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Advisory Opinion Issued by The Office of Special Counsel Updating Agency Approach to Enforcement of The Hatch Act as it Relates to Federal Employees

The Hatch Act limits the political activity of government workers. Congress committed Hatch Act enforcement to the Office of Special Counsel (OSC) and gave OSC the authority to issue advisory opinions. *See* 5 U.S.C. §1212(f). Through this opinion, OSC is informing federal employees and the public of updates to its enforcement approach in several areas.

First, because the adjudicatory body which hears OSC cases — the U.S. Merit Systems Protection Board (MSPB) — again has a quorum and because the Hatch Act and related laws contain no enforcement exception for White House personnel, OSC will bring cases alleging Hatch Act violations by White House commissioned officers and other top staffers that warrant disciplinary action to the MSPB rather than refer such misconduct to the President.

Congress has directed OSC to pursue disciplinary action in Hatch Act cases by filing complaints with the MSPB. *See* 5 U.S.C. §1215(a)(1). Congress exempted only certain Senate-confirmed Presidential appointees (PAS) from enforcement actions at the MSPB. *See* 5 U.S.C. §1215(b). For PAS officials, the law dictates that OSC instead submit a report to the President describing the alleged violations so that the President can take "appropriate action". *Id.* There is no similar exemption for other political appointees, including Assistants to the President and other White House commissioned officers.

In recent years, OSC has referenced a 1978 opinion issued by the U.S. Department of Justice's Office of Legal Counsel (OLC) at the request of the no longer extant Civil Service Commission as a reason — along with other factors including, importantly, the MSPB's absence of a quorum — for OSC to submit to the President reports of alleged Hatch Act violations by White House personnel rather than pursue discipline at the MSPB. The OLC opinion, in turn, rests on nearly century-old case law and applies it to draft legislation, the text of which changed before final enactment.

In light of the unambiguous statutory language directing OSC to pursue disciplinary action at the MSPB for Hatch Act violations committed by all non-PAS employees, OSC does not now view the OLC assessment of a proposed bill as sufficient support for OSC to unequivocally exempt White House personnel from possible enforcement at the MSPB. More recent case law developments, along with the fact that White House commissioned officers are subject to a range of other federal laws (including those such as the tax code with monetary penalties far greater than those in the Hatch Act), support this conclusion. In addition, the 1978 opinion acknowledges that its "conclusion [that Presidential appointees are not subject to discipline imposed by the MSPB] is perhaps more doubtful with respect to lesser actions such as reprimand and civil penalties." *See* 2 U.S. Op. Off. Legal Counsel 107, 109 (1978). OSC often seeks such sanctions when pursuing actions before the MSPB.

Thus, OSC will pursue disciplinary action for Hatch Act violations as expressly provided for by statute. This means OSC will consider all non-PAS political appointees, including those serving in the White House, as subject to disciplinary action proceedings at the MSPB. OSC will continue to be transparent in its enforcement efforts by making the filing of any such MSPB enforcement actions public at the time they are initiated, just as OSC has, in the past, made public reports to the President of alleged Hatch Act violations by White House personnel serious enough to include a request for sanctions and other remedial measures.

Second, because the Hatch Act does not bar enforcement against former employees and because the MSPB has held that an "employee's post-violation resignation does not eliminate the case or controversy between the employee and the Special Counsel concerning whether the employee violated the Hatch Act and, if so, what penalty is warranted", OSC will also bring to the MSPB appropriate cases alleging Hatch Act violations by individuals who engaged in material misconduct while a federal employee but who have since left government service. *See Special Counsel v. Malone*, 84 M.S.P.R. 342, 362 (1999).

Third, OSC is updating prior advisories on the wearing or displaying of political candidate or political party items in the workplace. Previously, OSC has advised that items such as t-shirts, hats, mugs, and buttons supporting a political party (or partisan political group such as a committee, club, or other entity affiliated with a political party) should be considered as prohibited year-round by the Hatch Act for on duty government employees. At the same time, OSC differentiated between items supporting a political candidate worn or displayed on duty before Election Day versus the same items being worn or displayed after Election Day. The former were deemed Hatch Act violations, the latter were not. This distinction is being withdrawn in favor of this advisory that political candidate displays in the government workplace should be avoided year-round (identical to the prohibition on party and partisan group items) for at least three reasons:

(i) Presidential candidates in particular increasingly appear closely associated with specific political parties. These associations exist after Election Day as well as before. As a result, the distinction between individual political figures on the one hand and political parties on the other often can be one with little or no practical significance.

(ii) The broad elimination of political candidate as well as political party items in the federal workplace was an impetus for Congressional passage of the *Hatch Act Reform Amendments Act of 1993*.[1] And the prohibition is consistent with the U.S. Supreme Court's view, expressed in a case upholding the Hatch Act, that the law's constraints on federal workers' support for politicians and their parties while on duty serves to instill public faith in government.[2]

(iii) A year-round prohibition on both candidate and party items in the workplace provides a straightforward and uniform standard that does not depend on federal workers knowing precisely when or whether a particular individual officially has become a candidate for office including re-election.

In light of the above, OSC views the year-round workplace political item prohibition as applicable to current or contemporaneous political figures as well as political parties.

Fourth, and finally, a blanket prohibition on tangible items intended only to convey a political candidate or political party message is not inconsistent with OSC's support for federal employee speech rights generally. For example, OSC is known for its strong enforcement of the anti-gag order provisions established by Congress in the *Whistleblower Protection Enhancement Act*. With regard to the Hatch Act, the Supreme Court has upheld the law's limitations on the speech and conduct of government employees, particularly when such activities are directed at or related to electoral outcomes. At the same time, OSC recognizes that the Supreme Court also has long directed that when limiting the speech of government employees, the goal "is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

Finding the right balance between speech that is protected versus that which is prohibited can be challenging. Some workplace speech with an arguable nexus to policy may be impermissible political activity, particularly if it occurs close to and is intended to influence an election.[3] And the activity may be deemed impermissibly political by OSC even if it does not involve unambiguous or express efforts to help a particular candidate or party succeed. At the same time, the use of a word or phrase associated with a candidate or party in a policy discussion does not necessarily violate the Hatch Act particularly when the language at issue has a legitimate connection to federal government programs, proposals, or related debates.

Importantly, OSC will always find violations of the Hatch Act when on-the-job speech or conduct includes express advocacy (*i.e.* please support the election of, vote against, donate to, or variations thereof). Beyond that, prohibited advocacy can also include using words, phrases, or images associated with a specific candidate or party, particularly when they appear alone, virtually alone, or gratuitously.

While this Advisory Opinion updates OSC's approach to Hatch Act enforcement in certain areas, it is important to note what remains unchanged. OSC will continue to provide extensive training, education, and advice to inform federal agencies and employees of Hatch Act obligations. Relatedly, OSC continues to encourage government workers to come into immediate compliance once alerted of violations. Quickly remedied and minor violations often can be addressed and closed through warnings from OSC rather than a filed case.

If you have questions about this Advisory Opinion, please contact OSC at HatchAct@osc.gov.

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[1] *See e.g.* 139 Cong. Rec. S8806 (July 15, 1993) (statement of Sen. Sarbanes) ("[T]he bill would prohibit Federal and postal workers from any type of political activity on the job, including the wearing of political buttons which is allowable under current law.").

[2] *See U.S. Civil Service Commission v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 564-565 (1973) ("It seems fundamental in the first place that employees in the Executive Branch of Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group of the members thereof….There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not be eroded to a disastrous extent.").

[3] This sentence has been edited from its original version to correct a mistake. In the original version, the "and" was inadvertently an "or."