UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 10

Docket No. CB-1216-11-0016-T-1

Special Counsel,

Petitioner,

v.

Norman Jackson and State of South Carolina,

Respondents.

February 1, 2013

Kathryn J. Lefeber, Esquire, and Leslie J. Gogan, Esquire, Washington, D.C., for the petitioner.

Norman Jackson, Columbia, South Carolina, pro se.

Alan Wilson, Natalie J. Moore, and Robert J. St. Onge, Columbia, South Carolina, for respondent State of South Carolina.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The respondent* has filed a petition for review of an initial decision in which an administrative law judge granted the petitioner's motion for summary

* There are two respondents in this appeal, Norman Jackson and the State of South Carolina. Complaint File (CF), Tab 1. For the sake of clarity, we have used the term "respondent" in the singular, and, unless otherwise noted, the term refers to Mr. Jackson.

adjudication and ordered the South Carolina Department of Transportation (SCDOT) to remove the respondent from his position. For the reasons set forth below, we VACATE the initial decision and REMAND the case to the administrative law judge for further adjudication in accordance with this Opinion and Order.

BACKGROUND

¶2 The respondent was employed by the SCDOT in connection with programs financed, in whole or in part, by federal funds. Complaint File (CF), Tab 1 at 1-2, Tab 4 at 1. The respondent was a candidate in the 2010 primary and general elections for South Carolina's Richland County Council, District 11 (County Council). CF, Tab 1 at 2, Tab 4 at 1. By letters dated May 18, 2010, and June 11, 2010, the petitioner advised the respondent that his candidacy violated the Hatch Act. CF, Tab 1 at 3, Exhibits 1, 2. Despite the petitioner's admonishments to either withdraw his candidacy or resign from employment with SCDOT, the respondent did neither. CF, Tab 1 at 3, Tab 4 at 1.

¶3 The petitioner filed a complaint with the Board charging the respondent with violating 5 U.S.C. § 1502(a)(3) of the Hatch Act and 5 C.F.R. § 151.121(c) by his candidacy in the 2010 primary and general elections for County Council. CF, Tab 1. The petitioner requested the respondent's removal. *Id.* at 3-4.

¶4 In his answer to the complaint, the respondent admitted the material facts underlying the complaint but denied that he violated 5 U.S.C. § 1502(a)(3) and 5 C.F.R. § 151.121(c) by being a candidate for elective public office in a partisan election. CF, Tab 4 at 1. He also raised a "counterclaim" against the petitioner and SCDOT, alleging that the petitioner and SCDOT's Office of General Counsel engaged in "selective prosecution" and violated his constitutional rights to equal protection and due process. *Id.* at 1-3. SCDOT moved to dismiss the respondent's counterclaim. CF, Tab 14.

¶5 The administrative law judge granted SCDOT's motion and dismissed the respondent's counterclaim against SCDOT for lack of jurisdiction, finding that he had no authority to adjudicate counterclaims among respondents. CF, Tab 19. However, the administrative law judge did not address the respondent's constitutional defense against the petitioner's prosecution.

¶6 The petitioner filed a motion for summary adjudication, arguing that no genuine issues of material fact were in dispute. CF, Tab 16 at 1. The respondent filed a response in opposition. CF, Tab 18. Based on the written record, the administrative law judge issued an initial decision granting the petitioner's motion. CF, Tab 31, Initial Decision (ID). The administrative law judge found that the respondent's candidacy constituted a violation of the Hatch Act and that removal was the appropriate sanction. *Id*. Accordingly, he ordered that the respondent be removed from his position with SCDOT. *Id.* at 30. He did not address the respondent's constitutional claims.

¶7 The respondent has filed a petition for review. Petition for Review (PFR) File, Tab 1. The petitioner has filed a response in opposition. PFR File, Tab 5.

ANALYSIS

The administrative law judge erred in granting the petitioner's motion for summary adjudication.

¶8 In granting the petitioner's motion for summary adjudication, the administrative law judge cited *Special Counsel v. Simmons*, 90 M.S.P.R. 83 (2001), and *Special Counsel v. Chidlow*, 21 M.S.P.R. 504, 505 (1984), for the proposition that summary adjudication is available in Hatch Act cases. ID at 8-9. His reliance on *Simmons* and *Chidlow* was misplaced, however. Both *Simmons* and *Chidlow* were federal Hatch Act cases and were not subject to 5 U.S.C. chapter 15, which provides as follows:

> Either the state or local officer or employee of the State or local agency employing him, or both, are entitled to appear with counsel at

> the hearing under section 1504 of this title, and be heard. After this hearing, the Merit Systems Protection Board shall –
>
> (1) determine whether a violation of section 1502 of this title has occurred;
>
> (2) determine whether the violation warrants the removal of the officer or employee from his office or employment; and
>
> (3) notify the officer or employee and the agency of the determination by registered or certified mail.

5 U.S.C. § 1505.

¶9 Because respondents in a state or local Hatch Act case have an unconditional statutory right to a hearing, the administrative law judge erred in granting the petitioner's motion for summary adjudication. *Cf. Crispin v. Department of Commerce*, 732 F.2d 919, 922 (Fed. Cir. 1984) (the statutory right to a hearing at 5 U.S.C. § 7701 (a)(1) bars summary judgment proceedings). The initial decision must therefore be vacated, and the case must be remanded for a hearing on the merits. *See Crispin*, 732 F.2d at 924.

The administrative law judge erred in failing to address the respondent's claim that the petitioner violated his constitutional rights.

¶10 Furthermore, the administrative law judge erred in failing to address the respondent's claim that the petitioner violated his due process and equal protection rights by selectively enforcing the Hatch Act. The Board has held that it lacks authority to adjudicate the constitutionality of statutes. *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 73 (1990) (declining to address respondent's claim that differences in the treatment of federal and state employees under the Hatch Act violated his constitutional right to due process and equal protection of the laws). However, the Board does have authority to adjudicate a constitutional challenge to an agency's application of a statute. *May v. Office of Personnel Management*, 38 M.S.P.R. 534, 538 (1988). Indeed, our predecessor agency, the Civil Service Commission, specifically held that it had authority to consider the constitutional applicability of the Hatch Act to particular facts. *In re Fishkin*, 2

P.A.R. 785, 790 n.6 (1968). Accordingly, on remand, the administrative law judge must provide the parties an opportunity to further develop the record on the respondent's constitutional defenses.

The administrative law judge properly dismissed the respondent's counterclaim against SCDOT for lack of jurisdiction.

¶11 On review, the respondent asserts that the administrative law judge failed to address his argument that SCDOT violated his equal protection rights by reassigning another County Council member to ensure that he was not in violation of the Hatch Act but denying the respondent's request for similar treatment. PFR File, Tab 1 at 5

¶12 We find this argument unavailing. The respondent raised this argument in his "counterclaim," and the administrative law judge properly dismissed the respondent's counterclaim against SCDOT for lack of jurisdiction during the proceedings below. CF, Tabs 4, 19. Moreover, in the initial decision, the administrative law judge explained his reasons for dismissing the respondent's "counterclaim" against SCDOT. ID at 4.

ORDER

¶13 Accordingly, we REMAND the case to the administrative law judge for further adjudication in accordance with this Opinion and Order and issuance of a new initial decision.

FOR THE BOARD:

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