



Washington, D.C. 20530

MAY 28 1997

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM:

STEPHEN R. COLGATE
Assistant Attorney General
for Administration

A handwritten signature in cursive script, reading "Stephen R. Colgate".

SUBJECT:

Personnel Recommendations from Members of Congress

There have been recent changes to the political recommendation provision of the Hatch Act, title 5 U.S.C. § 3303, which warrant an update to our guidance.

My most recent correspondence on this issue (a memorandum dated December 14, 1994) has been overtaken by the 1996 amendments to the Hatch Act. With the 1996 amendments, an agency official is permitted to solicit or consider a recommendation or a statement from anyone (including a Member of Congress) consisting of an evaluation of an individual's work performance, qualifications, ability, aptitude, character, loyalty, or suitability, when based on personal knowledge or records of the sender. However, an agency official concerned with examining or appointing an applicant for the competitive service must not receive or consider a recommendation from a Senator or a Representative, except as to the character or residence of the applicant unless the recommendation is based on personal knowledge or records of the sender. In no case is an agency required to return a letter to the sender even if it does not meet the above requirement.

Because there may be lingering confusion among Members whether a recommendation may be accepted, we recommend that all letters from Members be answered with a standard reply, a copy of which is attached. This example will also be incorporated into the Department's Correspondence Policy, Procedures, and Style Manual. If individuals in your component have questions whether they may consider a Congressional recommendation, they should refer those questions to your Deputy Designated Agency Ethics Officials (Deputy DAEOs), who have been briefed on this issue.

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from Members of Congress

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A copy of OPM's guidance on this matter is also attached. If your staff or your Deputy DAEOs have any questions, they should refer them to the Director of the Departmental Ethics Office, Mary Braden, who may be reached on 514-8196.

Attachments



Washington, D.C. 20530

The Honorable [Name]
United States Senate
Washington, DC ZIPCODE

Dear Senator:

This is to acknowledge receipt of your letter on behalf of [applicant's name], who has applied for a position in the Department of Justice.

You may be assured that [applicant's name]'s application will receive appropriate consideration for this position.

We appreciate [applicant's name]'s interest in employment with the Department of Justice.

Sincerely,

[Signature block of
approving official]



UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

APR 7 1997

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS
AND AGENCIES

FROM: JAMES B. KING
DIRECTOR

SUBJECT: Political Recommendations
for Federal Jobs

The Hatch Act Reform Amendments of 1993 (Reform Amendments) placed restrictions on political recommendations for Federal jobs with the exception of political appointments. The Legislative Branch Appropriation Act for fiscal year 1997 (Public Law 104-197) amends section 3303 of title 5, United States Code, by reinstating the prior law relating to Congressional recommendations on certain personnel decisions in the Executive Branch. Public Law 104-197 also amends a related provision, 5 U.S.C. § 2302(b)(2), by reinstating the prior law concerning the consideration of recommendations or statements about individuals who request, or are under consideration for, any personnel action. The Office of Personnel Management has prepared the following guidance in the form of answers to questions that we think are likely to arise in dealing with application of these two amended provisions.

Does the new law prohibit Members of Congress, Congressional employees, elected State or local government officials, or political party officials from making political recommendations? No, it focuses on the solicitation, receipt, or consideration of certain recommendations by Executive Branch officials. While the new law no longer specifically prohibits Members and others from making political recommendations, a recommendation that is not consistent with the new law could cause an official, who is concerned with examining or appointing, to be in violation of the law. In no circumstances should such an official actually consider any recommendation which is in violation of the law. Agencies covered by the new law should make every practicable effort to ensure that officials who are concerned with examining and appointing do not actually receive political recommendations that are inconsistent with the new law. This might be accomplished by preliminary review in the correspondence control process, through congressional relations offices, or through review by offices of counsel.

Does the new law require Executive Branch officials to return political recommendations to the sender? The new law does not require these officials to return a political recommendation to the person who sent it.

Does the new law also apply to the United States Postal Service? No. A separate law, 39 U.S.C. § 1002, still applies to political recommendations concerning applicants for positions with, and employees of, the United States Postal Service.

Does the new law apply to oral as well as written recommendations? Yes.

Who is subject to the prohibitions in the amended 5 U.S.C. § 3303? Executive Branch officials who have the authority to examine applicants for, or appoint individuals to, positions in the competitive service are subject to these prohibitions.

What does the amended section 3303 prohibit? It prohibits individuals concerned in appointing or examining officials from receiving or considering a recommendation from a Member of Congress concerning an individual who has applied for a competitive service position, except as to the character or residence of the applicant. A competitive service position is defined in 5 U.S.C. §2102.

Does the amended section 3303 permit appointing and examining officials to consider any recommendations from Members of Congress? Section 3303 permits such officials to receive and consider Congressional recommendations concerning the character or residence of applicants for competitive service positions. (Example: "I have known Mary Smith, a resident of my State, for many years, and she is a very fine person. She has always been reliable, and shown good judgment and integrity. She is very highly regarded in the community.") A recommendation under section 3303, which is limited to the applicant's character or residence may not, however, discuss the qualifications of an applicant or assess the applicant's suitability for employment with a particular agency or in a particular job. A communication that includes a request that a covered official consider an applicant for specific employment would violate 3303. (Example: "I have known Mary Smith, a resident of my state, for many years and she is a fine person of good moral character. I would like you consider her for the currently vacant position of policy analyst in your office.") In addition, OPM recommends against any communication that requests employment consideration even where such request is general in nature, as such a communication goes beyond a statement of character and residence. (Example: "I have known Mary Smith, a resident of my state, for many years and she is a fine person of good moral character. Please consider her for appointment, in accord with applicable civil service procedures.") Consistent with the additional guidance set forth below, recommendations or statements from members of Congress based on actual personal knowledge of the applicant's work performance and qualifications may be acceptable under section 2302(b)(2).

What positions are subject to the amended section 3303? Section 3303 applies to positions in the competitive service, including Administrative Law Judges. Section 3303 does not apply to excepted service positions, as defined in 5 U.S.C. §2103.

What does 5 U.S.C. § 2302 describe and who is subject to the amended section 2302(b)(2)? Section 2302 describes prohibited personnel practices and section 2302(b)(2) applies to Executive Branch officials who have the authority to take, direct others to take, recommend, or approve any personnel action.

What does “personnel action” mean? The definition of “personnel action” in section 2302(a)(2)(A) includes appointments; promotions; disciplinary or corrective actions; details; transfers; reassignments; restorations; reemployments; some performance evaluations; decisions about pay, benefits, or certain awards concerning education or training; decisions ordering psychiatric tests or examinations; or, any other significant changes in duties, responsibilities, or working conditions of an individual.

What does the amended section 2302(b)(2) prohibit appointing and examining officials from doing? Section 2302(b)(2) prohibits them from soliciting or considering oral or written recommendations or statements about an individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement fulfills the requirements in that section.

What kind of recommendation or statement does the amended section 2302(b)(2) permit these officials to solicit or consider? They may ask for, or consider, a recommendation or a statement based on the personal knowledge or records of the person furnishing the recommendation or statement. Additionally, the recommendation or statement must consist of an evaluation of an individual's: (1) work performance, ability, aptitude, or general qualifications; or (2) character, loyalty, or suitability.

Is the amended section 2302(b)(2) limited to personnel actions affecting competitive service employees? No, it applies to covered positions as defined in section 2302(a)(2)(B), including any position in the competitive service, all career SES and Administrative Law Judge positions, and any position in the excepted service which has not been excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character.

Does the new section 2302(b)(2) apply to personnel actions that affect political appointees or individuals seeking political appointments? No, consistent with section 2302(a)(2)(B)(I), applicants for and employees in “political” positions such as those under Schedule C or the non-Career SES are not covered by section 2302(b)(2). It should be noted, however, that where the political appointee is an incumbent of a position with authority to take, direct others to take, recommend, or approve any personnel action, concerning covered positions, that political appointee becomes subject to section 2302(b)(2) and can be in violation of the statute for soliciting or considering a recommendation that is inconsistent with this law. For example, a Member of Congress or a representative of a political party could recommend someone for a

political position (one covered by Schedule C or the non-career SES) and the potential appointing official receiving that recommendation could consider it without violating 2302(b)(2). However, a political appointee with authority to fill a competitive service position cannot solicit or consider a recommendation that does not meet the requirements of section 2302(b)(2).

May agency officials consider Congressional recommendations that meet the requirements of section 2302(b)(2) when section 3303 states that these officials are prohibited from receiving or considering such recommendations (except as to character or residence)? Yes. Section 2302(b)(2) permits agency officials to solicit or consider a recommendation or statement from anyone (including a Member of Congress) when the recommendation or statement consists of an evaluation concerning an individual's work performance, qualifications, ability, aptitude, character, loyalty, or suitability and it is based on the sender's personal knowledge or records. Because Congress amended sections 3303 and 2302(b)(2) in the same law, both provisions should be read together to avoid conflict and achieve a harmonious result. Accordingly, agency officials may solicit and consider recommendations from Members of Congress that meet the specific criteria described in section 2302(b)(2). If, however, recommendations from Members of Congress do not meet the criteria in section 2302(b)(2), such recommendations fall under section 3303 and should be treated under the guidance set forth above dealing with that newly amended section of law.

What if a communication meets the requirements of section 2302(b) but also includes a specific political recommendation. (Example: "I know Mary Smith's work from when she was employed in my office. She is an outstanding employee, has extensive technical skills, is a loyal and hardworking employee, and is also a long standing member of my political party and frequently contributes to its causes.") Can the recommendation be solicited or considered?

No. Reading Section 3303 and 2302(b) together, it is clear that Congress did not want consideration for personnel actions to be unduly or unfairly influenced by references to political affiliation or membership. Communications that include direct or specific references to political affiliation or membership are inconsistent with that intent, as evidenced by section 2302(b)(1)(E), which, among other factors, makes it a prohibited personnel practice to discriminate for or against any employee or applicant on the basis of political affiliation. Absent such political affiliation or membership references, communications that otherwise meet the requirements of section 2302(b)(2) are acceptable. Uncertainty as to the legality of any specific communication should be referred to your office of counsel for review.

For further details about these new rules, you should consult the law itself, 5 U.S.C. §§ 3303 and 2302(b)(2), as amended by section 315 of Public Law 104-197, 110 Stat. 2394, 2416.