



U.S. OFFICE OF SPECIAL COUNSEL  
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August 29, 2003

Mr. James A. Kahl  
Deputy General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: OSC File No. AD-03-0095

Dear Mr. Kahl:

This letter is in response to your request for an advisory opinion regarding the Hatch Act. You ask whether the Federal Election Commission (FEC) may adopt a regulation that would forbid a Commissioner or FEC employee from publicly supporting, working for, or contributing to a candidate, political party, or political committee subject to the jurisdiction of the FEC, even if, in the case of public support, the activity is not done in concert with the candidate, political party, or political committee. In sum, you ask whether the FEC can limit the political activity of Commissioners and FEC employees beyond the restrictions set forth in the Hatch Act.

Generally, since the 1993 amendments to the Hatch Act, most federal employees may take an active part in political management and political campaigns, subject to a few remaining restrictions. However, certain employees remain subject to further restrictions under the Act. These employees may not take an active part in political management or political campaigns. 5 U.S.C. § 7323 (b)(2).

FEC employees are subject to these further restrictions. In addition, the Hatch Act places special limitations on FEC employees, prohibiting them from requesting or receiving political contributions from, or giving political contributions to, an employee, a Member of Congress, or an officer of a uniformed service. 5 U.S.C. § 7323 (b)(1). However, Commissioners, as they are appointed by the President, by and with the advice and consent of the Senate, are not subject to these additional restrictions found at § 7323 (b)(1) and (2).

In enacting the 1993 amendments to the Hatch Act, Congress intended for employees to "be encouraged to exercise fully, freely and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation." 5 U.S.C. § 7321. Congress clearly stated that "[a]n employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates." 5 U.S.C. § 7323 (c). Therefore, any regulation restricting an employee's ability to publicly support a political party or candidate would directly conflict with the express intent of Congress.

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The Office of Personnel Management (OPM) issues regulations implementing the Hatch Act. See 5 C.F.R. Part 734. With regard to agencies such as the FEC, whose employees are subject to further restrictions under the Hatch Act, OPM regulations allow such employees to "[e]xpress his or her opinion as an individual privately or publicly on political subjects and candidates." 5 C.F.R. § 734.402 (a). OPM regulations provide that such activity may not be done "in concert with a political party, partisan political group, or a candidate for partisan political office." 5 C.F.R. § 734.402.

Furthermore, OPM regulations limit the extent to which the political activity of employees can be limited beyond the restrictions set forth in the Hatch Act. Specifically, 5 C.F.R. § 734.104 states that:

No further proscriptions or restrictions may be imposed upon employees covered under this regulation except:

- (a) Employees who are appointed by the President by and with the advice and consent of the Senate;
- (b) Employees who are appointed by the President;
- (c) Non-career senior executive service members;
- (d) Schedule C employees, 5 CFR 213.3301, 213.3302; and
- (e) Any other employees who serve at the pleasure of the President.

Thus, under this OPM regulation, the FEC cannot further restrict the political activity of its regular employees by forbidding them from publicly supporting or contributing to a candidate, political party, or political committee subject to the jurisdiction of the Commission.<sup>1</sup>

However, this OPM regulation does not limit the extent to which the political activity of FEC Commissioners can be limited beyond the restrictions set forth in the Hatch Act. This regulation is based upon the opinion that an Administration may impose additional restrictions on its political appointees. 59 Fed. Reg. 48,767 (Sept. 23, 1994). "As a policy matter, it is left to the President of the United States, or any official specifically authorized by him, to decide whether such further proscriptions or restrictions are appropriate." *Id.*

At present, the President has not determined, nor has he delegated the authority to determine, that further restrictions should apply to FEC Commissioners, as he has done in other instances.<sup>2</sup> Thus, the FEC has no authority to adopt regulations that would forbid a

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<sup>1</sup> Furthermore, the Office of Special Counsel knows of no statutory basis upon which such further restrictions could be based.

<sup>2</sup> For example, the President has delegated this authority to the Secretary of State and the Secretary of Defense. See 59 Fed. Reg. 54121 and 54515 (Oct. 27, 1994).

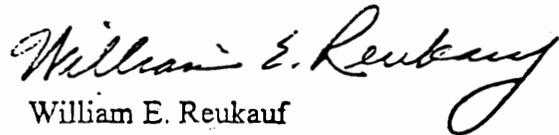
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Commissioner from publicly supporting, working for, or contributing to a candidate, political party, or political committee subject to the jurisdiction of the FEC.

Based upon the preceding, it is the position of the Office of Special Counsel that the FEC may not adopt regulations that would limit the political activity of FEC employees or Commissioners beyond the restrictions set forth in the Hatch Act. Please contact OSC attorney Ana Galindo-Marrone at 202-653-6005 if you have any additional questions regarding this matter.

Sincerely,

A handwritten signature in cursive script that reads "William E. Reukauf". The signature is written in black ink and is positioned above the printed name and title.

William E. Reukauf  
Associate Special Counsel  
for Investigation and Prosecution