Congressional Research Service

Memorandum September 11, 2008

TO: Subcommittee on Federal Workforce, Postal Service, and the District of Columbia; House Oversight and Government Reform Committee

FROM: Jack Maskell
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SUBJECT: Testimony on H.R. 4272, and Federal Limitations on Candidacies of State or Local Government Employees in Partisan Elections

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My name is Jack Maskell, and I am a legislative attorney in the American Law Division of CRS, and have worked on Hatch Act issues for the Congress for nearly 35 years. I have submitted to the Committee a more detailed, written analysis of the federal Hatch Act and how it applies to state and local government employees, and would like to confine my comments here to a few areas of that analysis.

When the Hatch Act was initially adopted for federal employees in 1939 — codifying certain restrictions in civil service rules and executive orders — the problems at which the law was directed involved allegations of wide-spread political patronage abuses, particularly in WPA projects. Allegations involved coercion of people to work on campaigns as a condition to get welfare work and to "kick back" a portion of one's salary as a political contribution to the party in charge — the infamous "2% clubs."

Shortly after the adoption of the Hatch Act, it became apparent that amendments and modifications were needed, and in 1940, when certain state and local government employees were added to the restrictions, one of the major modifications was to exempt federal employees in certain localities (in which there lived numerous federal employees) from the restrictions on running for office in a partisan election as an independent. This was done in the interest of allowing a large enough pool of civic-minded persons who would be interested in elected public service. This exception exists today for federal employees in more than 70 localities in the Washington D.C., area, and beyond, including Fairfax County, Virginia, which has nearly 1,000,000 residents.

It should be emphasized here that the Hatch Act restrictions have undergone substantial amendments and modifications over the years to accommodate the changing conditions and realities of federal and public employment. In 1942, for example, Congress enacted a specific exemption to the Hatch Act for employees of federal, state and local governments who were employed by a school or research institution. The exemption for school teachers

and employees remains as part of the current law, and was intended to assure that teachers had the right to freely discuss and be involved in political subjects and matters — to allow teachers to be examples for youth of participatory citizenship, as well as to assure a vibrant and effective discussion of public issues concerning schools in the political arena by those closely connected to and knowledgeable about the schools.

In 1974 major changes to the Hatch Act as it applied to state and local government employees were made eliminating most of the federal restrictions on off-duty, free-time political activities for state and local employees. What was, and is, left is the restriction on candidacy to elective office in a partisan election, as well as restrictions on using one's official influence to affect an election, and the prohibition against coercion of employees. Interestingly, after these changes were made in the federal law, several states then changed their provisions on political activities of state employees, - allowing for more voluntary, off-duty activities. Surveys by committees of the House in 1983 and in 1987 to state enforcement officials indicated that such changes did not increase incidents of reported violations or of abuses such as coercion, and did in fact increase the participation in the political process and in civic affairs by governmental employees. (Committee Print No. 98-9, 98th Congr., 1st Sess. 7-8 (1983); H.R. Rpt. No. 101-27, 101st Cong., 1st Sess. 12 (1989)).

In 1993 the provisions of Hatch Act for federal executive branch employees were significantly amended by the "Hatch Act Amendments of 1993" to allow most federal employees to engage in a wide range of voluntary, partisan political activities on their own free time, away from their federal jobs and off of any federal premises. The Hatch Act as originally enacted in 1939 and civil service rules were seen in some respects as *protections* of government employees from coercion from higher level, politically-appointed supervisors to engage in political activities or make contributions against their will. With the advent of the modern, more independent and merit-based civil service, and the adoption of increased statutory and regulatory protections of federal employees against improper coercion and retaliation, the need for a broad ban on all *voluntary* activities in politics as a means to *protect* employees was seen as less necessary. The demographics, conditions and realities of federal employment have changed dramatically since the first restrictions on political activities were passed. The percentage of merit system civil service employees grew from 10% of the federal workforce at the time of the passage of the Pendleton Civil Service Act in 1883, to 32 % of the federal workforce at the time of the passage of the Hatch Act in 1939, to the more recent figure of more than 80% of all federal workers being under a merit system. The Civil Service Reform Act brought in the codification of merit principles and a specific detailing of prohibited personnel practices. Mechanisms, agencies, and offices were created to enforce the rights of federal employees and to protect employees against coercion and retaliation. The 1993 Hatch Act Amendments thus removed many of the most restrictive limitations in federal law on employees' personal, off-duty voluntary activity, speech and expression, while at the same time provided more express statutory prohibitions on workplace politicking.

Similarly, the conditions and demographics of state and local government employment have changed, as well. The states have adopted since 1940 their own restrictions and limitations on political activities of their own employees, and have enacted more protections of employees from coercion and political patronage, while developing more professional and independent civil service systems. Additionally, since 1940 there has been an exponential increase in the subject areas and activities of state and local entities which now have the involvement of federal funds. Thus, more and more state and local employees than ever

before contemplated are coming within the restrictions of that portion of the federal Hatch Act.

As to candidacy specifically, in many ways, the Hatch Act provisions are more restrictive for state and local employees than such provisions are for federal employees. In the first instance, *federal* employees who work only part-time or intermittently are covered by the Hatch Act only when in "on-duty" status, and are allowed to run for office even in a partisan election when off-duty. However, there is no similar exemption for part-time or intermittent state or local employees covered under the federal provisions, and they apply as long as such position is the employee's principal employment.

Additionally, the exemption to allow federal employees to run for office as an independent in an otherwise partisan election in those communities having numerous federal government employees, applies only to federal employees. There is no similar exemption for state or local employees in communities or areas where the number of covered state and local employees may severely limit the pool of qualified and interested candidates for local offices.

To address the issues of the increased number of local and state employees now coming within the restrictions of the federal Hatch Act, and the resulting diminishing pool of civic-minded persons who are available to run for local office in some smaller communities, the bill under consideration, H.R. 4272, would exempt employees in local communities having a population under 100,000, and would allow such employees to run for local office. Unlike the federal exemption for certain communities, however, such state and local employees would appear to be permitted to run as partisan candidates in a partisan election for local office – federal employees in exempted localities must now run as independents. Additionally, one other area of consideration would be that federal employees are now generally prohibited from directly soliciting financial political contributions from other federal employees, except in certain circumstances, and that such federal restriction on federal employees would apply to even non-coercive solicitations. The existing restriction in the federal Hatch Act for state and local employees is only on coercing or "advising" another state or local employee to make a political contribution, and may not cover the much more subtle activity of merely soliciting one's colleagues for contributions to one's own campaign.