STATE OF WISCONSIN

BEFORE THE STATE BOARD OF PERSONNEL

Charles E. Holley,
Appellant,
vs.

Joseph C. Fagan, Chairman,
Department of Industry, Labor
and Human Relations,
Respondent.

MEMORANDUM DECISION

00-0011-PB

The Appellant was a permanent employe in the classified service of the State of Wisconsin, employed by the Department of Industry, Labor and Human Relations. He worked with the minority community in Milwaukee, Wisconsin, and reported directly to the Commissioners of the Department. Part of his salary was paid by the State Employment Service whose programs are at least partially funded by Federal Title III funds.

There is no question but what he was a state employe subject to the Federal Hatch Act if he engaged in partisan political activities prohibited by that Act.

One of the perils presented by state employes working on programs funded by federal funds who engage in political activity prohibited by the Hatch Act is that the federal funds may be withdrawn.

The Department has long been very sensitive on this matter for its Unemployment Compensation Division and Employment Service receive substantial federal monies.

The Department for years has had a well published and generally understood policy that compliance with the Hatch Act is a condition of employment with the Department for all its employes subject to the Act.

Appellant was aware of the policy. He had seen memoranda in regard to it, he was advised of it when he started his job, he was advised of it by Commissioner Estowski after he became involved in the affairs that led to his dismissal.

A vacancy occurred in the 9th State Senatorial District (Milwaukee) upon the death of the incumbent Senator Norman Sussman.

On or about May 5, Appellant announced himself as a candidate for the seat. He prepared a biographical sketch and a platform and telephoned a Milwaukee Journal reporter. As a result an announcement of his candidacy was published in that newspaper. Other Milwaukee newspapers also carried the announcement. He attended a few political meetings and discussed his candidacy. The record shows that he solicited the support of a co-worker with political interests.

The record indicates that on May 9, 1969, the Respondent sent the Appellant a memorandum requesting that he withdraw from the candidacy or resign. During the month a supervisor in the Employment Service (Earl Heise) reminded the Appellant of the restrictions. Shortly after May 9, Commissioner Estowski, Appellant's Supervisor, urged Appellant to do something about it or his job would be in jeopardy.

Appellant did nothing about withdrawing his candidacy.

The Department was most concerned about the affair. On May 19, 1969, Francis J. Walsh, Director of the Employment Service, after informal telephone calls to the U. S. Civil Service Commission, at the request of the Commissioners, wrote to John J. McCarthy, Assistant General Counsel of the Commission, outlining the facts and requesting an opinion. A reply was had from Mr. McCarthy under date of June 5 in which he stated that he was of the opinion that Appellant was violating the Hatch Act.

After the letter had been discussed, Respondent issued to the Appellant the following letter of discharge on June 9, 1969:

June 9, 1969

Mr. Charles E. Holley
Community Relations Specialist
Department of Industry, Labor
and Human Relations
819 North Sixth Street
Milwaukee, Wisconsin 53203

Dear Mr. Holley:

In my letter to you dated June 5, I told you that the matter surrounding your candidacy for the State Senate had been forwarded to the U.S. Civil Service Commission for decision. We have now received from the Civil Service Commission written confirmation of the earlier informal decision on this matter. We are advised that:

> "The Federal law on political activity (formerly the Hatch Act) prohibits a State employee whose principal employment is in connection with an activity financed in whole or part by Federal loans or grants, from taking an active part in partisan political management or partisan political campaigns. The prohibitions against taking an active part in political campaigns extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy."

In view of these facts, we are dismissing you from the service effective at the close of business June 20, 1969. Please make arrangements to take any vacation due you before that date.

Pursuant to provisions of 16.24 (1) Wisconsin Statutes, you are entitled to appeal this action before the Personnel Board in Madison, Wisconsin, provided you file a request to the Board within ten days of the effective date of your discharge.

Sincerely,

Joseph C. Fagan
Chairman

JCF:rt
cc: Governor Knowles
Mr. Wettengel
Mr. Marlett
U. S. Civil Service Commission

Contemporaneously with the issuance of the letter, Respondent telephoned Appellant and advised him of the discharge. Appellant thereafter withdrew his candidacy.

Although the record in this matter fills nearly 300 pages, there is no disagreement on the facts. The Appellant's case is largely predicated on this statement of Counsel's position:

At T. P. 18:

> " - - - it is our position that since there is no determination by the United States Civil Service Commission, the appropriate tribunal to decide, that Mr. Holley has violated Section 1502 of the United States Code, that this Commission must reinstate him to his position because there cannot --there is no just cause in the absence of such a determination for discharging him for an alleged violation of the Hatch Act which the United States Civil Service Commission is alone authorized to interpret and apply."

He may well be right if the state department employing a subject employe had been silent about Hatch Act violations and had no policy in regard to such violations. However, that is not the case. The Wisconsin Department of Industry, Labor and Human Relations had a policy. It was of long-standing, definitely certain and almost over-publicized. It succintly stated is, and has been, "we make it a condition of your employment in federally-funded programs, that you comply with the Hatch Act".

The Hatch Act does not preempt this field so that a state is powerless to act until the United States Civil Service Commission has itself acted with respect to partisan political activity in case of employes paid from federal funds. The Act contains no such language. If Congress had intended to grant exclusive power of jurisdiction to the United States Civil Service Commission "alone" or as the only appropriate tribunal to adjudicate any and all violations with respect to employers reimbursed or paid for

employe services out of federal funds, then it would have so provided - expressly and unequivocally as it has with the jurisdiction of the National Labor Relations Board over an employer engaged in interstate commerce.

That this is the attitude of the United States Civil Service Commission itself is clearly stated by Mr. McCarthy in his testimony.

"EXAMINATION

BY THE CHAIRMAN (Mr. John Shiels):

Q. Let me ask you this question, Counselor and Mr. McCarthy. This is rather direct and rather crude. Is the United States Civil Service Commission jealous of their prerogative under the Hatch Act? Do they want anybody else making any decision under the Hatch Act or not?

A. The Congress, I think, in passing this statute gave the Commission responsibility as the federal agency in the matter to enforce and administer this statute and the Commission, I think, welcomes cooperation in a broad sense from the state and local agencies that receive these federal funds.

As I said before, we like to have their full cooperation in informing the employees of prohibitions. I think I couldn't give an official answer as to what the Commission - -

Q. (Interrupting) That becomes one of the issues that this Board must act upon in deciding this case. It is one of the issues.

Now, paraphrasing Mr. Spencer's questions, suppose that a a state department adopts a rule that the fiolation of the Hatch Act is grounds for discipline or suppose that, not referring directly to the Hatch Act by name or statute number, they use the same language as the Hatch Act, violation of which being cause for discipline; does your Commission still want to be able to be the ones to pass on that in accordance with 1508?

A. Not necessarily. I don't think we dislike local enforcement of the Hatch Act if it is done early and properly.

Q. Done early and properly?

A. Yes.

Q. What would you say is properly?

A. In accordance with state law.

Q. In accordance with state law?

A. Yes. We look at the Hatch Act as something that governs

> federal action and what the state agency does is really not a federal issue or of federal interest unless we see that there is some harmful effect still remaining."

The Board hence concludes that the state can enforce the provisions of the Hatch Act if it is done in accordance with state law.

Pursuant to s. 16.24(1) Wis. Stats. an appointing officer may discipline a classified employe by discharge, among other things, for just cause.

The dismissal letter of June 9, 1969, is in conformance with the statute.

To have been for just cause the action must:

1. Not be arbitrary or capricious;

2. If it be for violation of a rule, the rule must be one with which the employe had been made familiar; and the rule must be a reasonable one bearing an appropriate relation to the employe's work;

3. Be based on substantial evidence that the rule was violated.

To discuss these components of just cause:

1. The Respondent acted with real concern. He discussed it with his associates. He gave Appellant unusual opportunity to desist. He had the Appellant's actions evaluated by others with more familiarity with the field than he had.

2. The rule or policy that compliance with the Hatch Act by subject employes be a condition of employment is a reasonable one. This was recently decided in Kaukl v. Wisconsin Natural Resources Board, (W. D. Wis. 1969(, 298 Fed. Supp. 339, based on United Public Workers v. Mitchell (1947) 330 U. S. 75, 90. There is no doubt that Appellant was well aware of the policy.

3. There is substantial evidence that Appellant violated the Hatch Act. Appellant did not make this an issue beyond his nebulous argument that he could not be a candidate for Senator from the 9th Senatorial District because the Governor had not by June 9, called a special election.

A case of this sort is of great concern to the state as are the Appellant's rights. Taking the Appellant through the state disciplinary route in the Board's opinion is not prejudicial. The Respondent's initial action is unilateral, but it has been appealed to the Board for a full administrative review. If Appellant is still unsatisfied he can have an easy judicial review of the Board's decision.

The Board is quite puzzled by the Appellant's posture. He has appealed to the Board to review the Respondent's action. This of itself should preclude any question of the Respondent's right to act as he did if he acted for just cause. The more appropriate forum for a challenge such as is made here is the Federal Court, the route that Kaukl took.

Respondent's action should be sustained and counsel for the Respondent shall draft appropriate Findings of Fact and Conclusions of Law consonant with this Memorandum.

Dated November _____, 1969.

STATE BOARD OF PERSONNEL

BY_____

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Member Serpe did not participate in this hearing.