



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505

**Federal Hatch Act Advisory:
Use of Electronic Messaging Devices to Engage in Political Activity**

May 30, 2002

This memorandum offers advice concerning the use of electronic messaging devices, such as computers, cellular telephones, handheld wireless E-mail devices (e.g., Palm Pilot™ and BlackBerry™), and text-messaging pagers, whether government or personally-owned, to send or deliver partisan political messages while on-duty, at the federal worksite, or in a government-owned vehicle.¹ During the last Presidential election, this issue arose in conjunction with a number of complaints filed with the Office of Special Counsel (OSC).

The Hatch Act (5 U.S.C. §§ 7321 – 7326) generally permits most federal employees to actively participate in political management and political campaigns. Employees are prohibited, however, from engaging in political activity while in uniform, on duty, in a government building, or in a government vehicle. Political activity is defined as “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101.

The Hatch Act does not purport to prohibit all discourse by federal employees on political subjects or candidates in a federal building or while on-duty. In fact, it explicitly protects the rights of federal employees to express their opinions on political subjects and candidates both publicly and privately. 5 U.S.C. § 7323(c); 5 C.F.R. §§ 734.203(a) and 734.402(a). Thus, 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).

Electronic messaging technology is often used instead of face-to-face conversation or a telephone call. The fact that a “water-cooler” type discussion takes place through the use of E-mail does not, in and of itself, transform the discussion from a protected exchange of personal opinion into prohibited political activity for purposes of the Hatch Act.

Electronic messaging technology, however, can be put to uses other than serving as an alternative mode for casual conversation. E-mail also provides employees with a means to disseminate their opinions on political subjects and candidates to a much wider audience than is possible in casual face-to-face conversation or a phone call. Federal employees can use E-mail to forward political messages to a mass audience. In short, electronic messaging technology

¹ This list of electronic messaging devices is not intended to be exhaustive.

enables employees to engage in a form of electronic leafleting or “electioneering” at the worksite which may constitute prohibited “political activity.”

To determine whether a communication by E-mail falls under the Hatch Act’s prohibition against on-duty political activity, relevant considerations include, but are not limited to: (1) the content of the message (i.e., is its purpose to encourage the recipient to support a particular political party or vote for a particular candidate for partisan political office); (2) its audience (e.g., the number of people it was sent to, the sender’s relationship to the recipients); and (3) whether the message was sent in a federal building, in a government-owned vehicle, or when the employee was on duty.

By way of illustration, on the day before the 2000 Presidential election, a government employee, while on duty and in a government building, used his government computer to E-mail all agency employees a message captioned “URGENT! FORWARD TO UNDECIDEDS & NADERITES.” The text of the message praised Presidential candidate Al Gore, and encouraged recipients to forward the message to as many other people as possible because there were “only 18 more hours to bring Nader voters to their senses and get them to vote for the ONLY candidate for President – Al Gore!!!”

OSC has concluded that this employee violated the Hatch Act when he sent this message. The content of the message explicitly encouraged its recipients to vote for Al Gore and urged others to do so. The message was sent to a mass audience, including many individuals with whom the sender had no prior acquaintance, much less personal relationship. Finally, the sender was on duty, in a government building when he sent the e-mail.²

By contrast, suppose that a government employee, while on duty and in a government building, used his government computer to E-mail a message to a few co-workers with whom the employee regularly engaged in friendly political debate. Assume that the E-mail was captioned “follow-up on our discussion this morning,” and attached the text of a newspaper column critical of one of the Presidential candidates’ tax proposals, with a statement supportive of the columnist’s views.

In this instance, the content of the message expresses the sender’s personal opinion about a candidate for partisan political office. It may also be true that the message is intended to encourage the recipients to support the sender’s candidate of choice. Nonetheless, the audience for the message consists of a small group of colleagues with whom the sender might

² We note here that the Hatch Act proscribes “activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. § 734.101. An employee who is merely a recipient of a message such as the one described in the text does not violate the Hatch Act, even if he or she receives, retrieves or reviews the message while on duty or in a government building because retrieving or reviewing a message are not acts directed toward the success or failure of a political party, candidate or group.

otherwise engage in political discourse, face to face. Thus, even though the message was sent in a government building and through use of government equipment, while on-duty, the Hatch Act was not violated because the E-mail message was simply a functional substitute for permissible face-to-face expression of personal opinion on political subjects.³

Ultimately, between these two extremes, there are many possible permutations. The determination whether an employee has engaged in prohibited political activity on duty or in a government building or vehicle must necessarily be made on a case-by-case basis. This advisory is intended only to outline the general considerations that apply and to alert employees covered by the Hatch Act to the fact that use of government E-mail to transmit political messages implicates the Act's prohibitions. We encourage employees to contact our office for advice about these matters as they arise.⁴

Please contact Ana Galindo-Marrone or Amber Bell at (800) 854-2824 if you have any questions.

_____/s/_____
William E. Reukauf
Associate Special Counsel
for Investigation and Prosecution

WER:KLE/kle

³ OSC has authority to issue advisory opinions concerning the Hatch Act. The use of government E-mail for non-work related purposes while on duty is also governed by federal regulations promulgated by the Office of Government Ethics, e.g., 5 C.F.R. § 2635.704(d), and/or agency policy. Individuals should contact the Office of Government Ethics or appropriate agency officials for advice about any such regulations or policies.

⁴ In addition to implicating the prohibitions in 5 U.S.C. § 7324, E-mail messages that solicit support for political candidates or parties may, in some circumstances implicate the Hatch Act's prohibition against using official authority or influence for the purpose of affecting or interfering with the results of an election. See 5 U.S.C. § 7323(a)(1). As set forth in 5 C.F.R. §734.302 activities which fall within this prohibition include use of an official title while engaging in political activity and using official authority to coerce any individual to engage in political activity.