UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2006 MSPB 151

Docket No. CB-1216-05-0013-T-1

CB-1216-05-0012-T-1

Special Counsel,

Petitioner,

v.

Leslye Sims
and

Michael Davis,

Respondents.

June 12, 2006

Kristin L. Ellis, Esquire, and Leonard Dribinsky, Esquire, Washington, D. C., for the petitioner.

Melvin L. Jenkins, Esquire, Omaha, Nebraska, for Respondent Sims.

Michael Davis, Respondent, Kansas City, Missouri, pro se.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The Office of Special Counsel (OSC) has filed a timely petition for review of an initial decision that dismissed its complaints seeking disciplinary action for

alleged violation of the Hatch Act for failure to state a claim upon which relief may be granted. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and REMAND these matters to the administrative law judge for further adjudication consistent with this opinion.

BACKGROUND

¶2 On January 14, 2005, OSC filed complaints seeking disciplinary action against the two respondents, who are federal employees, alleging that they violated 5 U.S.C. § 7324 and corresponding regulations by engaging in political activity while on duty in their government offices. *Special Counsel v. Sims*, MSPB Docket No. CB-1216-05-0013-T-1, Complaint File (CF 1), Tab 1; *Special Counsel v. Davis*, MSPB Docket No. CB-1216-05-0012-T-1, Complaint File (CF 2), Tab 1. The administrative law judge consolidated the two complaints because he determined that doing so would result in expeditious processing of the complaints and no party would be adversely affected. CF 1, Tab 6; CF 2, Tab 4. The administrative law judge also issued an order to show cause why the complaints should not be dismissed for failure to state a claim upon which relief may be granted. CF 1, Tab 7; CF 2, Tab 5. OSC responded in opposition to the consolidation of the two complaints and in answer to the order to show cause. CF 1, Tabs 8, 9; CF 2, Tabs 7, 8. The administrative law judge then dismissed the complaints for failure to state a claim. CF 1, Tab 10; CF 2, Tab 9.

¶3 OSC has filed a timely petition for review challenging the administrative law judge's order of consolidation and the dismissal for failure to state a claim. *Special Counsel v. Sims*, MSPB Docket No. CB-1216-05-0013-T-1, Petition For Review File (PFRF 1), Tab 1; *Special Counsel v. Davis*, MSPB Docket No. CB-1216-05-0012-T-1, Petition For Review File (PFRF 2), Tab 1. The National Treasury Employees Union (NTEU) has filed an amicus curiae brief in both matters and requests oral argument. PFRF 1, Tabs 9, 10; PFRF 2; Tabs 9, 10. OSC has filed timely responses in opposition to the request for oral argument and to the amicus brief. PFRF 1, Tabs 11, 12; PFRF 2, Tabs 11, 12. The respondents have

not responded to the petition for review.

ANALYSIS

¶4 The following facts are not in dispute. On the morning of October 25, 2004, respondent Sims, while on duty, forwarded an e-mail that she had received to 22 individual addressees, many of whom were fellow employees of the Social Security Administration (SSA), including respondent Davis. The subject line of her message was "FW: Fwd: Fw: Why I am supporting John Kerry for President?" Sims began her message with "**Some things to ponder** ……." and then copied the message that had been sent to her.[1] CF 1, Tab 1, Exhibit A. Shortly after receiving Sims's e-mail message, respondent Davis, also on duty, sent an e-mail message to 27 people. The addressees included individuals who are not SSA employees, Sims, and other agency employees, some of whom had also received Sims's message. The subject of Davis's message was "FW: Your Vote," and the body of the message was a copy of a message he had received.[2] CF 2, Tab 1, Exhibit A. OSC charged that the respondents violated 5 U.S.C. § 7324, the Hatch Act, when they sent these e-mail messages.

¶5 The Hatch Act provides, in pertinent part, as follows:

> An employee may not engage in political activity
>
> (1) while the employee is on duty; [or]
>
> (2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof ….

5 U.S.C. § 7324. The elements of the charge against the respondents are three: (1) The respondent is a federal employee subject to 5 U.S.C. § 7324; (2) he engaged in political activity; and (3) he did so, inter alia, while on duty. 5 U.S.C. §§ 7322, 7324. None of the parties challenges the facts that the respondents are covered by the Hatch Act and that they sent the e-mail messages appended to this Opinion while on duty in a federal facility. Thus, the only issue at this stage of these cases is

whether OSC raised a claim that the respondents' acts of sending the messages constituted engaging in political activity. The statute does not define "political activity," but the Office of Personnel Management's implementing regulation provides the following definition:

> *Political activity* means 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.

¶6 The administrative law judge found that OSC's complaint did not state a sufficient claim that the respondents had engaged in political activity when they sent the e-mail messages. He based this conclusion on an analysis of the statutory language of the Hatch Act at 5 U.S.C. § 7321, which permits a government employee to "participat[e] … in the political processes of the Nation" to the extent not expressly prohibited, and at 5 U.S.C. § 7323(c), which permits a government employee to "express his opinion on political subjects and candidates." Initial Decision (ID) at 3-4, 9-10, 14. He found that "nothing in the Complaint indicat[ed] that either Sims or Davis did anything other than express their personal opinions, as expressly permitted by statute." ID at 9. The administrative law judge found that this was so even if the statute was ambiguous, which he concluded it was not. Additionally, the administrative law judge, after applying the rule of lenity consistent with *Special Counsel v. Malone*, 84 M.S.P.R. 342 (1999), found that OSC did not allege a sufficient basis to find that the respondents were on notice that their conduct violated the Hatch Act. ID at 12-14. Accordingly, the administrative law judge found that OSC failed to state a claim upon which relief could be granted. ID at 14. We disagree.

¶7 In determining whether a claim is legally sufficient, factual allegations contained in the complaint must be taken as true and construed in the light most favorable to the complainant. Fed. R. Civ. P. 12(b)(6). Our reviewing court has held, "Dismissal for failure to state a claim is proper only when it is beyond doubt that the plaintiff can prove no set of facts that would entitle it to relief." *Amoco Oil*

Co. v. United States, 234 F.3d 1374, 1376 (Fed. Cir. 2000). The administrative law judge did not apply these principles when he concluded that the respondents' e-mail messages were "the functional equivalent of 'water-cooler' type discussions or 'face-to-face expression of personal opinion' that … did not constitute prohibited political activity." ID at 10. The administrative law judge in essence construed OSC's complaint in the light most favorable to the respondents, but, in assessing the sufficiency of the complaint, "all reasonable inferences" must be drawn in OSC's favor. *See Ainslie v. United States*, 355 F.3d 1371, 1373 (Fed. Cir. 2004). We find that, based on the facts alleged by OSC, it is not "beyond doubt" that OSC could prove that the respondents engaged in political activity in violation of the Hatch Act. *See* 5 C.F.R. § 734.101 (*Political activity* means an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group).

¶8 We note that, in arguing that a violation of 5 U.S.C. § 7324 occurred, OSC has relied on the court's opinion in *Burrus v. Vegliante*, 336 F.3d 82 (2d Cir. 2003), and the administrative law judge distinguished that case from these. In *Burrus*, the Court of Appeals stated that it disagreed with the decision of the district court judge who found that 5 U.S.C. § 7323(c) exempted the alleged political activity, displaying partisan political posters in the work place, from attack under section 7324. The *Burrus* court stated, "Section 7323(c) qualifies only the off-the-job active participation prohibitions contained in Section 7323(b) and the prohibitions on official coercion in Section 7323(a)." *Burrus*, 336 F.3d at 90-91. In its brief in opposition to OSC's petition for review, NTEU argues that the court's statement that section 7323(c) applies only to off-duty conduct was dictum and therefore ought not to be persuasive. NTEU Brief at 32, PFRF 1, Tab 9 & PFRF, Tab 9; *see also* ID at 10-11. We decline to address the scope of section 7323(c) because a holding one way or the other would not affect the result here, where the ultimate question is whether the respondents' on-duty conduct was "political activity" proscribed by section 7324(a).

¶9 The administrative law judge further based his decision to dismiss the

complaints for failure to state a claim on an application of the rule of lenity. He found that the statutory language was clear rather than ambiguous, but found in the alternative that, even if it were ambiguous, application of the rule of lenity would result in dismissal of the complaints because the complaints "do not allege a sufficient basis for concluding that the Respondents were given fair notice in advance that their conduct violated the Hatch Act." ID at 12-13. We find that the rule of lenity is not applicable to the determination of whether a violation of the Hatch Act occurred in these complaints. *See, e.g., Special Counsel v. Alexander*, 71 M.S.P.R. 636, 646 (1996) (to demonstrate a violation of the Hatch Act, OSC must show only that an employee covered by the Act engaged in political activity prohibited by the Act), *aff'd*, 165 F.3d 474 (6th Cir. 1999). In *Special Counsel v. Malone*, 84 M.S.P.R. 342 (1999), the case cited by the administrative law judge, the issue before the Board was the proper penalty for a violation of the Hatch Act and not the issue of whether a violation had occurred. The Board considered the facts that respondent Malone was unaware that his activities violated the Hatch Act and that his actions were consistent with the advice of his employer's legal counsel. These circumstances, along with others, led the Board to impose a 180-day suspension rather than removal. *Id*. at 365-66. Thus, we find that the holding of *Malone* does not support a finding, much less a legal conclusion, that no violation occurred.

¶10 We further find that remand is necessary to afford the parties an opportunity to develop the record so that the administrative law judge may determine whether the specific messages, in the context of the circumstances surrounding them, constitute political activity. Neither the Hatch Act nor its implementing regulations directly addresses e-mail activity. OSC issued an advisory opinion, however, entitled "Use of Electronic Messaging Devices to Engage in Political Activity." In it, OSC stated,

> The Hatch Act does not purport to prohibit all discourse by federal employees on political subjects or candidates in a federal building 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. … 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 ….
>
> E-mail also provides employees with a means to disseminate their opinions on political subjects and opinions [sic] to a much wider audience than is possible in casual face-to-face conversation or a phone call. … In short, electronic messaging technology enables employees to engage in a form of electronic leafleting or "electioneering" at the worksite which may constitute prohibited "political activity."

CF 1, Tab 7; CF 2, Tab 5.[3] In that advisory opinion, OSC, to aid in distinguishing between permissible "water-cooler" type electronic discussions and leafleting, offered the following non-exclusive list of factors: (1) The content of the message (whether its purpose is to encourage the recipient to support a particular political party or to 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 building, or when the employee was on duty. CF 1, Tab 7.

¶11 On remand, the parties should address these factors in presenting their arguments as to whether a violation occurred. We do not suggest, however, that this list is exclusive. The parties are free to argue additional circumstances that would support their views. After closing the record, the administrative law judge shall issue a new initial decision or decisions determining whether the respondents violated the Hatch Act and, if so, what the appropriate penalty is.

Procedural matters

¶12 We deny NTEU's request for oral argument. NTEU is not a party to this

proceeding. 5 C.F.R. § 1201.34(e). As such, it does not enjoy any of the rights accorded to the parties. Under our regulations, it is the respondents who have a right to a hearing. 5 C.F.R. § 1201.124(b)(3). On remand, the administrative law judge shall inform the respondents of that right and of the necessity to request a hearing in order to obtain one.

¶13 OSC objected below to the consolidation of these two cases and renews that objection on petition for review. CF 1, Tab 8; CF 2, Tab 7; PFRF 1, Tab 1; PFRF 2, Tab 1. In light of our disposition of these cases, i.e., remanding them for further development of the record and consideration of what could be substantially different evidence in each case, the administrative law judge shall reconsider OSC's objection to the consolidation.

ORDER

¶14 Accordingly, we REMAND these cases to the administrative law judge for further adjudication. The administrative law judge shall provide the parties with another opportunity to submit evidence and argument regarding the issue of whether the respondents' conduct constitutes a Hatch Act violation, shall reconsider his decision to consolidate these cases, and shall afford the respondents a hearing, if they request one. After closing the record, the administrative law judge shall issue a new initial decision or decisions determining whether OSC has met its burden of proof to show that the respondents violated the Hatch Act, and if so, what the appropriate penalty is, consistent with 5 U.S.C. § 7326.

FOR THE BOARD:

/s/
Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.

APPENDIX A

From the desk of
John Eisenhower

Dear Friend,

The presidential election to be held this coming Nov. 2 will be one of extraordinary importance to the future of our nation. The outcome will determine whether this country will continue on the same path it has followed for the last 3½ years or whether it will return to a set of core domestic and foreign policy values that have been at the heart of what has made this country great.

Now more than ever, we voters will have to make cool judgments, unencumbered by habits of the past. Experts tell us that we tend to vote as our parents did or as we "always have." We remained loyal to party labels. We cannot afford that luxury in the election of 2004. There are times when we must break with the past, and I believe this is one of them.

As son of a Republican President, Dwight D. Eisenhower, it is automatically expected by many that I am a Republican. For 50 years, through the election of 2000, I was. With the current administration's decision to invade Iraq unilaterally, however, I changed my voter registration to independent, and barring some utterly unforeseen development, I intend to vote for the Democratic Presidential candidate, Sen. John Kerry.

The fact is that today's "Republican" Party is one with which I am totally unfamiliar. To me, the word "Republican" has always been synonymous with the word "responsibility," which has meant limiting our governmental obligations to those we can afford in human and financial terms. Today's whopping budget deficit of some $440 billion does not meet that criterion.

Responsibility used to be observed in foreign affairs. That has meant respect for others. America, though recognized as the leader of the community of nations, has

always acted as a part of it, not as a maverick separate from that community and at times insulting towards it. Leadership involves setting a direction and building consensus, not viewing other countries as practically devoid of significance. Recent developments indicate that the current Republican Party leadership has confused confident leadership with hubris and arrogance.

In the Middle East crisis of 1991, President George H. W. Bush marshaled world opinion through the United Nations before employing military force to free Kuwait from Saddam Hussein. Through negotiation he arranged for the action to be financed by all the industrialized nations, not just the United States. When Kuwait had been freed, President George H. W. Bush stayed within the United Nations mandate, aware of the dangers of occupying an entire nation.

Today many people are rightly concerned about our precious individual freedoms, our privacy, the basis for our democracy. Of course we must fight terrorism, but have we irresponsibly gone overboard in doing so? I wonder. In 1960, President Eisenhower told the Republican convention, “If ever we put any other value above (our) liberty, and above principle, we shall lose both.” I would appreciate hearing such warnings from the Republican Party of today.

The Republican Party I used to know placed heavy emphasis on fiscal responsibility, which included balancing the budget whenever the state of the economy allowed it to do so. The Eisenhower administration accomplished that difficult task three times during its eight years in office. It did not attain that remarkable achievement by cutting taxes for the rich. Republicans disliked taxes, of course, but the party accepted them as a necessary means of keep [sic] the nation’s financial structure sound.

The Republicans used to be deeply concerned for the middle class and small business. Today’s Republican leadership, while not solely accountable for the loss of American jobs, encourages it with its tax code and heads us in the direction of a society of very rich and very poor.

Sen. Kerry, in whom I am willing to place my trust, has demonstrated that he is courageous, sober, competent, and concerned with fighting the dangers associated with the widening socio-economic gap in this country. I will vote for him enthusiastically.

I celebrate, along with other Americans, the diversity of opinion in this country. But let it be based on careful thought. I urge everyone, Republicans and Democrats alike, to avoid voting for a ticket merely because it carries the label of the party of one's parents or of our own ingrained habits.

Sincerely,

John Eisenhower

John Eisenhower, son of President Dwight D. Eisenhower, served on the White House staff between October 1958 and the end of the Eisenhower administration. From 1961 to 1964 he assisted his father in writing "The White House Years," his Presidential memoirs. He served as American ambassador to Belgium between 1969 and 1971. He is the author of nine books, largely on military subjects.

APPENDIX B

There are a number of issues that people consider before casting their vote but our votes should be for the party that stands firm on morally and ethically correct issues as written in the bible. Kerry claims he has morals and ethics but he "can't legislate it to the country." Whaaaaat? This man is only worried about pleasing each and every audience he's speaking to – that's the reason for the endless inconsistencies. American society under Kerry's command is frightening to even think about.

Pass along the **"I VOTE THE BIBLE"** button.

[The message contained a graphic of a button with a flag background and the words "I VOTE THE BIBLE" and a photograph of President George W. Bush with the

words “I VOTE” at the top and “THE BIBLE” at the bottom of the photograph.]

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[1] A copy of the text of the message, captioned “From the Desk of John Eisenhower,” is set forth in Appendix A attached hereto.

[2] The text of this message is set forth in Appendix B.

[3] This advisory opinion was not submitted by any party below. In his March 10, 2005 order to show cause, the administrative law judge took notice of it, quoted it in its entirety, and remarked that it remained on OSC’s website on that date. CF 1, Tab 7; CF 2, Tab 5. It remains on the website to date. OSC did not challenge the authenticity or completeness of the quoted opinion. We recognize that OSC’s advisory opinion is not binding and is not subject to scrutiny under the Administrative Procedures Act. *See Pitsker v. Office of Personnel Management*, 234 F.3d 1378, 1383 (Fed. Cir. 2000). Nevertheless, OSC’s view is worthy of consideration, and we see no error in the administrative law judge’s affording it the weight that it deserves.