UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Special Counsel, Petitioner,

v.

Janet B. Purnell and Herbert Johnson, Sr., and Akron Metropolitan Housing Authority, Respondents.

Special Counsel, Petitioner,

v.

Frank J. Fela and the City of Cuyahoga Falls, Ohio, and Akron Metropolitan Housing Authority, Respondents.

Docket Number HQ12068710001

Date: June 24, 1988

David J. Cortes, and Robert A. Lane, Washington, D.C., for petitioner.

James H. Hewitt, III, Coaxum & Hewitt, Cleveland, Ohio, for respondent Purnell.

Edward J. Riegler, Grisi & Riegler, Akron, Ohio, for respondent Fela.

Andrew L. Johnson, Jr., Cleveland, Ohio, for respondent Johnson.

Virgil Arrington, Jr., and Gerald Pursley, for respondent City of Cuyahoga Falls.

Jacqueline A. Silas, for respondent Akron Metropolitan Housing Authority.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

PART I: BACKGROUND

This case originated with a disciplinary action complaint filed by the Special Counsel (SC) charging Janet Purnell, Herbert Johnson, and Frank Fela, all of whom are state or local government employees, with violating that provision of the Hatch Act which makes it unlawful for covered employees to "directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes...." 5 U.S.C. § 1502(a)(2). The gravamen of the charges against these three respondents is that they unlawfully coerced other employees to make contributions to a political party. Notice and Order dated October 24, 1986, tab 4, at 1. At the time of the alleged violations, the respondents were employed by the Akron Metropolitan Housing Authority (AMHA). Before the Special Counsel complaint was filed, however, respondent Fela resigned from AMHA and was employed by the city of Cuyahoga Falls, Ohio. These agencies have been named as governmental respondents pursuant to 5 U.S.C. §§ 1504 and 1505.

Pursuant to 5 C.F.R. § 1201.129(a), this case was assigned to the Board's Chief Administrative Law Judge (CALJ). Following a hearing, the CALJ issued a Recommended Decision (R.D.) in which he found that each individual respondent had violated 5 U.S.C. § 1502(a)(2), and that the penalty of removal was warranted in each case. He therefore recommended that respondents Purnell and Johnson be removed from their positions with AMHA and that respondent Fela be removed from his position with Cuyahoga Falls. R.D., at 46. The individual respondents, as well as the governmental respondents, have filed exceptions to the Recommended Decision, and the petitioner has responded to the exceptions. Between the time that respondents' exceptions were filed and the issuance of this decision, the petitioner advised the Board that respondents Purnell and Johnson had resigned from their positions at AMHA, effective April 30, 1988. Tab 155. As discussed in Parts IV and VII of this opinion, *infra,* however, we find that respondents' resignations do not moot the issues raised in this proceeding.

For the reasons set forth below, the Board hereby ADOPTS AS MODIFIED the CALJ's Recommended Decision and incorporates it into this final decision.

PART II: BURDEN OF PROOF

The CALJ found that although the Board had applied the preponderance of the evidence standard in other Special Counsel cases, it had not had occasion to

rule upon the standard of proof applicable in Hatch Act cases. R.D., at 11 n. 3. He therefore applied the evidentiary standard which had been applied in Hatch Act cases by the Civil Service Commission, the Board's predecessor agency. That standard required that proof of a Hatch Act violation must be shown by a "clear preponderance" of the evidence, a stricter standard than a preponderance of the evidence. *See In re Cartwright,* 1 P.A.R. 138, 144 (1946).[1]

There is nothing in the language of the statute at issue here which addresses the quantum of proof necessary to sustain the charges. 5 U.S.C. §§ 1501-08. Although the Commission stated in *Cartwright* that its decision to apply the "clear preponderance" standard was based on policy reasons, it did not explain those reasons. *In re Cartwright,* 1 P.A.R. at 144. In the absence of any controlling or persuasive authority in support of the "clear preponderance" standard, we find that it is appropriate for the Board to apply the preponderance of the evidence standard in this type of proceeding. That is the standard most commonly invoked in agency proceedings, it is the one that seems to be required under the Administrative Procedure Act, 5 U.S.C. § 556(a), and it is the standard applicable in other original jurisdiction proceedings brought by the Special Counsel.[2] *In re Frazier,* 1 M.S.P.R. 163, 185 (1979), *aff'd sub nom. Frazier v. Merit Systems Protection Board,* 672 F.2d 150 (D.C. Cir. 1982); *Special Counsel v. Cummings,* 20 M.S.P.R. 625, 626-27 (1984).

PART III: RESPONDENT PURNELL'S EXCEPTIONS

The CALJ, relying largely on his credibility findings, sustained the charges against respondent Purnell. Specifically, he found that, while serving as the Executive Director of AMHA, respondent Purnell violated section 1502(a)(2) by: (1) Coercing William Fesler, a subordinate employee whom she had hired, to sell several tickets for political events; (2) coercing and attempting to coerce Lola Coker, another subordinate employee Purnell had hired, to purchase tickets to political events; and (3) coercing Coker to contribute labor to the election

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[1] The citation "P.A.R." refers to the "Political Activity Reporter" which contains the decisions of the Civil Service Commission concerning the Hatch Act.

[2] Since the "clear preponderance" standard is a stricter standard than the preponderance standard, the respondents were not prejudiced by the CALJ's application of the former standard. Additionally, the CALJ determined that the petitioner's charges on which the petitioner did not prevail did not meet the preponderance standard. Hence, the CALJ's application of the "clear preponderance" standard did not harm the parties.

campaign of a mayoral candidate.[3] The CALJ found "inherently unbelievable" respondent Purnell's testimony that Fesler and Coker willingly engaged in the activities requested by the respondent. R.D., at 10, 13-14. In contrast, he found credible the testimony of Fesler and Coker that they had agreed to Purnell's requests to sell or buy tickets, or to engage in other political activities, because they felt pressure from her to do so. R.D., at 7-9, 13-14, 15-16, and 18.

In her exceptions to the Recommended Decision, respondent Purnell contends that the CALJ: (1) Failed to consider her social relationships with Coker and Fesler, which she alleges establish that these employees willingly participated in the politically related activities; (2) erred in finding that she established a policy to coordinate ticket sales; (3) erred in finding that she requested Coker to make phone calls during working hours for partisan political purposes; and, (4) failed to give sufficient weight to mitigating factors in determining that the penalty of removal was appropriate.[4] Tab 152, at 3-13.

A review of the record establishes that these exceptions to the CALJ's findings are a reiteration of the same arguments which the respondent presented to the CALJ, and which he properly rejected. Additionally, we note that all, or nearly all, of the findings which the respondent challenges were based on the CALJ's credibility determinations. Although the Board may substitute its own findings for those of the CALJ, special deference must be accorded to a hearing officer's findings regarding credibility. *Special Counsel v. Russell,* 32 M.S.P.R. 115, 118 (1987), *citing Universal Camera Corp. v. NLRB,* 340 U.S. 474, 495-96 (1951); *Special Counsel v. Hoban,* 24 M.S.P.R. 154, 158-59 (1984).

In view of these factors, we have independently reviewed the record to determine if it supports the CALJ's finding that Fesler and Coker did not willingly participate in the ticket sales. We find ample support for this finding. The testimony of Fesler and Coker, both of whom the CALJ found to be credible witnesses, clearly supports the view that their acquiescence in Purnell's requests was not motivated by any social relationship with Purnell or by an independent

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[3] The Special Counsel amended count seven, which charged respondent Purnell with attempting to get Ms. Coker and Gail Basilli to encourage voters to support a political candidate, to allege a violation of section 1502(a)(2) rather than section 1502(a)(1). Tabs 42, 74. The CALJ dismissed that part of count eight which alleged that respondent Purnell had attempted to coerce Ms. Basilli to purchase tickets to a fund raiser. R.D., at 19.

[4] All the respondents have challenged the CALJ's conclusion that the penalty of removal was warranted in their cases. This issue is discussed in part VII of this decision, *infra.*

interest in politics.[5] Hearing Transcript (H.T.), at 82-83, 105, 318, 323, 332; R.D., at 7-9, 13-14, 15-16, and 18. As the Special Counsel correctly points out in response to respondent's exceptions, the only evidence which supports the respondent's assertion that Coker purchased tickets to political activities because she wanted to meet political officials in the Akron community is the respondent's testimony. However, the CALJ found this testimony unworthy of belief, and he explained in detail the basis for his adverse credibility findings regarding the respondent. R.D., at 13-14; Petitioner's Response to Exceptions, tab 154, at 3-9. In her exceptions, the respondent provides no persuasive reason to disturb the CALJ's credibility findings in this regard.[6]

The respondent also contends the CALJ failed to properly evaluate the evidence when he found that she had formulated an internal policy to coordinate ticket sales and had requested that Ms. Coker make phone calls for a partisan political purpose. Tab 152, at 8-11. These contentions are without merit. The CALJ's finding with regard to the respondent's internal policy is fully supported by the testimony of Fesler and Coker, and is buttressed by the respondent's own admissions. H.T., at 102, 111, 327-28, 1043-48. Mr. Fesler's testimony that the respondent stated at one staff meeting that there should be no political ticket selling during work hours does not support a contrary result. H.T., at 340. Respondent's reliance on this testimony overlooks the fact that Mr. Fesler emphasized that this meeting took place after his ticket purchases in June 1983. *Id.* Hence, the respondent's reliance on her belated statement at the staff meeting is unavailing, since it is not relevant to whether she had previously established a policy with regard to ticket sales and pressured subordinate employees into buying and selling tickets.[7]

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[5] In this regard, we note that Coker's testimony was consistent with her March 1985 letter to the Office of Special Counsel wherein she contended that she was resigning from her AMHA position because of "political pressure." Petitioner's Exhibit P-6. In the letter, she stated that Purnell and Fela had told her that she was expected to purchase tickets to political events, and that Fela had told her that she "was putting [her] job ... on the line, because of [her] unwillingness to participate in these activities." *Id.*

[6] For the same reasons, we find no merit in respondent AMHA's contention that Ms. Coker and Mr. Fesler willingly participated in the politically related activities, or that the CALJ erred in assessing these witnesses' credibility. Tab 151, at 3-4, 13-14.

[7] The more likely explanation for respondent's admonishment at the staff meeting is that it was an attempt to pacify Ms. Coker, who had, shortly before the meeting, vocally objected to being pressured by two AMHA employees to buy tickets to political events. H.T., at 918-24. Respondent's reliance on the testimony of two other AMHA employees, Terry Meese and Eula Powers, is similarly flawed. Although Mr. Meese testified that he

Respondent's reliance on the testimony of Polly Dobkin to support her contention that the respondent did not request Ms. Coker to make phone calls during work hours on election day is also misplaced. The CALJ explained in detail his reasons for finding that the respondent's testimony denying the charge regarding the election day phone calls was not credible and that Coker's testimony that the respondent had asked her to make the phone calls was a "truthful" and "accurate version of the events." R.D., at 15-16. Moreover, the CALJ explicitly considered Dobkin's testimony, but he correctly discounted it on the ground that Dobkin may not have been in a position to know who had made phone calls to potential voters on election day. R.D., at 16. *See also* Petitioner's Response to Exceptions, tab 154, at 13-14. The respondent has provided no convincing argument or evidence which would tend to undermine the CALJ's determinations crediting Ms. Coker's testimony and discounting Ms. Dobkin's testimony.

PART IV: EXCEPTIONS OF RESPONDENTS FELA AND CITY OF CUYAHOGA FALLS

At the time of the alleged violations, respondent Fela served as the Personnel Management Administrator of AMHA. R.D., at 20. He resigned from his AMHA position on May 31, 1984, however, and did not reenter public employment for twenty months, when he accepted a position as Financial Manager with the City of Cuyahoga Falls on January 21, 1986. The CALJ found that Mr. Fela violated section 1502(a)(2) while at AMHA by coercing and advising Ms. Coker to purchase tickets to partisan political events; by attempting to coerce Coker to contribute her labor to the campaign of a political candidate; and by attempting to coerce Bruce Brown, who was employed as a Lead Plumber at AMHA, to purchase a ticket to a political fund-raising event.[8] R.D., at 25, 27-28, 30. The CALJ found that the penalty of removal was warranted. *Id.* at 46.

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had no knowledge that the respondent encouraged partisan political activities at AMHA, H.T. at 1141, that testimony was clearly outweighed by other testimony establishing that the respondent had established a plan to coordinate the sale of tickets to politically related events to AMHA employees. R.D. at 9-10. Respondent's reliance on the testimony of Ms. Powers is also misplaced. That testimony related to a conversation Powers had with the respondent in the spring or summer of 1984, which was, again, subsequent to the time that the respondent requested Coker and Fesler to buy or sell tickets.

[8] The CALJ did not sustain the charge that Mr. Fela unlawfully solicited AMHA employee Charles Kalail to purchase a ticket (count nine), finding that the evidence did not establish that this alleged solicitation occurred before Mr. Fela left AMHA. R.D., at 30-32.

In their exceptions, neither respondent Cuyahoga Falls nor Fela challenges the CALJ's findings sustaining the charges against Fela. *See* Exceptions at tabs 148, 150. Rather, these respondents contend that the removal penalty is unreasonable, and they reassert two other defenses to the action which were rejected by the CALJ in his Recommended Decision. First, they contend that the petitioner's alleged delay in bringing the complaint bars this action under the doctrine of laches, or, alternatively, that the petitioner's alleged delay should be considered in mitigating the penalty. The record shows that the petitioner became aware of the possibility of Hatch Act violations at AMHA in early 1985, that respondent Fela was hired by Cuyahoga Falls ten months later, and that the petitioner instituted the complaint in October 1986. R.D., at 21, 41. We find that the CALJ properly analyzed this issue when he found that: (1) There was no inexcusable delay in the Special Counsel's institution of this action;[9] (2) there is no statute of limitations which is applicable to Hatch Act cases, and a general statute of limitation would not provide a bar to proceedings which were in the public interest; and (3) even if a comparable statute were looked to as guidance to determine what length of time might constitute an excusable delay, the most comparable statute, 18 U.S.C. § 3282, contains a five-year period of limitation, and this action was brought well within that time frame.[10] R.D., at 41-42. In their exceptions, neither respondent Fela nor Cuyahoga Falls provides any basis for overturning these findings.

The second defense that these respondents reassert in their exceptions is their contention that the action against Fela must be dismissed because he has, in effect, already served the maximum penalty which the Board is authorized to impose upon him under 5 U.S.C. §§ 1505-06. When the Board finds that a covered state or local employee has violated 5 U.S.C. § 1502, it must determine if the violation warrants removal. 5 U.S.C. § 1505. If the Board so determines, and the employing agency fails to remove the respondent, the Board is authorized to effectuate a withholding of Federal funds from the agency which is ordered to remove the respondent-such funds to be equal to the amount of two years of the salary which the respondent was receiving when the offense was committed.

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[9] In asserting that it was prejudiced by the petitioner's alleged delay in filing the complaint against Fela, Cuyahoga Falls asserts that it never would have hired Fela if it had known he was being investigated for possible Hatch Act violations. We agree with the petitioner's arguments, however, that given the number and complexity of the allegations, and the numerous legal issues involved in this case, it is not reasonable to expect that the petitioner could have conducted a thorough investigation and filed a complaint within ten months. Petitioner's Brief in Rebuttal to City of Cuyahoga Falls, tab 137, at 7-8.

[10] 18 U.S.C. § 3282 governs the time for bringing criminal charges of political coercion against individuals whose salaries are derived from federal funds.

5 U.S.C. § 1506(a). In the event that the respondent has been removed and then appointed within eighteen months to any position within that state, the Board is authorized to effectuate a withholding of funds from the agency that employed the respondent at the time of the violation or from the agency which subsequently rehired the respondent, if it receives federal funds. *Id; Special Counsel v. Suso,* 26 M.S.P.R. 673, 679-80 n. 11 (1985).

Based on the fact that twenty months elapsed between respondent Fela's resignation from AMHA and his subsequent employment with Cuyahoga Falls, the respondents argue that Fela's resignation was tantamount to removal, that he would be subject to double punishment if the Board ordered his removal. We find that this argument is spurious. It is clear from the language of section 1506(a) that Congress did not intend an accident of fate-here, respondent's self-imposed break in public employment-to frustrate the penalty provisions contained in section 1506(a).

As the CALJ correctly found, if section 1506(a) is interpreted as the respondents urge, then employees who resigned or were hired by another state or local agency before the Board issued its decision would be insulated from any liability for their violations. *See In re Grandison,* 1 M.S.P.R. 19, 22-23 (1979) (adopting ALJ's recommended decision which found that respondent's dismissal by one local agency and subsequent employment by another did not divest the Board of jurisdiction to enforce the Hatch Act). In cases involving an employee's resignation or subsequent employment in another state or local government position, both the Board and its predecessor agency, the Civil Service Commission, have consistently held that the eighteen-month period referenced in section 1506 does not begin to run until after the Board or Commission order directing the employee's removal.[11] Thus, we find no merit in respondents' contention that the eighteen-month period referenced in section 1506(a) began to run when respondent Fela voluntarily left AMHA, which was months before the Special Counsel brought the complaint.

Respondents' reliance on *Special Counsel v. Sims,* 20 M.S.P.R. 236 (1984), and *In re Eckman,* 1 P.A.R. 587 (1951), is misplaced. These decisions do not support the respondents' contention that Fela's twenty-month break in public service should be credited as the eighteen-month period referenced in section 1506(a). In both these cases, the federal agencies which employed the respondents removed or suspended them for allegedly violating the Hatch Act provision at 5 U.S.C. § 7324. In the subsequent proceedings before the Board or

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[11] *Special Counsel v. Suso,* 26 M.S.P.R. at 679-80 n. 11; *In re Knies,* 2 P.A.R. 578, 586 (1958); *In re Grover,* 2 P.A.R. 328, 330 (1947); and *In re Neustein,* 2 P.A.R. 108, 112 (1943), *aff'd, Neustein v. Mitchell,* 52 F. Supp. 531 (S.D.N.Y. 1943).

the Commission involving the same violations, the respondents received suspensions under 5 U.S.C. § 7325, but they were were given credit for the time they had been off the agency's rolls. *Sims,* 20 M.S.P.R. at 242-43; *Eckman,* 1 P.A.R. at 587-88. The facts in the instant case are strikingly dissimilar to those in *Sims* and *Eckman.* Here, respondent Fela's break in public service was the result of his own voluntary actions and entirely unrelated to his violations of the Hatch Act. Hence, even if the Board were to extend the *Sims* principle of credit-for-time-served to the eighteen-month period referenced in section 1506(a), the respondent's break in service cannot be viewed as a punishment which he has already served.

In view of the above, we find no basis to disturb the CALJ's findings with regard to this respondent.

PART V: RESPONDENT JOHNSON'S EXCEPTIONS

At all times relevant to the charges, respondent Johnson served as the Labor Relations Coordinator of AMHA. He was charged with seeking to get AMHA employees Bruce Brown and Edward Joseph to purchase tickets to a political fund-raising event. At the time of the events that formed the basis of these charges, Mr. Brown served as a Lead Plumber in AMHA, H.T. at 460, and Mr. Joseph was employed as a courier under the supervision of respondent Johnson. H.T., at 353-54, 360. The CALJ sustained these charges, finding credible the testimony of Brown and Joseph that they felt coerced by respondent's request that they purchase a ticket. R.D. at 36, 38. The CALJ noted, however, that an employee's reaction to a solicitation was not controlling, and he found that respondent's solicitation of these employees amounted to coercion under an objective standard. *Id.,* at 35, 37-38. Based on respondent Johnson's demeanor while testifying, as well as the internal inconsistencies in his testimony, the CALJ found that he "was not a credible witness." *Id.,* at 38-39.

In his exceptions, respondent Johnson contends that the CALJ erred in: (1) Finding that a supervisor's solicitation of a political contribution from a subordinate employee was inherently coercive; (2) not granting him a separate hearing; (3) finding that Mr. Brown's employment with AMHA was his principal employment; and (4) crediting the testimony of Brown and Joseph. Additionally, with his exceptions, respondent includes letters of support which praise his character and work record.[12]

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[12] The petitioner has moved to strike these documents on the ground that the respondent has failed to show good cause why they should be accepted after the record has closed. Tab 149. In his opposition to the motion, the respondent contends that the documents

Based upon our review of the record and the Recommended Decision, we find no merit in these contentions. The respondent's contention that his solicitation of Messrs. Brown and Joseph was not inherently coercive is, at bottom, a challenge to a well-settled rule of law enunciated by the Civil Service Commission, the Board's predecessor agency which formerly adjudicated Hatch Act cases. That rule, which was relied upon by the CALJ in this case, holds that it is inherently coercive for a supervisor to ask an employee to contribute to a political cause, absent exculpating circumstances. R.D., at 37-38, *citing In re Jarvis,* 2 P.A.R. 711 (1964).

We find that the CALJ did not err in relying upon this rule. The Commission consistently interpreted coercion in this manner, *e.g., In re Martin,* 2 P.A.R. 726, 733 (1965), and this rule finds support in the Supreme Court's decision in *Ex Parte Curtis,* (16 Otto) 106 U.S. 371, 373-74 (1882). Additionally, respondent's implicit contention that the rule is improperly broad overlooks the fact that, where exculpating circumstances exist, a supervisor's solicitation of a subordinate would not constitute coercion under the rule. In the instant case, the CALJ expressly referenced the “exculpating circumstances” exception in his statement of the rule, but he found that no such circumstances existed here. R.D., at 37. Moreover, the testimony of those employees who were solicited by the respondent clearly supports the CALJ's conclusion that the respondent's actions were coercive. The respondent's exceptions do not provide a basis for finding exculpating circumstances or for disregarding the testimony that supported the CALJ's findings sustaining the charges.

The respondent next argues that the CALJ erred in refusing his request for a separate hearing. In this regard, he contends that most of the evidence at the hearing was irrelevant to him, and that the CALJ's adverse findings as to the other two individual respondents tainted his case through “guilt by association.” Tab 147, at 3-4. We find no merit in respondent's arguments in this regard. In evaluating the evidence, the CALJ took considerable care to separate the evidence that pertained to each individual respondent. This is clearly shown by the structure of the Recommended Decision, which separately addressed the allegations against each respondent, charge by charge. Additionally, it is noteworthy that only respondent Johnson was charged with soliciting contributions from Mr. Joseph, who was his subordinate. Hence, Joseph's testimony refutes respondent's contention that the evidence was irrelevant to him

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were written in response to the CALJ's Recommended Decision, and hence, could not have been submitted at the time the record closed. Tab 153. Even assuming that these documents could be considered new evidence, however, we find that they are cumulative of the testimony already in the record concerning the respondent's character and work history. H.T. at 984-89. We therefore grant the petitioner's motion, and have not considered the documents on the merits of this case.

and that the CALJ sustained the charges merely because of his association with the other respondents. In sum, respondent has cited no example of any instance where the CALJ did not properly separate the evidence, and he has therefore failed to show error in the CALJ's ruling denying him a separate hearing.

The CALJ sustained the charge that the respondent had attempted to coerce Bruce Brown to purchase a ticket to a political fund-raising event. R.D., at 36. The respondent's third allegation of error concerns the CALJ's assignment of the burden of proof with regard to the issue of whether Mr. Brown was principally employed by AMHA.[13] Specifically, the CALJ found that "the petitioner produced evidence that Brown worked 40 hours a week at AMHA and the respondent did not establish that Brown worked greater hours elsewhere." *Id.,* at 35. Given the nature of Brown's duties and the hours he worked, the record clearly supports the conclusion that he was employed full-time at AMHA as the Lead Plumber. Petitioner's Brief in Rebuttal to Respondent's Post-Hearing Brief, tab 141, at 5-6. Additionally, we note that, in its answer to the complaint, respondent AMHA admitted that Mr. Brown was "at all times material to this complaint principally employed by AMHA as a Plumbing Leadman." Tab 1, par. 10; Tab 22, at 2. We find that the CALJ properly relied on the relevant case law in allocating the burden of proof on this issue by requiring the respondent to show that Brown was principally employed in a position other than that alleged by the petitioner.[14] *In re Nicely,* 2 P.A.R. 759 (1966).

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[13] To have violated 5 U.S.C. § 1502(a)(2) with regard to Mr. Brown, both respondent and Brown were required to be covered employees, as defined in 5 U.S.C. § 1501(4). A threshold requirement for a covered employee is that the employee's principal employment be with a covered agency, as defined in section 1501(2). The CALJ correctly found that both AMHA and Cuyahoga Falls were covered agencies, as defined in section 1502. R.D. at 3-6.

[14] The CALJ noted that despite the fact that the Commission had interpreted "principal employment" to mean "principal public employment," *see In re Lumpkin,* 2 P.A.R. 453 (1953), it had, in subsequent cases, considered whether the individual's non-public employment was the principal employment. In its response to the exceptions, the petitioner concedes that the CALJ may have erred in relying on *Lumpkin,* since two federal court decisions have rejected the *Lumpkin* definition of "principal employment." *Matturi v. U.S. Civil Service Commission,* 130 F. Supp. 15 (D.N.J. 1955), *aff'd Matturri v. U.S. Civil Service Commission,* 229 F.2d 435 (3d Cir. 1956); *Anderson v. U.S. Civil Service Commission,* 119 F. Supp. 567 (D. Mont. 1954). However, since the CALJ found that Mr. Brown met the "principal employment" test under the alternative rule which considered non-public employment, the respondent has shown no harmful adjudicatory error. *Karapinka v. Department of Energy,* 6 M.S.P.R. 124, 127 (1981) (the

The respondent also attacks the credibility of Messrs. Brown and Joseph. In this regard, he contends that Mr. Brown's testimony is unworthy of belief because he made statements to a reporter which were inconsistent with his later testimony; that the petitioner's counsel improperly coached Mr. Joseph; and that Mr. Joseph's testimony was motivated by his dislike for the respondent and should therefore be discredited. We find that the respondent's arguments provide no basis to disturb the CALJ's credibility findings regarding these witnesses. First, Mr. Brown's testimony supports the conclusion that his statements to the reporter were not inconsistent with his testimony. H.T., at 476-78. Additionally, to the extent that his statements to the reporter could be viewed as inconsistent, the CALJ properly discounted the probative value of the statements in favor of Brown's contemporaneous actions at the time of the solicitation, which were consistent with his testimony. R.D., at 36. Second, the petitioner fully countered the respondent's contention that it had improperly coached Mr. Joseph, and the respondent has shown no error in the CALJ's finding in this regard. *Id.* at 36 n. 5. *See* Tab 141, at 15-16.

In his post-hearing brief, the respondent presented numerous arguments in an attempt to discredit Mr. Joseph's testimony, most of which centered around his contention that Joseph harbored a personal dislike for the respondent. Tab 136, at 9-16. The CALJ specifically referenced respondent's brief in considering whether "Joseph would have lied about the degree of coercion which he allegedly felt." R.D., at 38. The CALJ found that Joseph's testimony on that point was credible, however, and he explained the reasons for his finding in some detail. *Id.* at 38-39. We find nothing in respondent's exceptions that provides a basis for overturning the CALJ's reasoning in this regard. Moreover, we find that since the respondent admitted most of the facts establishing the violation, the alleged bias of Mr. Joseph is, in a sense, immaterial. Specifically, the respondent admitted that he asked Joseph to purchase a ticket, that Joseph complained during the solicitation that, "Geez, Herb, that's a lot of money," and that, in the course of the solicitation, the respondent told Joseph that he "could be on the team by purchasing a ticket."[15] H.T., at 674-79. We find that the charge that respondent's solicitation of Joseph violated section 1502(a)(2) can be sustained on two other

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administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

[15] The cost of the ticket was $125, and Mr. Joseph's take home pay was approximately $155 per week. H.T., at 358-59. Although respondent Johnson stated in his deposition testimony that getting on the team meant being a Republican, at the hearing before the CALJ he attempted to qualify his earlier answer by stating that getting on the team meant being a cooperative employee and "help[ing] out the Republican Party by helping them in the fund raiser." H.T. at 675-678.

grounds cited by the CALJ which are not dependent upon Joseph's testimony regarding the degree of coercion he felt, i.e., that the respondent's action of soliciting a contribution from a subordinate employee was “inherently coercive” and without “exculpating circumstances,” or that a reasonable person would have felt coerced by the respondent's solicitation. R.D., at 37-38. Given respondent's admissions, we find persuasive the petitioner's contention that Mr. Joseph's credibility does not present a real issue since his testimony added nothing substantially material to the evidence.

PART VI: EXCEPTIONS OF RESPONDENT AMHA

In its exceptions, respondent AMHA reiterates the same arguments which were considered and rejected by the CALJ. AMHA's contention that the CALJ erred in recommending that respondents Purnell and Johnson be removed from their AMHA positions is addressed in the next part of this decision, *infra.* The remainder of AMHA's arguments were raised by other respondents and have already been addressed in the preceding parts of this decision: (1) that the doctrine of laches bars this action (Part IV); (2) that the CALJ erred in finding that respondent Purnell coerced Linda Coker to place phone calls on behalf of a political candidate (Part III); (3) that respondent Purnell's solicitation of Mr. Fesler and Ms. Coker was mitigated by their allegedly close relationship with her (Part III); and (4) that the CALJ erred in crediting the testimony of Messrs. Brown and Joseph (Part V).

PART VII: RESPONDENTS' EXCEPTIONS WITH REGARD TO THE PENALTY

In cases involving violations of 5 U.S.C. § 1502, the statute does not authorize any penalty short of removal. 5 U.S.C. § 1505(2). Hence, if the Board determines that the removal penalty is not warranted, no penalty may be imposed. *See 5* U.S.C. § 1505(2). *Special Counsel v. Suso,* 26 M.S.P.R. at 679-80 n. 11.

In considering the propriety of the penalty, the CALJ found that the Board's decisions were unclear as to whether it is appropriate for the Board to consider the mitigating factors identified in *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 306 (1981), in Hatch Act cases involving nonfederal employees. R.D., at 43-44. Even if the *Douglas* factors were considered, the CALJ found that removal was the appropriate penalty.

We agree with the CALJ's observation that the Board's decisions have been unclear as to whether it is appropriate to consider mitigating circumstances in determining whether removal is warranted in Hatch Act cases involving state and local government employees, and if so, what factors are appropriate to

consider.[16] We note that in cases involving Hatch Act violations by federal employees under 5 U.S.C. § 7321*et seq.,* where the Board is authorized to suspend the employee for not less than thirty days if it finds that removal is not warranted, the Board has considered all relevant mitigating or aggravating factors in determining whether removal is warranted. *E.g., Special Counsel v. Zanjani,* 21 M.S.P.R. 67 (1984), 26 M.S.P.R. 192, 194 (1985). We find that it would be anomalous for the Board to consider mitigating factors in Hatch Act cases where the statute provides for another penalty besides removal, but to decline to do so in other cases where the statute requires the Board to impose the removal penalty or no penalty at all. Consequently, we find that prior Board decisions in which the Board considered all relevant mitigating and aggravating factors are controlling. *E.g., Yoho,* 15 M.S.P.R. at 413.[17] This conclusion requires us to overrule our contrary ruling in *Daniel,* 15 M.S.P.R. at 639 and *Hayes,* 16 M.S.P.R. at 169. *See* note 16, *supra.*

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[16] In *Special Counsel v. Yoho,* 15 M.S.P.R. 409, 413 (1983), the Board relied on a Commission decision for its holding that, in "determining whether removal is appropriate, all mitigating facts are considered." However, in *Special Counsel v. Daniel,* 15 M.S.P.R. 636, 639 (1983), the Board appeared *sub silentio* to overrule *Yoho* in finding that the "seriousness of the violation is the sole factor on which the Board may make its determination on the penalty under 5 U.S.C. § 1505(2)." Of the subsequent Board cases addressing the penalty under section 1505, none has considered the seriousness of the offense as the sole factor. In *Special Counsel v. Hayes,* 16 M.S.P.R. 166, 169 (1983), the Board found that removal was not warranted because the respondent reasonably relied on legal advice notwithstanding the fact that it stated, citing *Daniel,* that the seriousness of the offense was the sole factor in determining the penalty. The remainder of the cases have considered a variety of mitigating factors, and some have cited *Yoho* approvingly. *Special Counsel v. Mahone,* 21 M.S.P.R. 499, 502 (1984); *Special Counsel v. Suso,* 26 M.S.P.R. at 679; *Special Counsel v. Kehoe,* 33 M.S.P.R. 56, 65 (1987) (citing *Yoho*),*aff'd in part and rev'd in part sub nom. State of Minn., Dep't. of Jobs and Training v. MSPB,* 666 F. Supp. 1305 (D. Minn.1987); *Special Counsel v. Camillieri,* 33 M.S.P.R. 565, 566 (1987); and *Special Counsel v. Winkleman,* 36 M.S.P.R. 71, 73 (1988).

[17] The statement in *Special Counsel v. Chidlow,* 21 M.S.P.R. 504, 506 (1984), that *Yoho* is "not precedent for the penalty" is overbroad and requires clarification. In cases such as *Chidlow* where the Board is considering the penalty under 5 U.S.C. § 7325, the mitigating factors identified in *Yoho* cannot serve as a basis for finding that the employee's violation warrants no penalty, but rather, only as a basis for finding that a suspension is the appropriate penalty. This is so because in section 7325 cases, the Board must impose a suspension if it unanimously finds that the employee's violation does not warrant removal. *Id.* Hence, *Chidlow* stands for the proposition that in section 7325 cases, *Yoho* cannot serve as precedent for the imposition of no penalty at all.

The specific factors which are relevant to the question of whether removal is warranted under section 1505 will vary from case to case. Generally, the seriousness of the violation, together with those additional factors which bear on the seriousness of the violation, will be the primary factors that are relevant to a determination of appropriateness of the removal penalty. The factors identified in the Civil Service Commission's decisions are instructive, but not controlling. Among the factors which the Commission considered were the following: (1) The nature of the offense and the extent of the employee's participation, *In re Weber,* 2 P.A.R. 33, 35 (1941); (2) the employee's motive and intent, *In re Lightsey,* 2 P.A.R. 813, 823-24 (1969); (3) whether the employee had received advice of counsel regarding the activities at issue, *In re Hutchins,* 2 P.A.R. 160, 170-72 (1944); (3) whether the employee had ceased the activities, *In re Rhodes,* 2 P.A.R. 276, 278-79 (1945); (4) the employee's past employment record, *In re Fleming,* 2 P.A.R. 1, 4 (1943); and (5) the political coloring of the employee's activities, *In re Cook,* 2 P.A.R. 516, 526 (1955).[18]

Where the Special Counsel has established that the respondent violated the Hatch Act and has presented a prima facie case that the removal penalty is warranted, the burden of producing evidence to establish that the removal penalty is not warranted shifts to the respondent. *Cf. Palmore,* 3 P.A.R. 137, 144 (1972) (requiring respondents in Hatch Act cases to show good cause why removal is not justified for an offense charged and proved by the Government). In *Special Counsel v. Yoho,* 15 M.S.P.R. at 413, the Board relied on Commission precedent in concluding that the Special Counsel must show "by clear and convincing evidence that the [employee's] violation occurred under circumstances demonstrating a deliberate disregard of the [Hatch] Act." In light of our conclusion in Part II, *supra,* that the Special Counsel must establish the charges by a preponderance of the evidence, we have reexamined the basis for our ruling in *Yoho* regarding the evidentiary standard which is applicable to the penalty. A review of the Commission's decisions regarding this issue reveals no persuasive rationale for the "clear and convincing" standard. *See, e.g., In re Jansen,* 2 P.A.R. 808, 811 (1969), and *In re Fishkin,* 2 P.A.R. 785, 789 (1968). For the

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[18] Some of the mitigating factors that the Commission recognized in its P.A.R. decisions are similar to the factors which it applied in adverse action cases, and which the Board later adopted in *Douglas,* 5 M.S.P.R. at 305. However, because the factors recognized by the Commission's P.A.R. decisions were specifically tailored to the issue of mitigation in Hatch Act cases, it will generally be more appropriate for the Board to look to those decisions, rather than to *Douglas,* for guidance in determining whether the factors which a respondent pleads in mitigation are relevant to the issue of whether removal is warranted. As in *Douglas,* however, we recognize that the factors identified by the Commission are not exhaustive. *Id.* The respondents were not prejudiced by the CALJ's reliance on *Douglas* because he considered all relevant mitigating factors.

same reasons cited in Part II, we therefore conclude that the preponderance standard is applicable to factual issues that are relevant to the imposition of the removal penalty. Thus, the Special Counsel must prove any facts that support the removal penalty by a preponderance of the evidence.[19] *Cf. Douglas,* 5 M.S.P.R. at 296-97 (holding that the agency which effects an adverse action must establish those facts which support the imposition of a particular penalty by a preponderance of the evidence). Thus, while *Yoho* correctly stated that the Board would consider all mitigating factors in determining whether removal was warranted, we find that its application of the "clear and convincing" evidentiary standard to the appropriateness of the penalty was incorrect and must be overruled.

With these considerations in mind, we turn to the issue of whether the penalty of removal is warranted for each of the respondents in this case. The CALJ discussed the numerous factors which led him to recommend respondents' removals: (1) The respondents had each committed more than one offense, and their violations were part of a pattern of the respondents' using their positions to influence other employees to make political contributions; (2) the respondents' violations were willfully committed, extremely serious, and involved the most pernicious of the activities made unlawful by the Hatch Act, i.e., the coercion of political contributions; (3) the respondents intended the obvious effect of their actions, and, contrary to their assertions, they did not believe that the employees they solicited were predisposed to making the requested contributions; and (4) the respondents held high-level supervisory and fiduciary roles in a governmental agency, and engaged in a pattern of coercive behavior which was well-publicized and adversely affected the reputation of their employer. R.D., at 44-45.

In their exceptions, all the respondents contend that the CALJ erred in not giving sufficient weight to the professional and/or civic achievements of the individual respondents. In this regard, AMHA and Cuyahoga Falls contend that the imposition of the removal penalty would be contrary to the public interest because the individual respondents are valuable, if not indispensable,

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[19] Although there may be factual issues that bear on the question of whether or not removal is warranted, the question of the penalty involves the application of administrative judgment and discretion. *Douglas,* 5 M.S.P.R. at 297. In adverse action cases, the primary discretion for selecting the penalty is entrusted to the agency which effects the action. *Id.* 5 M.S.P.R. at 300-01. However, in Special Counsel original jurisdiction cases, it is the Board which effects the action and exercises its discretion in determining the penalty.

employees.[20] We find that the CALJ correctly found that the respondents' work records and value to their agencies were outweighed by the seriousness of the respondents' offenses, which were repeated and willful. The Commission's precedent amply supports the CALJ's finding in this regard. *In re Wimer,* 2 P.A.R. 570, 575-76 (1959) (where the offense is conspicuous, removal is warranted notwithstanding the employee's good work record and value to the agency); *In re McNeel,* 2 P.A.R. 503, 505-09 (1955), *In re Fleming,* 2 P.A.R. 1, 4 (1943) (the seriousness of the employee's offense outweighed his 27 years of unblemished professional service). The Commission's decisions further support the conclusion that, in the absence of other mitigating factors, the employee's good work record cannot serve as the sole, or even the primary, basis for finding that removal is not warranted. *See, e.g., In re Cook,* 2 P.A.R. 516, 525-26 (1955) (relying on the "cumulative" force of several mitigating factors, including the employee's work record, reasonable belief that activities were lawful, and lack of political coloring in office held).

Finally, it is apparent that the detriment which an agency alleges it will suffer if the employee is removed, which has been termed the "public interest" factor, can never serve as a significant factor in determining that removal is not warranted. To hold otherwise would be tantamount to finding that the penalty of removal is warranted only for employees who, in their agency's view, occupy unimportant positions. *McNeel,* 2 P.A.R. at 506 (citing government brief). Even if we were to agree that the respondents are indispensable employees, we cannot agree that their removal is not warranted in light of the seriousness of their violations. The proscriptions of the Hatch Act fall equally on clerks and managers alike.

The respondents also contend that the removal penalty is unwarranted because they had no knowledge that their actions were unlawful and did not intend to violate the Hatch Act. The CALJ rejected these contentions, finding their "claimed lack of knowledge to be as inherently unbelievable as their assertions that the persons who[m] they solicited were anxious to make the requested political contributions." R.D., at 45. The respondents have provided no basis to overturn this finding. Respondent Purnell's testimony supports the conclusion that she was aware of the prohibition against coercive solicitations. R.D., at 45; H.T., at 966-67. Additionally, these respondents have not shown that

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[20] Respondent Cuyahoga Falls also contends that removal of respondent Fela is not warranted because there is only a de minimis connection between any Federal funds and Fela's position with Cuyahoga Falls. We find that this argument goes to the issue of whether respondent Fela and Cuyahoga Falls are covered by the Hatch Act, not to mitigation. The CALJ properly rejected this argument when he found that the respondents are covered by the Hatch Act. R.D., at 22-23.

the advice which they received contemplated or authorized the coercive solicitations which they ultimately committed, nor have they shown that, even if their actions were contemplated by the advice, they reasonably relied on it.[21] Moreover, the record indicates that AMHA had an internal personnel manual which provided that:

An employee may not directly or indirectly coerce, command, or advise another employee to pay, lend, or contribute anything of value to a party, committee organization, agency, or person for political purposes.

Respondent Purnell's Ex. 32. *See also* Pet. Rebuttal Ex. 1, at 238-39 and H.T., at 965. In light of the fact that respondent Purnell was the Executive Director of the agency, and that respondents Fela and Johnson occupied managerial or supervisory positions in the agency related to personnel or labor relations, their contentions that they had no knowledge that their actions were unlawful is unbelievable.[22] It is not necessary that the respondents have actual knowledge of the prohibitions. However, information about the Hatch Act is readily available, failure to know about the Act is attributed to lack of ordinary care, and this knowledge may be imputed to the respondents. *In re Grindle,* 1

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[21] The testimony established that respondents Purnell and Fela were active in partisan political activities, as was the AMHA legal counsel, Mr. Wayne Calabreeze, from whom they sought advice. H.T. at 1042-43, 1045-46, 1105, 1214-16. Mr. Calabreeze admitted that he also sold tickets to political events while at AMHA, but he denied selling the tickets to AMHA employees. *Id.* at 1106-07. He further testified that he advised Fela and Purnell that soliciting employees was permitted, but that they could not coerce, intimidate, threaten, or advise the employees to engage in political activities, or attempt to coerce the employees. *Id.* at 1106. Although he testified that he told Purnell and Fela that there could sometime be a fine line between coercion and solicitation, there is no evidence that the respondents requested further advice on this issue. *Id.*

[22] In rejecting the respondents' contention that they were unaware of the prohibitions contained in the Hatch act, the CALJ found that Purnell had informed the AMHA staff of these prohibitions. H.T. at 918-24, 967, and 973. The CALJ's reliance on this testimony in finding that the respondents had actual knowledge of the prohibitions was erroneous. With one exception, the record does not reflect the dates of the meetings when information about the prohibitions was conveyed to the staff. In the case of the one meeting where there was testimony concerning the date, the testimony indicates that the meeting occurred after the solicitations at issue in this proceeding. *See* Part III, *supra, citing* H.T., at 340, 918-24.

M.S.P.R. 38, 43 (1979) (ALJ's recommended decision containing this holding adopted by the Board);[23] *In re Hansen,* 3 P.A.R. 53, 57 (1970).

In light of the above discussion, we conclude that the respondents' violations of the Hatch Act were of such a scope as to warrant their removal under 5 U.S.C. § 1505.

Because respondents Purnell and Johnson are no longer employees of AMHA, that agency cannot remove them. As discussed in Part IV of this opinion in connection with respondent Fela, however, the respondents' resignations from their AMHA positions do not moot the issues presented in this case. It is a well-settled canon of statutory construction that, where the language of a statute does not address whether the provision applies to a specific situation, it is appropriate to analyze the policies underlying the statutory provision to determine its proper scope. *Bowsher v. Merck & Co.,* 460 U.S. 824, 831 n. 7 (1983), quoting *Rose v. Lundy,* 455 U.S. 509, 517 (1982). Although the language of section 1506 does not explicitly address the effect of an employee's resignation on the application of that provision, it is evident that to hold that section 1506 is inapplicable to such cases would be inconsistent with Congress's intent and would lead to absurd results.

A review of the legislative history of section 1506 shows that the purpose of the eighteen-month restriction on public employment within the same state was to "plug up what appeared to be a loophole which would permit the shifting of employees from one department to another for the purpose of evading the terms of the measure." 86 Cong.Rec. S2428 (daily ed. March 6, 1940) (statement by Rep. Hatch, sponsor of the Senate bill). A determination that section 1506 is inapplicable to employees who resign before the issuance of the Board's decision would insulate such employees from any liability for their violations, thereby providing just the kind of "loophole" that Congress sought to proscribe by enacting the eighteen-month employment restriction. Such an interpretation leads to absurd results which are plainly at variance with the evident purpose of the statute, and we therefore reject this interpretation. *City of Lincoln, Neb. v. Ricketts,* 297 U.S. 373, 376 (1936). Consistent with this legislative purpose, both the former Civil Service Commission and the Board have uniformly held that, under section 1506, an employee who resigns or otherwise leaves the rolls of a covered agency before a determination is made that removal is warranted cannot be reemployed in a state or local agency within the same state for eighteen months without the new or former agency incurring the sanction of a withholding

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[23] In the Recommended Decision, the CALJ correctly stated and applied the holding in *Grindle,* but he misidentified it as a P.A.R. decision issued by the Commission. R.D., at 45.

of federal funds. *Special Counsel v. Suso,* 26 M.S.P.R. at 679-80 at n. 11; *In re Grover,* 2 P.A.R. at 330; and *In re Neustein,* 2 P.A.R. at 112. The eighteen-month period begins to run from the date of the Board's order finding that removal is warranted. *See In re Grover,* 2 P.A.R. at 330-31; *In re Knies,* 2 P.A.R. at 586.

PART VIII:

If the City of Cuyahoga Falls does not remove respondent Frank J. Fela from his position with the City within thirty (30) days of the date of this order, it shall be subject to the sanction of a withholding of federal funds, as provided in 5 U.S.C. § 1506.

The Special Counsel is ORDERED to notify the Board within sixty days of this final decision whether respondent Fela has been removed from his position with the City of Cuyahoga Falls, unless respondent Fela is suspended and this decision is stayed in accordance with 5 U.S.C. § 1508. It is further ORDERED, that after the first submission, the Special Counsel shall thereafter submit to the Board at three six-month intervals evidence concerning whether or not any of the respondents have been reemployed by any state or local agency of the State of Ohio for a period of eighteen months after the date of this order, as provided by 5 U.S.C. § 1506.

Pursuant to 5 U.S.C. § 1508, the respondents are hereby notified of the right to file a petition for review in the United States District Court for the district in which the respondent resides within thirty (30) days of the date of mailing of the Board's final decision. This is the final order of the Merit Systems Protection Board.

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

RECOMMENDED DECISION

Date: October 28, 1987

BEFORE:

Edward J. Reidy, Chief Administrative Law Judge.

I. Introduction

This case originates from a complaint filed October 6, 1986, by the Special Counsel (SC), who seeks the removal of three individual respondents for alleged violations of those provisions of the Hatch Act which apply to non-federal governmental employment. Those provisions, 5 U.S.C. § 1501 et seq., make it unlawful for covered employees of state and local agencies to engage in specified political activities. The constitutionality of those provisions has been upheld by the Supreme Court in *Oklahoma v. United States Civil Service Commission,* 330 U.S. 127 (1947) and *Civil Service Commission v. Letter Carriers,* 413 U.S. 548 (1973).

The individual respondents are each charged with violating the law's stricture that a covered employee may not "directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes ..." 5 U.S.C. § 1502(a)(2).

The Board assigned this matter to me to conduct a hearing and issue a recommended decision. Oral hearing was held in Akron, Ohio, from April 7-16, 1987. Post-hearing briefs have been filed and considered. Based upon my analysis of the record as a whole, I make the findings, conclusions and recommendations which are set forth below.

The individual respondents were all, at the time of the alleged violations, employees of the Akron Metropolitan Housing Authority (AMHA) in Akron. Two of them still are. The other is now employed by the Ohio city of Cuyahoga Falls. AMHA and Cuyahoga Falls have been named as additional respondents in this action in accordance with the provisions of 5 U.S.C. §§ 1504 and 1505. Those sections allow agencies employing individual respondents to participate in the hearings conducted under this law.

After the issue of jurisdiction is addressed, the charges against each of the individual respondents will be treated separately for reasons of clarity. Then the

various defenses raised by the agency respondents will be addressed and, finally, the issue of penalty will be considered.

II. Jurisdiction

This proceeding presents a variety of jurisdictional issues. Among them are questions of whether the individual respondents, the governmental respondents, and the individuals who were allegedly coerced by the individual respondents are all covered by the Act.

First, I will deal with the argument of AMHA that it is not a "State or local agency," as that term is defined in 5 U.S.C. § 1501 and that, therefore, its employees, by logical extension, cannot be covered State or local employees.

This argument is inconsistent with the federal and State statutes and with case law. The Hatch Act definition of a covered governmental body is exceptionally broad and provides that a " 'State or local agency' means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." 5 U.S.C. § 1501(2). The Board has, therefore, previously interpreted this provision to extend to the Troy (New York) Housing Authority which, like AMHA, is a public corporation organized by a state and funded, in large part, by an operating subsidy provided by the U.S. Department of Housing and Urban Development. *Special Counsel v. Hayes,* 16 M.S.P.R. 166 (1983). It has also found a regional planning agency, set up by four municipalities under a grant of authority from the State, to be a covered political entity. *Special Counsel v. Suso,* 26 M.S.P.R. 673 (1985).

Moreover, Section 3735.50 of the Ohio Revised Code provides that a "metropolitan housing authority constitutes a political subdivision of the state...." And, federal and State court decisions from Ohio confirm that Ohio metropolitan housing authorities are considered to be political subdivisions of the State. *Cuyahoga Metropolitan Housing Authority v. Cleveland,* 342 F. Supp. 250 (N.D. Ohio 1972) and *Country Club Hills v. Jefferson Metropolitan Housing Authority,* 5 Ohio App.3d 77, 449 N.E.2d 460 (1981).

Despite this range of authority, AMHA asserts that a decision from a county court establishes that metropolitan housing authorities in Ohio are not political subdivisions of the State. In making this argument, AMHA overreads the holding in *Bakker v. Cuyahoga Metropolitan Housing Authority,* Court of Common Pleas, Cuyahoga County, Ohio, unreported Case No. 82-36143, Vol. 641 at 393 (1983). That case does not stand for the proposition that a housing authority is not a political subdivision of the State of Ohio. In fact, the judge in that case acknowledged that Ohio law made the housing authority a body "corporate and politic" of the State. What that case stands for is the premise that, because of unusual circumstances, employees of housing authorities may be treated differently than employees of other political subdivisions of the State. In *Bakker,*

the judge concluded that the legislature had not intended to extend the same statutory vacation rights to housing authority employees that it had extended to other State employees. He found, instead, because housing authority employees were allowed to unionize, that the legislature had intended their vacation rights to be governed by negotiated agreements rather than by statute. Therefore, AMHA's argument that it is not a political subdivision of the State of Ohio with respect to the Hatch Act is rejected.

Turning to the other respondents, the Special Counsel has established that Cuyahoga Falls, which is a municipality, meets the definition of a State or local agency for purposes of the Hatch Act and, that despite their arguments to the contrary, that the individual respondents, as well as the persons from whom contributions were sought, were each covered by the law.

Employees are covered by the Act when their principal employment is with a covered agency, and, as a normal foreseeable incident of that employment, they perform duties in connection with activities financed in whole or in part by Federal loans or grants. *See Engelhardt v. United States Civil Service Commission,* 197 F. Supp. 806 (M.D. Ala.1961), *aff'd,* 304 F.2d 882 (5th Cir. 1962); *In re Hutchins,* 2 P.A.R. 160 (1944). In this case, a third of AMHA's operating budget at all relevant times was received as an operating subsidy from the federal government, and those federal funds were used to pay for administrative costs, and for salaries of AMHA employees. (Ex. P-5 at 5). Therefore, the duties of the individual respondents were in connection with federally financed activities. And similarly, so were the duties of the employees who were supposedly coerced by the individual respondents.

III. Charges against Janet Purnell

The complaint contains nine counts, of which four contain charges against Janet Purnell, the Executive Director of AMHA. Ms. Purnell is charged with violating section 1502(a)(2) for allegedly seeking to get William Fesler to sell several tickets for political events (Count 1); for allegedly seeking to get Lola Coker to purchase a ticket to a political event (Count 2); for allegedly seeking to get Lola Coker and Gail Basilli to encourage voters to support a political candidate (Count 7); and for allegedly seeking to get Lola Coker and Gail Basilli to purchase tickets to a political event (Count 8).

Count One

The following specific factual findings are made with regard to allegations contained in Count One. Ms. Purnell is now and, since 1982, has been the Executive Director of AMHA. As such, she exercises managerial control over the day-to-day operations of AMHA. She hired William Fesler to be the Deputy

Director of AMHA, and he served in that capacity from November 13, 1982, until June 22, 1984.

In February, 1983, Purnell informed Mr. Fesler that because of his position as Deputy Director, he would be expected to sell tickets to political events. (Tr. 315-316.) In June of that year, Ms. Purnell called William Fesler into her office and gave him eight tickets to sell to the Summit County Republican Party annual fund-raiser. Each of the tickets was priced at $125.00. Mr. Fesler sold those tickets, sending the money which he raised to the local Republican party headquarters. (Tr. 325.) While Fesler never complained about being asked to sell those tickets, (Tr. 339), he sold those tickets because, as he testified, "Mrs. Purnell asked me to sell tickets. She said it was expected of me to sell tickets.... [S]he was my boss, and I was expected to sell them. That was made clear earlier, from February of '83.... I mean it was part of my job." (Tr. 331-332.)

Ms. Purnell's defense against this count is that her actions in seeking to get Mr. Fesler to sell the tickets did not amount to "coercion" or, apparently by necessary but unarticulated implication, to "attempted coercion," to a "command," or to "advice;"-the activities made unlawful by section 1502(a)(2). Instead, the respondent characterized her actions in asking Fesler to sell the tickets as a "casual request" which she made of a "long-time personal friend." (Post Hearing Brief of Respondent Purnell at 12.) Having described her action in that fashion, she suggests, relying upon *Metz v. Department of Treasury,* 780 F.2d 1001 (Fed. Cir. 1986), that she can only be liable if that request amounted to an actual threat.

In making that argument, however, the respondent ignores a long history of U.S. Civil Service Commission decisions, interpreting section 1502(a)(2), which stand for the proposition that the nature of the supervisory relationship makes a request for political action from a supervisor to a subordinate employee inherently coercive. *In re Martin,* 2 PAR 726 (1965), *In re Stewart,* 2 PAR 236 (1945), *In re Fleming,* 2 PAR 1 (1943). Therefore, given the factual predicate here, the request in this case, even absent an intent to coerce Mr. Fesler, would have to be considered to have been unlawfully coercive. Any employee in Fesler's situation would reasonably have cause to be concerned that his or her continued employment was conditioned upon engaging in the political activities suggested by the supervisor. And, here, the respondent had to know that Fesler could readily have felt coerced into engaging in such activities, since he had been told by the head of his agency that selling tickets to political events was expected of him. Keep in mind that the Act condemns indirect as well as direct coercion, and even an attempt to coerce.

In addition, despite Ms. Purnell's claims to the contrary, I find that the coercion of Mr. Fesler-while less conspicuous than that of others-was intentional and not accidental. The record establishes that Purnell, who was an officer of the local Republican party, expected her staff to assist her in her political activities.

In that regard, she sold Fesler tickets to a political event in her office,[1] and she established an internal policy under which another supervisory employee coordinated ticket sales to political events. (Tr. 317-318, 327-328). Throughout the hearing, Purnell attempted to deny, to explain away, or to minimize SC's allegations that she engaged in unlawful political activities. On the issues relating to her allegedly unlawful political activities, Purnell's testimony, however, was often inherently unbelievable, contradicted by other more credible witnesses, or impeached by her own inconsistencies. For example, Purnell at one point denied that she ever solicited a political contribution from an AMHA employee. (Tr. 1042). Then, when confronted with a previous admission from her testimony in an earlier case, she acknowledged that she had sought such contributions but attempted to justify the discrepancy between her testimony in the two cases by offering noncredible and hair-splitting explanations. (Tr. 1042-1048).[2] Therefore, I remain unpersuaded by Purnell's testimony on these issues, despite the fact that the record reveals that she is an able, possibly even a laudable, executive director of AMHA.

I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Ms. Purnell did violate section 1502(a)(2) by coercing, in June, 1983, the Deputy Director of AMHA, William Fesler, to sell tickets to a Republican party fund-raiser.[3] His contributions cannot be explained away as voluntary.

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[1] In February of 1983, at the urging of Purnell, Fesler purchased tickets for a dinner sponsored by the Summit County Republican Party, and attended that dinner with his wife. (Tr. 314-315). Fesler agreed to buy those tickets because his supervisor, Purnell, asked him to, and because he realized that doing so was part of his role at AMHA. (Tr. 315, 317-318). Fesler testified that, while he did not fear the loss of his job, he had felt subtle pressure to buy these tickets and that, therefore, it never crossed his mind to say no to Purnell's request. Fesler, however, would not have purchased these tickets absent a request by Purnell. (Tr. 318, 323).

[2] After admitting that, as Republican party official, her functions included raising funds through the holding of fund raisers, Purnell justified denying that she sought contributions by claiming that, in selling tickets to those events, she was just selling tickets and not seeking political contributions. (Tr. 1041-1044). In a similar vein, she justified denying that, as a party official, she sought contributions from AMHA employees on the ground that she would have sought such political contributions even if she had not held any party position. (Tr. 1045-1046).

[3] Another respondent, Herbert Johnson, Sr., argues that the Office of Special Counsel must prove its case by a clear preponderance of the evidence; the evidentiary standard which was employed by the Civil Service Commission. *See In re Cartwright,* 1 P.A.R. 138, 144 (1946). The Board has not had occasion to rule upon the standard of proof in Hatch Act cases. However, the Board has applied the preponderance of the evidence

Other respondents have raised defenses which could arguably apply to Purnell's situation and which, if sustained, therefore, might lead to the conclusion that her conduct did not amount to a violation of law. Those defenses will be addressed when the arguments of the respondents raising them are considered. At this point, it is sufficient to observe that none of the other respondents have prevailed on any defense which would exculpate Purnell from liability.

Count Two

The following specific factual findings are made with regard to allegations contained in Count Two. Ms. Purnell promoted Lola Coker-an employee whom she had hired-to the position of Public Information Specialist on April 18, 1983. Sometime in May or June of that year, Purnell was told by Coker that a supervisory employee of AMHA, Frank Fela, had given her two $125.00 tickets to a Republican party function and had informed her, that since her new position was a patronage job, she was expected to purchase tickets to this party function. (Tr. 102). As Coker testified, during the ensuing discussion, Purnell attempted to persuade Coker to buy at least one of the two tickets. (Tr. 102-105). Purnell said that, as the Executive Director of AMHA, she was responsible for contributing money to the Republican Party, and that it would assist her, in that regard, if Coker bought just one of the tickets and paid for it in installments. Purnell said, moreover, if Coker could not attend the dinner that the ticket could be used by someone else, and Purnell then phoned another AMHA employee in order to inquire if that employee would be willing to attend the function on the ticket that she was attempting to persuade Coker to buy. Coker ultimately agreed to buy the ticket because Purnell put her in fear of losing her job by observing that a number of people, who would have no problems contributing to the Republican party, would love to have Coker's job. (Tr. 105). In that regard, earlier, in March of 1983, at a point when Coker and Purnell were discussing Coker's future at AMHA, Purnell told Coker that her future-and the future of administrators at AMHA-depended largely upon their political affiliation. (Tr. 82, 83).

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standard in other Special Counsel original jurisdiction cases. *See Matter of Frazier,* 1 M.S.P.R. 163, 185 (1979) (corrective actions) and *Special Counsel v. Cummings,* 20 M.S.P.R. 625, 626-627 (1984) (disciplinary actions). Therefore, it is probable that the Board, if it had considered the issue, would also have ruled that the preponderance of the evidence standard applied in Hatch Act cases. However, since the Board has not yet spoken on that point, I have applied, in an exercise of caution, the stricter, clear preponderance of the evidence, standard in this case. The Office of Special Counsel has not been prejudiced by having its evidence tested against that stricter standard since, on all of the charges on it which prevailed, its evidence met the stricter standard; and on the charges on which it did not prevail, its evidence did not reach the lower, preponderance, standard.

Ms. Purnell's defense against this count is that the testimony of Ms. Coker is not credible. She asserts that she did not attempt to persuade Coker to buy the ticket and that, instead, she advised Coker to decline Mr. Fela's solicitation. (Tr. 915). She further asserts that Coker has given false testimony in this case because Coker was extremely upset by Purnell's refusal, in 1985, to authorize advance sick leave when Coker needed time to recuperate from an operation. And, she asserts that Coker purchased the ticket in question and attended the function in order to develop her personal identity with the "movers and shapers" of Akron. (Post Hearing Brief of Respondent Purnell at 14).

Having listened to the conflicting testimony of Ms. Coker and Ms. Purnell on the allegations contained in this count, I am persuaded by Coker's version of the events. Coker's testimony was direct, internally consistent, and straightforward, while Purnell's was evasive as well as internally inconsistent on major and minor issues relating to Coker. For example, Purnell incorrectly testified at the hearing that she had not been involved in the original hiring of Coker. (Tr. 1031-1032). When asked about a memorandum she had written (Ex. P-23) which established that she had interviewed Coker and had recommended that she be hired, Purnell refused to concede the obvious error in her testimony and proffered a non-responsive and non-credible explanation for the disparity between her testimony and the facts.

Ms. Coker's credibility, on the other hand, was heightened by the consistency between her testimony and some of Ms. Purnell's concessions and actions. These concessions and actions revealed Purnell's readiness to seek, and to allow others to seek, political contributions from subordinate employees. In that regard, Purnell, who was the Vice-Chairman of the local Summit County Republican Party, freely admitted that she encouraged people to purchase tickets to Republican events. (Tr. 1044-1046). Similarly, the fact that she sold tickets to a Republican function in her office to Mr. Fesler reveals a willingness on her part to solicit political contributions from subordinates. And, the fact that she did not express any concern over the allegation that Mr. Fela was attempting to obtain a political contribution from Coker further reveals her willingness to allow such funds to be raised from solicitations of AMHA employees.

I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Purnell did violate section 1502(a)(2) by coercing, in May or June of 1983, the Public Information Specialist of AMHA, Lola Coker, to purchase a ticket to a Republican party fund-raiser.

Count Seven

The following specific factual findings are made with regard to allegations contained in Count Seven. In the fall of 1983, Lola Coker and Gail Basilli, who was Ms. Purnell's secretary, were asked by Purnell to call potential voters in

Akron on behalf of the Republican party in order to encourage those voters to cast ballots for the Republican mayoral candidate. (Tr. 128-129). In addition, on election day, Purnell instructed Coker to serve as AMHA's contact person with the candidate's headquarters and, as requested by that headquarters, to place remember-to-vote calls to identified voters. (Tr. 130-131).

Ms. Purnell admits that Ms. Coker made the October phone calls but asserts that she never asked Coker to do so. Instead, she asserts that Coker volunteered to make those calls and that she did so in order to assist Purnell who was leaving town and would not have time to place the calls. (Tr. 924-925). In addition, Purnell denies that she asked Ms. Basilli to make the October calls and also denies that she instructed Coker to make the election day calls.

SC's evidence of this alleged violation consists solely of Ms. Coker's testimony. However, as with the second count, and for essentially the same reasons, I am persuaded that Coker's testimony was truthful and reflects an accurate version of the events. Similarly, I do not believe the contrary testimony offered by Ms. Purnell.

In addition, I do not find the credibility of Ms. Coker's testimony to have been affected by the testimony of Polly Dobkin, the person in charge of the candidate's voter identification and election day activities. Ms. Dobkin testified that she was not aware of Coker being responsible for making calls, or of Coker being called by the candidate's headquarters, on that day. However, Coker could have been called without Dobkin necessarily having knowledge of that fact. In that regard, Dobkin's testimony revealed that she may well not have been aware of phone calls make by or on behalf of Purnell. Specifically, Dobkin testimony that Purnell never had any campaign phoning responsibilities on election day or any other day, (Tr. 1169), was contradicted by Purnell's testimony that she was responsible for making the October phone calls, which she asserts Coker “volunteered” to make for her. (Tr. 924-925).

In further defense of this count, the respondent makes an unclear argument which relates to the “anything of value” language in section 1502(a)(2). As noted earlier, it is unlawful to coerce, attempt to coerce, command or advise a covered employee to give “anything of value” for political purposes. Apparently, the respondent is arguing, that because phone calls are ephemeral in nature- frequently leaving no discernible record that they have been made- that without additional evidence to corroborate her story, Ms. Coker's testimony cannot be considered to have established that anything of value was involved in this count. Specifically, the respondent argued that:

> Because the Special Counsel has failed to present more reliable testimony or cite to ... case law establishing that phone calls absent corroborative proof amount to value, it cannot be established with

> any degree of precision that the phone calls were actually made, thus deriving value for a partisan political purpose.

(Post Hearing Brief of Respondent Purnell at 20).

There is no merit to this argument. The time and effort expended making phone calls can be something of value. The statute's broad wording reveals that Congress intended its coverage to be encompassing. On its face, the unlawful conduct is not limited solely to the solicitation of monetary contributions. Therefore, consistent with the provision's language, the Civil Service Commission has found the act of distributing campaign literature to have been something of "value." *In re Rankin,* 2 P.A.R. 629 (1960).

In addition, even attempting to get an individual to contribute is illegal. Accordingly, a violation can occur when something of value is improperly requested. Because of that, SC could have prevailed on this count without ever establishing that the phone calls were actually made. The respondent has failed, therefore, to show why anyone should engraft, in cases involving telephone calls, an unrequired additional element on the SC's burden of proof.

I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Ms. Purnell did violate section 1502(a)(2) by coercing, in October and November of 1983, her secretary, Gail Basilli, and the Public Information Specialist of AMHA, Lola Coker, to place phone calls on behalf of a political candidate.

Count Eight

The following specific factual findings are made with regard to allegations contained in Count Eight. In May, 1984, Ms. Purnell informed Ms. Coker of an upcoming fundraiser for the local Republican party, commenting that she should start saving her money since Purnell wanted her to attend this dinner for which tickets cost $125.00. (Tr. 137-138). Believing that she could lead Purnell into thinking that she had purchased a ticket when, in fact, she had not, Coker attended the event for a brief period of time and never paid for the ticket. (Tr. 139-140).

Ms. Purnell's defense against this count is that the testimony of Ms. Coker is not credible and that evidence of this alleged violation consists solely of Coker's testimony. However, as with the second and seventh counts, and for essentially the same reasons, I am persuaded that Coker's testimony was truthful and reflects an accurate version of the events. In addition, as with those counts, I find that Purnell's actions were intended to be coercive. Moreover, particularly in light of the history of earlier instances of intentional coercion, the act of this supervisor soliciting this employee for a political contribution was inherently coercive.

During the middle of the hearing, I dismissed the remaining portion of this Count, which alleged that Ms. Purnell had comparably attempted to coerce Ms. Basilli to purchase tickets to the fund raiser. Petitioner seeks to have that portion of Count 8 reinstated. I decline to do so. Basilli, who was available, was never called to testify even after I ruled that without her testimony I would not be able to find that preponderant evidence supported a finding of a violation on this portion of the charge. Since I dismissed this charge in the middle of the hearing, I will not consider reinstating it now because the respondent has not been given a full opportunity to defend against it. Moreover, even if I were to reinstate the charge and to find that the respondent had attempted to so coerce Ms. Basilli, it would not change, in any regard, the result in this case since a finding of an additional violation would not alter the penalty which I am going to recommend. Therefore, my action in refusing to reinstate this portion of Count 8 will protect the rights of the respondent and will not be unfair to, or in any manner harm, the Special Counsel.

I conclude, based upon the foregoing, that the clearly preponderant evidence established that Ms. Purnell did violate section 1502(a)(2) by attempting to coerce Lola Coker, in May, 1984, to purchase a $125.00 ticket to a political fund-raiser.

IV. Charges Against Frank Fela

Five of the complaint's nine counts contain charges against Frank Fela, who was, at the time of the alleged violations, the Personnel-Management Administrator of AMHA. Fela is charged with violating section 1502(a)(2) for allegedly seeking to get Lola Coker to donate her labor to a political campaign (Count 6), and for allegedly seeking to get Lola Coker, (Count 2 and Count 5), Bruce Brown (Count 3), and Charles Kalail (Count 9) to purchase tickets to political events. Fela has raised two jurisdictional objections, peculiar to him, which will be considered before the allegations contained in each of those counts are addressed.

In cases where the Board finds that there has been a violation of the state Hatch Act, the Board must then determine whether the violation warrants the removal of the state or local employee from his or her position. 5 U.S.C. § 1505. If the Board so determines, it notifies the employing agency of its decision, and the employing agency effectuates the removal.

Should the employing agency fail to do so, or should the employee be removed and then rehired, within eighteen months, into any public office in that State, the Board is empowered to effectuate a withholding of Federal funds (equal in amount to two years of the salary which the employee was receiving when he committed the offense) from the agency which employed the respondent at the time of the violation or from the agency which rehired the respondent, if it receives federal funds. 5 U.S.C. § 1506.

Based upon this statutory scheme, Mr. Fela argues that the maximum penalty that the Board can impose upon a respondent is a removal from public employment in a given State for eighteen months. He then argues that he has already served that penalty and that, therefore, this action against him, which was commenced in October, 1986, should be dismissed. The factual predicate for Mr. Fela's argument is that he resigned from his position in AMHA on May 31, 1984 and did not reenter public employment in the state of Ohio for more than 20 months, or until January 21, 1986, when he accepted his current position with Cuyahoga Falls.

From that, he incorrectly argues that he cannot now be removed or barred from state employment, since prior Hatch Act rulings have treated resignations as removals. However, neither of the cases upon which he relies, *In re Impson,* 1 P.A.R. 15 (1943) and *In re Walker,* 1 P.A.R. 17 (1943), stand for the proposition that a voluntary resignation is tantamount to a removal. Instead, they stand for the premise that a voluntary resignation does not divest the hearing tribunal of jurisdiction to determine if the law has been violated. Moreover, in Hatch Act cases dealing with non-federal employees, the contention that resignation could insulate employees from liability for their violations has been specifically rejected as being contrary to the law's intent. *Neustein v. Mitchell,* 52 F. Supp. 531 (D.C.N.Y. 1943); *In re Steisel,* 2 P.A.R. 192, 195-196 (1944).

Mr. Fela also argues that Board lacks jurisdiction over him in this case because the law's prohibitions apply only to state or local employees “whose principal employment is in connection with an activity which is financed” with federal funds. 5 U.S.C. § 1501(4). He asserts that, in his present position, his connection with federal funds is de minimis. From this, he contends that the connection between his current employment and federal funds is so attenuated that his position at Cuyahoga Falls is not covered by the law. *See In re Todd,* 2 P.A.R. 49 (1943). Petitioner, however, argues that the requirement for a connection with federal funds only applies to the respondent's employment at the time that the offense is committed, and not to any subsequent reemployment. *See In re Robertson,* 2 P.A.R. 266 (1945). Since the respondent is not accused of committing any violations during his employment at Cuyahoga Falls, SC argues that source of the funding for the responsibilities encompassed within his current position is not relevant to the charges in this case.

The petitioner's arguments on this issue are persuasive. The law prohibits employees with a connection to Federal funds from engaging in certain partisan activities, and the respondent is accused of violating the law when he was a covered employee at AMHA. Prior decisions have held that jurisdiction to determine whether a violation has occurred remains unaffected by the fact that the employee has resigned from and is, therefore, no longer employed by the covered agency. Thus, Mr. Fela's current employment is not relevant to the

issues of whether he violated the law or whether the Special Counsel can proceed with this action.[4]

Therefore, the jurisdictional defenses raised by respondent Fela do not constitute a bar to this action. However, other respondents have raised defenses which could, if sustained, lead to the legal conclusion that Fela's conduct did not amount to a violation of law or to an offense for which he can now be punished. Those defenses will be addressed when the arguments of the respondents raising them are considered. At this point, it is sufficient to observe that none of the other respondents have prevailed on any defense which would insulate Fela from responsibility for his alleged violations.

Count Two

In the section dealing with Ms. Purnell, I found, under this count, that, in May or June of 1983, she coerced Lola Coker into purchasing a $125.00 ticket to a Summit County Republican Party fund-raising event. The following specific factual findings are made with regard to the additional allegations, contained in Count Two, that Mr. Fela similarly violated section 1502(a)(2) by attempting to get Coker to purchase tickets to the same event. While at work at AMHA, in May or June of 1983, Coker received two tickets from Fela to a local Republican party fund-raiser. (Tr. 101). In a conversation concerning those tickets, Fela told Coker that, given her position in the agency, she was expected to purchase those tickets. *Id.*

Mr. Fela's defense against this count is that the testimony of Ms. Coker is not credible. He denies that he provided tickets to Coker or discussed the matter with her. I have previously described my reasons for finding Coker's testimony with regard to this count to be credible in the section relating to Purnell. I make the same finding with regard to Coker's testimony concerning Fela's conduct and statements.

Moreover, it is difficult to accept as truthful Mr. Fela's blanket denial of this charge. By his own admissions, he had a significant role in sale of tickets to political events at AMHA. He admits that he was a member of the fund-raiser's executive committee and that he was, also, an unofficial “contact point” at AMHA for ticket sales to that event. (Tr. 1277-1282). He also admits selling tickets to other AMHA employees. (Tr. 1226-1228). Ticket-selling at AMHA was widespread. When those admissions are considered together with Purnell's testimony-that she received a contemporaneous complaint from Ms. Coker about

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[4] Moreover, since Cuyahoga Falls is a municipality within the meaning of the Hatch Act, it can, as the current employing agency, be ordered to remove this respondent pursuant to 5 U.S.C. § 1505. *Special Counsel v. Daniel,* 15 M.S.P.R. 636, 639, n. 4 (1983).

Fela's actions, (Tr. 915),-the clearly preponderant evidence establishes that the alleged conversation with Coker occurred.

Therefore, I conclude that Mr. Fela violated section 1502(a)(2) by advising Ms. Coker to purchase tickets, in May or June of 1983, to a political fund-raising event.

Count Three

The following specific factual findings are made with regard to allegations contained in Count Three. In June of 1983, Mr. Fela told Herbert Johnson, Sr. to solicit Bruce Brown to purchase a $125.00 ticket to the same fund-raising event involved in Count 2. (Tr. 659-660). Herbert Johnson, Sr., who is also a respondent in this case, was AMHA's Labor Relations Coordinator and worked directly for Mr. Fela. (Tr. 641). Mr. Brown was a plumber employed by AMHA. (Tr. 640).

In defense of this charge, Mr. Fela asserts that he suggested that Mr. Johnson contact Mr. Brown because he thought that Brown might be interested in purchasing a ticket based upon the fact that an active Republican had originally referred Brown to AMHA. (Post Hearing Brief of Respondent Fela at 3).

However, even if I were to accept Mr. Fela's explanation, his conduct would still amount to a violation of law. Whenever a key management official official solicits a junior employee for a political contribution, the solicitation is inherently coercive, absent exculpating circumstances, which are not present here. *In re Martin,* 2 P.A.R. 726, 733 (1965). Therefore, merely by telling Mr. Johnson to sell a ticket to Brown, Mr. Fela was attempting to “indirectly ... coerce, [or] attempt to coerce” Brown in violation of section 1502(a)(2).

Moreover, I find that Mr. Fela was not merely seeking to have a potentially interested purchaser informed of the availability of tickets. Instead, I find that Fela's direction to Mr. Johnson was part of Fela's pattern of using his position at AMHA in order to intentionally solicit political contributions, both directly and indirectly, from other AMHA employees. For example, Fela provided Johnson with six tickets to sell, and advised him whom to solicit. (Tr. 640-643). In addition, he sold Michael Blakemore, another employee he supervised, five more tickets and directed Blakemore to sell tickets to other AMHA employees. (Ex. P-20 at 17, 18, 38-44).

Mr. Fela asserts, however, that he cannot have violated the law, even if his behavior was coercive, since Mr. Brown was a temporary employee. There is no merit to that contention. As noted earlier, the statute provides that employees whose principal employment is in connection with an activity financed in whole or in part with federal funds are included within the definition of covered employees. 5 U.S.C. § 1501(4). Tenure status is irrelevant, and the Commission has,

therefore, held that “temporary, part-time, and emergency employees are subject to the statute....” *In re Hoeh,* 3 P.A.R. 4, 5 (1969).

Therefore, I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Mr. Fela did violate section 1502(a)(2) by indirectly attempting to coerce, in June, 1983, Bruce Brown to buy a ticket to a Republican party fund-raiser.

Count Five

The following specific factual findings are made with regard to allegations contained in Count Five. In October, 1983, Mr. Fela informed Ms. Coker of a Summit County Republican Party cocktail party for which tickets cost $50.00. Coker bought a ticket from Fela because he told her that “she really needed” to attend this function. (Tr. 111).

Mr. Fela's defense against this count consists of a denial of the charge and an assertion that Ms. Coker's contrary testimony is not credible. In Count 2, I was required to resolve the disparity between their testimony. For essentially the same reasons, I am also persuaded here that Coker's version of the events alleged is truthful and that Fela's blanket denial is not. I also find that Fela's request of Coker to have been inherently coercive, given their relative positions in the agency. Moreover, when the strength of the language he used to recommend the purchase here, and the frequency with which he sought political solicitations from other AMHA subordinate employees, are considered, I find that the coercion in this instance was not accidental but intentional.

Therefore, I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Mr. Fela did violate section 1502(a)(2) by coercing, in October, 1983, Lola Coker to buy a ticket to a Republican party fund-raising event.

Count Six

The following specific factual findings are made with regard to allegations contained in Count Six. In October, 1983, Ms. Coker had a conversation with Mr. Fela and Wayne Calabrese, who was the General Counsel of AMHA. The conversation occurred in Calabrese's office. In that conversation, Calabrese asked Coker to put up yard signs for Roy Ray, the Republican candidate for Mayor of Akron. (Tr. 114-115). Calabrese, who is not a respondent in this case, informed Coker that, because of her position at AMHA, she was responsible for supporting the Republican party. *Id.* Fela agreed, and told Coker that if she did not support the Republican party that she would lose her job. Specifically, Coker testified that he said, with regard to supporting the Republican party, “[Y]ou've got to do something, or you're going to be out the door.” (Tr. 116).

Mr. Fela denies that he told Ms. Coker that; although he acknowledges that he and Mr. Calabrese had a conversation with Coker, in Calabrese's office, at which the topic of political volunteering was discussed. (Tr. 1243). Both he and Calabrese assert that Coker has mischaracterized the nature of that conversation, and that she was not asked to volunteer services to a Republican candidate. They claim that Coker, who was allegedly very upset, started the conversation by expressing her anger at previously having been solicited for political contributions at AMHA. (Tr. 1120-1121). In fact, Calabrese claims that, after trying to calm her down, he advised her that it was not a condition of employment for her to make political contributions. *Id.*

Despite their testimony, I am persuaded that Ms. Coker accurately described the conversation. If Coker had been as upset as Mssrs. Fela and Calabrese claim when she entered the room, it is unlikely that she would have engaged in the type of philosophical discussion, about political volunteering, which Fela described in his testimony. (Tr. 1243-1244). Moreover, there is corroborative evidence that it was the conversation with Mssrs. Fela and Calabrese which upset Coker. In that regard, Ms. Purnell testified that, immediately after that conversation, she observed that Coker was visibly upset and asked Coker what was troubling her. (Tr. 919). Purnell then testified that Coker said she was so upset because Fela and Calabrese had pressured her "about buying tickets, and doing things in support of the Party." *Id.* In fact, Ms. Purnell, on that same day, went to talk with Fela and Calabrese about Coker's complaint that they had just "confronted her about involvement in Republican-in working for the Republican Party, and contributing, and a greater commitment on her part." (Tr. 921).

Therefore, I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Mr. Fela did violate section 1502(a)(2) by, in October, 1983, attempting to coerce Lola Coker to contribute her labor to the campaign of a political candidate.

Count Nine

Mr. Fela is charged in this count with unlawfully soliciting, in June, 1984, a subordinate employee, Charles Kalail, to purchase a $125.00 ticket to a political event sponsored by the Summit County Republican Party. The evidence supporting this charge is an affidavit of that employee. At the time of the hearing, Kalail had a serious medical condition and was, therefore, not able to be called as a witness. Over Fela's objections, I accepted Kalail's affidavit, (Ex. P-13), into evidence since hearsay can be admissible in Board proceedings. *Borninkhof v. Department of Justice,* 5 M.S.P.R. 77 (1981).

Under the appropriate circumstances, such an affidavit could satisfy a party's burden of proof. That would be particularly true where other evidence

established that the respondent had engaged in activities comparable to those described in the affidavit.

However, there is a significant and unexplained inconsistency in Mr. Kalail's affidavit. It is undisputed that Mr. Fela left the employ of AMHA by June 1, 1984. However, Kalail's affidavit places the time of the alleged solicitation "as a few days before June 15, 1984," and indicates that Fela was still employed at AMHA at that time. Moreover, the affidavit is quite definite in placing the solicitation in mid-June, and similarly quite definite in asserting that Fela was still employed at AMHA after May 31, 1984. In that regard, Kalail asserts, in the affidavit, that he brought the check to Fela's office about June 15, 1984; that Fela said, upon receiving the check, that Kalail would be promoted; and that Fela, thereafter, announced that promotion at a managers' meeting in June of 1984. Given the time frame into which the affidavit places the solicitation, I find that the Special Counsel has failed to meet its burden of proof with regard to this count. The Special Counsel has failed to establish that Fela, whose resignation was effective at the end of May, 1984, was subject, as a State or local official, to the law's prohibitions at the time this alleged violation is supposed to have occurred.

V. Charges against Herbert Johnson, Sr.

Two of the complaint's nine counts contain charges against Herbert Johnson Sr., who was, at the relevant times, the Labor Relations Coordinator of AMHA. Mr. Johnson is charged with violating section 1502(a)(2) for allegedly seeking to get Bruce Brown (Count 3) and Edward Joseph (Count 4) to purchase tickets to political events.

Count Three

In the section dealing with Mr. Fela, I found, under this count that, in June of 1983, Fela indirectly attempted to coerce Bruce Brown into purchasing a $125.00 ticket to a Summit County Republican Party fund-raising event. The following specific factual findings are made with regard to the additional allegations, contained in Count Three, that Johnson similarly violated section 1502(a)(2) by attempting to get Brown to purchase tickets to the same event.

As noted earlier, Bruce Brown was employed by AMHA as a plumber. In June of 1983, Brown, having received a phone message returned Johnson's call. (Tr. 463). In that conversation, Johnson told Brown about an upcoming political fund-raiser, and asked him to purchase a $125.00 ticket to the event. *Id.* Several times in that conversation, Johnson was informed by Brown that he could not afford the ticket. *Id.* In response, as Brown testified, Johnson told Brown "they would like to see [him] at the function"; reminded Brown that he had recently been recommended for his job by Fela; and offered to help Brown, by making arrangements for the ticket price to be paid in installments. (Tr. 463-464).

Mr. Johnson admits that such a conversation occurred but denies, for several reasons, that he acted in contravention of law. First, he contends that no solicitation of Brown could violate the law. This contention is rooted in Brown's status as a temporary employee; a status which I have already held cannot insulate a respondent from liability. However, Johnson does not merely assert that a temporary employee can never be covered by the Act's protections. Instead, he asserts that in order for temporary employee, even one who works full-time hours, to be covered, it must be established there is no non-governmental job on which the employee spends more hours per week.

In making this argument, the respondent relies upon an advisory opinion, which he sought and received from the Office of Special Counsel after the hearing was completed in this case. And, that opinion does lend support to the respondent's contention. However, the existing law on this issue is to the contrary.

The Civil Service Commission has stated that it consistently interpreted "principal employment" to mean "principal public employment." *In re Lumpkin,* 2 P.A.R. 453 (1953). Under such an interpretation, which I find to be correct, Mr. Brown's non-public employment, if any, would be irrelevant.

Moreover, under a different interpretation, which was also followed by the Commission, Mr. Brown's public employment would still be considered to be have been his principal employment. The Commission did, on occasion, despite its statement in *Lumpkin,* look to see if the public employment was, in fact, the person's primary employment. However, when it did it placed the burden, in a case like this, upon the respondent of proving that the public employment was not the principal employment. Thus, in *In re Nicely,* 2 P.A.R. 759 (1966), where the respondent alleged that he spent more time on his non-public than his public employment, the Commission held that it would presume absent contrary evidence, that a full-time position was principal employment. Therefore, even under that approach, the respondent did not prevail on this defense, since the petitioner produced evidence that Brown worked 40 hours a week at AMHA and the respondent did not establish that Brown worked greater hours elsewhere.

Mr. Johnson next argues that his actions did not amount to attempted coercion because the solicitation did not cause Brown to feel that he was in danger of losing his job if he didn't buy the ticket. This argument rests upon an unduly restrictive interpretation of the law's provisions. In order to effectuate the remedial purposes of the law, the restrictions contained in Section 1502(a)(2) have not been narrowly construed. *In re Hankins,* 2 P.A.R. 121 (1944). On the contrary, the Civil Service Commission has ruled that a manager or supervisor violates the law if he "willfully permits his official influence to be a factor in inducing a subordinate ... to make a political contribution." *In re Jarvis,* 2 P.A.R. 711 (1964). And where, as here, a person, who has just been involved in the

interviewing and hiring of the employee, (Tr. 462), makes a strong pitch for the solicitation, there can be no doubt that the approach was inherently coercive. Moreover, since no reasonable person, under these circumstances, could have believed that this solicitation would not have had a coercive effect, I find that Johnson, acting at the request of his supervisor, actually intended the obviously coercive effects of his actions.

In addition, I am unpersuaded by the respondent's attempt, in aid of this argument, to discredit the testimony of Mr. Brown. During the hearing, Brown said that he actually felt coerced by the solicitation. (Tr. 464-465). In determining whether a respondent has violated the law, it has been held that the employee's reaction to the solicitation is not controlling. *Jarvis v. United States Civil Service Commission,* 382 F.2d 339 (6th Cir. 1967). But, to the degree that Brown's reaction has relevance, I find that his contemporaneous actions in seeking the advise of friends, concerning whether or not he could resist the pressure that had been applied, corroborates his testimony which I find to have been truthful.[5] Those actions are a more reliable indicator of his feelings than anything, including the comments which Brown made to a reporter several years later, upon which the respondent relies to discredit that testimony.

Therefore, I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Mr. Johnson did violate section 1502(a)(2) by, in June, 1983, attempting to coerce Bruce Brown to purchase a ticket to a political fund-raising event. Other respondents have raised defenses which arguably apply to Johnson's situation and which, if sustained, could lead to the conclusion that Mr. Johnson's conduct did not amount to a violation of law. Those defenses are being addressed when the arguments of the respondents raising them are considered. At this point, it is sufficient to observe that none of the other respondents have prevailed on any defense which would exculpate Johnson from liability.

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[5] As part of his attempt to discredit Mr. Brown's testimony, the respondent argued that Brown's testimony was the product of improper coaching by one of the attorneys representing the Special Counsel. In support of this contention, the respondent claimed that Mr. Brown had also been improperly coached at his deposition. I do not find that Mr. Brown's testimony was the product of improper coaching, nor do I find that improper coaching of the witness occurred. And, finally, in that regard, I specifically deny the respondent's written post-hearing objection to Rebuttal Exhibit 5; which is a transcript of that deposition and which was introduced by the Special Counsel in order to more fully demonstrate what had actually transpired when Mr. Brown was deposed.

Count Four

The following specific factual findings are made with regard to allegations contained in Count Four. On or about June 21, 1983, Mr. Johnson handed Edward Joseph a $125.00 ticket to a political fund-raiser. (Tr. 359). As Mr. Joseph testified, Johnson told him, with regard to buying that ticket, that Joseph had "to get on the team." *Id.* Joseph did buy the ticket. (Tr. 355). At the time of the request, Johnson was Joseph's supervisor. (Tr. 360).

Mr. Johnson contends, as he did with regard to Count Three, that his actions did not rise to the level of coercion. This argument, however, fails for the same reason that it did there. It is based upon a too restrictive an interpretation of the law's prohibitions. A supervisor who, asks an employee to contribute to a political cause has, absent exculpating circumstances not present here, inherently coerced the employee. *In re Jarvis,* 2 P.A.R. 711 (1964). That is particularly true here, where the supervisor overrode the employee's articulated concerns about the high cost of the ticket, which amounted to nearly one week of the employee's take home pay! (Tr. 358-360).

Moreover, I am unpersuaded by Mr. Johnson's attempts to discredit Mr. Joseph's testimony, (Post Hearing Brief of Respondent Johnson at 9-16); and to also portray him as a person who practically volunteered to purchase the ticket. (Tr. 769). Having evaluated the evidence offered by the respondent as to why Joseph would have lied about the degree of coercion which he allegedly felt, I find Joseph's testimony on that point to have been credible. It is consistent with the reaction which a reasonable man would have had to the admitted solicitation. Moreover, I cannot credit Johnson's argument that he approached Joseph only because he knew, from earlier conversations, that Joseph was amenable to being solicited for political contributions. This argument is predicated upon Johnson's assertions that he never pressured subordinate employees to buy tickets to political events because he was never pressured by his superiors to sell tickets to such events. (Post Hearing Brief of Respondent Johnson at 10). Those contentions are, however, inconsistent with Johnson's own testimony, and with my earlier findings. In that regard, Johnson testified that his supervisor, Mr. Fela, directed him to solicit Brown. (Tr. 659-660). And, I found that Johnson then intentionally attempted to coerce Brown into making a political contribution. Moreover, Johnson's testimony is suspect for reasons which go beyond those inconsistencies. I find that Johnson was not a credible witness. Not only was he unusually nervous and fidgety while on the stand but, in addition, he regularly gave evasive answers in situations where he appeared to believe that a direct answer might otherwise implicate him. (*See* Tr. 636, 640, 641, 644, 656, 668, 671, 673, 679, and 687).

Therefore, I conclude, based upon the foregoing, that the clearly preponderant evidence establishes that Mr. Johnson did violate section

1502(a)(2) by coercing Edward Joseph, in June, 1983, to purchase a ticket to a political fund-raising event.

VI. Defenses of the Agency Respondents

AMHA and Cuyahoga Falls have been named as additional respondents in this action in accordance with the provisions of 5 U.S.C. §§ 1504 and 1505. They have each raised special or jurisdictional defenses.

The arguments advanced by AMHA

AMHA first argues unpersuasively that the Special Counsel failed to establish the factual basis for the charges contained in the various counts.[6] It then makes jurisdictional arguments which have been considered and rejected at the beginning of this recommended decision.

In addition, AMHA presents several other arguments which each can be briefly addressed. First, contrary to AMHA's assertions, the recent Supreme Court case of *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), which relates to the procedural rights of terminated non-federal public employees, does not affect Hatch Act proceedings, which have always provided covered employees with notice and an opportunity to be heard. And second, there is no merit to AMHA's contention that a supervisor's or manager's request for a contribution can only be inherently coercive if it is made as part of an overall plan for soliciting employees. However, even if the petitioner were required to have established such a plan in order for the solicitations to have been inherently coercive, it did so by clearly preponderant evidence which proved that the respondents routinely, in 1983 and 1984, sought political contributions, in the form of money and services, from subordinate employees.

The arguments advanced by Cuyahoga Falls

Cuyahoga Falls contends that the petitioner's delay in bringing this action is grounds for invoking the the doctrine of laches. The complaint was filed nearly 3 and 1/2 years after the earliest of the alleged violations and 2 and 1/2 years after the most recent.

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[6] AMHA also moved to strike an exhibit offered by the Special Counsel after the close of the hearing. That exhibit consists of the cross-examination portion of Ms. Purnell's testimony in a factually-related case which was tried in an Ohio state court. AMHA's attorney had been allowed to introduce her direct examination as part of a post-hearing supplemental exhibit. I now grant the Special Counsel's motion to further supplement the record through the introduction of Petitioner's Rebuttal Exhibit 6 because the cross-examination reasonably completes AMHA's submission. I, correspondingly, deny the respondent's Motion to Strike.

The doctrine of laches can be invoked where a party has been prejudiced by an inexcusable delay in instituting suit. *University of Pittsburgh v. Champion Products, Inc.,* 686 F.2d 1040, 1044 (3rd Cir. 1982). In this case, there has been no inexcusable delay and it would, therefore, be inappropriate to bar this action on the grounds of laches.

SC became aware of the possibility of a violation in early 1985. At that time, the U.S. Department of Housing and Urban Development forwarded to the Special Counsel information revealing the possibility of Hatch Act violations; information which HUD had received from Ms. Coker. (Tr. 280). The complaint was filed on October 9, 1986. The Board has previously held that the expiration of a comparable period of time between notification of a possible violation and the Special Counsel's institution of a Hatch Act case is not inherently unreasonable. *Special Counsel v. West,* 18 M.S.P.R. 519, 523 (1984).

In addition, the Board noted in that case that there was no statute of limitations which applied to Hatch Act proceedings and a general statute of limitations would not provide a bar to proceedings which were in the public interest. *Federal Trade Commission v. Algoma Lumber Company,* 291 U.S. 67, 80 (1934).

Similarly the petitioner has persuasively argued, even if a comparable statute of limitations were looked to as guidance to determine what length of time might constitute an inexcusable delay, the most comparable statute contains a five year period of limitation. That statute is 18 U.S.C. § 3282 which governs the time for bringing criminal charges of political coercion against individuals whose salaries are derived from federal funds.[7]

Cayuhoga Falls also argued that Mr. Fela's resignation should be treated as a removal and that this action, therefore, should be dismissed. That argument

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[7] Having found no inexcusable delay, there is no need to reach the question of whether Cuyahoga Falls, as a new employer, was peculiarly prejudiced by any delay in this case. However, I note that Cuyahoga Fall's contention concerning the inherent unfairness of its situation rests upon the invalid assumption that the Act contains an implied assumption that the employing agency has somehow been privy to, or responsible for, the unlawful acts of its employees. It is not agencies but individuals who are punished under the Hatch Act. Therefore, any employing agency, ordered to remove a valued employee who has violated the Hatch Act, could be as inconvenienced and as blameless as Cayuhoga Falls. Moreover, the enforcement mechanism, set out in 5 U.S.C. § 1506, under which Federal funds can be withheld from State and local agencies, is not, as Cayuhoga Falls infers, a provision which penalizes an employing agency because of the unlawful acts of its employees. It a mechanism which penalizes employing agencies for refusing to carry out a lawful order of the Board requiring the removal and debarment of covered employees found to have violated Federal law.

was rejected earlier in this opinion, in the section dealing with the charges against Fela, and will not be readdressed here. In addition, Cayuhoga Falls presented several other arguments which, because they relate to the issue of penalty, will be addressed in the next section.

VII. Penalty

Having determined that each of the individual respondents has violated section 1502(a)(2), I now turn to the issue of penalty.

The Board has twice held in Hatch Act cases dealing with non-federal employees that, where there has been a willful and knowing violation, "the seriousness of the violation is the sole factor on which the Board may make its determination on the penalty...." *Special Counsel v. Daniel,* 15 M.S.P.R. 636, 639 (1983); *Special Counsel v. Hayes,* 16 M.S.P.R. 166, 169 (1983). If those cases are controlling on this issue, the Board will not consider the "mitigating" factors identified in *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981), when it is making penalty determinations under 5 U.S.C. § 1505(2).

Nevertheless, I allowed the parties to present evidence pertinent to the *Douglas* factors because the precedents are not unmistakably clear in this area. After issuing its decisions in *Daniel* and *Hayes,* the Board's holding, in a later State Hatch Act case, that the "seriousness of the violation is a primary factor in determining" the penalty, appears to imply that other factors may also be considered. *Special Counsel v. Mahone,* 21 M.S.P.R. 499, 502 (1984). In a similar vein, the Board held, in a decision issued immediately before *Daniel* and *Hayes* which has not been overruled or distinguished, that in determining "whether removal is appropriate, all mitigating facts are considered." *Special Counsel v. Yoho,* 15 M.S.P.R. 409, 413 (1983).

Whether the mitigating factors recognized in *Douglas* are considered or not, I find that the respondents should be removed from their positions. In this case, the wilfully committed offenses were extremely serious. The Civil Service Commission has described the coercion of political contributions as the most pernicious of the activities made unlawful by the Hatch Act. *In re Martin,* 2 P.A.R. 726 (1965). Therefore, even a single incident of attempted coercion probably can, absent an adequate explanation, be a serious violation of the law. And here, the respondents have each committed more than one offense. Moreover, their violations were part of a pattern of coercive behavior; a pattern of the respondents using their positions to influence other employees to make political contributions. In addition, the respondents intended the obvious effect of their actions-the actual or attempted coercion of the employees involved-and, contrary to their assertions, the respondents did not believe that the persons, identified in Counts 1 through 9, were predisposed to making the requested contributions.

The respondents argue, however, that removal is not warranted because they were unaware of the prohibitions contained in the Hatch Act. I find their claimed lack of knowledge to be as inherently unbelievable as their assertions that the persons who they solicited were anxious to make the requested political contributions. Moreover, their assertions are inconsistent with Ms. Purnell's testimony that she sought advice on the Hatch Act from the agency's counsel, (Tr. 965); that the General Counsel informed her that it was unlawful to coerce political contributions from employees at work, (Tr. 966); and that she informed the AMHA staff of the prohibitions required by the Hatch Act. (Tr. 967). Moreover, even had the staff not been so informed by Purnell, it has been held that "when information about the Hatch Act is readily available, failure to know about the Act is attributed to lack of ordinary care, and [that] knowledge may [therefore] be imputed." *In re Grindle,* 2 P.A.R. 34, 40 (1979). In this case, that information was readily available because the prohibitions of the Hatch Act were contained in AMHA's Personnel Policy Manual. (Tr. 965).

In addition, the respondents argue that a consideration of the *Douglas* factors should led to a determination that their removals are unwarranted. I cannot agree with those arguments. The respondents have each committed serious, well publicized offenses which have adversely affected the reputation of their employer. Moreover, the seriousness of their offenses was, in each case, aggravated by the fact that the respondents held high-level supervisory and fiduciary roles at a governmental agency. These factors, together with the wilful and knowing nature of the violations, outweigh any other considerations; such as the respondents potential for rehabilitation, their good prior work records, or the absence of any serious past disciplinary records. Therefore, I find, even if the *Douglas* factors are considered, that the penalties of removal are warranted in this case, particularly since any contrary result would impact negatively the future deterrent effect of this law.

VIII. Findings

Upon consideration of all facts in this record, I find that the clearly preponderant evidence establishes that the individual respondents have violated 5 U.S.C. § 1502 to the extent and in the manner described in my decision herein. I find that the respondents Purnell and Johnson should each be removed from their positions with AMHA and that the respondent Fela should be removed from his position with Cuyahoga Falls.

The parties have 35 days after the date of service of this recommended decision to file any exceptions. Replies to exceptions are due within 25 days of the date of service of exceptions. Exceptions and replies should be filed with the Office of the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Room 802, Washington, D.C. 20419. 5 C.F.R. § 1201.129(b) and (c).