

OFFICE OF THE GENERAL COUNSEL
COUNCIL OF THE DISTRICT OF COLUMBIA

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MEMORANDUM

To: All Councilmembers
From: V. David Zvenyach, General Counsel
Date: January 8, 2013
Re: Effect of Public Law No. 112-230, the Hatch Act
Modernization Act of 2012

BACKGROUND

On December 28, 2012, the President signed Public Law No. 112-230, the Hatch Act Modernization Act of 2012 (“Modernization Act”), which will go into effect on Monday, January 28, 2013. As part of the Modernization Act, Congress “remove[d] employees of the District of Columbia from coverage under the provisions [of the Hatch Act] that apply to federal employees and place[d] [District employees] under the provisions of the Hatch Act that apply to state and local government employees.”¹ In addition, the Modernization Act added the District of Columbia as a “designated locality,” which allows federal government employees residing in the District to “run for local office and otherwise to actively participate in local elections.”²

In 2010, the Council passed the Prohibition on Government Employee Engagement in Political Activity Act of 2010 (“Local Hatch Act”),³ which established “restrictions on District employees’ political activity similar to those already provided by the Hatch Act” in the event that the District was removed from coverage of the federal Hatch Act.⁴

¹ S. Rep. No. 112–211, at 6 (2012).

² *Id.* at 7.

³ Effective March 31, 2011 (D.C. Law 18-335; to be codified at D.C. Official Code § 1-1171.01 *et seq.*).

⁴ Council of the District of Columbia, Committee on Government Operations and the Environment, *Report on Bill 18-460, the Prohibition on Government Employee Engagement in Political Activity Act of 2010*, at 7 (Nov. 16, 2010).

AREAS IN NEED OF REFORM

Now that the Modernization Act is passed, the Council may wish to reconsider aspects of the Local Hatch Act in order to address the circumstances that have changed since its passage, and to make other adjustments. In order to aid the Council's consideration, I have identified 4 areas for potential reform.

1. Enforcement Authority

When the Council passed the Local Hatch Act, it placed enforcement authority in the Board of Elections and Ethics. In 2011, however, the Council established the Board of Ethics and Government Accountability ("Ethics Board") as a separate entity from the Board of Elections. No conforming amendments to the Local Hatch Act have yet been made. Accordingly, the Council should determine whether enforcement should remain with the Office of Campaign Finance, which ostensibly would have enforcement in the absence of legislation, or with the newly created Ethics Board.

2. Scope of Restriction

A. Coverage of non-District Elections

Before the Modernization Act, District employees were prohibited (like their federal counterparts) from full participation in *any* partisan political activity. Thus, District employees could not solicit, accept, or receive political contributions for federal elections (e.g., Presidential or Congressional races), or in state or local elections. As passed, the Local Hatch Act appears to continue that prohibition. Arguably, though, the act could be interpreted as only restricting participation in elections within the District.⁵ In

⁵ *Cf. District of Columbia v. Schwerman Trucking Co.*, 327 A.2d 818, 825 (D.C. 1974) (holding that a minimum-wage law applied only to employees actually working within the District); *Matthews v. Automated Business Systems & Services, Inc.*, 558 A.2d 1175, 1180 (D.C. 1989) ("We assume, without deciding, that the District of

light of the potential ambiguity, and given the different reasons for restricting federal employees and District employees with respect to non-District elections, the Council may wish to consider clarifying its intent with regard to non-District elections.

B. Coverage of federal employees and District employees

When the Local Hatch Act was passed, the Council acted with the presumption that federal employees in the District would continue to be subject to the same restrictions as District employees. But, the Modernization Act liberalized the political activities of federal employees residing in the District, which now positions District employees with greater restrictions on their political activities than their federal counterparts.

Under the Local Hatch Act, a District employee is prohibited from filing as a candidate for election to a partisan political office. After the Modernization Act, however, a federal employee is *not* prohibited from filing as a candidate for a partisan political office if the employee runs as an independent candidate. Thus, a District employee is more restricted than the employee's federal counterpart with regard to candidacy for office. Similarly, under the Local Hatch Act, almost every District employee is prohibited from soliciting, accepting, or receiving political contributions. But, after the Modernization Act, a federal employee may accept or receive political contributions, and may solicit contributions for independent candidates.

There may be good policy reasons for restricting District employees' participation in District elections. Nevertheless, the

Columbia Human Rights Act does not apply to acts occurring outside the District. Whether it has extraterritorial application is ultimately a question of legislative intent, which is not before us in this appeal.”).

Council may wish to consider amending the Local Hatch Act to address this disparity.⁶

3. Penalties

Before the Modernization Act, violations of the Hatch Act were punishable by removal from office. Under the Local Hatch Act, however, District employees who violate the Hatch Act continue to be subject to removal, and are subject to civil and criminal penalties. After the Modernization Act, federal employees who violate the Hatch Act are subject to only civil penalties up to \$1,000. Assuming that the Council keeps criminal penalties in place, the Council may wish to clarify the appropriate prosecuting authority for Local Hatch Act violations, and adjust the possible penalties accordingly. Additionally, the Council should amend the Local Hatch Act in conformance with the Criminal Fine Proportionality Act of 2012.

4. Standards of Conduct for Designated Employees

Under section 3(b) of the Local Hatch Act, the Mayor and each Councilmember may designate one employee to engage in fundraising activities, subject to certain time, place, and manner restrictions. In addition, the Local Hatch Act requires the Council to “issue standards of conduct” for these designated employees.

Pursuant to that requirement, I am preparing proposed supplements to the Code of Official Conduct. However, the Council may wish to determine whether it wishes to continue the existing restrictions on time, place, and manner restrictions on designated employees, or to supplement those restrictions.

⁶ More narrowly, assuming that the Council retains the restriction on non-District elections and that the Council continues to restrict District employees’ participation in District elections, the Council may wish to allow non-District residents to participate in their local, non-District elections.

CONCLUSION

The Modernization Act represents a major victory for Home Rule in the District of Columbia. The District is now treated like every other state in the nation, and has the ability to administer and enforce its own restrictions on its employees' political activity. To fully implement the Modernization Act, the Council should take steps to reform the Local Hatch Act as soon as possible. I am available if you have any questions.

VDZ

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	District Employees		Federal Employees	
	Pre-Modernization Act	Mini-Hatch Act	Pre-Modernization Act	Post-Modernization Act
Exemptions	Mayor, Council, Recorder of Deeds	(1) Employees of the courts of the District of Columbia; (2) Mayor; (3) Attorney General (beginning 2014); (4) Councilmembers; (5) ANC members; (6) SBOE members	N/A	N/A
Run for Partisan Political Office	No	No	No	May run as an independent candidate
Solicit, Accept, or Receive Contributions	No	No, unless the employee has filed as a candidate for political office, or if the employee is a "designated" employee	No	Yes, for an independent candidate, and may accept or receive (but not solicit) on behalf of partisan candidates, but in any event not from subordinates or knowingly solicit from federal employees
Solicit, accept, or receive uncompensated volunteer services	Yes, but not from subordinates	Yes, but not from subordinates (or potential future subordinates)	Yes, but not from subordinates	Yes, but not from subordinates
On Duty	No		No	No
Using official resources (incl. property)	No	No	No	No
Wearing a uniform	No	No	No	No
Penalties	Removal	Civil penalty not to exceed \$2,000; Disqualification from appointment as an election monitor or from acting in any capacity at the polls on the day of an election if the Board finds that the person has knowingly violated any provision of this act; suspension with or without pay, or removal a person from employment; or, if willful, 180 days imprisonment, \$2000, or treble damages	Removal	Removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.