Office of the Attorney General

Governor
Dave Freudenthal

Administration
123 State Capitol
Cheyenne, Wyoming 82002
307-777-7841 Telephone
307-777-6869 Fax

Attorney General
Patrick J. Crank

Chief Deputy
Michael R. O'Donnell

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Joseph B. Meyer
Secretary of State
State Capitol
Cheyenne, Wyoming 82002

RE: Hatch Act Questions

Dear Joe:

You have asked whether the county clerks must assume an investigatory or gatekeeper role regarding whether a partisan political candidate may be in violation of the Hatch Act. In addition, you have attached a letter to Senator Craig Thomas regarding the federal funding for the purchase of election equipment under the Help America Vote Act (HAVA) and whether a county clerk would be in violation of the Hatch Act should such county clerk seek election to a partisan office in the future. A short description of the Hatch Act is necessary to answer the question.

The Hatch Act

The Hatch Act (5 U.S.C. §§ 1501-1508) was passed in 1939 to regulate the political activity of government employees (federal, state and local) in order for public institutions to function efficiently and effectively. The Act restricts the political activity of individuals principally employed by state, county or municipal executive agencies in connection with programs financed in whole or in part by

loans or grants made by the United States or a federal agency. Generally, only those individuals who exercise any authority over budgets are covered by the Hatch Act. An employee covered by the Act may not be a candidate for public office in a partisan election. The Act does not apply to employees of educational or research institutions, establishments, agencies or systems which are supported in whole or in part by a state or political subdivision, or to employees who exercise no functions in connection with those activities. 5 U.S.C. § 1501(4)(B). Partisan candidacy by a covered employee is a "per se violation of the Hatch Act." *Williams v. Merit Sys. Protection Bd.*, 55 F.3d 917, 920 (4th Cir. 1995). Nor does the Act apply to governors, lieutenant governors, mayors, elected heads of executive departments and individual(s) holding elective office. 5 U.S.C. § 1502(c).

" 'The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship.' " *Williams v. U.S. Merit Systems Protection Bd.*, 55 F.3d 917, 920 (C.A.4 (Md.) 1995), quoting *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). "When it comes to regulating the political activities of state employees, however, the federal government does not have the same interest in promoting efficiency or public confidence in state government as a whole but, rather, has an interest in removing partisan political influence from the administration of federal funds." *Alexander v. Merit Systems Protection Bd.*, 165 F.3d 474, 485 (C.A.6 (Mich.) 1999).

Thus, once it is shown that a covered state employee has violated the Act, the penalties include removal from employment or office and possible forfeiture of federal funds equal to two years' salary of the individual in question. Depending upon the circumstances, the Merit Systems Protection Board may conclude that no penalty shall be imposed. "The Merit Systems Protection Board has plenary jurisdiction under 5 U.S.C. § 1501 to determine after a hearing whether a state or local employee has violated the Hatch Act, and 'whether the violation warrants the removal of the officer or employee from his office or employment[.]" *Alexander v. Merit Systems Protection Bd.*, 165 F.3d 474, 480 (C.A.6 (Mich.) 1999), quoting from 5 U.S.C. § 1505(2).

Despite the provisions of 5 U.S.C. § 1505, "[t]he penalty provision in 5 U.S.C. § 1506(a) clearly gives the employer the choice of removing the employee in question 'from his office or employment,' or forfeiting federal funds equal to two years' pay at the rate or amount the employee was receiving at the time of the violation. Further, for 18 months *after his removal* from employment, federal funds also will be forfeited if the employee is appointed to an office or employment with a state or local agency within the same state." *Id.* at 482, quoting from 5

U.S.C. § 1506. The choice, therefore, belongs to the employer as to whether it wants to "forfeit" the federal funding or the employee.

Discussion

Wyoming law does not address Hatch Act violations and, thus, does not impose reporting or investigative responsibilities upon county clerks. In addition, the Hatch Act itself does not require removal of a candidate who may be in violation of the Act from the ballot. Consequently, neither the Secretary of State nor the county clerks have any responsibility under the Hatch Act or Wyoming law to take any preventative measures that would exclude or remove someone from the ballot because of a Hatch Act violation.

Regarding the federal grant money provided to states pursuant to HAVA, at this point it is unclear whether the State would buy election equipment or whether some of the HAVA money would be passed through to the counties. We note that if the State is responsible for managing the HAVA funds, then the Secretary of State, who is exempt under the Hatch Act, would be the only person exercising any authority over the budget. However, the fact that federal money is passed through to a county clerk's office for the purpose of purchasing election equipment (or to meet any other HAVA requirements) does not automatically restrict the political activities of county clerks or other employees who have oversight of the budget and spending authority. 5 U.S.C. § 1501(4) states:

> "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency . . ..

As you pointed out in your letter Senator Craig Thomas, a county clerk's responsibilities extends beyond election matters. A county clerk is also the chief budget officer, county real estate recording officer and she serves in other capacities as well. The "determinative factor for Hatch Act coverage [is] 'the extent to which the individual's employment is "in connection with" a Federally supported activity or program.'" *Special Counsel v. Bianchi*, 57 M.S.P.R. 627, 631 (June 10, 1993) (reference cite omitted).

We do not believe that a one-time funding grant from the federal government to assist states in complying with the HAVA provisions can be considered to constitute the federal funding of a program or office, for purposes of the Hatch

Act. The evil sought to be contained by the Hatch Act is to prevent political influence or the appearance of political influence in the operation of government, including influence over budget, salaries, etc. The Act was originally promulgated in 1939 to " 'prevent pernicious political activities' within the Federal work force," and was expanded a year later to cover state employees. We find it unlikely that receipt of one-time HAVA money would ever result in any "pernicious political activities" or otherwise disrupt the efficient and fair operation of government by clerks that would require the imposition of the Hatch Act against any clerk or employee who later seeks to run for partisan office.

Sincerely,

Patrick J. Crank
Attorney General

Barbara L. Boyer
Senior Assistant Attorney General

PJC:BLB:cc