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Hatch Act Advisory Opinion Regarding Candidacy in  
Nominally Nonpartisan Elections

The U.S. Office of Special Counsel (OSC) has seen an increase in cases involving federal employees running for elected office. These cases potentially implicate 5 U.S.C. § 7323(a)(3), which prohibits employees from being candidates for election to a “partisan political office.” Notably, some elections designated as nonpartisan under state or local law may still be elections for a “partisan political office” as that term is defined in the Hatch Act.<sup>1</sup> OSC is issuing this advisory opinion to clarify when an election is for a partisan political office.

A “partisan political office” is one for which “any candidate is 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.”<sup>2</sup> Merit Systems Protection Board (MSPB) case law shows that the MSPB uses a two-part test, which we hereafter refer to as the *Broering* test,<sup>3</sup> to determine whether a candidate is representing a party in an election. Under the *Broering* test, a candidate is representing a party if the candidate (1) is endorsed by that party, or (2) directly or indirectly acts in concert with that party to promote the candidate’s campaign.<sup>4</sup> Note that this is an “either/or” test, meaning that if either part of the test is satisfied then that is sufficient to establish that a candidate is representing a party.

**A. The two-part *Broering* test**

*1. A candidate endorsed by a political party is representing that party.*

The first part of the *Broering* test is satisfied if any candidate in an election is endorsed by a party. In *Special Counsel v. Mahnke*, the respondent’s opponent in a local election was

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<sup>1</sup> If an election is designated as nonpartisan under state or local law, that creates only a presumption that the election is not for a partisan political office. That presumption may be rebutted by evidence showing that partisan politics actually entered the race. See, e.g., *Special Counsel v. Yoho*, 15 M.S.P.R. 409, 411 (1983).

<sup>2</sup> 5 U.S.C. § 7322(2).

<sup>3</sup> The name derives from *In re Broering*, a Civil Service Commission decision frequently cited by the MSPB when analyzing whether a candidate in a nominally nonpartisan election is running as representing a party. See, e.g., *Yoho*, 15 M.S.P.R. at 411.

<sup>4</sup> Note that the Hatch Act prohibits “activity by indirection,” or enlisting another person to engage in political activity that an employee is personally prohibited from engaging in. See *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 581-82 (1973).

endorsed by a party but the respondent was not.<sup>5</sup> The respondent argued that a party's endorsement was not, by itself, sufficient to show that a candidate was running as representing that party.<sup>6</sup> The MSPB disagreed, finding that "[t]hat issue was resolved in *In re Broering*, which was followed by the [MSPB] in *Yoho*. In *Broering*, the Civil Service Commission held that the partisan nature of an election may be shown by the fact that the candidates are nominated or *endorsed* by state or national political parties or the local political committee of such a State or national political party."<sup>7</sup> Even though the respondent employee was not endorsed by a party, the fact that one other candidate in the race received a party endorsement was sufficient for the MSPB to find that the election was for a partisan political office.

In *McEntee v. Merit Systems Protection Board*, the Federal Circuit similarly held that "the term 'represent' as used in the Hatch Act refers *not only to candidates who have received the formal endorsement of a major political party*, but also to candidates who act in concert with a major political party."<sup>8</sup> Inherent in the Federal Circuit's decision is that candidates who have been endorsed by a party are representing that party in an election.

From these cases, OSC derives the bright-line rule that if a candidate is endorsed by a party, that is sufficient to establish that the candidate is representing that party in an election, even where the election is nominally nonpartisan.

2. *A candidate is representing a political party if the candidate acts in concert with the party to promote the candidate's campaign.*

The second part of the *Broering* test is satisfied if any candidate in an election acts in concert with a party to promote the candidate's campaign. The leading case for this part of the test is *McEntee v. Merit Systems Protection Board*. *McEntee* involved an employee who was not endorsed by a party but who did work with senior party leaders to promote his campaign and whose campaign materials prominently associated himself with the party.<sup>9</sup>

The Federal Circuit affirmed the MSPB's finding that the employee ran as representing a party. The Federal Circuit further held that under the second part of the *Broering* test a candidate "is prohibited from engaging in speech and conduct that indicate he is acting in concert with a major political party."<sup>10</sup>

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<sup>5</sup> 54 M.S.P.R. 13, 16 (1992).

<sup>6</sup> *Id.* at 17.

<sup>7</sup> *Id.* (citing *Special Counsel v. Yoho*, 15 M.S.P.R. 409 (1983)) (emphasis in original). Although both *Mahnke* and *Yoho* involved the Hatch Act candidacy prohibition applicable to state or local government employees, not federal employees, the MSPB applies the same analysis in both types of cases. See *Special Counsel v. Seastrunk*, 28 M.S.P.R. 51, 53 (1985) (citing *Yoho* when analyzing whether a federal employee violated the candidacy prohibition); *Special Counsel v. Sims*, 20 M.S.P.R. 236, 239 (1984) (same).

<sup>8</sup> 404 F.3d 1320, 1334 (Fed. Cir. 2005).

<sup>9</sup> *Id.* at 1323.

<sup>10</sup> *Id.* at 1333-34.

Actions suggesting that an employee is acting in concert with a party include, but are not limited to, an employee: holding him- or herself out as having the party's political support by advertising that support in speeches, flyers, mailings, campaign websites, or social media accounts; soliciting or advertising endorsements from prominent party officials or party-affiliated organizations; accepting financial or other campaign-related assistance from a party, such as supplies, voter mailing lists, campaign volunteers, or use of party headquarters; appearing with a party at events promoting the employee's candidacy; and courting prospective voters on the basis that the employee will work to further a party's agenda.<sup>11</sup>

**B. Applicability of the *Broering* test to candidacy for local partisan political office in a designated locality**

There are certain "designated localities" throughout the United States in which federal employees may run as independent candidates for local partisan political office.<sup>12</sup> However, employees who run for local partisan political office in a designated locality must do so as independent candidates.<sup>13</sup> They may not run as representing a party.<sup>14</sup> The two-part *Broering* test described in the preceding sections is used by the MSPB to determine whether a candidate in an election is representing a party. Accordingly, employees in a designated locality who wish to run for local partisan political office generally may not (1) receive or advertise the endorsement of a party, or (2) directly or indirectly work in concert with a party to promote the employee's campaign.<sup>15</sup> Doing either would mean that the employee is representing a party in the election, and thus the employee's candidacy would not be independent as required by the Hatch Act.

OSC recommends that any employee interested in running for elected office contact OSC for information about how to ensure that their candidacy complies with the Hatch Act. Employees may contact OSC by email at [hatchact@osc.gov](mailto:hatchact@osc.gov) or by phone at (202) 804-7002.

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<sup>11</sup> See *id.* at 1323-24, 1334.

<sup>12</sup> See 5 C.F.R. § 733.103(b)(1).

<sup>13</sup> *Id.*

<sup>14</sup> See 5 C.F.R. § 733.104(b)(1).

<sup>15</sup> There may be some limited circumstances where the mere receipt of a party's endorsement, if an employee took no action to directly or indirectly seek that endorsement, does not result in a loss of the employee's independence. See *Campbell v. Merit Sys. Prot. Bd.*, 27 F.3d 1560, 1570-71 (Fed. Cir. 1994). OSC recommends that an employee who receives an unsolicited endorsement when running for local partisan political office in a designated locality should formally and publicly decline the endorsement (*e.g.*, post the declination on campaign website and social media account). The employee also should make it clear to the political party that, except for monetary contributions, the employee cannot accept party support, such as volunteers, voter data, materials or resources (*e.g.*, sample ballots, fliers, websites) advertising the employee as the party's endorsed candidate. Lastly, the employee should contact OSC for specific advice.