

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

GEORGE W. SWEENEY, SR.,)	
)	
Employee/Grievant,)	
)	DOCKET No. 10-02-468
v.)	
)	DECISION AND ORDER
DEPARTMENT OF TRANSPORTATION,)	
)	
Employer/Respondent.)	

After due notice of time and place, this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on June 30, 2010 at the Public Service Commission, Silver Lake Plaza, Canon Building, 861 Silver Lake Boulevard, Dover, DE 19904.

BEFORE Martha K. Austin, Chair, John F. Schmutz, Paul R. Houck, and Victoria Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Roy S. Shiels, Esquire
on behalf of George W. Sweeney, Sr.

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of
Transportation

BRIEF SUMMARY OF THE EVIDENCE

The employee/grievant, George W. Sweeney, Sr. (Sweeney), offered and the Board admitted into evidence without objection eight exhibits marked for identification as Exhibits 1-8. Sweeney goes by the first name of “Jody.”

The Department of Transportation (DelDot) offered and the Board admitted into evidence without objection eleven exhibits marked for identification as Exhibits A-K.

Sweeney testified on his own behalf but did not call any other witnesses. DelDot called three witnesses: Marti N. Dobson, DelDot Director of Technology and Support Services; Colleen Gause, Telecommunications Team Leader, Department of Technology and Information (DTI); and Tara L. Honold, DelDot Chief Information Officer.

FINDINGS OF FACT

By letter dated October 29, 2008, the Office of Auditor of Accounts notified the DelDot Secretary that it had received an anonymous complaint alleging “Mr. Sweeney’s use of State-owned equipment to post political related information to NEWSZAP Public Internet Forums.” The Office of Auditor of Accounts recommended “that your Department initiate personnel action against this individual.”

Marti N. Dodson, DelDot Director of Technology and Support Services, conducted an investigation. Dodson asked DTI to copy Sweeney’s Internet activity logs for September 22 through October 20, 2008. In reviewing those logs, Dodson found three postings on Newszap, a free public website which has hundreds of forums (commonly known as “blogs”) for individuals to discuss and comment on news articles and matters of community concern. According to the Newszap home

page, the website is designed “to provide citizens with the electronic equivalent of a town hall meeting as a place where people gather, socialize, conduct business, exchange local news, and discuss public issues.” Any person can access and read each forum free of charge, but must have an account name and number to post a message on one of the blogs.

On Tuesday, October 7, 2008 at 10:20 a.m., “Jody.Sweeney Member” posted this message on Newszap:

This is about the election. My election is for Levy Court. . . I am the only candidate for this office who has lived here in Kent County for 48 years. I believe that my historical perspective is an asset in that it is good to know where we have been when making land use decisions about where we are going. . . . I am the only candidate who stood up in opposition to the Camden Comprehensive Plan that annexed that land, while my opponent was in favor of it My opponent seems to forget that he represents more Camden residents than just those few who are involved in special interests.

On Tuesday, October 7, 2010 at 2:04 p.m., “Jody.Sweeney Member” re-posted that same message with the introduction:

The Kent County Forum has this entry from today. As a candidate, you spend months making sure everyone knows where the problem is, who is behind it. Most of it is an attempt to general conversation with people you are talking to. Then the ideas start to formulate, somewhere around 60 days before the election, based on all the input from thousands of people talked to.

On Thursday, October 9, 2008 at 8:14 a.m., “Jody.Sweeney Member” posted this message on Newszap:

Mr. Edmanson is self-serving and grandizing. He

associates with special interests and thinks that when he is the lone vote that he stands out. Look at his campaign funding. Nearly \$3,000 in donations from Development Special Interests, and it shows in his voting pattern. The residents of the 5th District need someone who understands where we have been; Someone with a history in the District; Someone who will represent them better on Levy Court, making new development come clean with funding for the infrastructure that is lagging so far behind. Sweeney.

The Board takes judicial notice that W.G. Edmanson, II, a republican, was incumbent Commissioner representing the 5th District on the Kent County Levy Court. Sweeney, a democrat, defeated Edmanson in the general election in November 2008.

Dodson verified that all three blogs were posted from Sweeney's State computer (IP address 172.24.52.6). Dodson also verified that Sweeney was not on leave on October 7 or 9, 2008, and that the three blogs were posted during Sweeney's normal work hours (7:30 a.m. – 4:00 p.m.) after adjusting between Greenwich Mean Time (in which DTI maintains Internet activity logs) to local time. Sweeney acknowledged at the hearing that he posted the first message and might have posted the other two. ¹

By letter dated May 12, 2009, Dobson notified Sweeney: "It is clear that you have engaged in political activity during your hours of employment, . . . Following the Merit Rules, Section 15.3.4, I am recommending termination of your employment with the State of Delaware, along with you being ineligible to hold any office or position in the State service for one year."

¹ During cross-examination of DelDot's witnesses, Sweeney suggested that someone else might have accessed his State computer and posted the messages on Newszap pretending to be Sweeney. The Board finds it highly improbable that on three separate occasions Sweeney was logged on to his State computer, but out of the office, when someone sneaked in and, using Sweeney's Newszap account information, pretended to be Sweeney in posting the messages.

Sweeney requested and received a pre-decision meeting on June 12, 2009. By letter dated July 9, 2009, the Secretary of DelDot notified Sweeney of his termination. “It is clear that many of the issues you discussed [on Newszap] were indeed political and partisan. You were pushing your election for Levy Court, while criticizing your opponent and even referring to past personnel issues when you worked together.”

CONCLUSIONS OF LAW

The Merit statutes provide:

No employee in the classified service shall engage in any political activity, or solicit any political contribution, assessment or subscription during

the employee’s hours of employment or while engaged in the business of the State.

...

Any officer or employee in the classified service who violates any of the provisions of this section shall forfeit such office or position, and for 1 year shall be ineligible for any office or position in the state service.

29 *Del. C.* §5954(b), (d). Merit Rules 15.3.2 and 15.3.4 have virtually identical language. Sweeney claims that: (1) DelDot violated Merit Rule 15.3.2 by terminating him because he did not engage in any “political activity” on the job; and (2) Merit Rules 15.3.2 and 15.3.4 violate his First Amendment right of political speech.

By statute, the Board’s jurisdiction is limited to “the redress of an alleged wrong, arising under a misapplication of any provision of this chapter, the merit rules or the Director’s regulations adopted thereunder.” 29 *Del. C.* §5943(a). Sweeney’s First Amendment claim is not based on a

misapplication of the Merit statutes or the Merit Rules, but rather is a constitutional challenge to the prohibition against political activity while on the job.

The Board has previously decided that it “does not believe that the Merit statutes or the Merit Rules give the Board jurisdiction to decide a grievance based solely on an alleged constitutional violation, rather than on a violation of the Merit statutes or Merit Rules.” *Greene v. DSCYF*, MERB Docket No. 07-03-385, at p.7 (May 15, 2008) (footnote omitted). “Resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board.” *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973). Accordingly, the Board will not address Sweeney’s First Amendment claim.

The Merit statutes and Merit Rules do not define “political activity.” Sweeney cited another Delaware statute governing the political activity of Department of Justice employees. That statute defines “political activity” as

participating in any activity in support of or in opposition to a political party or partisan candidate for public or political party office, including but not limited to writing or distributing statements in support of or in opposition to a candidate, initiating or circulating a partisan nominating petition, contributing money or anything of value to or for the benefit of a candidate, and soliciting votes of support for a candidate. “Political activity” does not include registering or voting in an election, or expressing opinions on political subjects or candidates.

29 *Del. C.* §2509A(e)(3). Sweeney argues that his postings on Newszap were not prohibited because political activity, as defined by this statute, does not include expressing his opinions on political subjects or candidates.

The Board does not agree with Sweeney’s construction of Section 2509A(e)(3). “[U]nder

familiar principles of statutory construction, effect must be given, if possible, to every part of the statute so that no part will be inoperative.” *DiSabatino v. Ellis*, 184 A.2d 469, 473 (Del. 1962). Under Sweeney’s construction, the exception for expression of “opinions on political subjects or candidates” would render inoperative the prohibition against “writing or distributing statements in support or opposition to a candidate.”

Sweeney’s construction also ignores “the maxim of statutory interpretation *generalis specialibus non derogat*, that a specific statute controls the more general to the extent of any conflict.” *Allen v. State*, 970 A.2d 203, 223 (Del. 2009). The general exception for political activity to express “opinions on political subjects of candidates” must yield to the more specific prohibition against “writing or distributing statements in support or opposition to a candidate.” Otherwise, the exception would swallow the rule.

What constitutes prohibited on the job “political activity” is an issue of first impression for the Board and, ultimately, the courts in Delaware. The Board believes that the Delaware courts would turn for guidance to the substantial body of case law interpreting the comparable term – “political activity” – in the federal Hatch Act.

The Hatch Act, in pertinent part, provides that an employee in the classified service “may not engage in political activity – (1) while the employee is on duty; [or] in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof . . .” 5 U.S.C. §7324(a)(1). However, “[a]n employee retains the right to vote as he chooses and to express his or her opinion on political subjects and candidates.” *Id.* §7323.

Office of Personnel Management (OPM) regulations define “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 C.F.R. §734.101.

On May 30, 2002, the Office of Special Counsel (OSC), which prosecutes Hatch Act violations, issued a “Federal Hatch Act Advisory: Use of Electronic Messaging Devices to Engage in Political Activity” (<http://www.osc.gov/documents/hatchact/federal/fha-29.htm>).

The OSC Advisory observed that the “Hatch Act does not purport to prohibit all discourse by federal employees on political subjects or candidates in a federal building or while on-duty. In fact, it explicitly protects the rights of federal employees to express their opinions on political subjects and candidates both publicly and privately. 5 U.S.C. §7323.”

For example, “the Hatch Act does not prohibit ‘water-cooler’ type discussions and exchanges of opinion among co-workers concerning the events of the day (including political campaigns). . . . The fact that a ‘water-cooler’ type discussion takes place through the use of E-mail does not, in and of itself, transform the discussion from a protected exchange of personal opinion into prohibited political activity for purposes of the Hatch Act.”

Electronic messaging technology, however, can be put to uses other than serving as an alternative mode for casual conversation. E-mail also provides employees with a means to disseminate their opinions on political subjects and candidates to a much wider audience than is possible in casual face-to-face conversations or a phone call. Federal employees can use E-mail to forward political messages to a mass audience. In short, electronic messaging technology enables employees to engage in a form of electronic “electioneering” at the workplace which may constitute prohibited political activity.

The OSC Advisory sets forth three factors to determine whether an electronic message is prohibited political activity: (1) the content of the message (is its purpose to encourage the recipient

to support a particular political party or vote for a particular candidate for partisan political office); (2) the audience (the number of people it was sent to, the sender's relationship with the recipients); and (3) whether the message was sent in a government building, in a government owned vehicle, or when the employee was on duty.

The OSC Advisory analyzed two hypothetical scenarios. In the first scenario, the day before the 2000 Presidential election a government employee while on duty and in a government building used his government computer to send an e-mail to all agency employees: "Only 18 more hours to bring Nader voters to their senses and get them to vote for the ONLY candidate for President – Al Gore!!!" OSC concluded this e-mail violated the Hatch Act. "The content of the message explicitly encouraged its recipients to vote for Al Gore and urged others to do so. The message was sent to a mass audience, including many individuals with whom the sender had no prior acquaintance, much less personal relationship. Finally, the sender was on duty, in a government building when he sent the e-mail."

In the second scenario, a government employee while on duty and in a government building used his government computer to e-mail a few co-workers with whom the employee regularly engaged in friendly political debate, and attached the text of a newspaper column critical of one of the Presidential candidates' tax proposals with a statement supportive of the columnist's views.

"In this instance, the content of the message expresses the sender's personal opinion about a candidate for partisan political office. It may also be true that the message is intended to encourage the recipients to support the sender's candidate of choice. Nonetheless, the audience for the message consists of a small group of colleagues with whom the sender might otherwise engage in political discourse, face to face."

The Board adopts the three factors from the OSC Advisory to analyze Sweeney’s blogs on Newszap to determine if they constituted “political activity,” *i.e.*, “an activity directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.” 5 C.F.R. §734.101.

1. Content

Based on the content of the messages, the Board believes that the purpose of Sweeney’s three blogs on Newszap was to encourage readers to vote for Sweeney and against the incumbent as a candidate for partisan political office. Sweeney specifically mentioned the election for Levy Court, his candidacy and his own qualifications, and Sweeney contrasted and criticized the incumbent opponent (Edmanson) on issues like land use and development. The third blog is particularly telling:

Mr. Edmanson is self-serving and grandizing. He associates with special interests and thinks that when he is the lone vote that he stands out. Look at his campaign funding. Nearly \$3,000 in donations from Development Special Interests, and it shows in his voting pattern. The residents of the 5th District need someone who understands where we have been. Someone with a history in the District; Someone who will represent them better in Levy Court, . . . Sweeney.

It is clear to the Board that Sweeney’s purpose in posting that blog was to encourage readers to vote for him for the Levy Court and not for his opponent.

2. Audience

Sweeney did not send messages to a finite number of readers as one might with an e-mail loop, but posted it on a free public website where it could be read by hundreds if not thousands of viewers. Sweeney did not have any employment or personal relationship with those viewers. The

audience for those messages was not a small group of colleagues with whom Sweeney might otherwise have engaged in political discussion face-to-face.

3. Where and When

Sweeney posted the three blogs on Newszap while in a State building, using his State computer, and while he was on duty.

Based on these three considerations, the Board does not believe that Sweeney's blogs on Newszap were akin to a "water cooler" exchange of political views and opinions with a limited number of co-workers. The Board believes that Sweeney's blogs were more in the nature of "electronic electioneering" to promote his partisan candidacy, criticize the record of the incumbent opponent, and convince voters to elect him as Commissioner to represent the 5th District on the Levy Court. By posting those messages on a free website like Newszap, Sweeney conveyed those messages to potentially thousands of readers.

Based on this factual record, the Board concludes as a matter of law that Sweeney engaged in political activity while on duty by posting blogs on a free public website for all the world to read in support of his candidacy for partisan political office. Accordingly, the Board concludes as a matter of law that DelDot did not violate Merit Rules 15.3.2 or 15.3.4 by terminating Sweeney for engaging in prohibited political activity on the job.

The Board, however, is troubled by the single sanction – forfeiture of office – prescribed by the Merit statutes and the Merit Rules which does not allow the Board to take into account the extent and egregiousness of the particular violation. In contrast, the federal "Hatch Act provides a presumptive penalty of removal for a violation of the Act, unless the [Merit Systems Protection Board] finds by a unanimous vote that the violation does not warrant removal, in which

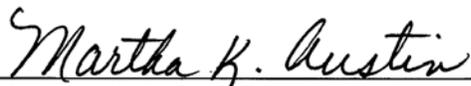
case the Board may impose a penalty of not less than a 30-day suspension without pay.” *Special Counsel v. Wilkinson*, 104 M.S.P.R. 253, 263 (2006).

“The [Merit Systems Protection] Board has found the following six factors, which may be mitigating or aggravating, relevant in determining whether mitigation of the removal penalty is warranted: the nature of the offense and the extent of the employee’s participation; the employee’s motive and intent; whether the employee received advice of counsel regarding the activity that violated the Act; whether the employee ceased the activities in question; the employee’s past employment record; and the political coloring of the employee’s activities.” *Id.*

To avoid future unfairness that might result from forfeiture of office as a result of single sanction, the Board may request that the Director of the Office of Management and Budget investigate this issue pursuant to 29 *Del. C.* §5907(1).

ORDER

It is this 8th day of July, 2010, by a vote of 3-0, the Decision and Order of the Board to deny Sweeney's appeal.



MARTHA K. AUSTIN, MERB Chairwoman



JOHN F. SCHMUTZ, MERB Member



Victoria Cairns
Member



PAUL R. HOUCK, MERB Member

I respectfully abstain.

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (d) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **July 8, 2010**

Distribution:

Original: File

Copies: Grievant

Agency's Representative

Board Counsel

OMB/HRM

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