

**Hearing Statement of B. Chad Bungard, General Counsel
U.S. Merit Systems Protection Board**

Before the

**Senate Committee on Homeland Security and
Governmental Affairs**

**Subcommittee on Oversight of Government Management, the
Federal Workforce, and the District of Columbia**

***The Perils of Politics in Government: A Review of the Scope and
Enforcement of the Hatch Act***

October 18, 2007

I am delighted to accept the invitation from Chairman Daniel Akaka and Ranking Member George Voinovich to share information regarding the role of the Merit Systems Protection Board (MSPB) in enforcing the Hatch Act. The Subcommittee has asked me to address the following issues:

1. The Board's processing and adjudication of Hatch Act cases;
2. The scope of the MSPB's jurisdiction over Hatch Act cases;
3. The extent of the Board's Hatch Act caseload (absolute numbers as well as the percentage of the Board's overall caseload); and
4. Recent developments in the Board's case law under the Hatch Act with special attention to the "water cooler exception."

BACKGROUND AND SCOPE OF MSPB JURISDICTION OVER HATCH ACT CASES

The Hatch Political Activities Act (Hatch Act) governs the extent to which government employees at the federal, state and local levels may engage in political activity. Under amendments enacted by Congress in 1993, most federal and District of Columbia government employees are permitted (with significant limitations) to take an active part in partisan political management and campaigns. The Board does not have authority to consider a complaint alleging a violation of the Hatch Act by an employee in a confidential, policy-making, policy-determining, or policy-advocating position who was appointed by the President, by and with the advice and consent of the Senate (other than an individual in the U.S. Foreign Service.)

ADJUDICATION OF HATCH ACT CASES BEFORE THE BOARD

The Merit Systems Protection Board adjudicates complaints alleging violations of the Hatch Act that are filed by the Office of Special Counsel. The complaint is heard by an Administrative Law Judge (ALJ), for the MSPB, not an administrative judge employed by the MSPB. Under the terms of an inter-agency contract, MSPB uses the services of administrative law judges from the National Labor Relations Board. The respondent (employee) has a right to answer the complaint, to be represented, to a hearing, and to a written decision. Hearings generally are open to the public. The judge may order a hearing or any part of a hearing closed when doing so would be in the best interests of the respondent, a witness, the public, or any other person affected by the proceeding.

Except as otherwise provided, the procedures applicable to MSPB appellate cases also apply to Hatch Act disciplinary actions. That is, ALJs have the authority to, among other things, issue subpoenas, rule on discovery motions, order a hearing, impose sanctions, and issue decisions. The Special Counsel must establish a violation of the Hatch Act by a preponderance of the evidence.

ALLEGATIONS AGAINST FEDERAL EMPLOYEES

If the ALJ determines that a Federal employee has violated the Hatch Act and that removal is warranted, the ALJ issues an initial decision ordering removal of the employee which may be appealed to the Board on petition for review. If, on petition for review, the Board decides that a Federal employee has violated the Hatch Act, the penalty must be either removal or a suspension without pay for not less than 30 days.

If the ALJ determines a Federal employee has violated the Hatch Act, but that the appropriate penalty is less than removal, the ALJ issues a recommended decision for consideration by the 3-member Board. The parties may file exceptions to the recommended decision and replies to the exceptions. The three-member Board considers the recommended decision, any exceptions that have been filed, as well as any replies to those exceptions and issues a final written decision. A penalty of less than removal requires a unanimous vote of the Board.

The ALJ may initiate attempts to settle the complaint at any time during the proceeding. If a settlement is reached, the settlement agreement becomes the final and binding resolution of the complaint.

ALLEGATIONS AGAINST STATE OR LOCAL AGENCY EMPLOYEES

If the Board decides that an employee of a state or local agency whose principal employment is in connection with an activity financed in whole or in part by Federal funds has violated the Hatch Act, the outcome must be the penalty of removal or a determination that no penalty is warranted. If the Board determines that removal is warranted and the state or local agency fails to comply with the Board's order or reinstates the employee within 18 months of the removal, the ALJ or the Board may order the Federal entity providing funding to the agency to withhold funds from the agency. The amount to be withheld may be the equivalent of two years of pay for the subject employee.

RIGHT OF JUDICIAL REVIEW

The Board's decision that a Federal employee violated the Hatch Act may be appealed to the U. S. Court of Appeals for the Federal Circuit. The Board's decision that a state or local agency employee violated the Hatch Act can be reviewed by an appropriate U.S. district court.

THE MERIT SYSTEMS PROTECTION BOARD'S HATCH ACT CASELOAD

The MSPB receives approximately 8,400 appeals in its headquarters, regional and field offices each year. From January 2002 to September 2007, the Office of the Special Counsel brought 36 Hatch Act cases before the Merit Systems Protection Board. Of that total, 15 cases involved state or local agency employees. The outcomes were as follows:

- 12 Decisions upholding the findings of the Office of Special Counsel
- 3 Decisions modifying the findings of the Office of Special Counsel

- 3 Decisions reversing the findings of the Office of Special Counsel
- 12 Settlements
- 6 Dismissals before final decision

The most frequent types of Hatch Act violations that were committed by state or local agency employees were: running as a candidate in a partisan election (9 cases) and using official authority to influence or affect an election (3 cases). Although there was a spike in the number of cases brought against state and local employees in 2005 (when 9 cases were filed), our data do not reflect a steady increase in the number of such cases during the period in question.¹

RECENT DEVELOPMENTS IN HATCH ACT CASELAW

On May 30, 2002, the Office of the Special Counsel issued an advisory opinion regarding the use of electronic messaging devices to engage in political activity. The advisory sought to preserve the rights of Federal employees to express their opinions on political subjects and candidates both publicly and privately, while upholding the Act's prohibition on engaging in political activity while in uniform, on duty, in a government building, or in a government vehicle. The advisory opinion concluded that "the Hatch Act does not prohibit 'water-cooler' type discussions and exchanges of opinion among co-workers concerning the events of the day (including political campaigns)."

In 2006, the Merit Systems Protection Board issued a series of decisions involving allegations of Hatch Act violations. In 3 of these cases, the 3-Member Board determined that, the employee had engaged

¹ In 2002, two cases were filed. In 2003 and 2007 no cases were filed. In 2004, one case was filed and in 2006, three cases were filed.

in political activity that was prohibited by the Hatch Act. First, in Special Counsel v. Morrill, 103 M.S.P.R. 143 (2006), OSC alleged that Morrill, a career civilian employee with the Naval Inventory Control Point (NICP), sent an e-mail to over 300 agency NICP employees and other individuals directing recipients to take specific action in support of a partisan candidate for a local legislature. With the subject line "Halloween Party for Tim Holden," the message directed recipients to "see attached. post, distribute widely, make phone calls and make this the event that will be remembered above all others!!!!" The e-mail message also contained an attached announcement for Tim Holden's Halloween Party, hosted by the Harrisburg Region Central Labor Council. The announcement encouraged all recipients to attend the party and "meet Tim Holden" and stated that Holden "has spent his career supporting Working Families," "is surprising everyone by leading in the Polls," and "must have the support of Working Families to WIN!" The administrative law judge determined that Morrill engaged in "political activity" in violation of the Hatch Act and should be suspended for 60 days. The Board denied Morrill's petition for review.

Second, in Special Counsel v. Eisinger, 103 M.S.P.R. 252 (2006), OSC alleged that Eisinger, an employee of the Small Business Administration, made numerous telephone calls and used his government computer to draft documents and send over 100 e-mails directed towards the success of the Green party, while on duty or in a room or building occupied in the discharge of his official duties. The Board adopted the ALJ's determination that the employee violated the Hatch Act and should be removed.

Third, in Special Counsel v. Wilkinson, 104 M.S.P.R. 253 (2006), the Board held that a career federal employee of the Environmental Protection Agency (EPA), who forwarded a letter from the Democratic

National Committee (DNC) that was signed by the Chairman of the DNC to 31 fellow employees by e-mail using a government computer while on duty in his government office had engaged in "political activity" in violation of the Hatch Act. The text of the DNC letter asked readers to "foil George Bush's alleged attempt to steal victory, to watch the Gore-Bush debate and vote in online polls, write a letter to the editor, and call in to talk radio programs." The letter also told the readers that their "actions immediately after the debate tonight can help John Kerry win on November 2".

In Special Counsel v. Davis and Sims, 102 M.S.P.R. 288 (2006), the ALJ dismissed the complaint on the grounds that it did not allege a Hatch Act violation. The Board reversed and remanded this decision, finding that Sims' actions in forwarding an e-mail to 22 individual addressees and Davis' actions in forwarding an email to 27 individual addressees could support a finding of Hatch Act violations. The subject line of Sims' message was "FW: Fwd: Fw: Why I am supporting John Kerry for President?" Sims message began with "Some things to ponder" and included a copy of a letter allegedly written by John Eisenhower, son of former Republican President Eisenhower, which explained why he supported John Kerry for President. The subject of Davis's message was "FW: Your Vote," and in the body of the message was a copy of an e-mail attacking Senator Kerry and inviting recipients to pass along the "I VOTE THE BIBLE" button. On remand, the Board directed the parties to address factors identified in OSC's 2002 Advisory Opinion "Use of Electronic Messaging Devices to Engage in Political Activity" along with any additional arguments that would support their views as to whether a violation occurred.

The Office of the Special Counsel rescinded its 2002 advisory opinion in March of this year stating that these Board decisions provide “clear guidance” and intimating that the Board held that the right to express opinions on political subjects and candidates was intended to apply to off-duty expressions, *i.e.*, that the “water cooler exception” is no longer valid. To the contrary, the Board has not decided whether an employee’s on-duty expressions of his or her opinion on political subjects and candidates constitute “political activity,” as prohibited under the Act. In all four of these Board decisions, the issue was whether the employees’ communications exceeded the mere exchange of opinions and urged others to take specific action in support of or against specific partisan candidates.

CONCLUSION

As the data show, Hatch Act cases are a very small part of the Board’s overall caseload. However, these cases are very significant to the Board’s statutory mission of ensuring a merit-based Federal civil service system. The Board endeavors to adjudicate these cases promptly and efficiently, and in a manner that comports with the congressional intent of the Act.