United States
Office of Government Ethics
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September 7, 2011
LA-11-06

TO: Alternate Designated Agency Ethics Official

FROM: Don W. Fox
General Counsel

SUBJECT: ETHICS ISSUES REGARDING AN EMPLOYEE RUNNING FOR OR HOLDING A LOCAL NONPARTISAN ELECTIVE OFFICE

This responds to your request for guidance from the Office of Government Ethics (OGE) on whether your department (Department) may rely on 5 C.F.R. § 2635.802 to prohibit an employee of, or an applicant for employment with, a Bureau of your department (Bureau) from running for or holding a local nonpartisan elective office because the elective office has the potential to create the appearance of misuse of her Federal position.

OGE is pleased to assist you with the complex ethics issues raised by your question.[1] Because the nature of the outside activity raises fundamental constitutional rights, we are doubtful that the possible appearance of a violation of 5 C.F.R. § 2635.802 can be relied upon to categorically deny employees their right to run for or hold nonpartisan public office. Consequently, if your Department decides to pursue such a broad policy, we recommend you obtain definitive guidance from the Office of Legal Counsel, Department of Justice (OLC). Nevertheless, because OGE has been asked in several circumstances whether, or to what extent, an employee may run for or hold a local nonpartisan public office, we provide the following guidance for analyzing this kind of outside activity on a case-by-case basis.

FACTS

Your letter pertains to a [Bureau] employee who asked your office whether she could run for office in an election to be City Commissioner. It is your understanding that the election for City Commissioner is a nonpartisan election.[2] Your letter states that the employee's City

[1] In the development of this opinion, OGE consulted with and received feedback from the U.S. Office of Special Counsel.

[2] A nonpartisan election is typically designated as such by state or local laws. "Such state and local laws, however, create only a rebuttable presumption that an election is nonpartisan. *See Special Counsel v. Yoho*, 15 M.S.P.R. 409, 413 (1983) (*overruled on other grounds*), *Special Counsel v. Purnell*, 37 M.S.P.R. 184 (1988). Evidence showing that partisan politics actually entered a candidate's campaign may rebut this presumption. *See McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320 (Fed. Cir. 2005). "[A] nonpartisan election could become partisan if, for instance, one of the candidates were to: participate in and win a party caucus; hold himself out as having the party's political support by advertising this in his speeches, flyers or mailings; seek and advertise the political party's endorsement; or receive party support in the form of funding, supplies (*e.g.*, wooden stakes for signs, bulk mail permit), campaign volunteers, campaign publications (*e.g.*, flyers, posters) or use of party headquarters." U.S. Office of Special Counsel, Federal Hatch Act Advisory: When Does a Nonpartisan Election Become Partisan for Purposes of the Hatch Act (Nov. 18, 2009).

Commissioner duties would not impinge upon the employee's ability to fulfill her [Bureau] duties.

The [Bureau] conducts [a variety of surveys]. The employee at issue is one of the thousands of [deleted] temporary employees who collect [data]. The [data] covers a wide range of topics [topics deleted]. [Employees] visit households and sometimes conduct interviews by telephone at randomly selected, computer-generated addresses that are typically in the area where they live. It is our understanding that [Employees] contact every house or every other house in a neighborhood in any given [outreach assignment]. [Employees] are required to introduce themselves as employees of the [Bureau]. When conducting [their] work, [Employees] do not drive Government vehicles. Most [Employees] do not supervise other employees, although some [Employees] may serve in team leader-like positions. Once [Employees] have collected the answers [to a survey], the employees turn over the raw data to other [Bureau] employees who then assimilate the information and provide the data to other Government agencies and interested parties. [Employees] do not prepare reports, make recommendations, or exercise any discretionary functions based on the data they collect.

The [Bureau's] hiring manual has a written policy prohibiting prospective [Employees] from running for, or holding, any political office, whether partisan or nonpartisan. Some applicants have questioned this policy. Your office confirmed that the [Employee] at issue is already serving in her personal capacity as City Commissioner, [in a town of approximately 1,500 residents]. The relevant election occurred November 3, 2009. Since then, the [Employee] has continued both to work for the [Bureau] and to serve as a City Commissioner without reported incident. The [County's] Supervisor of Elections website indicates her two-year term expires November 2011.[3] According to your office, there is no evidence to suggest the [Employee] engaged in electoral activities while on official time. Whether or not your employee had a campaign committee is not known. It was your office's assessment that the 2009 election was not highly contested. [Deleted.]

The Department has not required the [Employee] to resign from either her Government position or her City Commissioner position despite the [Bureau's] policy of prohibiting prospective employees from running for or holding elective office. Your office anticipates that it will continue to receive questions from applicants and employees challenging this policy. Thus, the issue is not moot. Because the outside activity in question is both recurring and may be constitutionally-protected conduct, the Department asked whether it may determine, under 5 C.F.R. § 2635.802 ("Conflicting outside employment and activities"), that a [Bureau's] employee may not run for or hold nonpartisan elective office because it has the potential to create the appearance of misuse of her Federal position. For the reasons discussed below, we are doubtful that such a blanket prohibition can be legally supported.

[3] *[Deleted]*

DISCUSSION

I. Ethics Laws and Regulations

An executive branch employee may not engage in outside employment or activities that conflict with the employee's official Government duties. 5 C.F.R. § 2635.101(b)(10). An outside activity conflicts with an employee's duties if it is prohibited by statute or by an agency supplemental regulation. 5 C.F.R. § 2635.802(a). An outside activity also poses a conflict when, under the standards set forth in 5 C.F.R. §§ 2635.402 and 2635.502, "it would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired." 5 C.F.R. § 2635.802(b).

In addition to the requirements in 5 C.F.R. § 2635.802(a), 5 C.F.R. §§ 2635.801(c) and 2635.802(b) require agencies to determine whether a proposed outside activity is consistent with other provisions in the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct), including the prohibition in 5 C.F.R. § 2635.702 against using public office for private gain. Based on the facts, it may be possible for the Department to prohibit, on a case-by-case basis, an employee from campaigning for or holding a local, nonpartisan, elective office by relying on § 2635.702 ("Use of public office for private gain"). However, as explained below, OGE lacks the authority to sanction blanket approval for such a policy due to potentially profound constitutional issues raised by your question.

A. Conduct is Not Prohibited by Supplemental Regulation

Although several agencies have supplemental regulations requiring employees to obtain prior approval to engage in certain outside employment or activities,[4] the Department has not issued supplemental ethics regulations. Thus, the outside activities of running for and holding nonpartisan elective office do not conflict with the [Employee's] duties by virtue of an agency supplemental regulation.

[4] The Department of Interior has a narrowly tailored supplemental regulation which prohibits employees in the Office of the Assistant Secretary – Indian Affairs, or in the Bureau of Indian Affairs (BIA), from holding "a position on a tribal election board or on a tribal school board which oversees BIA schools. Note to paragraph (a)(3): Except for membership on a tribal board and a tribal school board which oversees BIA schools, an eligible person employed in the office of the Assistant Secretary – Indian Affairs or in the BIA may become a candidate for office in his local tribe or may be appointed as a representative of his local tribe if prior approval is obtained from the Deputy Assistant Secretary – Indian Affairs…." 5 C.F.R. § 3501.105(3).

In contrast, the Department of Health and Human Service's supplemental regulation concerning prior approval for outside activities states that "prior approval is not required for participation in the activities of a *political*, religious, social, fraternal, or recreational organization unless" the activity involves professional services or the activity is compensated. *See* 5 C.F.R. § 5501.106(d)(3) (emphasis added).

B. Conduct is Not Prohibited by Statute

Based on our understanding of the facts, the [Employee's] nonpartisan activities do not appear to be prohibited by any Federal statute. Your letter states that the employee's "[suvey] responsibilities are unrelated to any funding of local government programs and would not affect the financial interests of the [local government]." Therefore, your letter concluded that 18 U.S.C. § 208(a) does not prohibit the [Employee] at issue from working on the [surveys] while *holding* a position with the [city government]. While we defer to your determination, the Department should continue to assess whether the employee's future [Bureau] activities would directly and predictably affect the financial interests of the [city].

OGE's position is that running for a nonpartisan office does not constitute "negotiating for employment" under 18 U.S.C. § 208. Thus, engaging in campaign activities does not implicate 18 U.S.C. § 208.[5] We caution, however, that being a candidate for elective office could be considered "seeking employment" under subpart F of the Standards of Conduct. We discuss the application of the seeking employment rule below.

Where there is an *actual* conflict of interest with an employee's official responsibilities, at least one Federal department has prevailed in litigation over a ban on nonpartisan political activities. The Merit Systems Protections Board (MSPB) sustained a decision by the Department of Housing and Urban Development (HUD) to terminate an employee who ran for local, nonpartisan public office. *See Howell v. HUD*, CH-0752-06-0197-I-1 (MSPB, Aug. 22, 2002), *aff'd*, 94 M.S.P.R. 482 (2003), *aff'd per curiam*, 111 Fed. Appx. 605 (Fed. Cir. 2004). *Howell* involved a HUD "Community Builder" who wanted to run for the nonpartisan office of Mayor of East Cleveland, Ohio. Community Builders provided services to state and local governments, were involved in discretionary actions and decision-making that could affect the grants available to neighborhoods, and had significant contact with the public.

Seeking to avoid public confusion between Community Builders' official and unofficial roles, HUD policy prohibited Community Builders from participating in a variety of political activities, including many nonpartisan elective offices. Ms. Howell was advised she could not run for mayor, both because of the appearance of a conflict of interest and the potential for an actual conflict of interest between her Federal position and her campaign for mayor. In defiance of HUD's policy, Ms. Howell ran for mayor and was removed from her employment with HUD.

In her appeal to the MSPB, Howell claimed that she had a "right to political activity." Calling that argument "meritless," the MSPB stated that a Federal employee has "no right to engage in 'political activity' if that activity creates a conflict of interest" with the employee's Government position. *See Howell* at 6. Based on the possibility that Howell might favor the city of East Cleveland while acting as a Federal official, the MSPB found adequate evidence that

[5] OGE previously addressed the question of whether a Department employee's campaign activities would constitute "negotiating for employment" under 18 U.S.C. § 208. We provided oral guidance to your office that negotiating for employment typically involves a "discussion or communication" mutually conducted with a view toward reaching an agreement regarding possible employment." 5 C.F.R. § 2635.603(b)(1)(i). We concluded that running for elective office does not involve the kind of bilateral negotiations that would implicate 18 U.S.C. § 208. However, we advised that communications to a city, whether made directly or indirectly through the media or campaign committee filings, about possible employment as an elected official could be regarded as seeking employment.

Ms. Howell's candidacy for mayor created the appearance of or an actual conflict of interest, and upheld HUD's decision to terminate the employee. *Id.*

The facts of *Howell* have some similarity to the facts in the instant situation. Similar to HUD's Community Builders, [employees such as the one at issue here] interact regularly and personally with the public. [Employees] also work in the communities where they live, which are the same communities where they likely would become candidates or serve in office. However, unlike HUD's Community Builders, the [Employees here] do not directly and predictably affect the interests of any one community. Most importantly, whereas HUD determined that the political activity would create a serious appearance of a conflict of interest and that there was potential for a serious *actual* conflict, your letter observes that the [Employee's] [survey] responsibilities are "unrelated to any funding of local government programs and would not affect the financial interests of the [local government]." Thus, while *Howell* addressed the issue of nonpartisan political activity that creates an actual conflict of interest under 18 U.S.C. § 208, its application should not be extended to cases where there is only a speculative appearance of a conflict of interest.

Another statute, the Hatch Act, 5 U.S.C. §§ 7321-7326, also does not prohibit a Federal employee from being a candidate in a nonpartisan election[6] or holding such an office. Generally, the Hatch Act prohibits covered executive branch employees from running for public office in partisan elections. *See* 5 U.S.C. § 7323(a)(3).[7] By contrast, the Hatch Act does not prohibit a covered employee from running for office in a nonpartisan election. 5 C.F.R. §§ 734.207(b) (lesser restricted employees), 734.403(b) (further restricted employees).[8] In fact, with few exceptions, an agency may not impose additional political activity proscriptions or restrictions on employees covered under the Hatch Act. 5 C.F.R. § 734.104. Federal employees may participate in, hold office in, and fundraise on behalf of a nonpartisan group as long as the purpose is not for promoting or opposing a political party or candidate in a partisan election. *Civil Serv. Comm'n v. Nat'l Letter Carriers*, 413 U.S. 548, 556 (1973); *see also* 5 C.F.R. § 734.203.

[6] A nonpartisan election is one in which none of the candidates is to be nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected. 5 U.S.C. §§ 1503 and 7322(2).

[7] "A federal executive branch employee who works on an occasional or irregular basis is subject to the restrictions with the Hatch Act only when the employee is on duty." *See* U.S. Office of Special Counsel, Federal Hatch Act Advisory: Temporary Seasonal Employees Under a 1039 Appointment (May 6, 2010) (concluding the Hatch Act did not prohibit a temporary seasonal employee hired under a "1039 appointment" by the USDA Forest Service from being a candidate in a partisan election, provided the employee did not campaign while on duty). *See also* 5 C.F.R. § 734.601. If the [Employee] was an occasional employee who satisfied the conditions of a 1039 appointment as set forth at 5 C.F.R. § 213.103-4, then Hatch Act provisions would only apply to her when she was on duty as a temporary employee and she would be permitted to pursue partisan political activity on her personal time. *But see Kane v. Merit Sys. Prot. Bd.*, 210 F.3d 1379, 1382 (Fed. Cir. 2000), *aff'g Special Counsel v. Kane*, 77 M.S.P.R. 530 (1998) (finding that a U.S. Postal Service employee who worked every Saturday did not work on an irregular or occasional basis).

[8] *See also* U.S. Office of Special Counsel, Federal Hatch Act Advisory: When Does a Nonpartisan Election Become Partisan for Purposes of the Hatch Act (Nov. 18, 2009).

Therefore, assuming the election for City Commissioner is indeed nonpartisan, the Hatch Act would not prohibit a [Bureau] employee from being a candidate in such election.[9]

For these reasons, no supplemental regulation or statute prohibits [a Department employee] from running for or holding local, nonpartisan elective office. *See* 5 C.F.R. § 2635.802(a). The question then becomes whether under § 2635.802(b) the [Employee's] nonpartisan local political activity requires her disqualification from matters so critical to the performance of her official duties that the employee's ability to perform her job is materially impaired.

C. Employee Not Disqualified From Matters So Critical to the Performance of her Duties that Her Ability to Perform is Materially Impaired

Based on the facts presented, it does not appear that the [Employee's] outside activities would require her disqualification from matters so central or critical to the performance of her official duties that her ability to perform her [Federal government] duties would be materially impaired. *See* 5 C.F.R. § 2635.802(b). The analysis turns on whether the [Employee] would be disqualified under §§ 2635.402 (disqualifying financial interests), 2635.502 (personal and business relationships), or 2635.604 (seeking employment). As noted above, disqualification in this matter is not required under 18 U.S.C. § 208 and 5 C.F.R. § 2635.402.

Running for local office could involve activities that would be considered "seeking employment." In addition to actual negotiations, as described in 5 C.F.R. § 2635.603(b)(1)(i), seeking employment also includes unsolicited communications by an employee regarding possible employment, as described in § 2635.603(b)(1)(ii). You may recall a similar matter involving another of your employees in which the employee's official duties were to do outreach work for the [government] in [a different city]. The employee then became a candidate for a nonpartisan position on the City Council. OGE orally advised your office that the employee had begun "seeking employment" within the meaning of § 2635.603(b) because he had made communications, whether directly or indirectly through media or required candidate filings, to the city concerning employment on the City Council. We also advised that the employee could not benefit from the exception that permits communication solely for the purpose of submitting a resume or employment proposal to a person affected by the employee's duties only as part of a class. *See* 5 C.F.R. § 2635.603(b)(1)(ii)(B). Here, the [Employee's] Federal duties focus not just on [the local district], but on all of the municipalities of [the county]. Thus, it appears that the [Employee] could benefit from the exception to the "seeking employment" rule because [the city] is affected by the [Employee's] duties only as part of a class of cities in that [region]. Moreover, since the [Employee] in question already holds office, any "seeking employment" question is moot, at least for the time-being.

[9] The Hatch Act implementing regulations state that a lesser restricted employee may "[p]articipate fully in public affairs, except as prohibited by other Federal law, in a manner which does not compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of the agency or instrumentality of the United States Government …" 5 C.F.R. § 734.203(d) ("Participation in nonpartisan activities"). The Hatch Act regulations further remind a candidate that although he may run for nonpartisan office, he is still subject to "part 2635 of this title as well as any other directives that might apply …." 5 C.F.R. § 734.207(b) (Example 1).

Under the impartiality provisions of the Standards of Conduct, running for or holding a local elective office could appear to conflict with the official duties of the [Bureau] employee. 5 C.F.R. § 2635.502. An employee has a "covered relationship" with, among other persons:

> Any person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee; or
>
> An organization, other than a political party described in 26 U.S.C. § 527(e), in which the employee is an active participant. Participation is active if, for example, it involves service as an official of the organization or in a capacity similar to that of a committee or subcommittee chairperson or spokesperson, or participation in directing the activities of the organization.

5 C.F.R. § 2635.502(b)(1)(iv), (v).

The [Employee], as a City Commissioner, has a covered relationship with the [city]. Where there is a covered relationship, Subpart E requires an employee to take appropriate steps to avoid the appearance of loss of impartiality in the performance of her official duties. OGE defers to your determination that the [Employee] need not disqualify herself from any particular matter involving specific parties. According to your staff, your office determined that, much like there is no concern that the [Employee's] official duties would affect the financial interests of [the city], disqualification has not been required under § 2635.502. Of course, your office could grant an authorization under § 2635.502(d) if the Government's interest in permitting the [Employee] both to participate in any given party matter outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations.

Given that the [Employee's] nonpartisan political activity is not prohibited by agency supplemental regulation, is not prohibited by statute, and does not require her disqualification from any particular matters, her City Commissioner position would not "conflict with" her officialBureau duties under 5 C.F.R. § 2635.802. However, under 5 C.F.R. § 2635.802, the Department is correct to analyze whether the conduct at issue is consistent with other Standards of Conduct rules, namely those of § 2635.702, which prevent employees from using public office for private gain.[10]

D. Misuse of Official Position

Executive Order 12731 prohibits an executive branch employee from using public office for private gain or creating the appearance of such use.[11] This principle is implemented, in part, in Subpart G of the Standards of Conduct. In general, an employee may not use his public office

[10] As OGE stated in the Preamble to the proposed Standards of Conduct regulations: "In most cases, outside employment should be permitted *unless, under the standards proposed in § 2635.802, it conflicts* with performance of the employee's duties. *Where outside employment involves a violation of some other provision of this part or a statute or regulation referenced in this part, that violation should be addressed*." 56 Fed. Reg. 33778, 33788 (July 23, 1991) (emphasis added).

[11] Exec. Order No. 12731, Pt. 1, § 101(g) & (n), 55 Fed. Reg. 42547 (1990).

for the private gain of himself or any organization with which he is affiliated in a private capacity. 5 C.F.R. § 2635.702. Specifically, this Subpart prohibits:

> The use of public office for private gain,
> The use of official time, including a subordinate's time, to perform non-official duties,
> The use of government property[12] for unauthorized purposes, and
> The use of nonpublic information to further a private interest.

See 5 C.F.R. §§ 2635.702–705.

The essence of Subpart G is that it is unseemly for a Government employee to take advantage of his Government job for any private interest, whether his own or someone else's.

1. Possible Appearance of Endorsement

Your letter identifies three potential misuses of position concerns, the first of which is whether permitting the [Employee] to conduct [her official government work] and to participate in nonpartisan political activity suggests that the Government sanctions or endorses her outside activity. An employee who is running for or holding elective office may not use or permit the use of her official position to suggest that the Government endorses or sanctions her personal activities, the activities of her campaign committee (if any), or the activities of a local government to which she is elected or appointed. *See* 5 C.F.R. § 2635.702(b); 5 C.F.R. § 2635.807(b). The [Employee] was asked to consider running for the [deleted] City Commissioner position. Information from a local [state] newspaper's online site indicates that your employee was the only candidate for the position and that she ran "unopposed." These facts strongly suggest that the employee did not need to actively campaign for what appears to have been an uncontested election. Moreover, your office is not aware of any allegations that the employee engaged in campaign or other political activities while on official time. For these reasons, we do not believe there is an appearance of Government sanction or endorsement.

Assuming *arguendo* that the [Employee] is not engaging in campaign-related activities while conducting [her work], the next issue is whether it might appear that the Government endorses this employee if she engages in political activity during her off-duty hours. Merely permitting an employee to engage in an otherwise permissible outside activity on her own time does not equate to Government endorsement of the employee running for public office. Admittedly, an [Employee] could collect publicly available data from the very community which she seeks to or does represent. Nevertheless, we do not believe permitting [an Employee] to do [Federal] work on official time and City Commissioner work on her own time suggests that the Government either favors the employee at issue or disfavors another person who might run for that particular elective office in the future.

[12] The circumstances do not seem to raise any issues concerning the [Employee's] use of Government property. *See* 5 C.F.R. § 2635.704. If [Employees] had Government vehicles to conduct their [deleted] work and an employee used one for unauthorized purposes, then § .704 might be implicated. However, there are no facts to suggest that [Employees] would violate § .704 simply by running for office in a nonpartisan election or holding such office.

2. Possible Perception that Official Position Could be Used for the Employee's Personal Advantage

The second potential concern identified in your letter—that there could be a perception that the [Bureau] is compensating its employee to meet constituents—seems to raise perhaps the most potentially valid governmental concern about the [Employee's] pursuit of a local political office. At the heart of this appearance concern is the [Employee's] use of her title, position, and authority.

Section 2635.702(a) specifically prohibits an employee from using or permitting the use of "his government position or title or any authority associated with his public office in a manner that is intended to induce or coerce" another person to provide a benefit to the employee or to "persons with whom the employee is affiliated in a nongovernmental capacity."[13] Applying this standard, the real potential for an appearance concern stems from the opportunity to do both [Federal] work and campaign for public office at the same time. For example, if the [Employee], or someone acting on her behalf, used her official title repeatedly in connection with a campaign-related activity, event, or communication, the public could be confused as to whether the employee is acting in her official or personal capacity. Similarly, if the [Employee] gave undue prominence to her title or official position in campaign literature, it might appear that the employee was using her public office for private gain.[14] However, absent any indication that an [Employee] is inducing or coercing someone who she is [communicating with] to vote for her, there seems to be little risk of an [Employee] implicating § 2635.702(a) while the employee is running for office in a local, uncontested, nonpartisan election. Similarly, this [Employee] could violate 5 C.F.R. § 2635.702(a) if, for example, she used her official title or authority to advance the interests of [the city]. We are not aware of any facts suggesting there is a direct connection between this [Employee's] official authority doing [her Federal] work and any potential benefit to the [city].

Another issue is this [Employee's] use of official time, pursuant to 5 C.F.R. § 635.705. Section 2635.705(a) provides that employees must use official time in an honest effort to perform official duties. To the extent that [an Employee] actively campaigned while conducting [her Bureau work], such action could implicate § 2635.705(a). However, the fact that the [individuals the employee communicates with in the course of her Bureau duties] are chosen at random and not by the [Employee] herself should allay some of the concern about electioneering during official duty hours.[15] Also, since [the city] is only one of several municipalities in [the] County, and [the ward] is only one of several wards in [the city], the [Employee] necessarily conducts most [of her work] in areas other than where her potential voters or constituents live.

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[13] *See also* 5 C.F.R. § 2635.807(b), as discussed in OGE DAEOgram *Book Deals Involving Government Employees*, DO-08-006b, 26 (Mar. 6, 2008) and OGE Informal Advisory Letter 98 x 4 (Mar. 21, 1997).

[14] *See* 5 C.F.R. § 2635.807(b)(1) providing that any employee "may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him … provided his title is given no more prominence than other significant biographical details." *See also* OGE Informal Advisory Opinion 10 x 1, Letter to a Designated Agency Ethics Official dated March 19, 2010, Regarding Uncompensated Teaching, Writing, and Speaking.

[15] Although 5 C.F.R. § 2635.705 extends to the misuse of a subordinate's time, [Employees] generally do not supervise other employees. We are not aware of any facts to suggest that this [Employee] could implicate § 2635.705 by using the official time of subordinates for nonofficial purposes.

The [Employee] should be counseled not to mention that she is running for or serving as City Commissioner while [gathering data for the Bureau]. If someone [deleted] the [Employee] is [speaking with] were to recognize the employee as a City Commissioner, the [Employee] simply could state that the purpose of her visit is to conduct a Government [activity] and that she is not permitted to discuss her outside activities while on Government time.

3. *Possible Perception of Misuse of Nonpublic Information*

Your letter identifies as a third concern the "possible perception" that the [Employee] "may have access to non-public information that would aid her in performing the duties of her elected position." The relevant Standards of Conduct provision provides that "[a]n employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another." *See* 5 C.F.R. § 2635.703(a). "Nonpublic information" is defined at 5 C.F.R. § 2635.703(b) as "information that the employee gains by reason of Federal employment and that he knows or should know has not been made available to the general public."[16] Significantly, a Federal law prohibits Department employees from improperly disclosing covered [information] and imposes possible fines or imprisonment for wrongful disclosure. [Citation deleted]. In fact, [these Employees] take an oath not to reveal [data] to anyone other than an authorized [Bureau] employee. Your Department has not indicated that the [Employee] has disclosed any protected information or used any nonpublic information to further either her own private interest or that of [the city]. Significantly, both the [the Federal law] and 5 C.F.R. § 2635.703(a) address only *actual* disclosure and misuse of nonpublic information, not the speculative appearance of such misuse.

In sum, if there were some factual basis for doing so, the Department could conclude that appearance of misuse of position concerns were so serious as to outweigh [an Employee's] interest in seeking or holding nonpartisan elective office. However, where the appearance concerns are purely speculative, we do not think a wholesale policy prohibiting [Bureau] employees from running for office in nonpartisan elections or holding such offices can be justified.

Our recommendation comports with the practice of another large agency that has thousands of employees who interact with the public on a daily basis. The agency generally does not constrain nonpartisan political activities because of its concern about interfering with employees' First Amendment rights. Specifically, if a nonpartisan political activity is not prohibited by the Hatch Act, is not conducted during official duty hours, and is not conducted on Government property, this agency typically permits the nonpartisan political activity. In fact, many of that agency's employees hold nonpartisan political offices, such as town council positions, and routinely perform such outside activities on their own time. Of course, each agency's mission is different, but we note this agency's practice for your consideration.

[16] Nonpublic information "includes information that [an employee] knows or reasonably should know: (1) [i]s routinely exempt from disclosure under 5 U.S.C. § 552 or otherwise protected from disclosure by statute, Executive order or regulation; (2) [i]s designated as confidential by an agency; or (3) [h]as not actually been disseminated to the general public and is not authorized to be made available to the public on request." 5 C.F.R. § 2635.703(b).

II. Limits on This Employee's Right to Seek or Hold Elective Office

Assuming that there are no actual conflicts of interest and no actual violations of the Standards of Conduct, it is important to discuss the larger context in which this request to participate in nonpartisan political activity takes place. Given that this [Employee's] conduct does not implicate any ethics rules, we are not aware of any vital government end that justifies the [Bureau's] hiring policy of prohibiting all [Employees] from running for office in nonpartisan elections or holding such offices.

The issue of whether and the extent to which a government employee's First Amendment rights as a citizen may be restricted because of government's interest in regulating public employment is not new and, in fact, is a heavily litigated one. "Precedent in the area of constitutional protection for candidacy can best be described as a legal morass." *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir., 2010).

The Hatch Act was passed because Congress sought to "protect civil service employees from undue political influence by prohibiting Federal workers from engaging in *partisan* political activities altogether." 139 Cong. Rec. S. 690 (emphasis added). The Act's legislative history includes several statements by U.S. Senators indicating that Congress expressly sought to carve out nonpartisan activities from the scope of the Act. For example, Senator Schwartz asked whether an amendment would "protect nonpartisan activities." Senator Brown replied, "It would protect such activity." 86 Cong. Rec. 2922 (March 15, 1940). Similarly, Senator Brown sought to exclude from the law's prohibition "participation in political campaigns of a nature totally disconnected from partisan politics." 86 Cong. Rec. 2347 (March 15, 1940). Senator Hatch, himself, agreed to support an amendment, if one was necessary, to ensure that a "nonpartisan election, such as for a school trustee or on a bond issue, is not within the language" of the bill. *Id.* In developing the Hatch Act Reform Amendments of 1993, Senator Glenn observed that the Senate Government Affairs Committee "exercised extreme caution in balancing the need to protect the integrity of the civil service with our duty to protect the constitutional right of all citizens to participate in the Nation's political processes." 139 Cong. Rec. S. 690-02, 697-98 (1993).

Yet partisan political activity by civil servants, which Congress sought to limit, has weathered legal challenges. For the most part, the Hatch Act's narrowly tailored prohibitions on partisan political activity by Federal employees have survived because the Supreme Court has recognized that the Hatch Act carefully balances government employees' constitutional rights and the government's interest in achieving legitimate governmental interests. "Neither the right to associate nor the right to participate in political activities is absolute." *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947). Public employees "do not relinquish their First Amendment rights" to free speech merely because they enter into an employment relationship with the government, but "the government's interest in the efficiency and integrity of public service can be sufficient to limit those rights." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1969). *Pickering* set forth the current First Amendment analysis, under which a public employee's right to speak as a citizen addressing matters of public concern is balanced against the interest of the government, as an employer, in promoting the efficiency of the public service.

In sustaining the constitutionality of the Hatch Act, the Court has deferred to Congress' judgment that "partisan political activities by Federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences." *Civil Serv. Comm'n v. Nat'l Letter Carriers*, 413 U.S. 548 (1973) (sustaining the constitutionality of § 9(a) of the Hatch Act of 1940 prohibiting Federal employees in the executive branch from taking "any active part in political management or in political campaigns"). Yet even these pivotal Supreme Court cases caution that the "prohibition against political activity was not to be construed to prohibit political activity in nonpartisan elections" *Id*. at 562.

Moreover, the Eleventh Circuit Court of Appeals recently concluded that the individual's "right to candidacy" does enjoy some First Amendment protection. *See Randall*, 610 F.3d at 713 (equating the right to candidacy with the right to support a candidate). In *Randall*, a city worker filed a 42 U.S.C. § 1983 civil rights action against his employer after he was fired for running for chairman of his county board of commissioners. Although *Randall* did not decide what level of constitutional scrutiny is required when the government seeks to limit employees' right to seek elective office, the court held that government employees do enjoy *some* First Amendment protection for political candidacy. "Restricting candidacy," the court concluded, "must be the least restrictive means of furthering a 'vital government end.'" *See id*. at 711 (quoting *Elrod v. Burns*, 427 U.S. 347, 363 (1976)).

Based on the existing First Amendment balancing test, the Department must balance its interest in avoiding a potential appearance of misuse of an employee's Federal position against the individual's right to seek public office in a nonpartisan election. Accordingly, any [Bureau] policy on nonpartisan political activity should operate in a way that achieves legitimate governmental interests while preserving its employees' First Amendment rights. We do not believe the [Bureau's] blanket restriction prohibiting all [Employees] from running for or holding nonpartisan elective positions is narrowly tailored enough to pass the *Pickering* First Amendment balancing test for public employee speech.[17] It could be that restricting a particular [Employee] from running for or holding a certain elective office in other circumstances could be justifiable. But we do not believe the burden has been met here.

III. Additional Ethics Considerations

If your Department decides to permit this [Employee] to engage in nonpartisan political activity, she should be counseled about relevant conflicts of interest laws and the Standards of Conduct.[18] In addition to the restrictions discussed above, OGE notes briefly that there are certain other rules that could apply to this [Employee].

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[17] Moreover, a blanket restriction may be a prohibited personnel practice under 5 U.S.C. § 2302(b)(12), which generally provides that a federal employee who has authority over personnel actions may not take or fail to take a personnel action if taking or failing to take the action would violate any law, rule or regulation implementing or directly concerning merit systems principles at 5 U.S.C. § 2301.

[18] The Department has provided no information that would indicate whether the employee at issue is a "covered noncareer employee," as defined in 5 C.F.R. § 2636.303(a). Please note that additional restrictions on outside activities and outside earned income apply to certain covered noncareer employees.

As you know, a Federal employee is barred from acting as an agent or attorney, or otherwise representing someone before a Federal agency or court. *See* 18 U.S.C. §§ 203, 205. Prohibited representation means any communication with the intent to influence Government action, including but not limited to phone calls, meetings, and written letters. This restriction does not bar an employee from contacting a Federal agency on her own behalf, but it does bar contacts on behalf of a separate legal entity, such as a campaign or a city commission. Although § 205 would not bar the employee from providing "behind-the-scenes" assistance to the [city], the employee should be counseled to ensure that she does not represent a campaign committee or a local municipality before the Government in connection with any particular matter in which the United States is a party or has a direct and substantial interest. Section 205 not only would prohibit her from representing another entity in contacts with the [Bureau] or the Department, but would also prohibit her from making representations before any other Federal agency.

Political activities invoke certain other Standards of Conduct provisions. Campaign activities in particular trigger the teaching, speaking, and writing restrictions of 5 C.F.R. § 2635.807. For example, an employee is not allowed to use his official Government title or position to identify himself in connection with a speaking activity, except that an employee may include "his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details." *See* 5 C.F.R. § 2635.807(b). "The purpose of [this] section … is to ensure that [the] public is not misled as to whether the views expressed by an Executive Branch employee in uncompensated teaching, writing, or speaking are those of the employee or those of the Government." OGE Informal Advisory Letter 10 x 1 (March 19, 2010). When the employee at issue was running for City Commissioner, her candidate biography stated that she "works for [your Bureau]," [19] but she included other information about herself in her biography, as well. Based on the totality of the circumstances, we believe this is a permissible reference to the employee's vocation. Nonetheless, as a general matter, the employee and/or the ethics office should try to review any future candidate campaign materials to ensure that the employee's position and title are among several biographical details and whether an appropriate disclaimer would be prudent. *See* OGE Informal Advisory Letter 10 x 1.

As with any outside activity, the [Employee] should ensure that she does not use Federal buildings, vehicles, equipment, time, or personnel to accomplish otherwise permissible activities. 5 C.F.R. §§ 2635.704- 2635.705. In addition, any use of Government property in furtherance of an outside activity should fully comply with the Department's limited personal use policy. The employee should be aware that any use of Government property in violation of or in excess of the limited personal use policy could result in an appropriate disciplinary action. Finally, political fundraising (which was not presented as an issue here) could implicate Subpart B of the Standards of Conduct if she were to solicit or accept a gift of campaign funds from a prohibited source.

[19] *[Citation deleted.]*

CONCLUSION

OGE recognizes that an employee's outside activities, and political activities, in particular, can be a sensitive subject for both the employee and the agency. Therefore, OGE has endeavored not only to answer your question about 5 C.F.R. § 2635.802 but also to provide related guidance.

In conclusion, OGE generally will not question an agency's judgment regarding whether it may prohibit an employee from pursuing an outside activity because it creates the appearance of misuse of the employee's Federal position. However, because of the core constitutional values potentially at stake, we cannot opine authoritatively on whether the [Bureau] should continue its blanket prohibition on [Employees] running for or holding political office, including nonpartisan office. If your Department desires definitive advice on whether the [Bureau] may continue its policy of prohibiting [Bureau] employees, or applicants for positions with the [Bureau] from running for public office in nonpartisan elections or holding such offices, you should address that question to the Office of Legal Counsel.

I hope you find this guidance helpful. Please do not hesitate to contact Associate General Counsel Allison George or me if OGE may be of further assistance.