; served as point of contact; filed grant reports and otherwise corresponded with the federal grantor as required; alerted Ogden City, Roy City, and Weber County officials to grant opportunities; monitored preparation of their joint application; committed Ogden City to act as grant manager and to accept responsibility for grant compliance and record keeping on behalf of all participants; signed numerous documents pertaining to the grants; requested an extension of time relative to a grant; and supervised individuals responsible for implementing the grants and received relevant reports from them. In these circumstances, the evidence shows that [the respondent] held significant responsibility for and performed significant duties in connection with OPD's acquisition and disposition of federal grant funds, which were not *de minimis*.

ID at 16-17. After fully considering the evidence and argument, we agree with the administrative law judge that the respondent's connection with federal funding was not de minimis. He is therefore a "State or local officer or

employee" within the meaning of 5 U.S.C. § 1501(4), and the Hatch Act's prohibition on candidacy to elective office applies to him. ID at 16-17; *see* 5 U.S.C. § 1502(a)(3); 5 C.F.R. § 151.121(c).

Penalty

¶18 The respondent argues that the administrative law judge erred in her penalty analysis and he addresses the various penalty factors that the Board set forth in *Purnell*, 37 M.S.P.R. at 200. PFR File, Tab 1 at 18-21.

¶19 In this case, the nature of the appellant's offense, active candidacy for partisan political office, was conspicuous and substantial. Tr. 2 at 66-75 (testimony of the respondent). It weighs in favor of removal. *See Alexander v. Merit Systems Protection Board*, 165 F.3d 474, 483 (6th Cir. 1999); *Special Counsel v. Brondyk*, 42 M.S.P.R. 333, 337 (1989). The respondent's arguments about this factor on review are irrelevant because they pertain to his de minimis defense rather than the nature of his offense. PFR File, Tab 1 at 18; *see Purnell*, 37 M.S.P.R. at 202 n.20. The respondent's candidacy for partisan political office carries with it political coloring of the highest order. This factor, therefore, also weighs in favor of removal. *See Alexander*, 165 F.3d at 483; *Special Counsel v. Jakiela*, 57 M.S.P.R. 228, 234 (1993).

¶20 The respondent's motive and intent likewise weigh in favor of removal. Having been warned by the petitioner late in his candidacy that he was in violation of the Hatch Act, the respondent relied on the advice of counsel and proceeded with his candidacy. CF, Tab 7 at 5-8, Tab 37, Subtabs 78-79; Tr. 2 at 80-90 (testimony of the respondent); *see In re Lightsey*, 2 P.A.R. 813, 823-24 (1969) (the respondent proceeded with his candidacy "on a calculated risk basis"). The administrative law judge correctly found that the respondent "voluntarily and knowingly placed himself at risk of prosecution." ID at 19; *see West*, 18 M.S.P.R. at 524 (the respondent's willingness to test the limits of the Hatch Act and run the attendant risks was an aggravating factor).

¶21 The respondent sought legal advice regarding any impediments to his candidacy prior to running for office, and once the petitioner notified him of his Hatch Act violation, he suspended his campaign and sought the advice of counsel again before proceeding. Tr. 2 at 63-66, 80-90 (testimony of the respondent). The respondent is correct that his actions in this regard weigh against removal. PFR File, Tab 1 at 20; *see Special Counsel v. Campbell*, 58 M.S.P.R. 170, 182 (1993), *aff'd*, 27 F.3d 1560 (Fed. Cir. 1994). We, note, however, that among the individuals from whom the respondent sought advice were employees of the Utah Attorney General's office and the Utah Attorney General himself.[8] Tr. 2 at 63, 65, 82-84, 88 (testimony of the respondent). To the extent that these individuals advised the appellant that he was not covered by the Hatch Act, they apparently overlooked a published and publicly available Utah Attorney General Opinion, which states in relevant part:

> [I]t seems clear from federal court cases that a department head or other employee who has responsibility for major policy decisions regarding the federally financed activities will likely be covered by the Hatch Act, regardless of the de minimis standard. . . . That is apparently true even when the employee does not exercise the decision-making authority but rather delegates it to other employees.

Utah Attorney General Opinion 92-018 (July 27, 1995), *available at* http://attorneygeneral.utah.gov/495.html (citations omitted).

¶22 The respondent argues that there was a "cessation of activities" because the OPD instituted a compliance program to insulate him from federal grants, and in any event, he had minimal connection with grant-related activity in the first place. PFR File, Tab 1 at 20. However, the petitioner correctly argues that this penalty factor refers to the cessation of the political activity that caused the Hatch

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[8] Apart from the respondent's representative before the Board, it appears that all of the individuals from whom he sought advice were either elected officials or state or local employees of some type, rather than objective, uninterested private attorneys. Tr. 2 at 63-65, 81-88 (testimony of the respondent).

Act violation – not to the cessation of employment activity related to federal funds. PFR File, Tab 3 at 40; *cf. In re Rhodes*, 2 P.A.R. 276, 278-79 (1945). The respondent's Hatch Act violation was his candidacy for political office – not his service in that office. *See In re Lyle*, 2 P.A.R. 413, 415 (1951). In other words, the respondent's Hatch Act violation ceased upon the termination of his candidacy pursuant to his electoral victory. We therefore cannot agree with the dissent that the institution of a compliance program after the Hatch Act violation had already ceased somehow brought the respondent into compliance with the Act. We find that this factor is not especially relevant to the penalty analysis.

¶23 The respondent further argues that the petitioner's delay in filing the complaint demonstrates that the petitioner did not consider his violation serious. PFR File, Tab 1 at 18 n.13. Without speculating as to the reasons for the filing delay, we find that, in the absence of an explicit recommendation of leniency, the petitioner's opinion of the seriousness of the violation is not a relevant penalty factor because the penalty decision belongs to the Board. *See Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 146 (1947); *cf. In re Marois*, 2 P.A.R. 29, 32 (1941) (a recommendation of leniency by the petitioner's trial attorney may be given due weight in light of the entire record). Moreover, the petitioner's ultimate decision to file a complaint that could only result in removal or no penalty at all provides greater indication of its concern than does its delay in doing so. *See Special Counsel v. Williams*, 55 F.3d 917, 922 (4th Cir. 1995) (the only penalty available for a violation of 5 U.S.C. § 1502 is removal).

¶24 We agree with the respondent that his employment record weighs against removal. PFR File, Tab 1 at 20-21; *see Special Counsel v. Ware*, 114 M.S.P.R. 128, ¶ 33 (2010). We find that it is by far the most significant mitigating factor in this case. The undisputed evidence shows that the respondent is an outstanding employee with no disciplinary record in his long career with the OPD, that he is well-respected in the local community, that he has dedicated his life to public

service, and that he has rendered that service both faithfully and well. Tr. 2 at 57, 155-56 (testimony of the respondent).[9]

¶25 Nevertheless, weighing all of these penalty factors together, we must agree with the administrative law judge that removal in this case is warranted. ID at 20. Although the respondent has an exemplary employment history at the OPD, his active candidacy for partisan political office was a serious violation of the Hatch Act. *See Special Counsel v. Williams*, 56 M.S.P.R. 277, 286 (1993), *aff'd*, 55 F.3d 917 (4th Cir. 1995); *Brondyk*, 42 M.S.P.R. at 337. In addition, although the respondent proceeded with his candidacy on the advice of counsel, he knowingly ran the risk of prosecution for his actions and we find it appropriate to hold him accountable for the consequences of his decision. The respondent cannot now escape full responsibility for his actions by reliance on poor advice, especially in the face of contrary advice from the federal agency specializing in Hatch Act prosecutions. *See Williams*, 56 M.S.P.R. at 286; *Special Counsel v. Tracy*, 39 M.S.P.R. 95, 102-03 (1988). The administrative law judge's penalty decision is consistent with penalty decisions in similar cases. ID at 17-20; *see, e.g.*, *Alexander*, 165 F.3d at 483; *Williams*, 55 F.3d at 922; *State of Minnesota, Department of Jobs and Training v. Merit Systems Protection Board*, 875 F.2d 179, 184 (8th Cir. 1989) (en banc); *Special Counsel v. Mahnke*, 54 M.S.P.R. 13, 18-20 (1992); *Brondyk*, 42 M.S.P.R. at 337-39, 342-43; *In re Di Leo*, 3 P.A.R. 84, 87-88 (1971).

¶26 Although the respondent's employment record is a significant mitigating factor in this case, and although the OPD might suffer considerable disruption

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[9] The record in this case suggests that due to the substantial federal funding received by local law enforcement agencies since the terrorist attacks of September 11, 2001, many good candidates, such as the respondent, will be kept out of local partisan politics. Unfortunately for the respondent, the Board is not free to disregard the requirements of the Hatch Act because of these potentially harsh and perhaps unforeseen consequences of the increased level of federal funding. It is for Congress, not the Board, to address such matters.

upon his removal, there is no lesser penalty available under the statute. *See Williams*, 55 F.3d at 922. The Board is the agency entrusted by Congress to adjudicate Hatch Act cases, 5 U.S.C. §1505, and we cannot in good faith countenance such a major Hatch Act violation by ordering no penalty at all. We note, however, that if respondent Ogden City believes that it would be better served by retaining respondent Greiner as Chief of Police and foregoing federal funding equivalent to 2 years' pay at the rate respondent Greiner was receiving at the time of the violation, it is free to do so. *See* 5 U.S.C § 1506(a). Considering respondent Ogden City's contention throughout this litigation that federal funding constitutes a very minor part of the OPD's budget, foregoing a small percentage of that funding may be a modest price to pay for the retention of its current Chief of Police.

ORDER

¶27 We ORDER the respondent Ogden City to remove respondent Greiner from his employment with the OPD. If Ogden City fails to remove respondent Greiner, or if it appoints him within 18 months after his removal to an office of employment in the same State in a State or local agency that does not receive loans or grants from a federal agency, the Board or the administrative law judge to whom the case is assigned may order the federal entity administering loans or grants to OPD to withhold funds from the OPD. 5 U.S.C § 1506(a); 5 C.F.R. § 1201.126(b). The amount of funds to be withheld is to be equal to 2 years' pay at the rate respondent Greiner was receiving at the time of the violation. 5 U.S.C § 1506(a). If respondent Greiner is appointed within 18 months after his removal to a State or local agency that receives loans or grants from a federal agency, the Board will order that the withholding be made from that State or local agency. *Id*.

¶28 We further ORDER the Office of Special Counsel to notify the Clerk of the Board within 60 days of the date of this Opinion and Order whether respondent

Greiner has been removed as ordered. We further ORDER the Office of Special Counsel to submit to the Clerk of the Board thereafter, at three 6-month intervals, evidence as to whether respondent Greiner has been reemployed by any State or local agency in the State of Utah for a period of 18 months after his removal as provided in 5 U.S.C § 1506.

NOTICE TO THE RESPONDENTS REGARDING YOUR FURTHER REVIEW RIGHTS

Pursuant to 5 U.S.C. § 1508, you have the right to file a petition for judicial review in the United States district court for the district in which respondent Jon Greiner resides within 30 days after the date of mailing of this final decision.

FOR THE BOARD:

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

DISSENTING OPINION OF ANNE M. WAGNER

in

Special Counsel v. Jon Greiner

MSPB Docket No. CB-1216-08-0025-T-1

¶1 In finding that the *de minimis* rule introduced in *In re Todd*, 2 P.A.R. 49 (1943), does not apply in this case, the majority considers the extent of Greiner's duties in connection with federal grants without due regard to the significance of those duties in relation to his other duties as Chief of OPD. *See* Majority Opinion, ¶¶ 12-15. I disagree with the majority's interpretation of *Todd*.

¶2 Our predecessor agency, the Civil Service Commission, issued *Todd* in the wake of the 1940 amendments to the Hatch Act that first extended the Act's reach to state and local government. *See* Pub. L. No. 76-753, 54 Stat. 767 (July 19, 1940). Then, as now, the Act imposed restrictions on the political activity of state and local employees "whose principal employment is in connection with" federally financed activity. *See id*, § 12(a).[1] Faced with the task of interpreting

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[1] Section 12(a) of the amended Act provided, in relevant part:

> No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or any federal agency shall (1) use his official authority or influence for the purposes of interfering with an election or a nomination for office, or affecting the result therefore, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns.

Pub. L. No. 76-753, § 12(a), 54 Stat. 767 (July 19, 1940). The Act has since been revised to eliminate the blanket prohibition against taking an active part in political management or political campaigns and replace it with a prohibition against candidacy for partisan political office. Pub. L. No. 93-443, Title IV, § 401(a), 88 Stat. 1263

the "principal employment" clause, the Commission approved two distinct jurisdictional rules.

¶3 The first rule, which the Commission termed the "General Rule of Section 12(a) Jurisdiction," provides as follows:

> An officer or employee of a State or local agency is subject to the Act if, as a normal and foreseeable incident to his principal position or job, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not.[2]

Todd, 2 P.A.R. at 50-51; *see also In re Slaymaker*, 2 P.A.R. 56, 58 (1943); *In re Fleming*, 2 P.A.R. 1, 6 (1943). In addition to the General Rule, the Commission also approved a "Secondary Rule of Jurisdictional Limitation," which is the source of the *de minimis* exception:

> An employee of a State or local agency is not within the "principal employment" requirement of Section 12(a) of the Hatch Act, if the only duties in respect to any activity financed in whole or in part by Federal loans or grants which he performs as a normal and intended

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(1974); *see* 5 U.S.C. § 1502(a)(3). However, the "principal employment" clause of the original § 12(a) is equivalent to the current statutory language limiting the scope of the Act to "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency." *See* 5 U.S.C. §§ 1501(4), 1502(a). Consequently, decisions interpreting the "principal employment" clause of § 12(a) apply equally well, *mutatis mutandis*, to the current version of the Act.

[2] A corollary of the General Rule is that an employee is not subject to the Hatch Act if the duties he performs in connection with federally financed activity are a "casual or accidental occurrence," as opposed to a "normal and foreseeable incident" to his principal position or job. *See In re Slaymaker*, 2 P.A.R. 56, 62 (1943); *In re Fleming*, 2 P.A.R. 1, 9 (1943). For example, a local fireman called upon to extinguish a blaze at the office of a federally financed state agency would not, on that account, become subject to the Act. *Slaymaker*, 2 P.A.R. at 61-62; *Fleming*, 2 P.A.R. at 9. The courts have, on occasion, conflated the "casual or accidental" standard with the *de minimis* exception identified in *Todd*. *See, e.g.*, *Williams v. Merit Systems Protection Board*, 55 F.3d 917, 920-21 (4th Cir. 1994); *Palmer v. Civil Service Commission*, 297 F.2d 450, 454 (7th Cir. 1962). We are not obliged to follow the Fourth and Seventh Circuits in committing the same error. *See Mynard v. Office of Personnel Management*, 108 M.S.P.R. 58, ¶ 14 (2008) (decisions by courts other than the Board's reviewing court are authoritative only to the extent the Board finds them persuasive).

> incident of his principal job or position, are so inconsequential in comparison with other duties of his said job or position as to make applicable the maxim *de minimis non curat lex*.[3]

Todd, 2 P.A.R. at 50-51.

¶4 As is clear from the above language, it was the considered view of the Commission that the *de minimis* principle applies in cases where an employee's duties in connection with federally financed activity are minimal *in comparison with the other duties of his position*. For example, in *Todd*, the Commission found that the respondent, an employee of the Division of State Highways in Illinois, would be subject to the Act if the General Rule stood alone, because the duties of his position included supervision of "roadside improvement" or "highway beautification," and a federal contribution was made to these activities. *Id*. at 52. The Commission went on to find, however, that because only 0.1 percent of Todd's time was devoted to that duty, the Secondary Rule applied, and he was, therefore, not subject to the Act. *Id*.; *see also In re Hathaway*, 2 P.A.R. 46, 46 (1943) (finding two respondents exempt from the Act under the Secondary Rule).

¶5 Thus, to determine whether Greiner qualifies as a "State or local officer or employee" within the meaning of 5 U.S.C. § 1502, we must consider the significance of his grant-related duties in relation to his duties as a whole. If the duties in question were "substantial" in relation to his other duties, then he was bound by the Act. *See In re Capps*, 3 P.A.R. 235, 236 (1973) (although some of the respondent's time was spent on state activities that received no federal subsidy, there was "such a substantial allocation of time" to federally funded

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[3] The majority incorrectly describes the *de minimis* rule as "entirely a judicial invention" with "no basis in the statutory text." Majority Opinion, ¶ 17. The Commission, which was at that time charged with administering the Act, derived both the General and Secondary Rules from the "principal employment" clause of § 12(a). *See Chemical Mfrs. Ass'n v. Natural Resources Defenses Council, Inc.*, 470 U.S. 116, 125 (1985) (the view of the agency charged with administering a statute is entitled to considerable deference).

activities that he was subject to the Act); *In re Knies*, 2 P.A.R. 578, 584 (1958) (distinguishing *Todd* on the grounds that "Mr. Knies' estimate of ten percent occupation with Federal projects . . . multiplied Mr. Todd's one hundred times"). If, on the other hand, Greiner's grant-related activities were "inconsequential" in comparison to his other duties, then the *de minimis* principle applies, and he was not subject to the Act's prohibition against candidacy in a partisan election. *See Todd*, 2 P.A.R. at 46. It is not merely the case, as the majority implies, that the comparison "might be relevant" to the *de minimis* issue, *see* Majority Opinion, ¶ 12; rather, it is the very essence of the Secondary Rule.

¶6 I would find that the Secondary Rule applies in this case, and that Greiner was not subject to the Act at the time of the alleged violation. Greiner testified without rebuttal that, during the 8 months of his candidacy, he worked between 50 and 60 hours per week, for a total of at least 1600 hours. Hearing Transcript (HT-2) at 80. During that period, he played no role in the management of federal funds, and performed only the following grant-related tasks: requesting a 6-month extension of the Interoperable Grant, filing two quarterly program performance reports relating to the Interoperable Grant, and signing a standard form accepting the 2006 Byrne Grant.[4] *See* Complaint File, Tab 37, Subtabs 34, 36-37, 57. He did not personally draft or edit the letter requesting the extension of the Interoperable Grant, or play any role in the decision to seek the extension. Complaint File, Tab 37, Exhibit 85 at 163-65. Nor did he prepare or assist in preparing the quarterly reports, which were largely identical to the quarterly reports filed prior to his candidacy. Complaint File, Tab 37, Exhibit 85 at 147,

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[4] The majority notes that Greiner was designated as the point of contact or authorized representative on various other grants that were still in effect during some portion of his candidacy. He was not, however, called upon to perform any tasks in connection with those grants. In determining whether a state or local employee is subject to the Act, the pertinent consideration is whether the employee is "actually engaged" in the federally financed activity. *See* 86 Cong. Rec. 2335, 2350 (1940) (colloquy between Sens. McKellar and Hatch).

168 -71; *see also id.*, Exhibits 30-33. According to Greiner's sworn testimony, his grant-related tasks occupied approximately 15 minutes, representing at most .0156 percent of his time on the job - less than a sixth of the percentage of time Todd devoted to his activities in connection with federally financed activities. HT-2 at 80. While the administrative law judge considered the 15-minute estimate improbably low, she specifically found that the time Greiner devoted to grant-related tasks in comparison to his other duties was "not significant" - that is to say, inconsequential. Initial Decision at 16 n.12. Even if Greiner underestimated the time spent on grant-related tasks by a factor of a hundred, the percentage of his overall time devoted to these tasks would still be less than 1.76 percent, a figure which the Commission considered low enough to warrant application of the *de minimis* rule. *See Todd*, 2 P.A.R. at 52.

¶7 The majority would decline to follow *Todd* in favor of *In re Palmer*, 2 P.A.R. 590 (1959), in which the Commission found that, based on the significance of Palmer's responsibilities in connection with federally financed activities, the *de minimis* rule did not apply even though he devoted "very little time" to those activities. *Palmer*, 2 P.A.R. at 595. The Commission's decision was subsequently reversed in U.S. District Court, however, *see Palmer v. Civil Service Commission*, 191 F. Supp. 495 (S.D. Ill. 1961), and the Seventh Circuit reversed the district court based in part on a finding that Palmer had in fact devoted more than fifty percent of his time to federally financed activities, *see Palmer v. Civil Service Commission*, 297 F.2d 450, 454 (7th Cir. 1962), thus obviating the Commission's attempt to distinguish *Todd*. In any event, it cannot be said that Greiner's grant-related duties were so great in importance as to compensate for the miniscule amount of time involved. The majority makes much of the fact that OPD would not have received the grant money if Greiner or another designated official had not signed the relevant documents, *see* Majority Opinion, ¶ 14, but such is the nature of paperwork requirements. In any event, the federal grants themselves were not especially significant, accounting for less

than 1 percent of the OPD budget. HT-2 at 21 (testimony of Patterson); *see Brooks v. Nacrelli*, 331 F. Supp. 1350, 1354 (1962) (federal aid representing less than one fortieth of one percent the agency budget was "so small as to evoke the rule of *de minimis*").

¶8 The majority also contends that *Todd* is not controlling in light of *In re Moore*, 2 P.A.R. 530 (1955), in which the Commission found the respondent subject to the Act even though a "very small" part of his time was devoted to federally aided projects, and federal aid was a "minor part" of the agency's funding. In reaching that finding, the Commission rejected the *de minimis* rule altogether:

> In our opinion, these facts do not affect Section 12(a) jurisdiction. The only test is whether, in the language of the statute, "principal employment" is "in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency." Where it is, responsibility under the Hatch Act is not affected by other activities.

Id. at 532. This holding, however, cannot be considered good law in light of the Commission's subsequent decision in *Knies*, 2 P.A.R. at 583-84, which expressly acknowledged the continued vitality of *Todd*. Nor can *Moore* be reconciled with other Commission and court decisions recognizing that the time spent by an employee on federally financed activity is a pertinent consideration in the *de minimis* analysis. *See, e.g.*, *Palmer*, 297 F.2d at 454; *Capps*, 3 P.A.R. at 237 (finding the respondent covered by the Act based on the "substantial allocation" of time to federally assisted programs). *Moore* is also at odds with later decisions that treat the proportion of federal grant money to the agency's overall budget as a relevant factor. *See Brooks*, 331 F. Supp. at 1354; *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990) (noting that federal grants constituted between 5.9 and 45.6 percent of the agency's total funds during the relevant period). In sum, the majority's reliance on *Moore* is misplaced.

¶9 Moreover, the Board has held that the Hatch Act is a penal statute that must be read strictly in favor of the party against whom disciplinary action is sought. *Special Counsel v. Malone*, 84 M.S.P.R. 342 (1999); *see Huddleston v. United States*, 415 U.S. 814, 830-31 (1974) (any ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity); *Groves v. Modified Retirement Plan for Hourly Paid Employees of John Mansville Corporation and Subsidiaries*, 803 F.2d 109, 118 (3d Cir. 1986) (applying rule of lenity to civil penalty provision of ERISA); *see also Smith v. Blackwell*, 34 F. Supp. 989, 994 (E.D.S.C. 1940) (finding Hatch Act to be penal in nature). In addition, to avoid chilling First Amendment rights, the Act must "be construed to constrain only what it clearly prohibits." *See Bauers v. Cornett*, 865 F.2d 1517, 1524 n.8 (8th Cir. 1989); *see also City of Buffalo v. U.S. Department of Labor*, 729 F.2d 64, 67 (2d Cir. 1984) ("[r]eviewing the legislative history of Section 1502(a)(3), we find that Congress intended that this provision be interpreted narrowly"); *cf. In re McDuffie*, 1 M.S.P.R. 8, 11 (1979) (regulations promulgated under the Hatch Act should be narrowly construed because they restrict the right of individuals to participate in the political process). Thus, if there is any remaining doubt as to whether Greiner was in violation of the Act, it must be resolved in his favor.

¶10 Finally, even if Greiner had violated the Act, I would find removal unwarranted in light of the respondents' good faith efforts to bring him into compliance. It was not until October 16, 2006, just 22 days before the November 7, 2006 general election, that the Office of Special Counsel (OSC) first informed Greiner of its opinion that he was in violation of the Act. Complaint File, Tab 1. In that same letter, OSC informed Greiner that he would not face prosecution if he came into immediate compliance with the Act, either by ceasing his campaign, or by resigning his position as Chief of OPD, which would have the effect of removing him from the Act's coverage. *Id*. Despite the short notice, the respondents took steps prior to the election to insulate Greiner from further contact with federal grants, thereby achieving that same result that

would have been obtained through his resignation. Complaint File, Tab 40, Ex. R-59 (November 3, 2006 letter from Greiner's counsel to OSC); HT-2 at 22-23 (testimony of Patterson). That the respondents chose to achieve the end of compliance by means other than those recommended in OSC's letter did not, in my view, diminish the remedial effect of their efforts, yet OSC nonetheless sought Greiner's removal, and did so after an unexplained delay of nearly 2 years. It may be, as the majority finds, that the respondents' chosen method of achieving compliance did not technically constitute "cessation of activity," as the term is used in *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988), *aff'd sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989). The *Purnell* factors were not intended to be exhaustive, however, *see id.*, and there is no discernible reason not to consider the prompt institution of a compliance program as a significant mitigating factor in this case. Considering as well Greiner's exemplary employment record, I would conclude that removal is unwarranted.

¶11 For the reasons stated above, I respectfully dissent.

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Anne M. Wagner
Vice Chairman