OP. NO. 03-023

ELECTIONS: CANDIDATES FOR OFFICE – NOMINATIONS OF CANDIDATES BY POLITICAL PARTIES.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (ORGANIZATION AND GOVERNMENT).

Petersburg city council candidate may be nominated by political party. State or local government employee who exercises no functions in connection with federally financed activity, and who is seeking election to city council as political party nominee or is opposed by party nominee, is not subject to Hatch Political Activity Act; such employee who exercises no functions in connection with federally financed activity, and who is nonpartisan candidate not opposed by partisan candidate in city council election where partisan candidates are seeking other election in other council wards, is not subject to Hatch Act. Federal employee, or state or local government employee who exercises function in connection with federally financed activity, generally is subject to Hatch Act and may not participate as partisan candidate in city council election. Federal employee, or state or local government employee who exercises function in connection with federally financed activity, should request determination from United States Office of Special Counsel as to whether Hatch Act prohibits specific political activity.

The Honorable Fenton L. Bland, Jr.
Member, House of Delegates
June 13, 2003

Issue Presented

You ask whether a candidate for the Petersburg city council may be nominated by a political party. You also inquire regarding the application of the Hatch Political Activity Act to a federal, state or local government employee seeking election to the city council either as a political party nominee who is opposed by a party nominee, or as a nonpartisan candidate who is not opposed by a partisan candidate, but partisan candidates are seeking election in other council wards at the same time.

Response

It is my opinion that a candidate for the Petersburg city council may be nominated by a political party. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is seeking election to city council as a political party nominee or opposed by a party nominee, is not subject to the Hatch Political Activity Act. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is a nonpartisan candidate that is not opposed by a partisan candidate in a city council election where partisan candidates are seeking election in other council wards, is not subject to the Hatch Act.

A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, however, generally is subject to the Hatch Act and, therefore, may not participate as a partisan candidate in a city council election. A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, should request a determination from the United States Office of Special Counsel as to whether the Hatch Act prohibits a specific political activity.

Background

You relate that the Petersburg city council is contemplating moving elections for council members from May to November. Questions have arisen as to the applicability of the Hatch Political Activity Act to such elections. The Hatch Act generally prohibits employees of the executive branch of federal government from seeking public office in partisan elections. The Hatch Act also restricts the political activity of individuals principally employed by state, county or municipal executive agencies in connection with programs financed in whole or in part by federal loans or grants.

Applicable Authorities and Discussion

Article VII, § 2 of the Constitution of Virginia provides that "[t]he General Assembly may … provide by special act for the … powers of any county, city, town, or regional government." A charter provision that establishes the powers of a local government is special legislation. The charter for the city of Petersburg provides that "[c]andidates for the office of councilman may be nominated by petition or by general law."[1] An applicable rule of statutory construction is that the use of the word "may" in such legislation implies that the provision is discretionary, and not mandatory.[2] Consequently, under the Petersburg charter, a city council candidate may be nominated by filing with the circuit court clerk, "a petition signed by not less than one hundred twenty-five qualified voters of the ward from which the candidate seeks election."[3]

Such a candidate also may be nominated in the manner permitted by general law. "[A] general law … applies to all who are similarly situated."[4] The general laws regarding nominations of candidates by political parties are set out in Article 3, Chapter 5 of Title 24.2, §§ 24.2-508 through 24.2-511. Sections 24.2-508 and 24.2-509 authorize a political party to select candidates by a primary or by some other method of nomination determined by the party. If the primary method is selected, the conduct of the primary is subject to the provisions of the applicable election statutes.[5] If a nonprimary method of nomination is selected, one of the alternate methods of nomination provided by the party plan must be used.[6] Therefore, the General Assembly clearly permits a candidate for the Petersburg city council to be nominated by a political party.

The Hatch Political Activity Act[7] provides that, under certain limited conditions, a state or local officer or employee may not "be a candidate for elective office"[8] and, by implication, may not serve in an elective office. In general, the Hatch Act applies to officers or employees of a state or local government agency "whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency."[9] The Hatch Act, by its own terms, does not apply to a state or local officer or employee "who exercises no functions in connection with that activity."[10] Thus, the Hatch Act's prohibitions apply only if the state or local employee exercises functions in connection with a federally financed activity.[11] A prior opinion of the

Attorney General concludes that, assuming the connection with a federally financed activity under the Hatch Political Activity Act is not present, a classified state employee may be a candidate for and, if elected, serve in the General Assembly.[12] Consequently, an employee of a state or local government agency who exercises no functions in connection with a federally financed activity may be a candidate for election to, and, if elected, serve on, the Petersburg city council.

Under the Hatch Act, a federal employee and a state or local government employee exercising functions in connection with a federally financed activity must forego certain rights if they wish to participate in the political process. Despite the obvious exchange such a scheme forces federal, state or local employees having a connection with a federally financed activity to make, the Supreme Court of the United States has upheld the constitutionality of the Hatch Act's restrictions.

In *Clements v. Fashing,*[13] the United States Supreme Court upheld a state constitutional provision prohibiting certain officers from seeking other offices during the term for which they were elected.[14] In *United States Civil Service Commission v. National Association of Letter Carriers*[15] and *Broadrick v. Oklahoma*,[16] the Court upheld regulations and statutes requiring dismissal of civil servants who become political candidates. In these two cases, the Court recognized the government's interest in prohibiting its personnel from engaging in the clearly partisan activities deemed offensive to efficiency in the workplace, including becoming a partisan candidate for an elective office.[17]

Generally, the Hatch Political Activities Act permits federal, state and local government employees to be candidates in nonpartisan elections.[18] For purposes of the Act, § 1503 defines "political party" as "a party … whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected." Recently, the United States Office of Special Counsel issued an opinion related to nonpartisan elections.[19] The opinion notes that state and local laws designating an election as nonpartisan creates "a rebuttable presumption that an election is nonpartisan."[20] Changing the Petersburg city charter to prohibit partisan elections would appear to create a rebuttable presumption, for purposes of the Hatch Act, that city council elections are nonpartisan. "Evidence showing that partisan politics actually enter the campaigns of the candidates may rebut this presumption."[21] Consequently, although a candidate may not be a political party nominee who is opposed by a nonpartisan candidate, the actual election itself may become a partisan event depending on the circumstances of the campaign.[22] Any such evidence of partisanship will necessarily be fact specific.

For many years, Attorneys General of Virginia have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law.[23] In addition, a 1987 opinion of the Attorney General concludes that, in rendering official opinions pursuant to § 2.2-505, the Attorney General has declined to render such opinions when the request, among other matters, requires the interpretation of a matter reserved to another entity.[24] Congress has given the United States Office of Special Counsel "exclusive authority to investigate allegations of political activity prohibited by the Hatch Act."[25] In addition, the Office of Special Counsel also has exclusive authority to render advice concerning application of the Hatch Act to specific factual situations.[26] I must, therefore, respectfully decline to render

an opinion as to the appropriateness of a federal, state or local government employee, who exercises a function in connection with a federally financed activity, engaging in a partisan political activity. I am of the opinion that the United States Office of Special Counsel is the appropriate agency to make such determinations.[27]

Conclusion

Accordingly, it is my opinion that a candidate for the Petersburg city council may be nominated by a political party. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is seeking election to city council as a political party nominee or is opposed by a party nominee, is not subject to the Hatch Political Activity Act. A state or local government employee who exercises no functions in connection with a federally financed activity, and who is a nonpartisan candidate that is not opposed by a partisan candidate in a city council election where partisan candidates are seeking election in other council wards, is not subject to the Hatch Act.

A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, however, generally is subject to the Hatch Act and, therefore, may not participate as a partisan candidate in a city council election. A federal employee, or a state or local government employee who exercises a function in connection with a federally financed activity, should request a determination from the United States Office of Special Counsel as to whether the Hatch Act prohibits a specific political activity.

[1]1974 Va. Acts ch. 2, at 4, 7 (quoting § 2-3.1).

[2]"Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning—permission, importing discretion." Masters v. Hart, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949), *quoted in* Bd. of Supvrs. v. Weems, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); *see also* Op. Va. Att’y Gen.: 2000 at 29, 32 n.2; 1999 at 193, 195 n.6; 1997 at 10, 12; 1978-1979 at 61, 62.

[3]1974 Va. Acts, *supra* note 1, at 7 (quoting § 2-3.1).

[4]1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 543 (1974).

[5]*See* Op. Va. Att’y Gen.: 1977-1978 at 139, 140; 1970-1971 at 133, 133-34; *id*. at 181, 182; 1968-1969 at 90.

[6]*See* 1986-1987 Op. Va. Att’y Gen. 204.

[7]5 U.S.C.A. §§ 1501 to 1508 (2000).

[8]5 U.S.C.A. § 1502(a)(3).

[9]5 U.S.C.A. § 1501(4) (defining "state or local officer or employee").

[10]5 U.S.C.A. § 1501(4)(A).

[11]*See* 1982-1983 Op. Va. Att'y Gen. 399 (concluding that State Police dispatcher need not resign position during candidacy for political office).

[12]2001 Op. Va. Att'y Gen. 31, 32.

[13]457 U.S. 957 (1982). In *Clements v. Fashing*, the Supreme Court of the United States used the rational basis test traditionally applied in equal protection challenges. A court's determination of the standard of review to apply often will depend on whether the restriction will survive challenge. The cases considering restrictions on government employees' seeking or holding public office, however, are not altogether consistent in the standard of review applied. If the court applies a rational basis standard, the restriction will be upheld, unless there is no reasonable ground for imposing the restriction. If the court applies a strict scrutiny standard, the restriction will be upheld only if the government can establish a compelling state interest for imposing the restriction and can show that the restriction is narrowly tailored to achieve that interest. In adopting the rational basis test in *Clements*, the Court stated that equal protection challenges are subject to a stricter standard only if the challenged statute burdens a suspect class or a fundamental right. 457 U.S. at 963. The Court does not recognize candidacy as a fundamental right. *Id*. (citing Bullock v. Carter, 405 U.S. 134, 142-43 (1972)). The Court explained, however, that traditional equal protection principles may give way to a heightened standard, even absent a fundamental right, if the nature of the affected interest and the extent of the burden placed on candidates are significant. 457 U.S. at 965-66.

[14]The constitutional provision operated to prohibit an elected officeholder from resigning before the end of his term to become a candidate for another office. 457 U.S. at 960 (quoting Tx. Const. art. III, § 19, applicable solely to candidacy for Texas legislature). A justice of the peace who wished to run for the state legislature challenged the restriction. *Id*. at 966. The state's interest rationally related to the restriction was to preserve the integrity of the office of justice of the peace by preventing abuse of discretion or neglect of duties and by discouraging justices from vacating their terms of office. *Id.* at 968.

[15]413 U.S. 548 (1973).

[16]413 U.S. 601 (1973).

[17]The restrictions in both *Letter Carriers* and *Broadrick v. Oklahoma* were confined to partisan activities. The Hatch Act, which was challenged in *Letter Carriers*, prohibits federal employees' participation as independent candidates in partisan elections. *See* 413 U.S. at 550 (quoting 5 U.S.C.A. § 7324(a)(2), which prohibits federal employees from engaging in acts of political management or political campaigning). In *Broadrick*, the Court noted that, despite the broad language of the state statute prohibiting state employees from becoming candidates for any paid political office, both the State Personnel Board and the Oklahoma Attorney General interpreted the statute as prohibiting only clearly partisan political activity. 413 U.S. at 616-17.

[18]*See* 5 U.S.C.A. § 1503.

[19]*See* letter opinion from Ana Galindo-Marrone, Hatch Act Unit Attorney, U.S. Office of Special Counsel, Washington, DC, OSC File No. AD-01-0064 (Jan. 16, 2002), *available at* http://www.osc.gov/documents/hatchact/federal/fha-27.pdf.

[20]*Id*. at *1.

[21]*Id*. at *1-2.

[22]"For example, if a candidate solicits or advertises the endorsement of a partisan political party or uses a political party's resources to further his or her campaign, these actions may transform a nonpartisan election into a partisan one." *Id*. at 2. Similarly, although an election may be nonpartisan in one ward and partisan in the other wards of the city, circumstances may arise in the "nonpartisan" ward that implicate Hatch Act prohibitions.

[23]*See, e.g.*, Op. Va. Att'y Gen.: 1991 at 122, 124; 1986-1987 at 1, 6.

[24]1987-1988 Op. Va. Att'y Gen. 69, 72, and opinions cited therein.

[25]5 C.F.R. § 734.102(a) (2003); *see id*. § 1800.1(b)(1)-(2) (2003).

[26]*See* 5 C.F.R. § 734.102(a), *supra* note 25; *see id.* § 1800.3 (2003) (authorizing United States Office of Special Counsel "to issue advisory opinions only concerning Chapter 15 of Title 5, United States Code (dealing with political activity of State or local officers and employees) and Subchapter III of Chapter 73 of Title 5, United States Code (dealing with political activity of Federal officers and employees").

[27]*See* Op. Va. Att'y Gen.: 2001 at 65, 68; *id*. at 107, 109; 1998 at 28, 29; 1987-1988 at 489, 490, and opinions cited therein (noting that Attorney General declines to render official opinions when request requires interpretation of matter reserved to another entity).

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