

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

93 M.S.P.R. 334

TIMOTHY F. KAUFFMAN,
Petitioner,

DOCKET NUMBER
CB-1205-02-0021-U-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: March 4, 2003

Timothy F. Kauffman, Marshall Space Flight Center, Alabama, pro se.

Jo-Ann Chabot, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Chairman
Beth S. Slavet, Member

OPINION AND ORDER

¶1 The petitioner has requested that the Board review, pursuant to its authority at 5 U.S.C. § 1204(f), two regulations issued by the Office of Personnel Management (OPM), 5 C.F.R. §§ 734.205(a) and 734.306(a)(1). For the reasons set forth below, we DISMISS the petitioner's request for regulation review for lack of jurisdiction.

BACKGROUND

¶2 The petitioner seeks review of two OPM regulations, 5 C.F.R. §§ 734.205(a) and 734.306(a)(1). Request File (RF), Tab 1. These regulations

implement the Hatch Act, 5 U.S.C. §§ 7321-7326, which restricts the partisan political activities of federal employees. The Hatch Act provides, in pertinent part, that “[a]n employee may not engage in political activity . . . while the employee is on duty.” 5 U.S.C. § 7324(a)(1). The regulations in question prohibit federal employees from wearing partisan political buttons while on duty.

Subject to the prohibitions in § 734.306, an employee may:

(a) Display pictures, signs, stickers, badges, or buttons associated with political parties, candidates for partisan political office, or partisan political groups, as long as these items are displayed in accordance with the provisions of § 734.306 of subpart C of this part;

5 C.F.R. § 734.205(a). Section 734.306 includes the following restriction.

An employee may not participate in political activities subject to the provisions of subpart E of this part:

(1) While he or she is on duty.

5 C.F.R. § 734.306(a)(1).

¶3 The petitioner argues that by prohibiting employees from wearing partisan political buttons on duty, the regulations coerce employees into refraining from political activity, which the petitioner claims is a prohibited personnel practice under 5 U.S.C. § 2302(b)(3).¹ RF, Tab 1 at 1. He further argues that the regulations violate the constitutional guarantee of free speech, and thereby cause

¹ Section 2302(b)(3) provides:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

* * *

coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

5 U.S.C. § 2302(b)(3).

a prohibited personnel practice under 5 U.S.C. § 2302(b)(12)² by violating a law concerning the merit systems principles at 5 U.S.C. § 2301(b)(4) and (8).³ *Id.* OPM has responded in opposition to the appellant's request. RF, Tab 5. The petitioner has filed a reply to OPM's response. RF, Tab 6.

ANALYSIS

¶4 The Board may review a regulation promulgated by OPM and declare the regulation invalid if “such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b).” 5 U.S.C. § 1204(f)(2)(A). The Board's regulations implementing this authority require a petitioner seeking review of an OPM regulation to provide, *inter alia*, a statement describing in detail the reasons why the regulation would require an employee to commit a prohibited personnel practice under section 2302(b). 5 C.F.R. § 1203.11(b)(1)(iii). The petitioner has not met this regulatory requirement because he has failed to explain how OPM's Hatch Act regulations require an

² Section 2302(b)(12) states that an employee with personnel action authority may not take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

5 U.S.C. § 2302(b)(12).

³ These merit system principles provide:

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

* * *

(8) Employees should be -

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes.

5 U.S.C. § 2301(b)(4) and (8).

employee to take any personnel action. The petitioner notes that an employee may be removed or suspended for violating the Hatch Act and OPM's implementing regulations. 5 U.S.C. § 7326. However, agency managers may not remove or suspend an employee for violating the Hatch Act. *Id.* Rather, the Special Counsel possesses exclusive authority to investigate and charge an employee with violating the Hatch Act, and the Board possesses exclusive authority to discipline a federal employee for violating the Hatch Act. *Id.*; *Sims v. Government of the District of Columbia*, 7 M.S.P.R. 45, 53-54 (1981). Neither the Special Counsel nor the Board is an employee. *See* 5 U.S.C. §§ 1201 and 1211. Consequently, a removal or suspension ordered by the Board as a penalty for violating the Hatch Act does not constitute a personnel action taken by an employee that could be a prohibited personnel practice. *See* 5 U.S.C. § 2302(b) (“[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority” take any of a series of enumerated actions.) Therefore, the appellant has failed to present a non-frivolous allegation that the regulations in question require an employee to commit a prohibited personnel practice.

ORDER

¶5 The petitioner's request for regulation review is DISMISSED. This is the final decision of the Merit Systems Protection Board. 5 C.F.R. § 1203.12(b)

NOTICE TO THE APPELLANT 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 web site, <http://www.mspb.gov>.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.