Office of the Attorney General
State of Connecticut
M E M O R A N D U M

TO: AGENCY HEADS
FROM: RICHARD BLUMENTHAL, ATTORNEY GENERAL
RE: POLITICAL ACTIVITIES OF STATE EMPLOYEES
DATE: MAY 30, 1995

We understand that agencies may be in need of our advice on the application of the Federal Hatch Act (5 U.S.C. §§ 1501 -1508) to state employees, and the consequences of violations of the Hatch Act on the state. This requires a discussion of the restrictions on political activities imposed by state and federal law.

Discussed below are the state and federal law provisions. In some areas federal law and state law contain identical provisions restricting certain activities, about which agency heads need to be sensitive. In other areas, the provisions of federal and state law differ. To the extent that federal law restricts political activity permitted under state law, the state may be subject to a loss of some federal funding.

Nonetheless, as we explain, if the political activity is permitted under state law there is no just cause. under state law for disciplinary measures. It is important for state agencies to make every effort to avoid being placed in the difficult position of possibly losing federal funding as a result of the political activities of a state employee, while not being able to take action against the employee.

I. POLITICAL ACTIVITIES UNDER STATE LAW.

State law regulates political activities of state employees in Conn. Gen. Stat. §§ 5-266a - 268.These provisions apply to

all employees in the classified service and in the judicial department. **1/**

A: Permitted Activities (Conn. Gen. Stat. §§ 5-266a(b),(c)).

A person employed in the classified service or judicial department may vote as he chooses, express his opinions on political subjects and candidates, and participate actively in political management and campaigns. This may include membership and holding office in a political party, campaigning for a candidate by making speeches, soliciting votes in support of or opposition ,to a candidate, and making contributions of time or money to a party or candidate. Under state. law, an employee can even be a candidate for state or local office. An employee why is a candidate for state office or for full-time municipal office is required by virtue of Conn. Gen. Stat. § 5-266a (c) to notify his appointing authority within thirty days of nomination.

B. Prohibited Activities (Cons. Gen. Stat. §§ 5-266a(a),(b)).

No person employed in the classified state service or in the judicial department may use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office or directly or indirectly coercing, commanding or advising a state or local officer or employee to contribute anything of value to a party or person for political purposes. Furthermore, no permitted activity may be done on state time or with state resources.

C. Candidacy for Office and Holding Office.

As noted above, state employees may be candidates for state or local office. There are, however, some restrictions on holding office.

1) Municipal Office.

A state employee may not hold municipal office where there is a conflict of interest. The State Ethics Commission has promulgated § 5-266a-1 of the state regulations defining conflicts of interest.

Conflicts of interest include situations where the agency in which the employee-municipal officer holder works has authority to remove the municipal officer holder from office, approve the

1/The term estate employees as used in this memorandum only refers to classified employees or judicial department employees. It does not include unclassified employees.

accounts or actions of the municipal office, institute or recommend actions for penalties against the incumbent of the municipal office, regulate the emoluments of the municipal office, or affect state grants and subsidies for which the municipality is eligible. Also included are circumstances where state statute or local charter or ordinance prohibit the state employee from holding local office or where the state employees job includes assisting himself as a municipal office holder.

2) State Office.

State employees are allowed to be candidates ,for state office. However, Conn. Gen. Stat. S 5-266a(c) requires that classified state employees or judicial. department employees who accept an elective state office shall resign from their employment upon taking office. Furthermore, with respect to a state employee elected to the General Assembly, it is important to note that Conn. Const. Art. III, S 11 prohibits a legislator .from holding an appointive position in the executive or judicial branches. Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 (1978), app. dismissed, 454 U.S. 958 (1981).

D. Enforcement.(Conn. Gen. Stat. §§ 5-266d, 268).

A violation of state law provisions concerning political activity is just cause for discipline. Regulations of Connecticut State Agencies § 5-240-1a(14). Disciplinary action may be taken by an appointing authority. However, in this area, the Commissioner of the Department of Administrative Services is also authorized to directly take disciplinary action. Conn. Gen. Stat. § 5-266d; Regulations of Connecticut State Agencies § 5-240-5a (b). Disciplinary action may be in the form of a dismissal, or of a suspension of the employee for not less than thirty days or more than six months. Conn. Gen. Stat. § 5-2.66d.

Any possible violations of state law regarding political activity should be reported to the Commissioner of Administrative Services. The Commissioner of Administrative Services will then investigate and take whatever action is appropriate.

Violations of state law regarding political activity may also lead to criminal sanctions under Conn. Gen. Stat. S 5-268. These sanctions may include a fine of up to $1,000, imprisonment of up to one year,or both.

II. POLITICAL ACTIVITIES UNDER FEDERAL LAW.

Federal law (commonly called the Hatch Act") sets out regulations regarding political activities of state employees in 5
U.S.C. SS 1501 - 1508 and 5 C.F.R. S§ 151.101 - 151.122.Federal

law does not distinguish between classified employees and unclassified employees. However, not all employees are covered by federal law. Accordingly, it is important to identify who is covered and who is not.

A. Employees Covered (5 U.S.C. § 1501, 5 C.F.R. 5 151.101).

Generally, an individual employed by a state agency whose principal employment is in connection with an activity financed in whole or in part by federal funds is covered by the Hatch Act. This includes most elected officers and commissioners. Employees of educational and research institutions supported in whole or in part by the state are not included. Also, the Hatch Act does not include employees of the legislative or judicial branches. In determining which employees are included, an agency should anticipate that any employee who may perform duties in connection with an activity financed in whole or in part by federal loans or grants, as a normal and foreseeable incident to this principal position or job, is covered. This involves two steps of analysis. First, is the employee's employment with the state his principal employment? Second, does this employment involve, as a normal and foreseeable incident thereof, performance of some duties in connection with a federally financed activity? In Re Nello A. Tineri, 2 Pol. Act. Rptr. 825, 829 (1969).2/

In determining whether the employee's employment is his principal employment, one looks at whether his principal employment is as a state employee, not at his duties. Normally, the principal employment of state employees is employment as state employees. However, if an employee has two jobs, there may be a question as to which job is the principal employment. Thus,- an unpaid member of a housing authority who was also engaged in the private practice of law was not principally employed by the housing authority and, accordingly, not covered by the Hatch Act. Matturri v. United States Civil Service Commission, 130 F. Supp. 15 (D. N.J. 1955), aff'd 229 F.2d 435 (3d Cir. 1956) (per curiam).

Once it has been determined that a persons principal job is as a state employee, the nature of the employee's duties ought to be scrutinized. If it is a normal and foreseeable part of an employee's job to perform any duties in connection with a federally financed activity, the employee is covered by the Hatch Act. However, when the duties in connection with a federally financed activity are so small that they are insignificant the legal maxim

2/The Political Activity Reporter was a reporter published by the United States Civil Service Commission, predecessor to the Merit Systems Protection Board.

de minimis non curat lex (the law is not concerned with trifles) comes into play. See Simmons v. Stanton, 502 F. Supp. 932, 937 (W.D. Mich. 1980).

We offer a word of caution on application of the de minimis maxim. It only comes into play when the employee's activities connected to federally financed activity are insignificantly small. An employee who devotes a small amount of time to federally financed activity is covered by the Hatch Act where it is a normal and foreseeable consequence of the employees job to perform the duties connected to a federally financed program.

The following situations are examples of employees who would be covered by the Hatch Act:

1. A Department of Transportation engineer some of whose work is in connection with federally funded highway activity.

2. An Assistant Attorney General some of whose work is in connection with federally financed child support programs.

3. A secretary in the Department of Social Services, some of whose typing and filing duties are related to federally funded programs.

4. A maintenance worker in a federally financed maintenance program.

A case by case review is necessary, since each situation may be different. However, where the work in connection with a federally financed activity is a normal and foreseeable activity of the employee, it is safe to assume that the employee is covered by the Hatch Act.

B. Permitted Activities (5 C.F.R. 5 151.11).

State employees covered by the Hatch Act are permitted to engage in political activity to the widest extent consistent with the restrictions imposed by the Hatch Act. Permitted activity includes candidacy for political party office.

C. Prohibited Activities (5 U.S.C. 5 1502; 5 C.F.R. §§ 151.121, 151.222).

State officers and employees, including elected officers and commissioners., who are covered by the Hatch Act may not use their official authority or influence for the purpose of interfering with or affecting the result of an election or. nomination for

office, directly or indirectly coercing or advising a state or local employee to contribute anything of value to a political party or a person for a political purpose, or being a candidate for elective public office in a partisan election. The only exception is that the prohibition on candidacy does not apply to the Governor, Lieutenant Governor or the elected head of an executive department (in Connecticut these are the Secretary of the State, Treasurer, Comptroller, and Attorney General).

It is important to point out that it is only candidacy for office that is prohibited, not holding office. Thus, an individual who first enters state service while holding local office is not affected. However, running for election or reelection while a state employee would pose a problem.

D. Enforcement (5 U.S.C. §§ 1504-iS08).

The federal agency responsible for enforcing the Hatch Act is the Merit Systems Protection Board. Charges may be instituted by the Boards Special Counsel by providing notice to the employee involved and to the state.

After holding a hearing, at which both the employee and the state are entitled to be heard, the Board determines whether the Hatch Act was violated and whether the violation warrants removal from employment. The determinations are appealable to the United States District Court.

A determination that there is no violation or that a violation does not warrant removal ends the matter. However, a determination that there is a violation warranting removal may have consequences for the state. If the Board made a determination that a violation warranted removal and the employee was not removed within thirty days, or finds that the employee was removed and rehired within eighteen months, the state will lose federal funding equivalent to twice the annual salary of the employee.

State agencies should obviously avoid losing any federal funding. However, since the prohibitions under federal law are slightly different from the prohibitions under state law, state agencies must be particularly careful in taking action to avoid losing federal funds.

III. INTERACTION BETWEEN STATE LAW AND FEDERAL LAW.

Much of what is prohibited by state law is also prohibited by federal law.- Indeed, both state law and federal law prohibit using official authority for influencing elections and coercing state or local employees to pay or contribute anything of value

for a political purpose. Violations of these provisions are just cause for discharge under state law. The Commissioner of Administrative Services will certainly investigate violations. If the commissioner concludes that there was a violation, he will act accordingly. Violations that could lead to disciplinary action are described below.

State law and federal law do, however, differ on one point. State law permits candidacy for office while federal law prohibits candidacy. This conflict may have an effect on state agencies. This is also described below.

A. Violations That Could Lead To Disciplinary Action.

Several provisions of state law contain restrictions:. on-certain political activity. Violation of any of these provisions would constitute just cause for discipline.

First and foremost, state law clearly prohibits any political activity on state time or with state resources. Conn. Gen. Stat. § 5-266a(b). Employees may not engage in such conduct at all. Agency heads should not tolerate any such activity.

In addition, two provisions of federal law and state law which restrict certain political activity are identical. These sections involve influencing the results of an election and coercing contributions for political purposes. Violations of either of these provisions could result in enforcement action under federal law and/or disciplinary action under state law.

A covered employee may not use the employee's official position to interfere with or affect the result of an election or nomination for office. 5 U.S. C. § 1502 (a) (1) ; Conn. Gen. Stat. § 5-266a(a)(1). The meaning of these provisions is evident from the express terms of the statutes. They should certainly be heeded.

In addition, a covered employee may not coerce, attempt to coerce, command or advise a state or local employee to make contributions for political purposes. 5 U.S.C. § 1502(a)(2); Conn. Gen. Stat. § 5-266a(a)(2)**.3/** The statutes regulate the employee who solicits funds for political purposes. They do not regulate the employee who is making the contributions.

3/ Nothing in these laws prohibits voluntary contributions by an employee, something which is expressly permitted by Conn. Gen. Stat. § 5-266a(b).

The determination of what conduct constitutes a violation of this restriction on solicitations is inherently fact-based. In looking at the facts it is nevertheless important to recognize that where political contributions are concerned, "it is easy to see that what begins as a request may end as a demand ... " Ex Parte Curtis, 106 U.S. 371, 1 S.Ct. 381, 384 (1882). The U.S. Merit Systems Protection Board, and its predecessor, the Civil Service Commission, have in the past rendered a number of decisions finding that superiors soliciting political contributions from subordinates is .inherently coercive.

Based upon our review of the caselaw, virtually all solicitation by a superior of a political contribution from a subordinate would be viewed as inherently coercive, and therefore barred. While there may be extremely limited circumstances where a factual defense could be articulated, such an approach is quite risky. Our advice to agency heads is that solicitation of a subordinate employee by a superior employee should not be allowed.

In the same vein, with respect to a solicitation of a state or local employee who is not a subordinate of the employee making the solicitation, our review of the relevant authorities indicates to us that it could be difficult to establish sufficient facts to justify solicitations of state or local employees in most situations. Accordingly, we suggest the prudent approach of classified state employees refraining from such solicitations. Should questions of political solicitations by classified employees of state or local employees arise, they should be addressed on a case by case basis to ascertain whether or not there was in fact a violation.

The above advice should not be read too broadly. Employees continue to have a right to make voluntary political contributions in whatever manner they may see fit. In addition, off-duty solicitation that does not involve state resources is permissible, so long that it does not involve solicitations of subordinates or other solicitations of state or local employees that would run afoul of the dictates of the law.

B. What Happens When Conduct Permitted By State Law Is Prohibited By Federal Law.

There is one important area where federal law and state law are different, namely the extent to which candidacy for office is restricted. In evaluating the interaction between federal law and state law in this area, it is important to understand that the federal law is directed to federal financing of state programs. Nothing in the federal regulatory program prevents the General Assembly from enacting legislation inconsistent with the federal requirements. The consequence of such action could well

be the loss of some federal funding. See Maher v. Freedom of Information Commission, 192 Conn. 310, 317 - 318, 472 A.2d 321 (1984); accord, Neustein v. Mitchell, 52 F. Supp. 531, 532 (S.D.N.Y. 1943) (state may retain employee if it wishes as only penalty is withholding federal funds).

Nevertheless, candidacy for elective office is expressly permitted by state law. Accordingly, there is no just cause for discharge, or any other discipline, under state law.

The Office of the Attorney General has previously litigated with the federal government a constitutional challenge to the Hatch Act, in which we claimed that the Hatch Act as applied to two Connecticut employees, among other things, violated constitution rights of political association. The lower federal courts decided against us, feeling that they were not free to depart from previous decisions of the U.S. Supreme Court, and the Supreme Court declined to review the case. State of Conn., DHR v. U.S. M.S:P.B., 718 F.Supp. 125 (D. Conn. 1989), aff'd mem., 896 F.2d 543 (2d Cir. 1990), cert. denied, 498 U.S. 810, 111 S.Ct. 43 (1990). This litigation only involved constitutional issues and not the question of the application of the state statutory right to be a candidate. Indeed, the Merit Systems Protection Board acknowledges that the choice of whether to discharge an employee who was found to have engaged in political activity which "warrants removal, " under the Hatch Act, or suffer the withholding of certain federal funds, is one that belongs to the state. Special Counsel v. Camillieri, 33 M.S.P.R. 565, 567 n.5 (U.S. M.S.P.B. 1987); Special Counsel v. Winkleman, 36 M.S.P.R. 71, 74 n.3 (U.S. M.S.P.B. 1988). It is clear that Connecticut has made its choice through the statute expressly permitting candidacy.

Agency heads should be very conscious of this situation and make every effort, within the guidelines we provide below, to make work assignments that will avoid the loss of funding. We should note that heads of agencies that receive no federal funding should also be conscious of work assignments since employees of their agencies may perform some functions in connection with another state agency and possibly jeopardize some of the other agency's funding.

1) Planning to Avoid Future Loss of Funding.

While it may be too late to avoid funding problems resulting from an employee who was a candidate in the past, it is not too late to plan to avoid problems with future candidates. This could be done by transferring an employee to an area that performs no work at all in connection with a federally funded

activity. A transfer does not cure a past violation. It merely helps avoid the possibility of a future violation.
Any transfer to avoid Hatch Act penalties must be permanent, it cannot be limited to the time that the employee is a candidate. Also; a transfer must otherwise conform with state law.

With respect to employees who are covered by collective bargaining agreements, transfers must comply with the terms of the collective bargaining agreement. It is best if the transfer is voluntary. An agency head may consider an involuntary transfer only if the collective bargaining agreement permits involuntary transfers for non-disciplinary purposes.

With respect to employees not covered by collective bargaining agreements, § 5-239-1(a) of the state personnel regulations permits transfers to be made by an agency head for the good of state service. While here too, a voluntary transfer is best, the agency head may make an involuntary transfer to a position in the same salary range and with the same requirements as to knowledge, skill, ability, experience and training.

A transfer may not be made under these circumstances to a non-comparable or lower position. That would be a demotion. Just as being a candidate for office is not just cause for discharge, under state law, it is also not just cause for demotion.**4/**

2) Circumstances Not Warranting Loss of Funding.

Agencies only lose funding in those circumstances where the Merit Systems Protection Board finds a violation of the Hatch Act and that the violation warrants removal. As a practical matter, agency heads should assume that all violations will fit in. this category and plan accordingly.

There is, however, a very narrow class of cases where the Merit Systems Protection Board may find that a violation does not warrant removal. We will describe this class of cases very briefly.

4/We also note that candidacy for or holding office should not be a factor in hiring or promotional decisions, unless state statutes specifically provide otherwise. At the present time, these circumstances. would only be holding positions in more than one branch of state government or holding municipal office where there is a conflict of interest.

In determining whether removal is warranted, two things are examined. An inquiry is made as to an employee's knowledge that the Hatch Act applied to him and as to whether or not the prohibited activity was of a substantial nature.

Simply not knowing that the Hatch Act applied does not excuse a violation. But there is a 'serious question about the appropriateness of the penalty of removal where an employee had no actual knowledge of the Hatch Acts application to him or was employed under circumstances that did not place on him a burden to inquire further. Employees who knew of the Hatch Act or who knew that there might be same prohibition on political activity had a .duty to inquire as to whether the Hatch Act applied to them. In Re Stanley J. Brown, 3 Pol. Act. Rptr. 273, 312 (1974). Thus, if an employee made reasonable inquiry and was erroneously informed that the Hatch Act did not apply, the employee's activities did not warrant removal. In Re Nello A. Tineri, 2 Po1.,Act. Rptr. 825, 833 (1969).

Under an earlier and significantly broader version of the Hatch Act, the federal government would evaluate the nature and seriousness of the political activity including activity that did not amount to candidacy. While circulating a single nominating petition to 25 persons might not warrant removal, circulating a nominating petition requiring more than 25 signatures would warrant removal. In Re Stanley J. Brown, 3 Pol.. Act. Rptr. 273, 315 (1974). Historically, the Board has considered even political activity less than candidacy as justifying removal. In the two cases that we have litigated recently, the Board concluded that candidacy for office was a serious enough violation to warrant removal. Special Counsel v. Camillieri, 33 M.S.P.R. 565 (U.S. M.S.P.B. 1987); Special Counsel v. Winkleman, 36 M.S.P.R. 71, 74 (U.S. M.S.P.B. 1988). We expect the Board to continue this practice.

If agency heads transfer employees to avoid Hatch Act problems, as we suggest above, the agency heads should avoid, the possibility of future violations with a resulting loss of funds. However, if there is a situation that falls between the cracks and it turns out that the employee was unaware of the application of the Hatch Act, the state may have some protection against the loss of funds.

CONCLUSION

There are both state and federal laws regarding political activity of state employees. These laws are of direct concern to individual employees and to agency heads.

Individual employees and agency heads should be on notice that violations of state law regarding political activity are serious matters. These include engaging in any political activity on state time or with state resources, using official influence to affect the results of an election, or coercing, attempting to coerce, commanding or advising state or local officers or employees to make contributions for partisan purposes, as described in the body of this memorandum. Such violations are just cause for discipline.

Also, violations of the federal law may affect federal funding to the extent that the violation under federal .law is an activity permitted under state law. Agency heads should take steps, as we have suggested, to avoid loss of federal funding. These steps must be consistent with the rights of state employees under state law. The Office of the Attorney General and the Personnel Division of the Department of Administrative Services stand ready to assist agency heads with questions that may arise regarding the Hatch Act.