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The Restrictions on Political Activity by Active-Duty Service Members Are Much More Severe than the Restrictions on Federal Civilian Employees.

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Subject Index Codes:

7.6—Restrictions on Political Activity of Service Members

Q: I am a Commander³ in the Navy Reserve and a life member of the Reserve Organization of America.⁴ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniformed

¹ Please see www.roa.org/lawcenter. You will find more than 2,000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses’ Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997, and we add new articles each month. I am the author of more than 90% of the articles published so far, but we are always looking for “other than Sam” articles by other lawyers.

² BA 1973, Northwestern University; JD (law degree), 1976, University of Houston, LLM (advanced law degree), 1980, Georgetown University. I served on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I participated in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

³ The factual set-up for this article is hypothetical but realistic.

⁴ In 2018, the members of the Reserve Officers Association amended the organization’s constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name “Reserve Organization of America” (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are especially pertinent to those who serve our country in uniform.

On the civilian side, I am a GS-14 employee of the Department of the Army. I am active politically, and I am the county chairperson of one of the two major political parties for an intermediate-sized county. I am familiar with the Hatch Act, and I am careful not to violate it.

I never solicit, receive, or handle political contributions. Our county committee has other officers who love fundraising and do it well, so it is not necessary for me to be personally involved in that essential function. I never wear political campaign buttons at my federal civilian job, and I am careful to refrain from political activities while I am on the clock at my job. I never use any equipment (cell phone, desktop computer, etc.) that my federal agency has provided to me in any of my political activities. I never discuss politics or try to recruit political volunteers among my colleagues or subordinates at the civilian job. My colleagues at work mostly belong to the other major party.

I have volunteered to go on active duty for one year, from 10/1/2023 through 9/30/2024. I do not want to resign from my county chairperson position, but I will resign if that is necessary. The way I figure it, the political rules that apply to active-duty service members are almost identical to the rules that apply to federal civilian employees. If I can serve as the county chairperson of a political party while working as a federal civilian employee, I can also serve in that capacity while on active duty in the Navy. What do you say about that?

Answer, bottom line up front:

The rules that apply to active-duty service members are much stricter than the rules that apply to federal civilian employees. You will need to resign from the county chair position if you are going on active duty for an extended period. The DOD Directive provides: “A member of the Armed Forces on active duty shall not: ... Serve in any official capacity with or be listed as a sponsor of a partisan political club.”⁵

One can understand the distinction between the Hatch Act, as amended in 1993, and the Department of Defense (DOD) Directive by comparing the first section of the Hatch Act with the “catch-all” provision of the Directive. The first section of the Hatch Act reads as follows:

It is the policy of Congress that employees should 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.⁶

The Directive’s “catch-all” provision is as follows:

Activities not expressly prohibited may be contrary to the spirit and intent of this Directive. Any activity that may be reasonably viewed as directly or indirectly associating the Department of Defense or the Department of Homeland Security (in the case of

⁵ DOD Directive 1344.10 of February 19, 2008, Paragraph 4.1.2.4.

⁶ 5 U.S.C. § 7321.

the Coast Guard) or any component of these Departments with a partisan political activity or is otherwise contrary to the spirit and intention of this Directive shall be avoided.⁷

The Hatch Act provides: “Subject to the provisions of subsection (b), *an employee may take an active part in political management or in political campaigns, except ...*”⁸ But the DOD Directive provides: “In keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement, the following policy shall apply ...”⁹

Explanation

Because of concerns about the misuse of Works Progress Administration employees and other federal employees in the 1938 congressional elections, Congress enacted the Hatch Act¹⁰ in 1939. As originally enacted, the Hatch Act forbade federal civilian employees from engaging in “political campaign management”¹¹ *even on their own time*. In 1947 and again in 1973, the Supreme Court upheld the constitutionality of the Hatch Act.¹² Nonetheless, forbidding federal employees from engaging in political activities to protect them from compulsion to engage in such activities was controversial, to say the

⁷ DOD Directive 1344.10 of February 19, 2008, Paragraph 4.1.5.

⁸ 5 U.S.C. § 7323(a) (emphasis supplied).

⁹ DOD Directive 1344.10 of February 19, 2008, Paragraph 4.

¹⁰ Public Law 76-252, 53 Stat. 1147. The Hatch Act is codified in title 5, United States Code, sections 7321 through 7326 (5 U.S.C. §§ 7321-26).

¹¹ The forbidden “campaign management” activities include such necessary chores as stuffing envelopes, making telephone calls, and distributing campaign literature door-to-door.

¹² See *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947).

least. In 1993, Congress loosened the restrictions on political activities of most federal employees.¹³

Most federal employees are in the “less restricted employee” category. Under the 1973 amendment, employees in this category are subject to five limitations that apply to them 24 hours per day and seven days per week:

- a. The employee must not use his or her official authority, title, or position while engaged in political activities.¹⁴
- b. The employee must not invite subordinate employees to political events or otherwise suggest that subordinate employees attend political events or undertake any partisan activities.¹⁵
- c. The employee must not be a candidate for a partisan political office.¹⁶
- d. The employee must not solicit or discourage participation in any political activity of anyone who has business pending before the federal office that employs the employee.¹⁷
- e. The employee must not solicit, collect, or handle contributions to a political organization or candidate for partisan office.¹⁸

¹³ Hatch Act Reform Amendments of 1993, Public Law 103-94, 107 Stat. 1001.

¹⁴ 5 U.S.C. § 7323(a)(1).

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 7323(a). The Hatch Act defines the term “partisan political office” as follows: “partisan political office’ means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, *but shall exclude any office or position within a political party or affiliated organization.*” 5 U.S.C. § 7322(2) (emphasis supplied). The italicized clause means that you did not violate the Hatch Act when you ran for the office of county party chairperson.

¹⁷ 5 U.S.C. § 7323(a)(4).

¹⁸ 5 U.S.C. § 7323(a)(2).

Six other restrictions apply to “less restricted” federal employees when they are on duty, when they are in any federal room or building, when they are wearing a federal uniform or official insignia, or when they are using any federally owned or leased vehicle:

- a. The employee must not distribute campaign materials or items.
- b. The employee must not display campaign materials or items.
- c. The employee must not wear or display partisan political buttons, t-shirts, signs, or other items,
- d. The employee must not perform any campaign-related chores.
- e. The employee must not make political contributions to a partisan political party, candidate for partisan political office, or partisan political group.
- f. The employee must not use any e-mail account or social media to distribute, send, or forward content that advocates for or against a partisan political party, candidate for partisan political office, or partisan political group.¹⁹

Federal employees in the “further restricted employee” category must not engage in partisan political activities *even on their own time*.²⁰

¹⁹ 5 U.S.C. § 7324(a).

²⁰ Employees in the “further restricted” category include members of the Senior Executive Service, Administrative Law Judges, Contract Appeals Board Members, and Administrative Appeals Judges, as well as all employees of the Federal Election Commission, the Election Assistance Commission, the Federal Bureau of Investigation, the Secret Service, the Central Intelligence Agency, the National Security Council, the National Security Agency, the Defense Intelligence Agency, the Defense Intelligence Agency, the Merit Systems Protection Board, the Office of Special Counsel, the Office of Criminal Investigation of the Internal Revenue Service, the Office of Investigative Programs of the United States Customs Service, the Office of Law Enforcement of the Bureau of Alcohol, Tobacco, and Firearms, the National Geospatial Intelligence Agency, the Office of the Director of National Intelligence, the Criminal Division of the Department of Justice, and the National Security Division of the Department of Justice. 5 U.S.C. § 7324.

Active-duty military personnel must comply with a Department of Defense (DOD) Directive, not the Hatch Act.

The Hatch Act has never applied to service members. A DOD Directive²¹ governs political activity by service members on active duty. The Directive is like the Hatch Act *before the 1993 amendment* and to the current rules that apply to “further restricted” federal employees, like members of the Senior Executive Service. *Service members on active duty must not engage in partisan activities even on their own time.*

I invite the reader’s attention to Paragraph 4.5.4 of the Directive: “This is a lawful general regulation. Violations of paragraphs 4.1 through 4.5 of this Directive by persons who are subject to the Uniform Code of Military Justice are punishable under Article 92, ‘Failure to Obey Order or Regulation.’”

This means that you are charged with knowledge of the Directive. You can be court-martialed for violating the Directive, and “I did not know about the Directive” is not a defense. The prosecution need not prove that you had read the Directive or that somebody had put a copy of it in your hands. Ignorance of a lawful general regulation, like ignorance of a statute, is no defense.

If you are on active duty, the Directive applies to you 24 hours per day and 365 days per year, including days when you are on leave or liberty. “I did it on my own time” is no defense.

²¹ DOD Directive 1344.10 dated February 19, 2008. See generally “Thou Shalt Not Politick while on Active Duty,” Law Review 150096 (November 2015) for a detailed discussion of the permissible and impermissible political activities for active-duty service members.

Please join or support ROA

This article is one of 2,000-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997, and we add new articles each month.

ROA is more than a century old—on 10/2/1922, a group of veterans of “The Great War,” as World War I was then known, established ROA. General of the Armies John J. Pershing, the commander of our country’s military forces in that war, invited reserve officers who had served under him to attend a meeting at Washington’s historic Willard Hotel. General Pershing and the reserve officers who attended the meeting at his invitation recognized that calling the recently concluded war “the war to end all wars” was a dangerous conceit and that our nation needed to maintain military readiness.

One of the founders was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, Department of Labor (DOL) investigators, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We

provide information to service members, without regard to their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country's eight uniformed services,²² you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership.²³ Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

If you are eligible, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

Reserve Organization of America
1 Constitution Avenue NE
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The United States Office of Special Counsel (OSC) is responsible for enforcing the Hatch Act. Here is a link to the Hatch Act page on the OSC website:

<https://osc.gov/Services/Pages/HatchAct.aspx>

²² Congress recently created the United States Space Force as the 8th uniformed service.

²³ If you are under the age of 35, you can become an associate member for free for five years or when you turn 35, whichever comes first.

²⁴ You can also contribute on-line at www.roa.org.

Here is a link to Department of Defense Directive 1344.10 of February 19, 2008:

<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dod/d/134410p.pdf>