UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2007 MSPB 227

Docket No. CB-1216-06-0007-T-1

Special Counsel,

Petitioner,

v.

Paula Acconcia,

Respondent.

September 26, 2007

Amber Bell Vail, Esquire, Washington, D.C., for the petitioner.

Paula Acconcia, Lake Waukomis, Missouri, pro se.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The petitioner has filed a timely petition for review of the Administrative Law Judge's (ALJ) recommended decision (RD) which found that the respondent violated several provisions of the Hatch Act, 5 U.S.C. §§ 7321-7326, but recommended that the respondent serve a 45-day suspension rather than be removed as the penalty for her violations. For the reasons set forth below, the Board ADOPTS the RD with regard to the ALJ's findings that the respondent

violated 5 U.S.C. §§ 7323 and 7324,[1] but, contrary to the recommendation that the Board order the respondent to serve a 45-day suspension, ORDERS the respondent removed from her position.

BACKGROUND

¶2 The respondent is an Assistant United States Trustee employed in the Department of Justice's Kansas City, Missouri District Office of the United States Trustee. Complaint File (CF), Tab 1. The Office of Special Counsel (OSC) filed a complaint charging the respondent with three counts of violating the Hatch Act, specifically 5 U.S.C. §§ 7323(a)(1)-(2), and 7324(a)(2). *Id.* Count one of the complaint charged the respondent with violating 5 U.S.C. § 7323(a)(1) and 5 C.F.R. § 734.302 by using her official authority or influence to coerce a subordinate employee to make a political contribution for the purpose of affecting the result of a gubernatorial election. *Id.* at 2-4. In support of its charge, the petitioner alleged that on or about March 19, 2004, the respondent gave an invitation to a fundraiser soliciting contributions on behalf of a Democratic candidate for Governor of Missouri, Claire McCaskill, to a subordinate, Sherri Wattenbarger, a trial attorney in the Kansas City office. *Id.* The petitioner further alleged that the respondent hand wrote "Solicited by Pam Palmer" on the document because she wanted Ms. Palmer, a friend of the respondent, to receive credit from the McCaskill campaign for the contribution, and she also wrote an address on the solicitation indicating where the

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[1] The record does not establish that the respondent was on duty during the events at issue in this appeal, and, to the extent that the ALJ determined she was on duty, we do not adopt that finding. Nevertheless, OSC actually charged the respondent with violating 5 U.S.C. § 7324(a)(2), which prohibits federal employees from engaging in political activity while in any room or building occupied in the discharge of official duties by an individual employed by the Government of the United States. CF, Tab 1 at 3-4. Because the record establishes that the respondent solicited a political contribution from Wattenbarger while both women were present in the Office of the United States Trustee, we find that the petitioner established that the respondent's actions violated 5 U.S.C. § 7324(a)(2), as OSC charged.

contribution should be sent. *Id.* Count two of the complaint charged the respondent with violating 5 U.S.C. § 7323(a)(2) and 5 C.F.R. § 734.303, by knowingly soliciting a political contribution when she invited Wattenbarger to the McCaskill fundraiser. *Id.* at 4. Count three of the complaint charged the respondent with violating 5 U.S.C. § 7324(a)(2) and 5 C.F.R. § 734.306(a)(3) by engaging in political activity while in a room or building occupied in the discharge of official duties by an individual employed by the federal government, because the acts described in the first two counts occurred in the District Office of the United States Trustee, where the respondent and Wattenbarger both worked. *Id.* at 3-4. The petitioner alleged that the respondent had knowledge about the political activity restrictions of the Hatch Act, in part through a March 9, 2004 e-mail message regarding restrictions on political activity which was sent to all employees of the Office of the United States Trustee. *Id.* at 5-7. Attached to the e-mail message were four memoranda providing official guidance on the subject. *Id.*, Exhibit B. The petitioner further alleged that the respondent "acknowledged that she knew 'it was a little outside the rules' when she handed Ms. Wattenbarger the invitation to the fundraiser." *Id.* at 6. Accordingly, the petitioner contended that the respondent's Hatch Act violations were knowing, willful, and warranted her removal. *Id.* at 6-7.

¶3 After holding a hearing, the ALJ found that the respondent violated the Hatch Act proscriptions against knowingly soliciting a political contribution from any person, engaging in political activity while on duty in a government office, and using her official authority for the purpose of affecting the result of an election. CF, Tab 44, Recommended Decision (RD) at 8-10. He also found that, at the time that the events described above transpired, the evidence showed that the respondent was a federal government employee who was aware that the Hatch Act prohibited engaging in political activity in a government office or building and soliciting political contributions. RD at 8. The ALJ further found that Wattenbarger was the respondent's subordinate, not a personal friend, and that

"not only had Ms. Wattenbarger done nothing to suggest to [the respondent] that she was interested in supporting the McCaskill campaign, she had told [the respondent] that she disapproved of that campaign." *Id.* In considering the recommended penalty, the ALJ reviewed the pertinent factors, but he decided that removal was too severe a penalty for "a single solicitation by an individual who had no relationship with the political campaign involved and who made no attempt to follow up or ascertain whether a contribution was made." RD at 12. Accordingly, the ALJ recommended that the respondent serve a 45-day suspension in lieu of removal. *Id.* at 13. The petitioner filed timely objections to the RD, arguing that the presumptive penalty in a Hatch Act case is removal, unless the Board determines by unanimous vote that the respondent has demonstrated compelling reasons not to order her removal, and that the ALJ's recommended penalty of a 45-day suspension is neither supported by the record nor the Board's caselaw. Petition for Review File (PFRF), Tab 1 at 11. The respondent did not file a cross-petition for review nor a response to OSC's petition.

ANALYSIS

¶4 Because the respondent has not challenged the ALJ's findings of fact, and we perceive no error in that regard, we ADOPT the ALJ's factual findings and AFFIRM his conclusions that the respondent violated 5 U.S.C. §§ 7323 and 7324. Accordingly, we proceed directly to a discussion of the appropriate penalty for the respondent's violations of the Hatch Act. As the petitioner correctly asserts, "under 5 U.S.C. § 7326, removal is presumptively appropriate for a federal employee's violation of the Hatch Act, unless the Board finds by unanimous vote that the violation does not warrant removal, whereupon a penalty of not less than 30 days' suspension without pay shall be imposed by direction of the Board." *Special Counsel v. Simmons*, 90 M.S.P.R. 83, ¶ 14 (2001); *see* 5 U.S.C. § 7326. The factors which the Board considers in determining the appropriateness of a

penalty for a federal employee's violation of the Hatch Act are: (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 activities at issue; (4) whether the employee had ceased the activities; (5) the employee's past employment record; and, (6) the political coloring of the employee's activities. *Special Counsel v. Lee*, 58 M.S.P.R. 81, 91 (1993). Generally, a Hatch Act violation 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).

¶5 The nature of the offense, the coercion of political contributions, is one of "the most pernicious of the activities made unlawful by the Hatch Act," and the Board has found that the solicitation of political contributions from a subordinate employee warrants removal.[2] *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 201-02 (1988), *aff'd sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989). Although the ALJ downplayed the extent of the respondent's participation, finding it was a "single solicitation" with "no pattern of activities in which the respondent continued to engage," and that it did not appear that the respondent attempted to determine whether Wattenbarger actually made the contribution, RD at 11, the record establishes that the respondent attempted to coerce a political contribution from a subordinate employee. Hence,

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[2] In recommending that the respondent not be removed for her Hatch Act violations, the ALJ cited two cases where federal government employees solicited political contributions, but the Board ordered those respective agencies to suspend rather than remove the employees. RD at 12-13; *see Special Counsel v. Collier*, 101 M.S.P.R. 391 (2006) (30-day suspension); *see also Special Counsel v. Rivera*, 61 M.S.P.R. 440 (1994) (60-day suspension). The ALJ found that the respondent's behavior fell "somewhere between *Collier* and *Rivera* and recommend[ed] a 45-day suspension rather than removal." RD at 13. However, unlike the instant matter, neither *Collier* nor *Rivera* involved soliciting political contributions from federal employees or subordinates. The fact that the respondent in this case solicited a political contribution from a subordinate federal employee is a significant, aggravating factor which distinguishes the instant case from both *Collier* and *Rivera*.

the nature of the offense, the coercion of political contributions from a subordinate employee, is a significant aggravating factor.

¶6 The ALJ also minimized the second factor, the respondent's motive and intent, noting that the respondent testified that she wanted Palmer "to get credit for any contribution that Ms. Wattenbarger might make," and that the record contained "no evidence that the respondent was actively involved in the McCaskill campaign other than making her own monetary contribution or that she stood to personally gain anything if Ms. Wattenbarger had made a contribution." RD at 11. The respondent described her motive as "not *expressly* trying to separate Ms. Wattenbarger from her bankroll, but merely seeking to direct it into a Pam Palmer envelope if it was headed in that direction anyway." CF, Tab 43 at 7. However, even if the respondent was not personally involved in McCaskill's campaign and her primary motive was to benefit Palmer in the event that Wattenbarger chose to contribute to McCaskill's campaign, the intent to solicit a campaign contribution from a subordinate employee on behalf of the respondent's favored candidate for the purpose of benefitting a friend of the respondent who was personally involved in the campaign is not a significant factor that mitigates in favor of a penalty less than removal. This is especially true in light of one of the purposes of the Hatch Act, i.e., "to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 566 (1973).

¶7 Regarding the third factor, whether the respondent received advice of counsel regarding the activities at issue, the record does not reflect that she did. However, the ALJ noted that the respondent is an attorney who not only had knowledge of the Hatch Act proscriptions against political activity, but also bore the responsibility for assuring that her subordinate employees were aware of them as well. RD at 11. Further, the AJ found that the respondent stated when she

gave the solicitation to Wattenbarger, "that she knew [it] was 'a little outside the rules.'" RD at 3. As the ALJ noted regarding this aggravating factor, "[t]here is little to be said other than [the respondent] used incredibly bad judgment in passing on a political campaign solicitation to a subordinate in their workplace." RD at 11.

¶8 Regarding the fourth factor, whether the employee has ceased the activities, the ALJ again noted his finding that "[t]his was a single incident, which given the consequences, [he found] it unlikely that the respondent would ever repeat." *Id.* The ALJ's finding that the respondent ceased the activity and appeared unlikely to repeat the activity provides some support in favor of mitigating the penalty.

¶9 The respondent's past employment record, the fifth factor under consideration, indicates that since becoming an Assistant U.S. Trustee in 1988, the respondent has had the duty of supervising employees of the Kansas City District Office of the U.S. Trustee, including Ms. Wattenbarger. RD at 11-12; CF, Tab 43 at 1. In September 2004, the respondent received a 14-day suspension for unprofessional conduct, partly regarding her supervision of Wattenbarger. CF, Tab 40, Exhibit 4. The memorandum of decision on the respondent's suspension indicates that the respondent began inconsistently enforcing attendance requirements for staff meetings against Wattenbarger following Wattenbarger's involvement in an incident which resulted in the respondent receiving an official reprimand in December 2003. *Id.* at 4. The suspension was preceded by four separate counseling memoranda also regarding unprofessional conduct in the workplace. *Id.* Thus, the respondent's past employment record is not a significant mitigating factor.

¶10 The final factor to be considered is the political coloring of the employee's activities. The respondent attempted to coerce a political contribution from a subordinate for a gubernatorial candidate associated with a national political party, an act with significant political coloring. Although the ALJ found that the

invitation to the fundraiser which the respondent gave Wattenbarger did not indicate which party McCaskill represented, RD at 12, the record indicates that both women understood that McCaskill was campaigning to be selected as the Democratic candidate for the partisan political office of Governor, and the fact that the respondent considered Wattenbarger to be a member of the same national political party, CF, Tab 38 at 2, does not change the political coloring of the respondent's activities or provide a reason to mitigate the penalty. Accordingly, the record reveals significant aggravating factors and provides little support for mitigation. Furthermore, the circumstances indicated that the respondent acted with knowledge that her activities were prohibited by the Hatch Act. Therefore, the Board finds that the presumptive penalty of removal is appropriate in this matter. 5 U.S.C. § 7326.

ORDER

¶11 The Department of Justice is ORDERED to remove the respondent from her position as an Assistant United States Trustee. The Office of Special Counsel is ORDERED to notify the Board within 30 days of the date of this Opinion and Order whether the respondent has been removed 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 1201.113(c) (5 C.F.R. § 1201.113(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, 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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Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.