

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: May 12, 2017

TO: Charles Posner, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United States Postal Service
Case 05-CA-184753

133-5300
240-6775
506-2017-6700
512-5012-0125
524-8390-9600

This case was submitted for advice as to whether the United States Postal Service (“USPS” or the “Employer”) violated Section 8(a)(1) by promulgating an unlawfully overbroad work rule that restrained employees from engaging in concerted political activity that is protected by Section 7 but otherwise violates the Hatch Act.¹ We conclude that the Employer’s alleged rule was an accurate recitation of USPS employees’ obligations under the Hatch Act and was therefore not unlawfully overbroad. We also conclude that, in harmonizing the Hatch Act’s specific prohibitions against certain political activity and the NLRA as applied to USPS employees, there is no conflict in this case between postal employees’ broad Section 7 right to engage in conduct for their mutual aid or protection and the Hatch Act’s specific prohibitions against partisan political activity by such employees. Accordingly, absent withdrawal, the Region should dismiss the charge.

FACTS

On September 2, 2016² the president of the American Postal Workers Union (the “Union”) wrote the following letter to the Employer (*italics added*):

The nation is in the midst of an election, so clarification is urgently needed for the manner in which the [Employer]

¹ Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended by Hatch Act Reform Amendments of 1993 at 5 U.S.C. § 7321 et seq. (2015)).

² All dates hereinafter are in 2016 unless otherwise stated.

administers the right of employees to express political opinions as part of their NLRA-protected activity[.]

The National Labor Relations Act protects the right of employees and their unions to communicate with each other about political matters during non-work time, such as during breaks and meals. *See Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Unlike other employees of the [Employer], union members covered by §§ 1206 and 1209 of the [Postal Reorganization Act] have NLRA-protected rights during these periods, which must be accommodated with other laws.

The [Union] therefore believes that:

The Union has the right to communicate with employees in non-public areas of postal facilities by posting messages about current political issues on union bulletin boards, under *Eastex*.

Similarly, employees working in non-public areas and not in an official uniform may express their opinion by wearing political buttons, pins, tee shirts and similar paraphernalia, as protected under cases like *Pacific Bell*, 362 NLRB No. 105 (2015). In a like vein, employees may place political bumper stickers on their vehicles and park on postal property without violating the law.

Finally, employees in a duty status may use email and social media to post and receive political messages and forward them to others, including other employees, during nonwork time such as during meals and breaks. This is an NLRA-protected right under *Purple Communications*, 361 NLRB No. 126 (2014).

Time is of the essence. It is critical that the [Union] know precisely how the [Employer] intends to accommodate our members' NLRA rights and administer the law in the situations outlined above

On September 19, the Employer responded to the Union by letter as follows:

This is in response to your September 2 letter regarding political activity in the workplace by Postal Service employees.

Your letter asserts that Postal Service employees who are also members of a union may: (1) post messages about current political issues on union bulletin boards; (2) wear political messages on buttons, shirts, etc., while working in non-public areas and not in official uniform; (3) place bumper stickers on their vehicles and park them on postal property; and (4) use email and social media to post and receive political messages, and forward them to others, while in a duty status but during non-work time.

On the contrary, the Hatch Act of 1939, as amended, prohibits most of the subject activities. The Hatch Act applies to employees of the executive branch of the federal government, and it prohibits employees from (among other things) engaging in political activity while on duty, while on government property, and while wearing an official uniform or driving an official vehicle. Political activity is defined as activity directed toward the success or failure of a political party, candidate for a partisan political office, or partisan political group. Postal Service employees are employees of the executive branch and, accordingly, are subject to these rules. As detailed below, many of the circumstances you describe constitute political activity within the meaning of the Hatch Act, and therefore are not permissible.

First, posting material about current political issues on union boards is permissible unless the material constitutes political activity within the meaning of the Hatch Act. For example, posting or distributing union materials endorsing a specific political party or candidate for partisan political office is political activity, and thus is prohibited. On the other hand, posting information about the union's view of different versions of postal reform legislation is not political activity as defined by the Hatch Act.

As information, the [Union] has previously litigated a similar issue. Following the decision, which was decided in favor of the Postal Service . . . the U.S. Office of Special Counsel issued a press release entitled "U.S. Office of Special Counsel Announces Federal Appeals Court Decision Prohibiting Postal Workers From Displaying Political Materials on Union Bulletin Boards." . . . [.]

Regarding wearing political messages, employees may not wear political buttons, pins, or shirts that advocate for the success or failure of a political party, candidate for a partisan political office, or partisan political group. The Hatch Act applies to employees while they are on duty, regardless of whether they are in uniform or in a public area. This prohibition also applies to off duty employees that are in a government building or are in uniform.

With regard to bumper stickers on personally owned vehicles, employees may place one standard-sized political bumper sticker or magnet on their privately-owned vehicle and park it on government property. An employee may have an additional sticker or magnet endorsing another candidate; however, the vehicle must not look as though it is a campaign mobile. An employee is not allowed, under any circumstance, to affix a political bumper sticker, magnet or signage to a vehicle owned or leased by the Postal Service, including delivery vehicles. If an employee's personal vehicle is used for official Postal Service business, all political stickers, magnets and/or signs must be removed or covered up during the official use.

Lastly, employees are generally allowed to use personal email and social media to post and receive messages in support of or in opposition to political candidates, parties, or partisan political groups. However, the Hatch Act prohibits employees from engaging in that kind of activity while on duty, while in the federal workplace, while in uniform, or while using government resources such as Postal Service computers, phones or other equipment. Thus, employees may not engage in political activity using email or social media even with personal, non-postal devices while on Postal Service property.

None of the cases cited in your letter involve employees of the federal government whose political activities are subject to the restrictions of the Hatch Act. The general provisions of the National Labor Relations Act do not alter the specific prohibitions of the Hatch Act. Employees who violate the Hatch Act may be subject to appropriate corrective action, and therefore it is important that all Postal Service employees understand and comply with these rules.

The U.S. Office of Special Counsel is the agency responsible for enforcing the Hatch Act and can provide any further information you require.

The Union filed the instant charge alleging that the Employer's September 19 letter amounted to an unlawfully overbroad work rule restricting employees' ability to engage in Section 7 activity and specifically asking that the General Counsel contact the Office of Special Counsel to seek reconciliation of the NLRA and the Hatch Act.

ACTION

We initially conclude that the Employer's letter was an accurate recitation of USPS employees' obligations under the Hatch Act.³ As such, we conclude that there is no conflict in this case between USPS employees' Section 7 right to engage in activity for their mutual aid or protection and their obligation under the Hatch Act to refrain from engaging in prohibited partisan political activity. Accordingly, there is no need to contact the Office of Special Counsel and, absent withdrawal, the charge should be dismissed.

The Hatch Act explicitly prohibits political activity by federal employees, including USPS employees, while on duty.⁴ Specifically, the Hatch Act defines "political activity" as "an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group."⁵ Section 7, while generally protecting employees' right to engage in protected concerted activity, contains no specifically-articulated right, as broadly encompassed under the mutual aid or protection clause, to engage in political activity. As such, there is no clear conflict between the unspecified rights contained in the mutual aid or protection clause of Section 7 and the specific prohibitions legislated by the Hatch Act. It is also well-established that the Act should not be enforced "so single-mindedly that it may wholly ignore other and equally important Congressional objectives[.]"⁶

³ 5 U.S.C. § 7324(a) (2015) (federal employees prohibited from engaging in political activity while on duty, in a government building, wearing official uniform or official insignia, or using any vehicle owned or leased by the federal government).

⁴ 5 U.S.C. § 7322(1)(A) (2015) ("employees" defined as those holding position in Executive agencies); 5 C.F.R. § 734.101 (2014) (Hatch Act applies to Postal Service employees).

⁵ 5 C.F.R. § 734.101.

⁶ *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

Despite being federal employees, non-supervisory USPS employees are covered under the NLRA by virtue of the Postal Reorganization Act.⁷ Accordingly, this limited group of uniquely situated federal employees' right to engage in particular types of Section 7 conduct must be harmonized with the Hatch Act's prohibitions. The Employer's letter at issue in the instant case is a correct recitation of the Hatch Act's obligations and prohibitions under which USPS employees must operate. The Employer's letter responds to the Union's questions about the partisan election season occurring at the time by correctly reminding the Union that employees are prohibited by the Hatch Act from engaging in specifically defined partisan political activities. Thus, to the extent that the Union proposed that USPS employees be allowed to engage in partisan political activity while at work, the Union's proposed conduct is specifically prohibited by the Hatch Act. As such, the Employer's letter to the Union is not an unlawfully overbroad rule under Section 8(a)(1) as to this distinct group of employees.

Accordingly, there is no conflict between USPS non-supervisory employees engaging in activities for mutual aid or protection under Section 7 and the Employer's recitation of the Hatch Act's prohibition on engaging in particular "political activity." Although there may be instances where the Hatch Act's prohibitions directly conflict with rights protected by Section 7, such potential conflicts are best addressed by specific factual incidents.⁸ As there is no such conflict in this case, there is no need to

⁷ 39 U.S.C. § 1209(a) (2015).

⁸ *Cf., e.g., United States Postal Service*, 321 NLRB 1199, 1202 (1996) (recognizing that Congress placed Postal Service under Board's jurisdiction to extent not inconsistent with Postal Reorganization Act ("PRA")), *enforcement denied on other grounds*, 128 F.3d 280 (5th Cir. 1997). The ALJ, as affirmed by the Board, stated that the PRA confers upon Postal employees NLRA rights, but only "to the extent not inconsistent with [the PRA]," which required harmonizing the statutes and deferral to the Privacy Act. *Postal Service*, 321 NLRB at 1202; 39 U.S.C. § 1209(a) (Postal employees subject to NLRA). Importantly, the same section of the PRA that explicitly subjects employees to the Privacy Act, as noted in *Postal Service*, also explicitly subjects employees to the Hatch Act. 39 U.S.C. § 410(b)(1) (provisions that apply to Postal Service include, *inter alia*, the Hatch Act).

contact the Office of Special Counsel and the Union's charge should be dismissed, absent withdrawal.

/s/
B.J.K.

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