UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 353

Docket No. CB-1216-06-0006-T-1

Special Counsel,

Petitioner,

v.

Robert Wilkinson,

Respondent.

December 14, 2006

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

J. Ward Morrow, Esquire, Washington, D.C., for the respondent.

BEFORE

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

OPINION AND ORDER

¶1 The Office of Special Counsel (OSC) has filed a timely petition for review of the administrative law judge's (ALJ) recommended decision finding that the respondent did not violate 5 U.S.C. § 7324(a), a provision of the Hatch Act, 5 U.S.C. §§ 7321-7326, and denying OSC's request for disciplinary action. For the reasons set forth below, we GRANT the petition for review; REVERSE the recommended decision; FIND that the respondent violated the Hatch Act as charged; and REMAND this appeal to the ALJ to allow the parties to present evidence and argument as to the appropriate penalty under the circumstances of this case.

BACKGROUND

¶2 The material facts in this case are not in dispute. The respondent is a career federal employee of the Environmental Protection Agency (EPA) and is covered by the Hatch Act pursuant to 5 U.S.C. § 7322(1)(A). Complaint File (CF), Tabs 1, 4. While on duty in his government office on September 30, 2004, the respondent sent an electronic message (e-mail) using his government computer to 3 EPA mailbox groups, which resulted in 31 EPA employees receiving the e-mail. The respondent's e-mail forwarded a letter from the Democratic National Committee (DNC) that was signed by Terry McAuliffe, the Chairman of the DNC at that time. The text of the DNC letter, in part, provided:

> Tonight, don't let George Bush's henchmen steal another victory. We need your online help immediately after the debate, so save this email, print it out, and have it ready with you as you watch the first Presidential debate tonight.
>
> We all know what happened in 2000. Al Gore won the first debate on the issues, but [the] Republicans stole the post-debate spin. We are not going to let that happen again, and you will play a big role.
>
> Immediately after the debate, we need you to do three things: vote in online polls, write a letter to the editor, and call in to talk radio programs. Your 10 minutes of activism following the debate can make the difference.

The letter then provided instructions and information on how to "**Vote,**" "**Write,**" and "**Call,**" immediately following the debate and implored upon the reader that: "Your actions immediately after the debate tonight can help John Kerry win on November 2. Make your voice heard!" CF, Tab 1, Ex. A. John Kerry was the Democratic Party candidate for President of the United States in the 2004 presidential election. The DNC letter closed by stating: "PS: Make sure to forward this email to at least 10 people who will be watching the debate. Also, give printed copies to your friends, family members, coworkers and neighbors and get them involved." *Id.*

¶3 OSC filed a December 15, 2005 complaint alleging in Count One that on September 30, 2004, the respondent violated 5 U.S.C. § 7324(a)(1) and 5 C.F.R. § 734.306(a)(1) by engaging in political activity while on duty; and in Count Two that the respondent violated 5 U.S.C. § 7324(a)(2) and 5 C.F.R. § 734.306(a)(3) by engaging in the political activity set forth in Count One while he was in a government office. CF, Tab 1. In support of its assertion that the respondent knowingly and willfully violated the Hatch Act, OSC attached copies of EPA's December 17, 1999 memorandum instructing its employees not to engage in, *inter alia*, partisan political activity ("activity directed toward the success or failure of a political party or candidate of a political party") while "on the clock" or in a government owned or leased office space, and a January 27, 2000 follow-up memorandum warning employees not to forward e-mails, letters, or faxes that could be construed as partisan political material while on official time or using government equipment because such activity could be regarded as participation in a political activity while on duty and could also convey the impression that the EPA was endorsing a particular political candidate. CF, Tab 1, Exs. B-C.

¶4 The respondent's response to the charges admitted the material facts of OSC's charges but denied that his activity constituted a violation of the Hatch Act. CF, Tabs 4, 6. The respondent asserted several legal arguments as to why his conduct should not be deemed a violation of the Hatch Act. *Id.* The respondent moved to dismiss the complaint with prejudice based on his asserted legal arguments. CF, Tabs 4, 6.

¶5 The ALJ issued a notice that he would treat the respondent's motion to dismiss as a motion for summary judgment, unless OSC could show by affidavit or specific evidence that there were disputed issues of material fact. CF, Tab 8. OSC filed a response to the respondent's motion for summary judgment and a cross-motion for summary judgment, in which it asserted that there were no disputed material facts and the undisputed facts showed that the respondent's conduct violated the Hatch Act. CF, Tabs 9-10. Pursuant to an order of the ALJ,

the parties also submitted briefs on the impact of the 1993 amendments to the Hatch Act. CF, Tabs 11-13.

¶6 After finding that there were no genuine issues of material fact, the ALJ issued a recommended decision granting the respondent's motion for summary judgment. Initial Decision (ID) at 2-27. The ALJ found that the legislative history of the 1993 amendments to the Hatch Act suggests that the Office of Personnel Management's (OPM) definition of the term "political activity" in its regulations implementing the Hatch Act is impermissibly broad because OPM's definition, if so interpreted, would prohibit activity expressly allowed by 5 U.S.C. §§ 7321 and 7323, specifically, disseminating one's opinions on a political subject or candidate. ID at 6-9. Thus, the ALJ found that OPM's definition of "political activity" under 5 C.F.R. § 734.101 should be given no weight in considering whether the respondent's conduct violated the Act because the ALJ found OPM's definition to be manifestly contrary to the plain language of the statute. ID at 9.

¶7 The ALJ found that 5 U.S.C. § 1212(f) authorizes OSC to issue advisory opinions concerning potential Hatch Act violations by federal, state, and local government employees. ID at 9. The ALJ reviewed OSC's May 30, 2002 advisory regarding the use of electronic communications to engage in political activity while on duty or in a government owned or leased office space, as well as EPA's December 17, 1999, and January 27, 2000 memoranda regarding the Hatch Act, and the Hatch Act portion of EPA's 2004 annual ethics training. ID at 9-15. The ALJ found that EPA's 1999 and 2000 memoranda were superseded by EPA's 2004 annual ethics training and its reference to OSC's May 30, 2002 Hatch Act advisory. ID at 15 n.6.

¶8 The ALJ concluded that the respondent's conduct was permitted by the plain language of 5 U.S.C. § 7323(c), allowing an employee to express his or her opinion on political subjects or candidates, given that section 7321 of the Hatch Act and OPM's regulation at 5 C.F.R. § 734.202 "clearly state that an employee

may participate in the political process [sic] of the Nation to the extent not expressly prohibited." ID at 15-16. The ALJ concluded that no statute or regulation expressly prohibited the conduct the respondent engaged in, and:

> Therefore, an employee's expression of his or her personal opinion on a matter of politics does not become a Hatch Act violation by virtue of the fact that it is conveyed via a government computer, while an employee is on duty, to thirty fellow employees via email. Similarly, the expression of an employee's opinion on partisan political matters does not become a Hatch Act violation simply because it references material emanating from a partisan political organization recommending that recipients take action in support of a partisan political candidate.

ID at 14-15. The ALJ alternatively concluded that, even if he had found an ambiguity created by the Hatch Act sections allowing expressions of personal opinions on political subjects and the sections prohibiting political activity while on duty or in a government space, the legislative history of the 1993 amendments to the Hatch Act support a conclusion that the respondent's conduct was not prohibited because it could not be "deemed coercive," and, thus, "his conduct was not of the type contemplated by Congress to be within the realm of prohibited political activity while on duty." ID at 16-17. Finally, allegedly relying on the "rule of lenity" analysis the Board utilized in *Special Counsel v. Malone*, 84 M.S.P.R. 342, ¶ 7 (1999) to analyze an ambiguous portion of the Hatch Act's penalty section, the ALJ concluded that the respondent did not violate the Hatch Act because he was not provided with sufficiently clear information regarding the Hatch Act such that a reasonably prudent person would have known to avoid the conduct the respondent engaged in.[1] ID at 17-23. The ALJ also recommended that the Board adopt as an element of proof of a Hatch Act violation that OSC be

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[1] In *Special Counsel v. Sims*, 102 M.S.P.R. 288, ¶ 9 (2006), the Board rejected this analysis. In *Sims*, the Board found that the rule of lenity is applicable to the issue of the proper penalty for a violation of the Hatch Act, but it is not applicable to the determination of whether a violation of the Hatch Act occurred.

required to show that the alleged violator was given information regarding the Hatch Act such that a reasonably prudent person would have avoided the conduct that allegedly violated the Act.[2] ID at 23-27.

¶9 OSC has filed a petition for review asserting that the initial decision is based on an erroneous interpretation of statute or regulation. Petition For Review File (PFRF), Tab 1; *see* 5 C.F.R. § 1201.115(d)(2). The respondent has filed a response in opposition to OSC's petition for review. PFRF, Tab 6. For the reasons set forth below, we reject the ALJ's legal analysis, conclusions, and recommendation as contrary to law.

ANALYSIS

The undisputed material facts establish that the respondent violated the Hatch Act as charged.

¶10 The Hatch Act provides, in pertinent part, as follows:

> An employee may not engage in political activity-
>
> (1) while the employee is on duty; [or]
>
> (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof . . . .

5 U.S.C. § 7324(a)(1)-(2). The elements of a charge of violating 5 U.S.C. § 7324(a)(1) are: (1) The respondent is an employee within the meaning of 5 U.S.C. § 7322(1); (2) he engaged in political activity; and (3) he did so while on

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[2] We note that the Board has previously rejected a finding that an employee's conduct must be knowing and willful to constitute a violation of the Hatch Act. *See Special Counsel v. Alexander*, 71 M.S.P.R. 636, 646 (1996). Rather, the Board has stated that to demonstrate a violation of the Hatch Act, OSC must demonstrate only that an employee covered by the Act engaged in political activity prohibited by the Act, and that the employee's intent is relevant only to the determination of the penalty to be imposed for the violation. *Id.* Accordingly, we decline the ALJ's invitation to impose an additional element of proof to establish a violation of the Hatch Act.

duty. 5 U.S.C. §§ 7322(1), 7324(a)(1). The elements of a charge of violating 5 U.S.C. § 7324(a)(2) are: (1) The respondent is an employee within the meaning of 5 U.S.C. § 7322(1); (2) he engaged in political activity; and (3) he did so while in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof. 5 U.S.C. §§ 7322(1), 7324(a)(2). It is undisputed that the respondent is an employee as defined by 5 U.S.C. § 7322(1); that on September 30, 2004, he sent an e-mail to 31 EPA employees that forwarded the DNC letter set forth, in part, in ¶ 2 of this opinion; and that he was on duty and in a government office at the time he sent the e-mail. CF, Tab 1, Ex. A, Tabs 4, 6. Thus, the only issue is whether the respondent's act of sending the DNC letter to 31 EPA employees constituted "political activity."

¶11 OPM's regulations implementing 5 U.S.C. § 7324 provide the following definition of "political activity":

> *Political activity* means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.

5 C.F.R. § 734.101. As mentioned previously, the ALJ found that OPM's definition of political activity is impermissibly broad, because it would prohibit activity that is expressly allowed by 5 U.S.C. §§ 7321 and 7323(c), specifically, the expression of one's opinion on a political subject.

¶12 Section 7323 of the Hatch Act, which sets forth a general authorization allowing most federal employees to engage in political activities and then goes on to set forth specific types of political activities federal employees are prohibited from engaging in, specifically authorizes most federal employees to "take an active part in political management or in political campaigns." 5 U.S.C. § 7323(a).[3] Although the Hatch Act does not contain an explicit definition of

[3] Section 7323(b) further limits the political activity of employees of particular federal agencies and sub-agencies.

"political activity," the structure of the statute makes it clear that Congress intended the term "political activity" to encompass "taking an active part in political management or in political campaigns" because such activities are explicitly authorized by § 7323(a), the subsection that describes the specific political activities that are either authorized or prohibited for most federal employees. Further, 5 U.S.C. § 7323(b)(4) provides that:

> (4) For the purposes of this subsection, the term "active part in political management or in a political campaign" means those acts of political management or political campaigning which were prohibited for employees of the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

Thus, if an employee engages in an act of political management or political campaigning that was prohibited for employees of the competitive service before July 19, 1940, by determinations of the Civil Service Commission, that employee is deemed to have taken an active part in political management or in a political campaign and has engaged in political activity within the meaning of the Hatch Act.

¶13 One of the acts of political management or political campaigning that was prohibited for employees of the competitive service before July 19, 1940, was the distribution of campaign literature. *See United States Civil Service Commission v. National Association Of Letter Carriers*, 413 U.S. 548, 589 (1973). The content of the DNC letter that the respondent distributed established that the letter was intended to encourage its readers to act so as to increase the likelihood of John Kerry's election to the partisan political office of President of the United States by influencing the public's perception in favor of the view that Kerry had "won" the Presidential debate. We find that the DNC letter at issue in this case, i.e., textual material authored and initially distributed by a national committee of a political party on behalf of that party's candidate for a partisan political office and intended for further distribution by its recipients, constitutes campaign

literature. *See* 5 C.F.R. § 734.101 ("*Campaign* means all acts done by a candidate and his or her adherents to obtain a majority or plurality of the votes to be cast toward a nomination or in an election."). We further find that the respondent's dissemination of the DNC campaign literature to his fellow EPA employees by e-mail constitutes "distribution" of campaign literature and therefore constitutes "political activity" under the Hatch Act, regardless of whether OPM's definition of that term may be deemed to be too broad.

¶14 Nevertheless, we do not find the ALJ's reasoning for rejecting OPM's definition of "political activity" persuasive. In rejecting OPM's definition, the ALJ found that it was too broad because "if interpreted broadly, [it] clearly covers activities expressly allowed by 5 U.S.C. §§ 7321 and 7323." ID at 8. The ALJ also found that because § 7323(c) made clear that a federal employee is entitled to express his or her opinion on political subjects and candidates, "an employee's expression of his or her personal opinion on a matter of politics does not become a Hatch Act violation by virtue of the fact that it is conveyed via a government computer, while an employee is on duty, to thirty fellow employees via email." ID at 16. Thus, the initial decision suggests that the ALJ found OPM's definition of the term "political activity" too broad because the Hatch Act should not be interpreted to preclude federal employees from engaging in activities authorized by 5 U.S.C. § 7323 while they are on duty. We reject this suggestion. Rather, we interpret the Hatch Act, specifically 5 U.S.C. § 7324(a), as placing certain limitations on the circumstances under which federal employees may engage in political activity otherwise authorized by 5 U.S.C. § 7323. Section 7323 defines the permissible and prohibited political activities of federal employees by describing the type of activities that are permitted and prohibited without regard for the particular circumstances in which federal employees may find themselves. Section 7324, by contrast, does not prohibit political activity on the basis of the type of activity; rather, it describes particular circumstances in which federal employees are prohibited from engaging in

political activities. Thus, if § 7324(a) is interpreted as not precluding a federal employee who is on duty or in a government building or office from engaging in political activity otherwise authorized by § 7323, § 7324(a) would be rendered superfluous and inoperable because it would merely preclude a federal employee from engaging in the types of political activity that are already prohibited by virtue of the prohibitions contained within § 7323. Thus, it is clear from the structure of the Hatch Act that the political activities that an employee is prohibited from engaging in under the circumstances described in § 7324(a) are not those prohibited by § 7323, because such activities are prohibited regardless of the particular circumstances; rather, § 7324(a) places limits on when and where an employee may engage in political activities that are otherwise authorized by § 7323. The ALJ's apparent interpretation, i.e., that § 7324(a) cannot preclude an employee from engaging in political activity authorized by § 7323 while that employee is on duty or in a government building, would violate "'a cardinal principle of statutory construction' that 'a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW, Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001)).

¶15 Furthermore, even if we were to find that expressions of opinion on political subjects and candidates enjoyed special protection such that employees could engage in these activities while on duty or in a government building without violating § 7324(a), such a finding would not affect the result in this case because we reject the ALJ's finding that the respondent's e-mail constituted an expression of his opinion. While the appellant's opinion that Kerry was the better candidate for President may have been implicit in the fact that he distributed campaign literature intended to increase the likelihood of Kerry's election, the content of the e-mail did not explicitly state any opinion regarding the Presidential candidates or a political subject. Even the respondent

acknowledged that the DNC letter urged its readers to "vote" in various media polls to be conducted after that night's Presidential election debate, that it "was a type of mass mailing aimed at supporters of Senator Kerry," and that he forwarded the DNC letter without any comment. CF, Tab 6. The DNC letter was campaign literature intended to encourage its readers to engage in activities immediately following that night's Presidential election debate to help ensure that the DNC's candidate would be elected to a partisan political office. We find that the respondent's e-mail constituted primarily the distribution of campaign literature and that any statement of opinion regarding the candidates for President was merely implicit from the fact that the campaign literature the respondent distributed clearly favored one of the candidates. Thus, even if we were to accept the ALJ's conclusion that 5 U.S.C. § 7324(a) does not preclude federal employees who are on duty or in a government building or office from engaging in activity authorized by § 7323(c), i.e., expressing their opinions on political subjects and candidates, we would still conclude that the respondent's conduct in this case violated the Hatch Act.[4]

¶16 The undisputed record evidence established that, while on duty in his government office, the respondent distributed DNC campaign literature by e-mail to 31 other EPA employees. CF, Tab 1, Ex. A; Tabs 4, 6. The undisputed facts established that the respondent engaged in the political activity of distributing campaign literature while on duty and in a government office and, thus, that his conduct violated 5 U.S.C. § 7324(a)(1)-(2). Therefore, we find that the undisputed material facts are sufficient to establish both counts of OSC's

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[4] In *Burrus v. Vegliante*, 336 F.3d 82, 89-91 (2nd Cir. 2003), the court found that 5 U.S.C. § 7323(c) only authorizes federal employees to express their opinion on political subjects and candidates while off-duty. Because we find that the respondent's conduct was not primarily an expression of his opinion, for the purposes of this case we need not decide whether an employee's expressions of his opinion on political subjects and candidates constitutes "political activity," nor whether the court's interpretation of 5 U.S.C. § 7323(c) was correct.

complaint and that the ALJ should have granted summary judgment in favor of OSC regarding whether the respondent violated the Hatch Act. 5 C.F.R. § 1201.124(d) (allegations that are unanswered or admitted in the respondent's answer to an OSC complaint may be considered true); *see Special Counsel v. Simmons,* 90 M.S.P.R. 83, ¶ 10 (2001). Because the respondent's political activity while on duty and in a government office was expressly prohibited by 5 U.S.C. § 7324(a), punishing the respondent for such activity does not violate the policy, set forth in 5 U.S.C. § 7321, that federal employees may participate in the political processes of the Nation to the extent not expressly prohibited by law.

Penalty issue.

¶17 The Hatch Act provides a presumptive penalty of removal for a violation of the Act, unless the Board finds by unanimous vote that the violation does not warrant removal, in which case the Board may impose a penalty of not less than a 30-day suspension without pay. 5 U.S.C. § 7326; *see Special Counsel v. Collier,* 101 M.S.P.R. 391, ¶ 4 (2006); *Simmons,* 90 M.S.P.R. 83, ¶ 14. The Board has found the following six factors, which may be mitigating or aggravating, relevant in determining whether mitigation of the removal penalty is warranted: the nature of the offense and the extent of the employee's participation; the employee's motive and intent; whether the employee received the advice of counsel regarding the activity that violated the Act; whether the employee ceased the activities in question; the employee's past employment record; and the political coloring of the employee's activities. *See Collier,* 101 M.S.P.R. 391, ¶ 3; *Malone,* 84 M.S.P.R. 342, ¶ 39. The respondent bears the burden of presenting evidence showing that the presumptive removal penalty should be mitigated under the circumstances of the case. *See Special Counsel v. Williams*, 56 M.S.P.R. 277, 279, 285 (1993).

¶18 Although OSC presented argument regarding the penalty issue in its motion for summary judgment, the respondent did not, and OSC has acknowledged that the record does not contain any evidence regarding the quality of the respondent's past employment record. CF, Tab 6, Tab 9 at 20-27. Thus, we find it appropriate to remand this case back to the ALJ to allow the parties to present evidence and argument regarding the penalty issue. The ALJ shall then issue a new recommended decision regarding the penalty issue.

¶19 We note, however, that the ALJ should not consider in mitigation the respondent's asserted confusion resulting from the information set forth in OSC's May 30, 2002 Hatch Act Advisory Memorandum regarding the "Use of Electronic Messaging Devices To Engage in Political Activity." CF, Tabs 4, 6. We find the respondent's asserted confusion particularly unpersuasive given that OSC's 2002 advisory memorandum, upon which the respondent asserts he relied in deciding that sending the e-mail at issue in this appeal did not violate the Hatch Act, provides that the determination as to whether an employee has engaged in political activity on duty or in a government building or vehicle must necessarily be made on a case-by-case basis and specifically encourages employees to contact OSC "for advice about these matters as they arise" and provides direct contact information. Thus, the respondent's purported confusion regarding the information provided in OSC's 2002 advisory memorandum could have been alleviated if he had, in fact, fully followed the OSC information upon which he asserts he relied by contacting OSC and asking for OSC's opinion regarding his proposed actions.

ORDER

¶20 We REVERSE the ALJ's recommended decision and FIND that OSC has proven that the respondent committed the Hatch Act violations as charged. We

REMAND this case back to the ALJ for further adjudication of the penalty issue and the issuance of a new initial decision consistent with this Opinion and Order.

FOR THE BOARD:

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Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.