UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 105

Docket No. CB-1216-09-0025-T-1

Special Counsel,

Petitioner,

v.

Pattie Ware,

Respondent.

June 9, 2010

Leslie J. Gogan, Esquire, Washington, D.C., for the petitioner.

Pattie Ware, Olney, Maryland, pro se.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The petitioner has filed exceptions to the administrative law judge's recommended decision (RD), which found that the respondent violated several provisions of the Hatch Act, 5 U.S.C. §§ 7321-7326, but recommended a 60-day suspension rather than removal as the penalty for the violations. For the reasons set forth below, the Board ADOPTS the RD with regard to the administrative law judge's findings that the respondent violated 5 U.S.C. §§ 7323(a)(1)-(2) and 7324(a)(1)-(2), but DOES NOT ADOPT the RD with regard to the administrative

law judge's finding that a 60-day suspension is the appropriate penalty. The Board ORDERS the respondent's removal from her position.

BACKGROUND

¶2 The respondent is a Program Analyst and Contracting Officer Technical Representative (COTR) with the Department of the Treasury's Bureau of Engraving and Printing (BEP). She is the COTR for the staffing contract that BEP has with, inter alia, STG International (STG), which staffs BEP's Health Unit. She ensures that the facility is properly staffed with STG employees; if any staffing problem exists, she asks STG to solve it; solutions can include, among other things, STG replacing employees; and she monitors, documents and evaluates the contractor's overall performance. At all relevant times, Leila Warren, Denise Prentiss, and Tiffany Barnes were STG employees. Complaint File (CF), Tab 6, List of Stipulated Facts at 1-2.

¶3 The petitioner filed a complaint charging the respondent with five counts of violating the Hatch Act and related regulations as follows:

¶4 Count One: The respondent violated 5 U.S.C. § 7323(a)(2) and 5 C.F.R. § 734.303 by knowingly soliciting political contributions when she invited 16 people to a political fundraiser for then-Presidential candidate Barack Obama. Specifically, on or around September 18, 2008, the respondent sent an e-mail to 16 people entitled "FW: Michele Obama Speaking in Clinton, MD on Sunday 9/21" (the fundraiser e-mail). The e-mail read in pertinent part: "I don't know your political persuasions but thought you might be interested in the following. Michele Obama will be a speaker at an Obama fundraiser . . . . The event costs $75 for the dinner, show and speaker or $35 for the speaker part Only. . . . Please see the link below to sign up and pass on." The e-mail contained a link to Obama's campaign website to find details about the fundraiser. CF, Tab 1 at 2-3, Ex. A.

¶5 Count Two: The respondent violated 5 U.S.C. § 7323(a)(2) and 5 C.F.R. § 734.303 by knowingly soliciting a political contribution to a Presidential candidate's political campaign. Specifically, on or around September 5, 2008, the respondent sent an e-mail entitled "FW: Obama Insight" (the Obama insight e-mail) to 14 people, three of whom were federal contract employees [Warren, Prentiss, and Barnes]. The e-mail contained a link to a website that presented a slideshow containing a campaign graphic and text, magazine covers, and pictures of Obama, his wife and family at campaign events. The first slide stated in pertinent part: "The Choice *is* Clear . . . Stand For Change . . . Become a part of the largest grassroots movement in the history of presidential politics. Make a donation below and own a piece of this campaign." CF, Tab 1 at 3-4, Ex. B.

¶6 Count Three: The respondent violated 5 U.S.C. § 7324(a)(1) and 5 C.F.R. § 734.306(a)(1) by engaging in activity while on duty directed at the success of Obama and then Vice-Presidential candidate Joseph Biden. Specifically, the respondent sent the e-mails referenced in Counts One and Two and several additional e-mails in September 2008 to from 2 to 18 recipients per e-mail. The e-mails included titles like "Vote in November great slide show," "Obama in Oregon," and "The Obama Shuffle," and contained information, text or pictures pertaining to Obama and/or Biden. For example, the respondent sent the Vote in November e-mail to 15 people; it contained a slideshow presentation that depicted images of the civil rights movement and of Obama and Biden; and some of the slides contained text, for instance, "It's Time VOTE November 4, 2008"; "Obama-Biden 'Yes We Can'"; and "Remember!!!! Many People Made Great Sacrifices . . . Even Died For Our Rights, Honor Them By Going To The Polls And Casting Your Ballot." CF, Tab 1 at 4-5, Exs. C-F.

¶7 Count Four: The respondent violated 5 U.S.C. § 7324(a)(2) and 5 C.F.R. § 734.306(a)(3) by sending each e-mail from her government-issued computer and e-mail account and while occupying her government office, a room she used in the discharge of her official duties. CF, Tab 1 at 5-6.

¶8 Count Five: The respondent violated 5 U.S.C. § 7323(a)(l) and 5 C.F.R. § 734.302 by using her official authority or influence for the purpose of affecting the result of the 2008 Presidential election. Specifically, the respondent sent the September 5, 2008 Obama insight e-mail to recipients including Warren, Prentiss and Barnes, and the e-mail enclosed a slideshow presentation which in turn contained a solicitation for a political contribution as noted in Count Two. Further, the respondent sent the "Obama Shuffle" e-mail to recipients including Warren. The e-mail read in pertinent part: "This is funny, let's do the Obama Shuffle. . . . We have to learn this and teach others so that we can do this when Obama Wins. Please forward to everyone you know. . . ." The e-mail also contained a link to a website where recipients could watch a video, which began with a woman saying in pertinent part: "we have a hustle for Obama it's called Seniors [unintelligible] for Obama . . . we want each and every senior all around the world to join us doing this Hustle, when Obama wins, we are going to be doing this Hustle, so come on join us, let's do it. . ." and displayed people wearing campaign tee-shirts and line-dancing. CF, Tab 1 at 6-7, Exs. B, E.

¶9 The petitioner stated that the respondent knew or should have known about the Hatch Act's political activity restrictions. It requested that the Board order her removed pursuant to 5 C.F.R. § 7326. CF, Tab 1 at 7-10, Exs. H-J.

¶10 In her answer to the complaint, the respondent admitted engaging in the charged activities, but essentially denied that, by doing so, she violated the Hatch Act. CF, Tab 4. The parties subsequently agreed that the petitioner would file stipulations of fact and a motion for summary adjudication based on the premise that the admitted facts were sufficient to establish a Hatch Act violation. *Id.*, Tab 5.

¶11 The petitioner filed stipulations, to which the respondent agreed. The respondent stipulated that she sent six e-mails in September 2008, that she sent the e-mails from her government computer and e-mail account while on duty and occupying her government office, that she sent e-mails to federal contract

employees, and that the content of the e-mails was as set forth in the petitioner's complaint. The respondent also stipulated that: - she receives Annual Ethics Training; in 2007, the training was a 1-hour live class given by BEP's ethics counsel and covered the Hatch Act; the training materials delineated the Hatch Act's political activity restrictions including, for example, engaging in political activity while on duty, using a position to influence or interfere with an election and soliciting, accepting or receiving political contributions; and BEP records indicated that the respondent attended the training on October 16, 2007. CF, Tab 6, List of Stipulated Facts at 1-6.

¶12 The respondent further stipulated that, although she did not recall reading it, BEP distributed an internal communication to all employees on August 15, 2008, about the Hatch Act. That 5-page document contained Hatch Act related questions and answers, explained the restrictions and the penalty for a violation, and defined political activity. It gave several examples of prohibited political activities in the workplace, including, in pertinent part, sending partisan political e-mails or engaging in political blogs. It notified BEP employees that they could get additional information on the Hatch Act from BEP's Office of the Chief Counsel or OSC's website. The respondent also stipulated that BEP distributed such internal communications to all BEP offices and an internal communication is saved and archived on BEP's intranet website. CF, Tab 6, List of Stipulated Facts at 6. The petitioner filed a motion for partial summary adjudication. *Id.*, Tab 6.

¶13 On January 11, 2010, the administrative law judge issued an order granting the petitioner's motion for partial summary adjudication regarding the merits of the complaint. He reviewed the background, including the stipulated facts. CF, Tab 11, Order at 1-7. He found that, in September 2008, the respondent disseminated the six e-mails at issue from her government e-mail account, while she was on duty and in the federal workplace: (1) the fundraiser e-mail; (2) the Obama insight e-mail; (3) the Vote in November e-mail; (4) the Obama in Oregon

e-mail; (5) The Obama shuffle e-mail; and (6) "FW:" "Here she is . . . the (P.W.T.) Gov." (Palin e-mail).[1] *Id.* at 3-4.

¶14 The administrative law judge found that the stipulated facts showed that the respondent was covered under the Hatch Act and its political restrictions. He sustained Counts One and Two, finding that, by sending the fundraiser and Obama insight e-mails, the respondent knowingly solicited political contributions. He sustained Counts Three and Four, finding that the respondent sent the e-mails while on duty and in her BEP office; that the first two e-mails clearly constituted political activity because soliciting donations for a candidate is viewed as activity directed toward a candidate's success; and that the three other e-mails, excluding the Palin e-mail, constituted political activity because they urged the support of a candidate in the 2008 Presidential election. He sustained Count Five, finding that three STG contract employees received the Obama insight e-mail and one received the Obama shuffle e-mail; and that, since the insight e-mail solicited campaign contributions, the respondent used her official authority or influence to interfere with or affect the result of the 2008 Presidential election in violation of the Hatch Act by soliciting contributions from contract employees under her authority and influence. Order at 8-12.

¶15 On January 26, 2010, the administrative law judge issued his RD, which adopted his January 11, 2010 order, found that the respondent violated the Hatch Act,[2] acknowledged that the presumptive penalty for violation of the Hatch Act is

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[1] Although the administrative law judge initially stated that the respondent disseminated six "partisan political e-mails," Order at 3, he later found that the Palin e-mail did not amount to political activity, *id.* at 10 n.5.

[2] The administrative law judge stated that, in his Order, he found that "[s]ome of the e-mails, including the two that sought contributions, were sent to employees of two government contractors, over whom [the respondent] had authority as the [COTR]." RD at 2. The Order actually found, as the petitioner charged, that only one of the e-mails that sought contributions, the Obama insight e-mail, was sent to employees of one government contractor. It found that the other e-mail that was sent to one of the same employees was the Obama shuffle e-mail. Order at 11.

removal, but recommended a 60-day suspension. CF, Tab 13. As apparently aggravating factors, the administrative law judge found as follows: The respondent committed serious, multiple violations. The violations involved the Presidential election and the national political parties, giving political coloring to her activities. She intended to forward the e-mails. She conceded that she attended a training session that included material on the Hatch Act and that her agency distributed an internal communication about the Hatch Act, which included a reference about sending partisan political e-mails. That internal communication was dated just a month before she forwarded the e-mails, the relevant information was thus readily available to her, and she failed to follow the directives she received or to avail herself of relevant information. RD at 3-5.

¶16 As apparently mitigating factors, the administrative law judge found as follows: The respondent's e-mails reached only a small number of contract employees and her control over those employees was not as direct as a supervisor's control. There was no evidence that she continued forwarding political e-mails in defiance of specific warnings or in the last six weeks of the Presidential campaign, during its most heightened period. There was no evidence that her overall intent or motive was to benefit politically from her activities; rather, she was simply caught up in the intensity of the Presidential election. She did not compose or add to the e-mails and she did not follow up the e-mails, urge the recipients to contribute, or otherwise engage in political activities. She was not a high-level employee or a supervisor. She did not have the advice of counsel when she forwarded the e-mails. She had 38 years of federal service and the record contained no evidence that she was not a good employee or that she had disciplinary actions against her. She apologized and promised to refrain from future Hatch Act violations. RD at 3-5.

¶17 The petitioner has filed exceptions to the RD in which it asserts that the respondent's Hatch Act violations warrant removal.[3] CF, Tab 14. The respondent has neither filed exceptions nor replied to the petitioner's exceptions.

ANALYSIS

¶18 Because the respondent has not challenged the administrative law judge's factual findings and we perceive no error in that regard, we ADOPT those findings and AFFIRM his conclusions that she violated 5 U.S.C. §§ 7323(a)(1)-(2) and 7324(a)(1)-(2) of the Hatch Act. Accordingly, we proceed directly to a discussion of the appropriate penalty for the violations. *See Special Counsel v. Acconcia*, 107 M.S.P.R. 60, ¶ 4 (2007).

¶19 In asserting that the Board should order the respondent's removal, the petitioner contends that the administrative law judge's reasoning as to mitigation is supported by neither the record nor the case law. CF, Tab 14 at 2. It notes that the administrative law judge found that the respondent's multiple violations were serious and constituted an aggravating factor; that there was political coloring as to her e-mails; that she attended a BEP ethics training session on the Hatch Act; and that BEP made readily available to her additional information on the Act, which discussed sending political e-mails in the workplace; and, thus, that her knowledge about the Hatch Act was not a mitigating factor. It further notes that, indeed, he found that "the aggravating factors outweigh the mitigating factors." *Id.* at 10. It argues that he therefore erred in finding that the aggravating factors do not warrant termination. In that regard, it asserts that he erred in finding that the respondent's remorse and employment history and the counterbalancing circumstances he cited outweighed the seriousness of her violations. *Id.* at 10-11. Specifically, it argues that he erred because he failed to give enough weight to the

[3] The petitioner disagrees with the administrative law judge's finding that the Palin e-mail was not political activity, but does not take exception to that finding. CF, Tab 14 at 6 n.2.

nature and extent of her violations, downplayed her authority and influence over the contract employees, minimized her motive and intent, undervalued her status, considered the lack of advice from counsel as lessening the seriousness of her offense, failed to consider her knowledge of the Hatch Act as an aggravating factor, found that cessation of activity lessened the seriousness of her violations, found that remorse was a mitigating factor, and relied on her past record to mitigate the presumptive penalty. *Id.* at 13-34.

¶20 In considering whether removal is warranted for a Hatch Act violation, the Board looks to the seriousness of the violation, considering all aggravating and mitigating factors that bear upon the seriousness of the violation. Those factors include the following: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee had received advice of counsel regarding the activity at issue; (4) whether the employee ceased the activities; (5) the employee's past employment record; and (6) the political coloring of the employee's activities. *Special Counsel v. DeWitt*, 113 M.S.P.R. 458, ¶ 6; *Acconcia*, 107 M.S.P.R. 60, ¶ 4; *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200 (1988), *aff'd sub nom. Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989). Removal must be imposed for an employee's violation of 5 U.S.C. § 7323 or § 7324 unless the members of the Merit Systems Protection Board find "by unanimous vote" that a lesser penalty is warranted, and the respondent has the burden of showing why she should not be removed. 5 U.S.C. § 7326; *Special Counsel v. Briggs*, 110 M.S.P.R. 1, ¶ 12 (2008), *aff'd*, 322 F. App'x 983 (Fed. Cir. 2009).

¶21 After analyzing the relevant factors, we agree with the petitioner that the respondent's Hatch Act violations warrant her removal. In summary, we find that, although the administrative law judge correctly analyzed some factors, he incorrectly analyzed other factors, cited factors that are irrelevant in determining the penalty in a Hatch Act case, and made findings in his penalty determination that were inconsistent with his findings in his merits determination.

The nature of the offense and the extent of the employee's participation

¶22 The administrative law judge correctly found that the appellant's multiple Hatch Act violations, including sending the two e-mails that sought political contributions, were serious. He found that "[t]hose e-mails, sent from Respondent's government computer, clearly solicited campaign contributions. They asked readers to make a donation and gave them information to convince them to give and to effectuate the gift." Order at 9.

¶23 The Board has further found that solicitation of political contributions from a subordinate employee warrants removal. *Acconcia*, 107 M.S.P.R. 60, ¶ 5. Here, the administrative law judge found that the respondent solicited political contributions from three contract employees over whom she had authority and influence. Order at 11; RD at 2-3. In his RD, he downplayed the seriousness of her violation by finding that her control over the three contract employees was not as direct as would be that of a supervisor over an employee; for example, she did not evaluate the employees and the record contained no evidence as to the extent of her interactions with them. RD at 3.

¶24 The administrative law judge's findings concerning the respondent's control over the contract employees, however, contradict his previous findings in his Order. There, he found that, although the respondent apparently did not prepare performance appraisals of the employees, Order at 3 n.2, she evaluated the contractor's performance, a negative evaluation from her could result in non-renewal of the contract, and she had authority to ask STG to replace a contract employee if there was a staffing issue, *id.* at 11. He therefore found that, although the respondent was not the employees' supervisor, she had sufficient authority over them "so that the same evils that obtain when a supervisor asks a subordinate to contribute to a political cause or support a political candidate apply here." *Id.* Further, he found that the contract employees "would naturally feel that Respondent had the ability to replace them and indeed affect any contract renewal if they did not follow her requests or invitations," and that "the

relationship itself implies coercion." *Id*. Moreover, that the respondent's e-mails reached "only a small number of contract employees," RD at 3, is of little relevance. In *Acconcia*, 107 M.S.P.R. 60, the Board found removal appropriate where the employee solicited contributions from one subordinate employee by inviting her to a fundraiser. *Id.*, ¶¶ 4-5, 11. In addition, the Board has found that soliciting contributions from persons doing business with an agency is a serious violation of the Hatch Act because of the threat of coercion and the appearance that government contracts are awarded based on political patronage rather than competitive bidding. *See Special Counsel v. Malone*, 84 M.S.P.R. 342, ¶ 42 (1999).

¶25 Similarly, the administrative law judge's finding that the respondent's simply forwarding e-mails she did not compose without adding anything to them constituted a mitigating factor is contrary to his previous findings and inconsistent with the law. In his Order, the administrative law judge acknowledged the respondent's argument that she did not author the text of the e-mails, but only forwarded messages prepared by others. He found, however, that her conduct was "little different than distributing campaign literature prepared by others, a clear violation of the Hatch Act." Order at 9 n.4. Likewise, he found that forwarding the e-mail solicitations was "in substance the same as handing out leaflets seeking contributions, an activity that has long been found to violate the Hatch Act." *Id.* at 9. The administrative law judge's findings in his Order, as opposed to his RD, were consistent with Board law. *See*, *e.g.*, *Acconcia*, 107 M.S.P.R. 60, ¶¶ 2, 5.

The employee's motive and intent

¶26 The administrative law judge acknowledged the respondent's contention that she did not intend to violate the Hatch Act, but found that she no doubt intended to forward the e-mails and must be held to intend the foreseeable consequences of her acts. In that regard, he found that an employee does not need to actually know the Hatch Act's prohibitions; rather, as long as she has

access to information about the Hatch Act, she is charged with ordinary care in availing herself of that information. He found that the respondent conceded that she attended the BEP ethics training session that included material on the Hatch Act and that BEP made readily available to her additional information about the Act, which discussed sending political e-mails in the workplace. RD at 4-5.

¶27 The administrative law judge correctly found that, whether the respondent actually knew about the Hatch Act's restrictions or not, the knowledge was imputed to her. Claims that she did not know that she was committing a violation do not support a penalty less than removal. *See, e.g., Purnell*, 37 M.S.P.R. at 203-04. Further, the circumstances need not demonstrate that she acted knowingly in disregard of the law to warrant removal. *See Special Counsel v. Blackburne*, 58 M.S.P.R. 279, 283 (1993).

¶28 The administrative law judge failed to explain his subsequent finding that the respondent's motive or intent did not "amount to an aggravating circumstance." RD at 4. As previously noted, he stated that he "perceived no overall intent or motive to benefit politically from her activities"; he "believe[d] respondent was simply caught up in the intensity of the Presidential election"; she did not "compose the e-mails she forwarded or add anything of her own"; and she did not "follow up the e-mails or urge the recipients to contribute or otherwise engage in political activities." The administrative law judge has not explained the relevance of his first finding. In any event, the respondent presumably did intend to benefit politically by helping to obtain the election of her desired candidates. Further, a federal employee engaging in inappropriate activities because she is "caught up in the intensity of the Presidential election," far from being a mitigating factor in determining the penalty for a Hatch Act violation, is one of the very reasons for the Hatch Act's prohibitions against those activities. *See, e.g., Special Counsel v. Dominguez*, 55 M.S.P.R. 652, 656 (1992) (stating that, "[w]ithout doubt, this mandated penalty provision [of the Hatch Act] is a clear exposition of the congressional desire to keep separate government

employment and partisan politics"). [4] Also, as previously noted, the administrative law judge's findings concerning the respondent's simply forwarding the e-mails do not support mitigation. Moreover, that the respondent did not engage in yet more Hatch Act violations by sending additional e-mails or urging more contributions and political activities is not a mitigating factor to consider in determining the penalty for the violations she did commit. *See, e.g.*, *Acconcia*, 107 M.S.P.R. 60, ¶ 5.

Whether the employee had received advice of counsel regarding the activities at issue

¶29 As a mitigating factor, the administrative law judge found that the respondent did not have the advice of counsel when she forwarded the e-mails. RD at 4. The Board usually considers it a mitigating factor in determining the penalty for a Hatch Act violation when an employee's violation results from the erroneous advice of counsel, not when the employee acts without the advice of counsel. *See Malone*, 84 M.S.P.R. 342, ¶ 40; *Special Counsel v. Campbell*, 58 M.S.P.R. 170, 182 (1993), *aff'd*, 27 F.3d 1560 (Fed. Cir. 1994). The administrative law judge has not explained the relevance of his further statement that "although she originally employed counsel at the outset of this case, she stated that she could not afford counsel and went through most of these proceedings on her own, without the assistance of counsel." RD at 4. Whether or not she had counsel after she committed the Hatch Act violations is irrelevant to whether she relied on counsel's advice before she committed the violations. Thus, we find that, even if this is not an aggravating factor, it does not warrant mitigation.

[4] Although this discussion is in the administrative law judge's recommended decision, the Board explicitly approved and adopted the recommended decision in its own precedential decision. *Dominguez*, 55 M.S.P.R. at 653.

¶30 Moreover, as discussed above and as the administrative law judge found, the BEP provided legal advice concerning the Hatch Act. First, the respondent attended a 1-hour annual ethics training session in October 2007, which included material on the Hatch Act's restrictions on political activity. CF, Tab 1, Exs. H-I; Tab 6, Stipulations of Fact at 6. Second, on August 15, 2008, a mere 3 weeks before the respondent repeatedly violated the Hatch Act, BEP distributed a publication about the Hatch Act, which cited sending partisan political e-mails as an example of prohibited political activity in the workplace. CF, Tab 1, Ex. J; Tab 6, Stipulations of Fact at 6. Where the employee receives information about the Hatch Act that would cause a reasonably prudent person to avoid partisan political activity, the employee may not claim that violation of the Act was unknowing and unintentional. *See Special Counsel v. Murdock*, 61 M.S.P.R. 403, 406 (1994).

Whether the employee had ceased the activities

¶31 The petitioner asserts that the administrative law judge erred in finding this to be a mitigating factor on the bases that there was no evidence that the respondent continued forwarding political e-mails in defiance of specific warnings not to do so or that she engaged in any other unlawful political activity "during the most heightened period of the campaign," i.e., the last 6 weeks. The petitioner contends that the record contains no evidence as to why the respondent decided to stop engaging in prohibited political activity. It further contends that neither the statute nor the Board's precedent states that removal is warranted only if the respondent violates the Hatch Act within the last 6 weeks of the election. CF, Tab 14 at 28-30.

¶32 We disagree with the petitioner that the respondent's ceasing her Hatch Act violations 6 weeks before the Presidential election is not a mitigating factor. In *Acconcia*, 107 M.S.P.R. 60, ¶ 8, we recognized that the cessation of the objectionable political activity, regardless of reason for doing so provided "some support in favor of mitigating the penalty." Likewise, here, it appears that the

respondent's decision to cease her unlawful activity six weeks before the election provides support for mitigation.

The employee's past employment record

¶33 The petitioner asserts that the administrative law judge incorrectly relied on the respondent's past employment record to mitigate the presumptive penalty. It contends that the Board has long recognized that an employee's good work record is not enough to mitigate the penalty. IAF, Tab 14 at 33-34. As the petitioner concedes, though, the administrative law judge correctly found that the respondent had worked for the government for 38 years and the record contained no evidence of either performance problems or other disciplinary actions. IAF, Tab 14 at 33; RD at 5. We find that such a record is a mitigating factor in this case. *See, e.g.*, *Special Counsel v. Pierce*, 85 M.S.P.R. 281, ¶¶ 2-5 (2000) (accepting over 10 years of satisfactory performance as a mitigating factor). Nonetheless, an employee's good work record must be weighed against the seriousness of the offenses in assessing whether the presumptive penalty of removal for a Hatch Act violation is not warranted. *Purnell*, 37 M.S.P.R. at 202. Here, the above mitigating factors do not outweigh the seriousness of the respondent's repeated violations.

The political coloring of the employee's activities

¶34 The administrative law judge correctly found political coloring as to the e-mails in that they involved the Presidential election and the national political parties. RD at 4. Thus, this factor weighs against mitigation. *See Jakiela*, 57 M.S.P.R. at 234.

Other factors cited by the administrative law judge

¶35 The administrative law judge also found as a mitigating factor that the respondent is not "a high level employee and not a supervisor." RD at 4. The administrative law judge has not supported his finding and it is at odds with his finding concerning the respondent's authority over the contract employees.

Further, he has not explained how the respondent's employment status is sufficiently relevant to constitute a mitigating factor in determining the penalty for her Hatch Act violations because it does not bear on the seriousness of her violations. *See, e.g.*, *Special Counsel v. Alexander*, 71 M.S.P.R. 636, 647 (1996) (stating that factors that do not bear upon the seriousness of the violation should not be considered), *aff'd*, 165 F.3d 474 (6th Cir. 1999); *Special Counsel v. Kelley*, 60 M.S.P.R. 668, 673 (1994) (same). In any event, the Board has not made these distinctions in determining the penalty for a Hatch Act violation. *See, e.g.*, *Purnell*, 37 M.S.P.R. at 202-03 (noting that "[t]he proscriptions of the Hatch Act fall equally on clerks and managers alike"); *see also Kelley*, 60 M.S.P.R. at 673 (noting that nothing in the Hatch Act or its legislative history suggests that removal is warranted only for those employees with influential positions or whose removal would not cause a hardship to their employers or clients).

¶36 The petitioner asserts that the administrative law judge erred in relying on the petitioner's expression of remorse, through her "strong and clear" apology, as a mitigating factor. It contends that the Board generally does not consider remorse in determining whether to impose the presumptive penalty, and that, even if it did, remorse should not control the decision in this case. It argues that this case is unlike those in which the Board has considered remorse as a mitigating factor, and, further, that the respondent gave her "sincere regrets" only in response to its motion for partial summary judgment, well after it concluded its investigation. IAF, Tab 14 at 30-33.

¶37 Again, remorse is not one of the factors the Board has specifically identified as bearing upon the seriousness of the offense, and, thus, one of the factors that the Board should consider in determining whether removal is warranted for a Hatch Act violation. This would appear to be truer when the remorse was expressed, as here, after the petitioner had already brought charges. Nonetheless, the Board has recognized that the factors it generally considers in Hatch Act cases are not exhaustive, *see Purnell*, 37 M.S.P.R. at 200 n.18, has

apparently considered remorse as a factor in Hatch Act penalty determinations, and has not specified when the employee must express remorse for it to be considered a mitigating factor. *See, e.g.*, *Special Counsel v. Collier*, 101 M.S.P.R. 391, ¶¶ 3, 5 (2006); *Pierce*, 85 M.S.P.R. 281, ¶¶ 2-5. Thus, we find that the administrative law judge did not err to the extent that he considered the appellant's remorse as a mitigating factor. For the reasons discussed above, however, we find that it was insufficient to sustain her burden of proving that the Board should not impose the presumptive penalty of removal in this case.

ORDER

¶38 The Board ORDERS the Bureau of Printing and Engraving to remove the respondent from her position. The Board also ORDERS the Office of Special Counsel to notify the Board within 30 days of the date of this Opinion and Order whether the respondent has been removed as ordered. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE respondent REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does

not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.