

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY**

GEORGE W. SWEENEY,	:	
	:	C.A. No: 10A-08-002 (RBY)
_____ Appellant,	:	
	:	
v.	:	
	:	
DELAWARE DEPARTMENT OF	:	
TRANSPORTATION, et al.	:	
	:	
Appellees.	:	

Submitted: February 21, 2013

Decided: April 26, 2013

*Upon Consideration of Appellant's Appeal
from the Merit Based Employee Relations Board
Upon Remand
AFFIRMED*

OPINION and ORDER

Roy S. Shiels, Esq., Brown, Shiels & Beauregard, LLC, Dover, Delaware for Appellant.

Kevin R. Slattery, Esq., Deputy Attorney General, Department of Justice, Wilmington, Delaware for Appellees.

Young, J.

SUMMARY

Appellant George Sweeney (“Sweeney”) was employed by the Delaware Department of Transportation (“DDOT”) as a Technology Services Manager. Classified as a merit employee, he could be subject to termination for a violation of the Merit Rules. During his employment, Sweeney ran for political office. In October 2008, the Office of Auditor Accounts received an anonymous complaint which alleged that Sweeney had used a state-owned computer to make political postings on an internet forum. Merit Rule 16.3.2¹ prohibits merit employees from engaging in “political activity” during work hours or while doing business of the state. As a result of the complaint, an investigation was conducted by DDOT. After the investigation substantiated the allegations, Sweeney was notified of his termination, by letter, on May 12, 2009. He requested a pre-decision meeting. That request was granted, with the meeting’s occurring on June 12, 2009. After the meeting, he was notified by July 9, 2009 letter that his employment was terminated pursuant to the Merit Rules and §5954.

Sweeney appealed his termination to the Merit Employee Relations Board (the “Board”), arguing that his termination not only violated his First Amendment right to free speech, but also that the speech in question was not, in fact, political. The Board refused to address the First Amendment argument on jurisdictional grounds, but did consider his alternative argument. That argument raised an issue

¹ The parties and Courts have previously referred to Merit Rule 15.3.2. the language pertaining to “political activity” is found in Merit Rule 16.3.2 in the current version of the Merit Rules.

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of first impression, requiring the Board to develop a standard for reviewing whether conduct constituted a “political activity.” The Board turned to the Federal Hatch Act and the body of case law developed to interpret the term “political activity” therein. The Board found Sweeney’s postings to be “political activity” under the applicable three-factor test. As a result, the Board held that his discharge was appropriate. Thereafter, Sweeney appealed the Board’s decision to the Superior Court. The Court considered Sweeney’s four categories of arguments. On May 25, 2012 the Superior Court affirmed the Board’s Order terminating Sweeney’s employment, holding that the Board was correct in its analysis. The Court also found that the term in question, “political activity,” was not unconstitutionally overbroad or vague. Following the Superior Court’s decision, Sweeney appealed to the Delaware Supreme Court.

On appeal, the Supreme Court affirmed the portion of the Superior Court’s order which held that §5954 does not violate Sweeney’s First Amendment right to free speech. The Supreme Court reversed and remanded the case to the Superior Court for further proceedings appropriate to determine: 1) What is the legal significance or consequence of rescission of the OSC Advisory Opinion relied upon by the Board in its analysis, if any? 2) What constitutes “political activity” under §5954? Should §2509A be considered as part of this analysis? 3) Is §5954 unconstitutionally overbroad and vague? For the reasons discussed below, the decision of the Merit Employee Relations Board is **AFFIRMED**.

FACTS

George Sweeney was employed as a Technology Services Manager by the Delaware Department of Transportation. Sweeney was classified as a merit employee under 29 *Del. C.* §5903. Pursuant to Merit Rule 16.3.4., as a merit employee, Appellant was subject to termination for violation of the Merit Rules. Merit Rule 16.3.2 prohibited merit employees from engaging in “political activity” during work hours or while engaged in business of the state. Merit Rule 16.3.2 is codified as 29 *Del. C.* §5954, and is modeled after the Federal Hatch Act.

During his employment, Sweeney was running for political office. The Office of Auditor of Accounts notified DDOT’s Secretary, Carolann Wix (“Wix”), by October 29, 2008 letter, that it had received an anonymous complaint alleging that Sweeney had used state-owned equipment to post political information to an internet forum. The letter recommended that the Department initiate an action against Sweeney.

Marti Dobson (“Dobson”), DDOT’s Director of Technology and Support Services, subsequently conducted an investigation. Dobson had Sweeney’s internet activity logs for September 22 through October 20, 2008 copied. Upon review of the logs, Dobson found three postings to Newszap, a free public website that has hundreds of forums or blogs in which individuals may discuss and comment on news articles and other matters.² The three posts, posted under the

² According to the Newszap homepage, the website was 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.” The forums are accessible to be read by anyone, free of charge. An account name and number are required to post messages.

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user name “Jody.Sweeney,” consisted of the following:

Posted October 7, 2008 at 10:20 a.m.

Regardless, This is about the election. My election is for Levy Court. In my race, I have [sic] a standard greeting for almost everyone I can get to come to the door. Let me put it out here for everyone to debate, I am the only candidate for this office who has lived [sic] 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 believe in “infrastructure before Development,” which is a nice catch phrase that everyone is using, but I also believe that you and I as taxpayers should never have our taxes increased to pay for new infrastructure. When these developers bring in all these homes, they should be paying for roads, schools, fire company, and police improvements, not you and I as taxpayers. For examples, Camden residents just had their property taxes increased, a tax increase that will pay for infrastructure. 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, stating that it was good that the town was annexing farmland. I suppose he also opposed the latest annexation of 170 acres into Camden, where they plan to put 1200 homes. My opponent was at that meeting and sat there and said nothing. My opponent seems to forget that he represents more Camden residents than just those few who are involved in special interests.

Posted October 7, 2008 at 2:04 p.m.

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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.³

Posted October 9, 2008 at 8:14 p.m.

Mr. Edmanson is self-serving and grandizing [sic]. He associates with special interests and thinks 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.

Dobson met with two people from the Delaware Department of Technology and Information (“DTI”), to confirm that the postings did in fact come from Sweeney. The blog postings correlated with Sweeney’s internet log. Dobson also checked Sweeney’s leave records to confirm that he was working on the dates and times that the postings were made. In order for someone else to have posted on the blog from Sweeney’s State-owned computer, that person would have had to have

³ This language was followed immediately by a re-posting of the previous post.

access both to his State user name and password and to his Newszap user name and password. Sweeney testified that he had not given out his State of Delaware user name and password, but that other people did have access to his Newszap login information. Sweeney would later acknowledge at the Merit Employee Relations Board hearing that he posted the first message and “might have” posted the other two.

Sweeney was notified by a letter dated May 12, 2009 that Dobson was recommending to Wix that his employment be terminated. Dobson considered the posts to constitute “political activity.” Sweeney requested and received a pre-decision meeting on June 12, 2009. After that meeting, he was notified by letter dated July 9, 2009, that his employment was terminated pursuant to the Merit Rules and §5954.

Sweeney appealed his termination to the Merit Employee Relations Board, arguing that his termination violated his First Amendment right to engage freely in political speech. He also argued, in the alternative, that his speech was not, in fact, political.

The Board refused to entertain Sweeney’s First Amendment argument, noting that 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.”⁴ As Sweeney’s First Amendment claim is a constitutional challenge to the prohibition against political activity while

⁴ 29 Del. C. §5943(a).

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on the job, rather than a claim based on a misapplication of the Merit statutes or Merit Rules, the Board opined that it did not have jurisdiction to hear such a claim. The Board did, however, consider Appellant's alternative argument that his internet posting did not constitute political speech.

The Merit statutes and Merit Rules do not define "political activity." Sweeney cited another Delaware Statute, which governs the political activity of Department of Justice employees, which defined "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.

Sweeney argued that the Board should apply this definition in reaching a determination in his case. He further argued that his postings did not constitute "political activity" as defined by §2509(A), because his postings were mere expressions of his opinions on political subjects or candidates.

As the Board was faced with what appeared to be an issue of first impression in Delaware, a standard for reviewing whether Sweeney's conduct constituted "political activity" had to be developed. The Board chose not to use

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the statute suggested by Sweeney, instead turning to the substantial body of case law interpreting the 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 The Act goes on to state that “[a]n employee retains the right to vote as he chooses and to express his or her opinion on political subjects and candidates.”⁶ The Board also noted that the Office of Personnel Management 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.”⁷

In developing the necessary criteria to analyze Sweeney’s conduct, the Board described and applied a three-factor test. This test was, at least in part, taken from an advisory opinion published by the Office of Special Counsel, which is tasked with prosecuting Hatch Act violations (“Water Cooler Opinion”).⁸ As represented by the Board, the test considers: 1) the content and purpose of the

⁵ 5 U.S.C. §7324(a)(1).

⁶ *Id.*

⁷ 5 C.F.R. §734.101,

⁸ *Federal Hatch Act Advisory: Use of Electronic Messaging Devices to Engage in Political Activity*, U.S. OFFICE OF SPECIAL COUNSEL,
<http://www.osc.gov/documents/hatchact/federal/pha-29.htm> (Unable to confirm)(released May 30, 2002).

message; 2) the number of recipients and the relationship they have with the speaker; and 3) whether the message was sent from a government building or by a government employee while on duty. The Board found Sweeney's postings to be "political activity." As a result, the Board found his discharge to have been appropriate under the Merit Rules and §5954.

Sweeney appealed the Board's decision to the Superior Court. The Court grouped Sweeney's arguments on appeal into four categories. First, Sweeney contended that the Board should have applied Merit Rule 12's "just cause" standard for termination in lieu of 29 *Del. C.* §5954. Second, Sweeney argued that his termination violated his First Amendment right to free speech. Third, Sweeney argued that §5954 was unconstitutionally vague and overbroad. Fourth, Sweeney argued that the Board erred by applying the three-factor rest delineated by the Federal Office of Special Counsel to determine if his internet postings were, in fact, "political activity."

On May 25, 2012, the Superior Court affirmed the Board's order terminating Sweeney's employment. The Superior Court held that the Board was correct in applying 29 *Del. C.* §5954. The Delaware Code supersedes the Merit Rules, in the event of a conflict. Insofar as §5954 and Merit Rule 12 are inconsistent, §5954 takes precedence. The Superior Court also concluded that §5954 did not violate Sweeney's First Amendment rights. This decision was based on the fact that courts have frequently upheld such prohibitions against employees engaging in political activities while at work or on government property. In fact, government policies restricting employees' political activities at work satisfy the

United States Supreme Court’s balancing test in *Pickering v. Board of Education*.⁹

The Superior Court further ruled that §5954 was not unconstitutionally overbroad, as the provision did not prohibit employees from engaging in political activities outside of work. Nor did the Court find §5954 to be impermissibly vague, stating that while the term “political activity” was “subject to some degree of interpretation, it is specific enough to satisfy a challenge for vagueness.” The statute specifically prohibits solicitation of contributions, assessments and subscriptions. These examples are geared towards preventing campaign activity during working hours, which is exactly the kind of activity in which Sweeney is alleged to have engaged.

The Superior Court addressed Sweeney’s final argument, that the Board erred in applying the Federal Office of Special Counsel’s three-factor test in determining that the posts he made on the internet constituted “political activity.” The Court held that this was an issue of first impression in this state. As the statute was modeled after the Federal Hatch Act, the Court found that the Board did not commit legal error in adopting this test.

Following the Superior Court’s decision, Sweeney appealed to the Supreme Court. On appeal, Sweeney advanced three claims. First, he argued that assuming he was rightly subjected to discipline, he should have been subject to discipline under the Merit Rules, not §5954. Alternatively, Sweeney claims that in determining whether his postings constituted “political activity” under §5954, the

⁹ *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563 (1968).

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Board should have defined “political activity” according to §2509A, not the Hatch Act. Further, Sweeney contends that §5954 is constitutionally overbroad and vague. Finally, he argues that the First Amendment protects his right to postings of this sort, because they did not relate to his employment. He also alleges that the Board should have held §5954 to be “content-based” legislation, which would be unable to survive strict scrutiny review.

With regard to Sweeney’s first argument that, assuming he was rightly subjected to discipline, he should have been subject to discipline under the Merit Rules instead of §5954, the Delaware Supreme Court affirmed that the Board was correct in its evaluation of his conduct, as the Delaware Code trumps the Merit Rules. However, the Court determined it necessary to remand the case to the Superior Court to consider the legal significance and consequences of the fact that the Board (and the Superior Court) had relied upon a standard derived from a rescinded advisory opinion.

The Supreme Court also held that on remand the Superior Court must address Sweeney’s argument that §2509A should be part of the analysis used to determine what constitutes “political activity” under §5954. The Supreme Court’s final directive on this point was for the Superior Court to determine what constitutes “political activity” under §5954 with the other issues in mind.

Next, the Supreme Court addressed Sweeney’s second argument, that §5954 is unconstitutionally overbroad and vague. It held that, to decide this issue, this Court must first establish what constitutes “political activity” under §5954.

As for Sweeney’s final argument on appeal, that the First Amendment

protects his right to make the statements in question, the Supreme Court found his argument unpersuasive. The Court held that Superior Court was correct in its analysis. The First Amendment does not protect Sweeney's right to make political postings while working on government property. This result makes Sweeney's remaining arguments pertaining to strict scrutiny review moot.

The Superior Court now considers the issues remanded by the Delaware Supreme Court. The Court has permitted the parties in the matter to submit letter briefs in regard to those issues. These submissions, along with the record, were considered in reaching a decision.

STANDARD OF REVIEW

For administrative board appeals, this Court is limited to reviewing whether the Board's decision is supported by substantial evidence and free from legal error.¹⁰ Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."¹¹ It is "more than a scintilla, but less than preponderance of the evidence."¹² An abuse of discretion will be found if the board "acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce

¹⁰ 29 Del C. §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

¹¹ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

¹² *Id.* (quoting *Cross v. Calfano*, 475 F.Supp. 896, 898 (D. Fla. 1979)).

injustice.”¹³ Questions of law will be reviewed *de novo*.¹⁴ In the absence of an error of law, lack of substantial evidence or abuse of discretion, the Court will not disturb the decision of the board.¹⁵

DISCUSSION

The Delaware Supreme Court remanded to this Court the following issues:

- 1) What is the legal significance or consequence of rescission of the OSC Advisory Opinion relied upon by the Board in its analysis, if any?
- 2) What constitutes “political activity” under §5954? Should §2509A be considered as part of this analysis?
- 3) Is §5954 unconstitutionally overbroad and vague?

1) What is the legal significance or consequence of rescission of the OSC Advisory Opinion relied upon by the Board in its analysis, if any?

Rescission of the OSC Advisory Opinion in question has no bearing on the Board’s decision. Sweeney’s case presented the Board with an issue of first impression. As the statute did not provide an analytical structure for determining whether conduct constituted a “political activity,” the Board was required to develop a system and describe the criteria to be used. The Board appropriately

¹³ *Delaware Transit Corp. v. Roane*, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *2 (Del. Super. April 30, 2009)).

¹⁴ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998).

¹⁵ *Carrion v. City of Wilmington*, 2006 WL 3502092, at *3 (Del. Super. Dec. 5, 2006).

adopted a standard, based on thorough legal research and careful analysis. The fact that the standard was developed from an OSC Opinion, of which the Board became aware in its research, which was rescinded for one use, does not necessarily lead to the conclusion that the Board's analysis was inherently improper. Review of the release discussing the rescission explains why the Opinion was removed from the website. Apparently, there were "misconceptions in the federal community that using government email to circulate partisan political messages was an exception to the Hatch Act's prohibition against engaging in political activity while on duty or in a federal building."¹⁶ The May 30, 2012 advisory opinion was aimed at clarifying that "a water-cooler" discussion which took place through e-mail, did not necessarily "transform the discussion from a protected exchange of personal opinion into prohibited political activity for purposes of the Hatch Act."¹⁷ That distinction turned into a broad misconception that email was an exception to the rule. As a result, OSC retreated from the Water Cooler Opinion. It did not reflect upon the verbiage of the definition as interpretation of a concept, which could be examined and utilized by another body.

The implications of such a rescission on the validity of the Board's decision are perhaps best explained with an analogy. If for example, the Delaware Courts adopted a legal standard or position utilized by another state, the mere fact that the

¹⁶ Loren Smith, *OSC Removes Hatch Act Advisory for "Water Cooler" Political Email*, U.S. OFFICE OF SPECIAL COUNSEL, http://www.osc.gov/documents/press/2007/pr07_06.htm (last visited April 19, 2013)(OSC Press Release)(Mar. 14, 2007).

¹⁷ *Special Counsel v. Sims*, 102 M.S.P.R. 288, 2006 MSPB 151 (June 12, 2006).

other state stops using the legal standard would not alone be grounds for the invalidation of the standard put into use in Delaware.

The OSC's advisory opinions provide advice, offering what is "essentially a forecast, albeit an educated one, of the way the MSPB would rule if an actual case materialized."¹⁸ However, the Merit Systems Protection Board ("MSPB") is not bound by the advice contained in these opinions. Therefore, though the OSC rescinded the Water Cooler Opinion, replacing it with an absolutist approach to internet political activity, the MSPB has not adopted that extreme view. Rather than holding that §7323(c) authorizes employees to express opinions on political subjects or candidates only while off duty, the MSPB has framed the issue as "whether the employees' communications exceeded the mere exchange of opinions and urged others to take specific action in support of or against specific partisan candidates."¹⁹

In one of the cases cited in the March 14, 2007 OSC opinion rescinding the Water Cooler Opinion, the MSPB stated that "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

¹⁸ 18 U.S. Op. Off. Legal Counsel 1 (O.L.C.), 1994 WL810753 (Feb. 2, 1994).

¹⁹ Nikel Sus, *Yes We Can...Fire You for Sending Political E-Mails: A Proposal to Update the Hatch Act for the Twenty-First Century*, 78 Geo. Wash. L. Rev. 171, 179 (Nov. 2009) (quoting The Perils of Politics in Government: A review of the Scope and Enforcement of the Hatch Act: Hearing Before the Subcomm. On Oversight of Government Management, th Fed. Workforce, and th District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs, 110th Cong. 7 (2007) (testimony of B. Chard Bungard, General Counsel, U.S. Merit Systems Protections Board)).

prohibited political activity...”²⁰ This statement is accompanied by examples of Administrative Law Judges’ hesitancy to adopt such a strict approach.²¹ Together, these opinions demonstrate that, in determining whether particular conduct constitutes more than a “mere exchange of opinions... urg[ing] others to take specific action in support of or against specific partisan candidates,” the MSPB still appears to believe that the content of the message and the audience to whom it was sent are important considerations in determining whether a violation has been committed.²²

As stated, this Court’s obligation is to review the administrative appeal to determine whether it is supported by substantial evidence and free from legal error.²³ The determination by the Board to use a three factor test adopted from an OSC advisory opinion and MSPB case law is not legal error. As the Delaware Merit Rule at issue, codified as 29 *Del. C.* §5954 is modeled after the Federal Hatch Act, it is completely logical and appropriate for the Board to consider

²⁰ *Id.* at 294.

²¹ See e.g., *Special Counsel v. Wilkinson*, No. CB-1216-06-0006-B-1, slip op. at 9 (M.S.P.B. Aug. 8, 2007) (On remand from the MSPB, the ALJ was clearly hesitant to adopt such a strict view noting that under the MSPB’s interpretation of the Hatch Act, an employee could be “terminated for wearing a partisan political campaign button to work on a single occasion [or] passing out a single piece of campaign literature. The opinion goes on to state that it is “hard to believe that [Congress] intended to exact the penalty of termination or a substantial suspension without pay for conduct as trivial as that for which Mr. Wilkinson is being punished.”).

²² Carolyn M. Abbate, *It’s Time to “Hatch” a New Act: How the OSC’s Interpretations of the Hatch Act Chills Protected Speech*, 18 Fed. Circuit B.J. 139, 143 (2008) (quoting *Special Counsel v. Sims*, 102 M.S.P.R. 288 (2006)).

²³ 29 *Del C.* §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

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related case law and advisory opinions in the process of developing an analytical framework for its own use. The analysis and effort the Board exercised creating the standard and applying it to this case are commendable. Moreover, the test applied by the Board addresses the relevant considerations. It considers: 1) whether the content of the message is intended to encourage the support of a particular party or candidate; 2) the extent of the audience; and 3) was the message sent from a government building/while the employee was on-duty. The factors address the activities that the Hatch Act, and Delaware's version thereof, intend to present. § 5954 seeks to preserve a nonpartisan civil service. The test factors address that issue specifically. Accordingly, the Board did not commit legal error in adopting the Office of Special Counsel's test.

2) What constitutes “political activity” under §5954? Should §2509A be considered as part of this analysis?

The applicable statute, 29 *Del. C.* §5954, reads as follows:

(b) 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.

When Sweeney appealed his termination, the Board was required to determine what constituted “political activity” in this context. In reaching a

decision, the Board considered the definition provided by the Federal Office of Personnel Management (“OPM”), as well as 29 *Del. C.* §2509A, as suggested by Sweeney. The OPM regulation, 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.”²⁴ This definition is applicable to the Federal Hatch Act, after which §5954 is modeled. The definition proposed by Sweeney, §2509A, governing the political activity of Delaware Department of Justice employees, set out on page 8, above, does provide one definition of “political activity.”

The Board considered the possibility of using §2509A to supply the definition of “political activity” in the context of §5954. However, the Board decided that Delaware courts would likely turn for guidance to the case law and opinions interpreting the comparable term in the Federal Hatch Act. The Board’s analysis of the options, and the decision are based on an orderly and logical deductive process. Therefore, absent any clear error of law, this Court should adopt the Board’s decision.²⁵ 29 *Del. C.* §5954 is modeled after the Federal Hatch Act. Thus, it is clearly reasonable for the Board to rely upon the definition provided by OPM as well as the substantial case law interpreting the comparable provision of the Hatch Act. This Court agrees with the Board’s decision, finding not only that the Board engaged in a thorough analysis but also that no legal error

²⁴ 5 C.F.R. §734.101.

²⁵ *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972).

existed.

Upon remand from the Delaware Supreme Court, this Court was asked to consider Sweeney's argument that §2509A was the appropriate test for defining "political activity" under §5954, as this Court did not consider that argument previously. §2509A is the only statute within Title 29 that defines political activity. However, it is not the only Delaware statute that prohibits an employee from engaging in political activity and defines the term. Other examples include: 31 Del. Code §105 for the Department of Health and Social Services; 9 Del. Code §1401(d) for the New Castle County Auditor; DE R CJC Rule 4.1 for the Judiciary; and DE R LAW CLERK COND Canon 7 for Law Clerks. Each has been resolved to suit the purpose of a particular group. Many are codified. The Board needed a definition suitable for its purposes.

Many states other than Delaware have also the term "political activity" modeled after the Federal Hatch Act's definition. Appellee's letter brief to the Court provided several: New York, New Jersey and Texas. No one definition is necessarily better, or more closely related to this situation, than another. The Board could have chosen the definition of "political activity" and method of determining what falls within that definition, from any number of sources. The Board considered the legislative intent to proscribe conduct in a fashion to that of the Hatch Act. It determined, and this Court agrees, that using a standard adapted from relevant federal law was an entirely appropriate solution. Many options were reasonably, probably including Sweeney's suggestion of §2409A. The Board, however, chose otherwise, and did so advisedly.

Sweeney’s argument that §2409A should be applied to his situation instead fails for an additional reason. It appears that Sweeney chose this definition because he believed that under his interpretation of it, his conduct would be excepted. Not only did the Board consider whether this statute should apply to the situation, it also considered Sweeney’s interpretation thereof. Sweeney’s approach to construe the statute would essentially render some portion of it inoperative, perhaps creating an exception larger than the rule. Furthermore, the definition of “political activity” cannot be taken out of the context in which it appears. Review of all subparts of §2409A reveals that a Delaware Department of Justice employee cannot be a candidate for public office and continue to work as a regular employee, unless placed on a leave of absence.²⁶

Finally, it should be noted that regardless of the definition chosen for the term “political activity,” Sweeney’s conduct would still unquestionably fall within it. Not only was he actively running for political office, he was explaining to people on the internet why votes should be cast for him, all from his state-owned computer.

3) Is §5954 unconstitutionally overbroad and vague?

The Court now turns to the final question for consideration, whether §5954 is unconstitutionally overbroad or vague. There is a preliminary issue raised by the Supreme Court as to whether this issue must first be addressed by the Board,

²⁶ 29 Del. C. §2509A(c)(7).

before the Superior Court even considers a decision. When Sweeney brought his claim before the Board, he raised not only the issues described above, but a First Amendment violation claim as well. The Board held that its jurisdiction was limited to “the redress of an alleged wrong, arising under misapplication of any provision of this chapter, the merit rules or the Director’s regulations adopted thereunder.”²⁷ Therefore, it was the Board’s position that Sweeney’s First Amendment claim (or any grievance based solely on an alleged constitutional violation) was outside of its jurisdiction. This Court finds there to be no reason to send the case back to the Board for consideration of these constitutional issues based on the above reasoning.

With the preliminary matter taken care of, the Court turns its attention to reviewing the definition of “political activity” for alleged overbreadth or vagueness. When a statute is challenged as overly broad or vague, “a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail”²⁸ If there is no issue of overbreadth, the Court should then turn its attention to “the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge

²⁷ 29 Del. C. §5943(a).

²⁸ *State v. Baker*, 720 A.2d 1139 (Del.1998) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

only if the enactment is impermissibly vague in all of its applications.”²⁹

§5954, as defined, is not overbroad. The statute prohibits “political activity” by State employees while they are at work. The statute does not prohibit “political activity” beyond that scope. Such a prohibition is permissible. Political postings made while working on government property are not protected by the First Amendment. “It is settled law that the government’s interest in maintaining a nonpartisan civil service outweighs Sweeney’s interest in making political postings while working on government property.”³⁰ Accordingly, the statute in question does not implicate protected speech. It is therefore not overbroad.

As the statute implicates no protected conduct, the Court will uphold a challenge for vagueness only if the enactment is “impermissibly vague in all of its applications.”³¹ A statute will be void for vagueness where it “fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by the statute.”³² To assert a claim for unconstitutional vagueness, the party “must demonstrate that the statute under attack is vague as applied to his own conduct.”³³

The statute in question is not impermissibly vague in all of its applications.

²⁹ *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

³⁰ *Sweeney v. Delaware Dept. of Transportation*, 55 A.3d 337, 344 (Del. 2012).

³¹ *State v. Baker*, 720 A.2d 1139 (Del.1998) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

³² *Wein v. State*, 882 A.2d 183, 187 (Del. 2005).

³³ *Aiello v. City of Wilmington*, 623 F.2d 845, 850 (3rd Cir. 1980).

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The statute affords a person of reasonable intelligence fair notice of the conduct that it aims to regulate. While the term “political activity” is subject to some degree of interpretation, it is specific enough to satisfy a challenge based on vagueness. The statute itself specifically prohibits solicitation of contributions, assessments and subscriptions specifically. These examples demonstrate that it is geared towards preventing campaign activities during work hours. Campaign activity, in the form of postings, is exactly the type of activity in which Sweeney engaged. “A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.”³⁴ The three postings in question use the phrases “my election,” “as a candidate,” “the opposing candidate,” and “I am the only candidate.” His words leave no doubt that he was taking an active part in promoting his own candidacy for public office by making these postings. His conduct clearly falls within the proscriptions of the statute. A reasonable person would know that this kind of activity would be a violation.

The United States Supreme Court has upheld the application of the pre-1993 Federal Hatch Act, as well as at least one State’s statute modeled after it. In those comparable situations, the Court determined that the statutes were not vague.³⁵

³⁴ *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

³⁵ See e.g., *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

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Interestingly, the pre-1993 Federal Hatch Act was far more restrictive than both the current Hatch Act and Delaware's version, §5954.

CONCLUSION

For the foregoing reasons, the decision of the Merit Employee Relations Board is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBV/lmc
oc: Prothonotary
cc: Counsel
Supreme Court
Opinion Distribution
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