UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 159

Docket No. CB-1216-09-0013-T-1

Special Counsel,

Petitioner,

v.

Phillip Mark,

Respondent.

August 2, 2010

Carolyn S. Martorana, Esquire, and Mariama Liverpool, Esquire, Washington, D.C., for the petitioner.

Timothy Welsh, Esquire, Atlanta, Georgia, for the respondent.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The respondent has filed a petition for review of the initial decision that found his removal was warranted for violating provisions of the Hatch Act, 5 U.S.C. §§ 7321-7326. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115(d),[1] AFFIRM the initial decision's findings

[1] The initial decision in this Hatch Act case is subject to the procedures for filing a petition for review set forth under 5 C.F.R. part 1201, subpart C. *See* 5 C.F.R. § 1201.125(b).

that the respondent violated the Hatch Act, and ORDER a 120-day suspension for the respondent.

BACKGROUND

¶2 The petitioner filed a four-count complaint charging that the respondent, an Internal Revenue Service (IRS) Revenue Agent, violated the Hatch Act by forwarding one e-mail on January 11, 2008, to numerous individuals including co-workers. The e-mail, from then-presidential candidate Barack Obama, solicited online contributions. The respondent had added the following message to the forwarded e-mail: "FYI . . . if you want to help out the campaign! PS . . . If you are tired of getting e-mails from me, just let a brotha know!" The respondent sent the e-mail while on duty from his government office and the e-mail included his name, title, group, duty location, and telephone number. The petitioner charged the respondent with the following: 1. Violation of 5 U.S.C. § 7323(a)(1) and 5 C.F.R. § 734.302: Prohibition Against Using One's Official Authority or Influence for the Purpose of Interfering with or Affecting the Result of an Election; 2. Violation of 5 U.S.C. § 7323(a)(2) and 5 C.F.R. § 734.303: Prohibition Against Knowingly Soliciting, Accepting or Receiving a Political Contribution from Any Person; 3. Violation of 5 U.S.C. § 7324(a)(1) and 5 C.F.R. § 734.306(a)(1): Prohibition Against Engaging in Political Activity While On Duty; and 4. Violation of 5 U.S.C. § 7324(a)(2) and 5 C.F.R. § 734.306(a)(3): Prohibition Against Engaging in Political Activity While in Any Room or Building Occupied in the Discharge of Official Duties by an Individual Employed by the United States Government or Agency Thereof. Complaint File (CF), Tab 1. The petitioner asked for the respondent's removal. CF, Tab 16 at 2-3, 7-17.

¶3 In responding to the petitioner's complaint, the respondent admitted to the facts underlying the counts and to counts 2-4. He also admitted that he violated

the Hatch Act. CF, Tabs 4, 10, 13, 17 at 7, 12. He asserted, however, that his offense warranted a 30-day suspension rather than removal. *Id.*, Tab 17 at 18.

¶4 In his initial decision, the administrative law judge set forth the background of the case, found that the respondent admitted to three counts, and found it unnecessary to make a finding on the fourth count because he found that the three counts were sufficient to support removal. Initial Decision (ID) at 2-4. He considered the six factors that the Board considers in determining the appropriate penalty in Hatch Act cases. *Id.* at 4-8. He also considered other factors, including the respondent's knowledge of the Hatch Act restrictions. *Id.* at 8-9. He concluded that removal was warranted for the respondent's Hatch Act violation. *Id.* at 9.

¶5 The respondent has filed a petition for review. Petition for Review (PFR) File, Tab 1. The petitioner has filed a response opposing the petition for review. *Id.*, Tab 3.

ANALYSIS

¶6 Because the respondent has not challenged the administrative law judge's factual findings and we perceive no error in that regard, we AFFIRM his conclusions that the respondent violated 5 U.S.C. §§ 7323(a)(2) and 7324(a)(1)-(2) of the Hatch Act. Accordingly, we proceed directly to a discussion of the appropriate penalty for the violations. *See Special Counsel v. Ware*, 114 M.S.P.R. 128, ¶ 18 (2010); *Special Counsel v. Acconcia*, 107 M.S.P.R. 60, ¶ 4 (2007).

¶7 The respondent asserts that the administrative law judge erred in concluding that removal was warranted for his Hatch Act violation. He reiterates that the Board should impose only a 30-day suspension. He apparently contends that removal is not appropriate unless the petitioner shows that his violation occurred under circumstances demonstrating deliberate disregard of the Hatch Act, and that the record does not demonstrate any such deliberate disregard. He

also contends that the administrative law judge erred in addressing some of the penalty factors and not finding that they favor mitigation. He further contends that his knowledge of the Hatch Act was not a factor warranting removal and that the penalty contradicts Board precedent. PFR at 6-14.

¶8 In considering whether removal is warranted for a Hatch Act violation, the Board looks to the seriousness of the violation, considering all aggravating and mitigating factors that bear upon the seriousness of the violation. Those factors include the following: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee had received advice of counsel regarding the activity at issue; (4) whether the employee ceased the activities; (5) the employee's past employment record; and (6) the political coloring of the employee's activities. *Ware*, 114 M.S.P.R. 128, ¶ 20; *Acconcia*, 107 M.S.P.R. 60, ¶ 4; *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). Removal must be imposed for an employee's violation of 5 U.S.C. § 7323 or § 7324 unless the members of the Merit Systems Protection Board find "by unanimous vote" that a lesser penalty is warranted, and the respondent has the burden of showing why he should not be removed. *Ware*, 114 M.S.P.R. 128, ¶ 20; *see* 5 U.S.C. § 7326; *Special Counsel v. Briggs*, 110 M.S.P.R. 1, ¶ 12 (2008), *aff'd*, 322 F. App'x 983 (Fed. Cir. 2009). After analyzing the relevant factors, we have unanimously determined that forwarding one political e-mail, under the circumstances of this case, does not warrant removal.

The nature of the offense and the extent of the employee's participation

¶9 The respondent asserts that the administrative law judge erred in finding it to be an aggravating factor that some of the e-mail recipients were federal

employees[2] even though they were not his subordinates and he did not coerce them. Citing *Special Counsel v. Morrill*, 103 M.S.P.R. 143 (2006) (Table), he contends that, under similar circumstances, the Board has agreed that a lesser penalty than removal may be appropriate. He also asserts that the administrative law judge did not address his limited participation, specifically, that he circulated only one e-mail and that he was not active in the Obama campaign. He further asserts that the administrative law judge erred in finding that the violation itself was an aggravating factor in determining the penalty. PFR at 6-7.

¶10 The Board considers any Hatch Act violation by a federal employee, on duty and in government offices, to be a serious matter. Thus, the administrative law judge properly found that the respondent's violation was serious because some of the e-mail recipients were federal employees, he used his employing agency's e-mail system, and he sent the e-mail while on duty from his agency office. ID at 5-6; *see Ware*, 114 M.S.P.R. 128, ¶ 22. In addition, the respondent's citation to *Morrill*, 103 M.S.P.R. 143, does not support his argument because *Morrill* is a non-precedential final order. *See Roche v. Department of Transportation*, 110 M.S.P.R. 286, ¶ 13 (2008), *aff'd*, 596 F.3d 1375 (Fed. Cir. 2010).

¶11 Nonetheless, not all Hatch Act violations warrant removal, and, in that regard, this case is distinguishable from our recent decision in *Ware*, 114 M.S.P.R. 128, in which we imposed the removal penalty. There, the Board ordered Ware's removal for sending multiple partisan political e-mails from her government computer and e-mail account while on duty and occupying her government office. *Ware*, 114 M.S.P.R. 128, ¶¶ 4-8, 11, 38. We explained that Ware was a Contracting Officer Technical Representative (COTR) with the

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[2] The administrative law judge stated that the record did not appear to indicate the e-mail recipients' employer. ID at 5 n.4. As the administrative law judge also found, however, the respondent admitted that some of the recipients were his co-workers. ID at 2; CF, Tab 17, Respondent's Post-Hearing Brief at 5.

Department of the Treasury's Bureau of Engraving and Printing (BEP) for the staffing contract that BEP had with, inter alia, STG International (STG), which provided staff for BEP's Health Unit. As the COTR, she ensured that the facility was properly staffed with STG employees; if any staffing problem existed, she asked STG to solve it; solutions could include, among other things, STG replacing employees; and she monitored, documented and evaluated the contractor's overall performance. *Id.*, ¶ 2.

¶12 In discussing the nature of Ware's offense and the extent of her participation, the Board found that her multiple Hatch Act violations were serious. We found that her offense included sending two e-mails that sought political contributions, one of which invited numerous people to a political fundraising dinner for Obama. *Ware*, 114 M.S.P.R. 128, ¶¶ 4-5, 22. We specifically found that Ware's offense was more serious because she solicited political contributions from three contract employees over whom she had authority and influence. *Id.*, ¶¶ 23-24. Indeed, we adopted the administrative law judge's finding that Ware had violated 5 U.S.C. § 7323(a)(1), which prohibits using one's official authority or influence for the purpose of interfering with or affecting the result of an election. *Id.*, ¶¶ 8, 14, 18. We noted that, in *Acconcia*, 107 M.S.P.R. 60, ¶¶ 4-5, 11, we similarly found removal appropriate where the employee solicited contributions from one subordinate employee. We further noted that we had also found that soliciting contributions from persons doing business with an agency is a serious violation of the Hatch Act because of the threat of coercion and the appearance that government contracts are awarded based on political patronage rather than competitive bidding. *Ware*, 114 M.S.P.R. 128, ¶ 24; *see Special Counsel v. Malone*, 84 M.S.P.R. 342, ¶ 42 (1999).

¶13 Here, in contrast to Ware, the respondent forwarded only one e-mail. Significantly, he did not solicit subordinates or other individuals subject to his

control or authority.[3] Moreover, the petitioner did not charge, nor is there any evidence, that the respondent was a political operative or otherwise actively engaged in political fundraising or other campaign activity apart from the one e-mail that he forwarded. Therefore, we find that, although the respondent's offense was serious, this factor provides support for mitigation.

The employee's motive and intent

¶14 The respondent asserts that the administrative law judge erred in finding unpersuasive his explanation that his intent in forwarding the e-mail was simply to inform others how they could contribute, instead of to solicit contributions, and thus erred in finding intent to be an aggravating factor. He contends that the administrative law judge did not distinguish his situation from *Special Counsel v. Collier*, 101 M.S.P.R. 391 (2006), a case involving substantially more solicitations by a respondent far more politically active, which warranted only a suspension. He argues that here, as in *Collier*, he was unaware that he was violating the Hatch Act and expressed remorse and a determination to avoid further violations. PFR at 7-8.

¶15 The respondent has not shown that the administrative law judge erred in considering this factor. As the administrative law judge found, in forwarding the e-mail, the respondent wrote: "if you want to help out the campaign!" and the e-mail included three links enabling on-line contributions. ID at 6; CF, Tab 1, Ex. 1. The respondent has thus shown no error in the administrative law judge's rejection of his contention that his intent was only to inform, rather than to solicit contributions. *See Ware*, 114 M.S.P.R. 128, ¶ 25. Claims that he did not know that he was committing a violation do not support mitigation. *See, e.g., Ware*,

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[3] Although the petitioner charged the respondent in count 1 with violating 5 U.S.C. § 7323(a)(1), it has not objected to the administrative law judge's decision not to make a finding on count 1 and the record does not reflect that the respondent exercised any authority over the recipients of the e-mail.

114 M.S.P.R. 128, ¶ 27; *Purnell*, 37 M.S.P.R. at 203-04. Further, the circumstances need not demonstrate that he acted knowingly in disregard of the law to warrant removal. *Ware*, 114 M.S.P.R. 128, ¶ 27; *see Special Counsel v. Blackburne*, 58 M.S.P.R. 279, 283-84 (1993). In addition, the respondent has not contested the administrative law judge's finding that Collier did not solicit political contributions from federal employees. ID at 5. Moreover, as the administrative law judge also pointed out, 3 days after the respondent sent his e-mail, his manager sent an e-mail to a number of employees, including the respondent, reminding them that they were prohibited from soliciting political contributions or conducting partisan political activity while on duty or in the workplace, and inviting individuals who thought that they might have violated the Hatch Act to notify her. *Id.* at 9. The respondent did not come forward at that point. Further, we find that whether or not the respondent expressed remorse is insufficient to affect the penalty determination in this case. *See, e.g.*, *Ware*, 114 M.S.P.R. 128, ¶ 37.

Whether the employee had received advice of counsel regarding the activities at issue

¶16 The respondent has not contested the administrative law judge's findings that mitigation may be appropriate where an employee acted on advice of counsel in violating the Hatch Act and that nothing in the record showed that he acted on the advice of counsel in forwarding the e-mail. ID at 6-7. We find that, even if this is not an aggravating factor, it is not a mitigating factor. *See Ware*, 114 M.S.P.R. 128, ¶ 29.

Whether the employee ceased the activities

¶17 The respondent asserts that the administrative law judge erred in finding, under *Special Counsel v. Jakiela*, 57 M.S.P.R. 228 (1993), that his ceasing his prohibited activity after being reminded that soliciting contributions while on duty was improper did not justify a lesser penalty. He also asserts that *Jakiela* involved far more aggravating circumstances. PFR at 8. As in *Jakiela*, 57

M.S.P.R. at 234,[4] the administrative law judge found that the respondent's ceasing his prohibited activity was a mitigating, but not determinative factor. ID at 7. The administrative law judge's finding is in accordance with the Board's recognition that the cessation of the objectionable political activity, regardless of the reason for doing so, provides support for mitigation. *See Ware*, 114 M.S.P.R. 128, ¶ 32; *Acconcia*, 107 M.S.P.R. 60, ¶ 8.

The employee's past employment record

¶18 The respondent has not addressed the administrative law judge's finding that he had been a federal employee for only a little over 2 years when he violated the Hatch Act and, although not significant, he received a February 25, 2009 admonishment for another offense. ID at 7. The Board has considered in Hatch Act cases the mitigating effect of a substantial period of service, lack of disciplinary record, and satisfactory performance record. *See, e.g., Ware*, 114 M.S.P.R. 128, ¶ 33; *Special Counsel v. Pierce*, 85 M.S.P.R. 281, ¶¶ 2-5 (2000). Nonetheless, the Board has found that such a record is not determinative. *See Ware*, 114 M.S.P.R. 128, ¶ 33. Thus, we find that the respondent's brief tenure and admonishment is not an aggravating factor.

The political coloring of the employee's activities

¶19 Again, the respondent has not addressed the administrative law judge's finding that his forwarding an e-mail and soliciting contributions to support a partisan political candidate established the political coloring of his activity, and, therefore, that this factor did not support mitigation. ID at 7-8. The administrative law judge also recognized, however, that the respondent was not himself a candidate for partisan political office. *Id.* at 8. As discussed above, we find that the evidence did not show that the respondent was a political operative

[4] Although this discussion is in the administrative law judge's recommended decision, the Board explicitly incorporated the recommended decision into its own precedential decision. *Jakiela*, 57 M.S.P.R. at 230.

or otherwise actively engaged in political fundraising or other campaign activity apart from the one e-mail that he forwarded, and that this provides some support for mitigation.

Knowledge of the Hatch Act

¶20 The respondent asserts that the administrative law judge erred in finding that his knowledge of the Hatch Act's proscription of his activity, as evidenced by various information he received, was an aggravating factor. He acknowledges that the pamphlet he received when he joined the IRS, *Plain Talk About Ethics and Conduct*, included some Hatch Act information. He contends, though, that the annual online ethics training's Hatch Act information was only a link to the pamphlet and that employees were not required to research each of the links. He further contends that the reminder the IRS sent about restrictions on political activity 4 days before he forwarded his e-mail was a newsletter that provided only a link, and that he did not read the newsletter before he sent his e-mail. He notes that the administrative law judge did not mention his testimony that he asked what the Hatch Act was when contacted by the petitioner's investigator, indicating his ignorance. He thus argues that he did not defy or disregard explicit warnings and that the mere availability of information did not support the administrative law judge's conclusion that he violated the Hatch Act after being repeatedly informed of its proscriptions. PFR at 8-10.

¶21 The respondent has not shown that the administrative law judge erred. The administrative law judge correctly found that the respondent admitted that he knew or should have known about the political activity restrictions of the Hatch Act; that when he started his employment, he was given information about the Hatch Act; that the annual ethics training he was required to complete included information on the Hatch Act; and that 4 days before he forwarded the e-mail, an agency electronic newsletter reminded employees about restrictions on their political activity and provided links to the petitioner's Hatch Act page and a Hatch Act PowerPoint presentation. ID at 8-9; CF, Tabs 10, 15, Ex. 2. The

administrative law judge thus correctly found that, whether the respondent actually knew about the Hatch Act's restrictions or not, the knowledge was imputed to him and claims that he did not know that he was committing a violation did not support mitigation. ID at 8-9; *see, e.g.*, *Purnell*, 37 M.S.P.R. at 203-04.

Other Hatch Act cases

¶22 The respondent asserts that the administrative law judge's penalty determination contradicts the Board's precedent, again citing *Morrill*, 103 M.S.P.R. 143, and *Collier*, 101 M.S.P.R. 391. PFR at 10. He also asserts that in *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253 (2006), a federal employee forwarded an e-mail to 31 other federal employees in his agency urging them to support a Democratic candidate and the petitioner settled the matter for a 30-day suspension. PFR at 11. We have addressed the respondent's allegations concerning *Morrill* and *Collier* above. Further, the respondent has not shown that the Board should consider a decision in which the petitioner decided to settle the case. *See Special Counsel v. Lee*, 58 M.S.P.R. 81, 90 (1993).

¶23 The respondent argues that the Board has traditionally reserved removal for more egregious cases. He cites *Acconcia*, 107 M.S.P.R. 60, in which the Board noted as an aggravating factor that Acconcia solicited a subordinate. He states that Acconcia was an attorney who was responsible for training others in the Hatch Act, knew her actions were outside the rules, and had both prior and subsequent discipline. He also cites *Special Counsel v. Eisinger*, 103 M.S.P.R. 252 (2006), *aff'd*, 236 F. App'x 628 (Fed. Cir. 2007), stating that the Board found removal appropriate for Hatch Act violations by an attorney who had engaged in significant political activity over a 3-year period at work.[5] PFR at 11.

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[5] The appellant also cites *Special Counsel v. Shafer*, CB-1216-08-0008-T-1 (July 28, 2008), to support his argument. PFR at 11-12. This is an initial decision with no precedential value. *See, e.g.*, *Roche*, 110 M.S.P.R. 286, ¶ 13.

¶24 As discussed above under factor 1, we have considered the respondent's arguments that his violation, which consisted of forwarding one e-mail to individuals who were not under his control or authority, was not as egregious as those in cases in which the Board has ordered the respondents' removals. We have agreed with him that, under the particular facts of this case, his violation did not warrant removal. As also previously discussed, however, we consider any Hatch Act violation by a federal employee, on duty and in government offices, to be a serious matter. Thus, the Board has unanimously agreed to impose the significant penalty of a 120-day suspension for the respondent's Hatch Act violation.

ORDER

¶25 The Board ORDERS the Internal Revenue Service to suspend the respondent for 120 days. *See* 5 U.S.C. § 7326; 5 C.F.R. § 1201.126(c). The Board also ORDERS the petitioner to notify the Board within 30 days of the date of this Opinion and Order whether the respondent has been suspended as ordered. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.126(c) (5 C.F.R. § 1201.126(c)).

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, www.cafc.uscourts.gov. 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.