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NTEU Confident That Second Look at Hatch Act Cases Will Vindicate Political Rights in Employee E-Mails

Washington, D.C.—The leader of the nation’s largest independent union of federal workers today expressed her confidence that a second look at two Hatch Act cases by an administrative law judge (ALJ) will result in another decision rejecting complaints filed by the Office of Special Counsel (OSC) against two federal employees.

These employees each sent a single e-mail expressing their political opinions to relatively small groups of friends, coworkers and family members in the weeks preceding the 2004 presidential election. The Special Counsel complaints allege that in sending the e-mails, one of which expressed support for President Bush, and the other for Senator Kerry, the employees violated the Hatch Act, which carries a presumptive penalty of removal.

President Colleen M. Kelley of the National Treasury Employees Union (NTEU) said that in sending the case back to ALJ for further proceedings, the Merit Systems Protection Board (MSPB) did not reach the issue of whether, in fact, the employees had violated the Hatch Act when they sent the e-mails in question

The board ordered, instead, that further proceedings are necessary to enable the ALJ to determine, based on a more complete record of the facts in the case, “whether the specific messages, in the context of the circumstances surrounding them, constitute political activity” within the meaning of the Hatch Act.

(MORE)

NTEU Supports Hatch Act Rights for E-Mails--Add One

The ALJ originally dismissed the OSC complaint in a strongly worded opinion, in which he ruled that the agency had failed to even “state a claim” that the employees violated the Hatch Act. He further held that, in accordance with a 2002 OSC advisory opinion, the limited distribution e-mails did not violate the Act.

President Kelley was sharply critical of the Special Counsel’s prosecution of this case, arguing that his overreaching by choosing to file Hatch Act charges against the two employees “trivializes the important public purpose of the Hatch Act, and chills the First Amendment protection rights of all federal workers.”

NTEU, which was instrumental in securing 1994 reforms to the Hatch Act substantially broadening the political rights of federal employees, and which has aggressively sought to protect federal workers’ First Amendment rights, filed a brief in support of the two federal workers in this case. In it, NTEU called on the MSPB to affirm the ALJ’s ruling that the employees did not engage in prohibited political activity when they sent the e-mails, and to acknowledge that the Special Counsel’s prosecution of these employees was inconsistent with the Hatch Act’s express protection of the expression of personal opinion, as well as the First Amendment.

In dismissing the OSC complaints, the ALJ relied in part on a 2002 OSC advisory opinion which distinguished between sending e-mail messages that were the equivalent of virtual ‘water-cooler’ political discussion, which the Hatch Act does not prohibit, and sending mass e-mails to a wide group of federal workers who lack a personal relationship to the sender, which may constitute a form of “electronic leafletting” that would violate the Hatch Act’s prohibition against on-duty political activity.

The MSPB directed the ALJ to use the factors identified in OSC’s 2002 advisory opinion as the basis for deciding the case, after a full development of the record.

“I am confident that when the factors spelled out in the advisory opinion are applied in developing the factual record,” President Kelley said, “the ALJ will rule that the employees did not violate the Hatch Act when they sent the e-mails in question.”

As the largest independent federal union, NTEU represents some 150,000 employees in 30 agencies and departments.