

Mid-Term Elections Mean Fed Employees Must Mind Their E-mails

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The Office of Special Counsel's announcement last spring of its enforcement actions against two IRS employees who in 2012 engaged in partisan political activities in violation of the Hatch Act did not surprise me very much. After all, the alleged misconduct happened during a presidential election year. What did surprise me, though, was the technologically simplistic nature of the misconduct: federal employees conveying over the telephone partisan political messages. More specifically, one IRS customer service representative urged taxpayers to vote for President Barack Obama. The other employee, a tax advisory specialist, told a taxpayer she was "for" Democrats and "If you vote for a Republican, the rich are going to get richer and the poor are going to get poorer." Unlike many similar Hatch Act enforcement action announcements, the one pertaining to the IRS workers did not mention violations enabled by e-mails – or even Twitter. It was during my tenure as chairman of the Merit Systems Protection Board (MSPB) that the Board clearly established in 2006 that e-mails containing partisan political messages sent from government computers do, in fact, constitute Hatch Act violations. Since then, we have seen the OSC issue a steady stream of e-mail-prompted Hatch Act enforcement actions at, for example, the Department of Veterans Affairs, General Services Administration, Department of the Navy, Army Corps of Engineers, and National Institutes of Health. These Hatch Act violations resulted in penalties, reached either by settlement or MSPB order, ranging from short-term suspensions without pay to removal. It should be noted that removal used to be the default penalty for Hatch Act violations. However, the Hatch Act Modernization Act of 2012 gave the MSPB more penalty options, including removal, reduction in grade, debarment from federal employment for up to five years, suspension, reprimand, or an assessment of a civil penalty up to \$1,000. E-mail is a tool conducive to Hatch Act violations for many reasons. For starters, it allows federal employers to reach large audiences with a click of a button. The forwarding option is especially dangerous because it allows employees to pass along a message without realizing it contains a partisan political message. In other words, employees can violate the Hatch Act even if they lacked any intention to engage in partisan political activity. As the Board noted in *Special Counsel v. Wilkinson* (2006), the decision for which I co-authored, "OSC must demonstrate only that an employee covered by the Act engaged in political activity prohibited by the Act, and that the employee's intent is relevant only to the determination of the penalty

to be imposed for the violation.” In Wilkinson (2006), the OSC prosecuted a Hatch Act violation committed by an Environmental Protection Agency employee who forwarded an e-mail featuring a letter from the chairman of the Democratic National Committee (DNC) chairman shortly before the 2004 presidential election, in which John Kerry squared off against George W. Bush. The letter exclaims, “Tonight, don’t let George Bush’s henchmen steal another victory.” It urged people to “Vote,” “Write” and “Call” to “help John Kerry win on November 2.” The employee sent this e-mail while on duty and in a government office. The MSPB judge concluded this conduct was permissible under the Hatch Act because the law does not prohibit employees’ expression of their opinions on political subjects or candidates. The MSPB judge believed the Office of Personnel Management’s definition of “political activity” was impermissibly broad and would actually ban this permissible political speech. He said, “Therefore, an employee’s expression of his or her personal opinion on a matter of politics does not become a Hatch Act violation by virtue of the fact that it is conveyed via a government computer, while an employee is on duty, to thirty fellow employees via email.” The Board, however, disagreed with this reasoning. The Board noted that the e-mail with the DNC letter qualified as campaign literature and his “dissemination of the DNC campaign literature to his fellow EPA employees by e-mail constitutes ‘distribution’ of campaign literature and therefore constitutes ‘political activity’ under the Hatch Act.” Additionally, the Board pointed out that this e-mail was not a mere opinion piece. The employee did not even comment on the DNC letter; he simply forwarded it. “While the appellant’s opinion that Kerry was the better candidate for President may have been implicit in the fact that he distributed campaign literature intended to increase the likelihood of Kerry’s election, the content of the e-mail did not explicitly state any opinion regarding the Presidential candidates or a political subject,” the Board said. Instead, it was “campaign literature intended to encourage its readers to engage in activities immediately following that night’s Presidential election debate to help ensure that the DNC’s candidate would be elected to a partisan political office.” In its latest Performance and Accountability report, the OSC forecasted it will issue 75 Hatch Act warning letters to federal employees in both fiscal years 2014 and 2015. That is down from the 150 warning letters it issued in fiscal year 2013. It attributed the lower forecast to the Hatch Act Modernization Act’s narrower criteria for violations. With mid-term elections a few months away – and the Senate up for grabs and the nation more polarized than ever – I’d say that is a fairly optimistic forecast.