SPECIAL COUNSEL, Petitioner, v. RAYMOND F. GALLAGHER, ROBERT F. RUNG, KENNETH C. KRULY, and NIAGARA FRONTIER TRANSPORTATION AUTHORITY, Respondents.

DOCKET NUMBER HQ12068810012

MERIT SYSTEMS PROTECTION BOARD

44 M.S.P.R. 57; 1990 MSPB LEXIS 398

March 2, 1990

COUNSEL:
[**1]

Robert D. L'Heureux, Esquire, David J. Cortes, Esquire, and Ruth Robinson, Esquire, Washington, D.C. for the petitioner.

Edward C. Cosgrove, Esquire, Thomas P. Cleary, Esquire, and John T. Frizzell, Esquire, for the respondents.

OPINION:

[*59] BEFORE

Daniel R. Levinson, Chairman

Maria L. Johnson, Vice Chairman

FINAL DECISION AND ORDER

In this disciplinary proceeding, the Special Counsel has charged respondents Gallagher, Rung, and Kruly with violating provisions of the Hatch Act which apply to certain state and local government employees. n1 The complaint alleged that these respondents engaged in political activities prohibited by the Act while they were officers or employees of the Niagara Frontier Transportation Authority (NFTA) , an agency of the State of New York. n2 The Special Counsel charged that all three respondents violated *5 U.S.C. § 1502*(a)(2) by coercing other NFTA employees to make political contributions and that respondent Gallagher violated *5 U.S.C. § 1502*(a)(3) by being a candidate for elective office. n3 The case was assigned to the Board's Chief Administrative Law Judge (CALJ) for hearing and a recommended decision.

n1 The complaint also named other respondents, but their cases were resolved prior to the hearing by recommended decisions which the Board has previously adopted or adopts in decisions also issued today.

n2 The NFTA was named a respondent pursuant to *5 U.S.C. § 1504.* Although entitled to appear at the

hearing by *5 U.S.C. § 1505,* the NFTA has not entered an appearance in this case. "Respondent" hereafter refers to the individual respondents.

n3 Section 1502 (a) provides in pertinent part:

A State or local officer or employee may not --

. . .

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) be a candidate for elective office.

[**2]

The respondents presented a threshold challenge to the Act's coverage and the Board's jurisdiction by contending that neither they nor the employees whom they allegedly coerced were sufficiently involved with federally funded activities to be state officers or employees within the meaning of *5 U.S.C. § 1501*(4). The CALJ found, however, that the statutory definition was met. In a preliminary order issued February 9, 1989, Tab 59, the CALJ determined that the principal employment of the respondents and of those they allegedly coerced was in connection with activities financed in whole or in part by federal loans or grants.

Following a hearing on the charges, the CALJ issued a Recommended Decision (R.D.) which incorporated his jurisdictional ruling [*60] and found that each of the respondents violated section 1502(a)(2), that respondent Gallagher violated section 1502(a)(3), and that the penalty of removal was warranted in each case. The respondents have filed exceptions to the Recommended Decision, and the petitioner has responded. For the reasons set forth below, the Board hereby ADOPTS AS MODIFIED the CALJ's Recommended Decision and incorporates it into this final decision.

PART [**3] I: JURISDICTION

Although the respondents have not filed exceptions to the recommended finding of jurisdiction, the Board must nonetheless review the CALJ's jurisdictional ruling. It is well settled that the consent of the parties cannot serve to confer jurisdiction on the Board. *See, e.g., Pogarsky v. Department of the Treasury, 7 M.S.P.R. 196, 198 (1981).* The Board's jurisdiction is limited to those matters over which it has been given jurisdiction by statute or regulation, and it is our duty to ensure that the statute gives the Board authority to decide this case. *See Shaw v. Department of the Navy, 39 M.S.P.R. 586 (1989).*

The CALJ found that the Board has jurisdiction because all respondents and persons allegedly coerced by them were state officers or employees within the meaning of *5 U.S.C. § 1501*(4). n4 As noted above, the respondents contended that neither group was principally employed in connection with federally financed activities, as required by the statute. The respondents did not deny that between 1980 and 1986 the NFTA received approximately $ 500 million in federal grants, but they argued that most of the funds went to NFT METRO - a separate and distinct [**4] corporation from the NFTA, according to the respondents - and that none of the respondents and only one of the persons allegedly coerced worked for NFTA METRO. The respondents contended that any other federal grants went to capital projects outside the scope of their work or that the relationship between their jobs and the grants was *de minimis.* They also relied on allegations that the salaries of respondents Gallagher and Rung and of certain alleged coercees [*61] were not traceable to federal grants under the NFTA's cost allocation plan.

n4 *5 U.S.C. § 1501*(4) provides that for purposes of Chapter 15:

(4) "State or local officer or employee" means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include --

(A) an individual who exercises no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

[**5]

It has long been established that an officer or employee of a state agency is subject to the Hatch Act if, as a normal and foreseeable incident to his principal position or job, he performs duties in connection with an activity financed in whole or in part by federal funds. *In re Hutchins*, 2 P.A.R. 160, 164 (1944). n5 If the employee's duties meet this test, it is irrelevant whether federal funds were used to contribute directly to the employee's salary. *In re Hilburn*, 2 P.A.R. 701, 704-05 (1964). Applying this standard, the CALJ correctly found that the respondents and those they allegedly coerced were subject to the Act.

n5 The citation "P.A.R." refers to the Political Activity Reporter, which contains the decisions in Hatch Act cases of the Civil Service Commission, the Board's predecessor agency.

Respondent Gallagher was the Chairman of the Board of the NFTA during a period when the agency received substantial federal grants. As Chairman, Gallagher was chief executive officer responsible for the discharge of the agency's administrative functions. Petitioner's Exhibit (P.Ex.) 1. The respondents' own calculations showed that federal grants constituted between [**6] 5.9 and 45.6 percent of the NFTA's total funds during the years in question. Tab. 52, Exhibit C. The CALJ correctly found no reason to exclude grants designated for NFTA METRO or its construction division from the NFTA's federal funding. The NFTA's organizational charts clearly show that NFTA METRO is a part of the NFTA, and the Executive Director of the NFTA who reports to the Chairman and the Board is the President of METRO. P.Ex. 2, 23.

The CALJ also correctly found that respondents Kruly and Rung were covered. As NFTA Director of Administration and Finance, Kruly was responsible for liaison with federal officials on subsidies, P.Ex. 7, his position was funded in part by federal funds, P.Ex. 8, and he supervised employees whose salaries were funded in substantial part by federal grants, P.Ex. 5A-5F at 17. Respondent Rung was employed as Director of Operations and subsequently became Director of Revenue Development, both positions funded in part by federal funds. P.Ex. 8. As Director of Operations he was responsible for federally financed activities. P.Ex. 10. We also find, for the reasons stated by the CALJ, Tab 59 at 6-7, that the NFTA employees whom the respondents [**7] allegedly coerced were all "employees" within the meaning of the statute because they performed duties in connection with federally financed activities. Accordingly, we find the Board has jurisdiction over the Special Counsel's complaint. [*62]

PART II: THE MERITS

A. *Respondent Gallagher's Exceptions*

The Special Counsel brought two counts against respondent Gallagher: 1) that as Chairman of the NFTA he violated *5 U.S.C. § 1502*(a)(2) by condoning, encouraging, and participating in a plan implemented by his subordinates at NFTA which involved directly or indirectly coercing other NFTA employees to contribute money or labor for political purposes; and 2) that he violated *5 U.S.C. § 1502*(a)(3) by becoming the candidate of the Democratic Party in a partisan election for the Office of Comptroller of the State of New York during 1982. The CALJ found that preponderant evidence supported both charges. R.D. 15-19. Gallagher admitted the run for office. R.D. 18. The evidence of his involvement in the scheme to solicit NFTA employees on which the CALJ relied included Gallagher's

admission that he asked another NFTA official to solicit NFTA employees for contributions, his awareness [**8] that other senior officials were involved in the solicitations, and his providing the names of NFTA employees as potential donors to fundraisers. R.D. 16-18. Taking into account the serious nature of the offenses charged, the high-level position held by respondent Gallagher, and other relevant considerations, the CALJ concluded that his removal was warranted. R.D. 33-40.

Respondent Gallagher has raised a number of exceptions to the CALJ's conclusion that "Gallagher was fully aware of, condoned, and even participated in a plan to solicit NFTA employees for political purposes." R.D. 15-16. For the most part, rather than challenge the underlying fact findings, Gallagher disputes the CALJ's interpretation of the findings as support for this conclusion. Thus, the respondent contends that the CALJ is mistaken in relying on his providing the names of NFTA employees as potential contributors during a fundraising drive in support of Governor Cuomo. According to the respondent, this fact does not show he was aware that NFTA employees were being solicited by other NFTA employees because, he asserts, the list of names was provided to persons outside of the NFTA. Similarly, Gallagher objects [**9] to the CALJ's reliance on NFTA Executive Director Latona's testimony that Gallagher told him he had two NFTA employees acting as agents for ticket sales and that Gallagher rejected Latona's proposal to terminate respondent Rung for performance reasons because of Rung's key role in soliciting and collecting political contributions. The respondent urges that this testimony does not prove he was aware that these NFTA employees sold tickets to or solicited contributions from other NFTA employees.

However, the Recommended Decision's citation to the record shows that the list of potential donors to which the CALJ referred [*63] was supplied to Rocco Termini, the Manager of Purchasing for NFTA. n6 Hearing Transcript (Tr.) 354-57. Again, Latona's statements were made in the course of testimony that he served with Gallagher on a team selling tickets to support Governor Cuomo's reelection, with Gallagher being responsible for sales to NFTA employees. Tr. 596-98. The concern to retain respondent Rung at the NFTA which Gallagher expressed to Latona, Tr. 602, is understandable only if Rung's valued fundraising role was in solicitations *at the NFTA.* The extensive evidence that Rung did in fact [**10] solicit NFTA employees is discussed in Part II-C, *infra.*

n6 The Special Counsel's complaint charged Termini with 12 counts of coercing contributions from NFTA employees, but his case was resolved through a settlement in which he withdrew his answer and acknowledged that the allegations against him may be deemed admitted. Tab 88 at 2.

Another witness, Rosemarie Scamacca, also testified that she served with Gallagher on the fundraising committee for Cuomo's reelection and that Gallagher provided the names of NFTA employees as potential donors to be telephoned. Tr. 581-89. NFTA Purchasing Manager Termini told the New York State Commission of Investigation n7 that he solicited managerial employees of the NFTA for Cuomo in 1985 at Gallagher's request. P.Ex. 60 at 99, 101-04. Finally, Gallagher himself admitted to the State Commission of Investigation that he asked Termini to solicit contributions from NFTA employees for Cuomo during the time Gallagher was serving on a committee which sent out invitations and made follow-up calls to raise funds for the Governor. P.Ex. 58 at 33. n8

n7 The New York State Commission of Investigation conducted an investigation of political activities at the NFTA during 1986 and 1987 in which the sworn testimony of various NFTA officials was heard, in private and in public. Transcripts of parts of this testimony were admitted into evidence. Tr. 16-22.

n8 In light of this admission, Gallagher's objection that Termini's testimony before the State Commission to the same effect is unreliable hearsay lacks merit. Relevant hearsay is admissible in Board proceedings, its probative value depending on the circumstances of each case. *Borninkhof v. Department of Justice, 5 M.S.P.R. 77, 83 (1981).* We find that Termini's statement has probative value because it was given under oath and is consistent with Gallagher's admission and with the live testimony of other witnesses in this case. Tr. 208, 243, 354. *See Special Counsel v. Winfield, 18 M.S.P.R. 402, 407 (1983).*

[**11]

In his exceptions, respondent Gallagher does not deny that he asked Termini to solicit NFTA employees for contributions to the Cuomo campaign. Rather, he merely emphasizes, as he did in his testimony to the State Commission, that he did not ask Termini to solicit them at work. This qualification does not, of course, support the respondent's contention that he was unaware that NFTA employees were soliciting political contributions from other NFTA [*64] employees, nor does it affect the illegality of such solicitations under the Hatch Act. *See United Public Workers v. Mitchell, 330 U.S. 75, 94-95 (1947).* Gallagher also seeks unsuccessfully to downplay as "equivocal" his statements to the State Commission that Termini "may very well" have solicited NFTA employees for a fundraiser during the respondent's 1982 campaign for State Comptroller and that respondents Rung and Kruly "probably" solicited them for contributions of time or money during that campaign. P.Ex. 57 at 285-87. These statements may admit only what Gallagher assumed to be the case without conceding actual awareness on his part, but even as such they reveal that he condoned political solicitation of NFTA employees during [**12] his run for office. Moreover, Gallagher's statements may reveal more in view of other evidence concerning the respondent's involvement in solicitations at the NFTA for his 1982 campaign: testimony to the Commission by Termini that Gallagher asked him to help with a fundraising party, P.Ex. 60 at 89, and by respondent Kruly, the NFTA subordinate whom Gallagher chose to manage his 1982 campaign, that Gallagher probably knew he was soliciting NFTA employees to help out, P.Ex. 56 at 207-08.

In another exception, respondent Gallagher challenges the CALJ's finding that Termini invoked his name or title in soliciting funds from NFTA employees. We find that this finding is supported by the evidence cited by the CALJ, R.D. 17-18, the testimony of other solicited employees, Tr. 208, 243, 272, 876, 879, and the fact that Termini himself acknowledged to the State Commission that he did so, P.Ex. 60 at 103-04. The respondent also objects that, even if fundraisers did use his name, this fact does not prove they did so with his knowledge or consent. Respondent does not suggest why his subordinate Termini would have felt free to claim to other, senior-level employees that he was speaking "on [**13] behalf of the Chairman" if he were not in fact doing so. We find it unlikely that Termini solicited funds from NFTA employees on Gallagher's behalf without the respondent's awareness, particularly in light of the corroborating evidence of his involvement in the solicitations discussed above. We also agree with the CALJ that the evidence of Gallagher's involvement is further supported by the number of senior officials soliciting contributions from NFTA employees. R.D. 17. We doubt that their extensive efforts could have occurred without his awareness and approval. n9 Gallagher objects to the [*65] finding that solicitation of NFTA employees was "rampant" because the number of employees who testified was small in relation to the size of the total NFTA workforce. We think the evidence of repeated solicitations of these and other employees by their supervisors reveals a pattern of activity sufficiently widespread to provide support to the conclusion that the respondent knew of the solicitations and condoned them. *See* note 9, *supra. See also* P.Ex. 56 at 202-08.

n9 The CALJ sustained 3 counts of coercion against respondent Kruly, R.D. 23-27, and 11 against respondent Rung, R.D. 27-33, *see* Parts II-B and II-C, *infra.* Termini in effect admitted the 12 counts brought against him, *see* note 6, *supra,* and there was abundant testimony independently confirming his admission. *See* Tr. 125-26, 131, 174, 208-09, 234-35, 243-44, 306, 323, 354, 532, 540, 876, 879. Deputy Comptroller Marsteller admitted one count of coercing contributions. Tab. 92 at 2.

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The respondent raises objections to other findings as not supporting the CALJ's conclusion concerning his knowledge. He does not deny that he was informed that some of his employees had become "sick and tired" of being solicited or that he was upset at learning of their refusal to purchase tickets. R.D. 16. However, he contends that this evidence does not show he knew they were being solicited by other NFTA employees or that he took any action to pressure them to contribute. This contention is technically correct, but by itself this evidence belies his stated belief that employees' contributions were purely voluntary, P.Ex. 57 at 286, and, in conjunction with other evidence of his knowledge of solicitations by senior NFTA officials of their subordinates, it shows that the respondent was aware of the coercive nature of their activities. Furthermore, when informed of the employees' reluctance to contribute, Gallagher

suggested that their political sponsors should contact them to encourage contributions. P.Ex. 57 at 330-31; P. Ex. 58 at 34-35. The record shows that at least one reluctant NFTA contributor did in fact receive follow-up solicitation calls from the individual who [**15] recommended his hiring. Tr. 243-46, 253. n10

n10 Gallagher takes exception to other findings which are not necessary to the CALJ's conclusion that he knew about the solicitations. His exceptions to language disapproving his conduct and to the assessment of the evidence of his knowledge of the solicitations as "overwhelming" are clearly irrelevant. His exception to the finding that he was politically motivated in running the NFTA lacks merit because it makes no effort to respond to the uncontradicted testimony cited by the CALJ in support of his conclusion. We do agree, however, with the respondent's objection that his issuance of a memorandum to department heads against political solicitation at the NFTA did not necessarily make him aware of the solicitations occurring at the NFTA thereafter.

We agree with the CALJ that the evidence shows respondent was aware that NFTA officials were soliciting political contributions from subordinate NFTA employees, that he encouraged them in this activity, and that he participated by providing lists of NFTA employees as potential donors and by serving on a political fundraising committee which included NFTA employees among those it solicited. [**16] Moreover, we find that the respondent was aware that [*66] many of the NFTA employees solicited were unwilling contributors. Accordingly, we agree with the CALJ's recommendation and find that the respondent violated *5 U.S.C. § 1502*(a)(2), as charged. Gallagher admits that he was a candidate for partisan office as charged in count two. Therefore we also agree with the CALJ's recommendation as to this count and find that the respondent violated *5 U.S.C. § 1502*(a)(3).

The respondent's remaining exceptions which pertain to the CALJ's conclusion that his violations warrant his removal from office are discussed in Part III, *infra.*

B. *Respondent Kruly's Exceptions*

The Special Counsel charged respondent Kruly, the then NFTA Director of Administration and Finance, with three counts of violating section 1502(a)(2). In each count, Kruly was charged with coercing a lower-level employee to contribute work to a political cause. The CALJ found that preponderant evidence supported the charges, R.D. 19-23, and that Kruly's serious and willing violations warranted his removal, R.D. 40-41.

In his exceptions, respondent Kruly does not dispute the CALJ's findings that he requested NFTA [**17] employees Szuba, Connette, and Brunstad to help out at Erie County Democratic Headquarters by making phone calls, stuffing envelopes, or addressing invitations to political fundraisers. Kruly's contention is that his requests were not coercive in form or tone and that these employees voluntarily contributed their services. He contends that, because he asked, rather than told, his subordinates to help, any feelings of fear or coercion on their part were purely subjective and not attributable to him. Essentially, the respondent challenges the long-established rule that it is inherently coercive for a supervisor to ask a subordinate to contribute to a political cause, absent exculpating circumstances. *See Special Counsel v. Purnell, 37 M.S.P.R. 184, 195 (1988), aff'd sub nom. Fela v. United States,* No. C88-2553A (N.D. Oh., August 8, 1989); *In re Jarvis,* 2 P.A.R. 711, 719, *aff'd, 382 F.2d 339 (6th Cir. 1967); In re Stewart,* 2 P.A.R. 236, 241 (1945). Kruly's effort to distinguish his case from those in which this rule has been applied is unpersuasive. The employees whom the respondent solicited testified that they performed work for the Democratic Party, not because [**18] they wanted to, but because Kruly asked them to do so and they hoped to improve their standing if they agreed or feared the effect on their jobs if they declined. This testimony amply supports the CALJ's conclusion that the respondent's actions were coercive, and we adopt his recommended finding that the [*67] respondent violated section 1502(a)(2), as charged. n11

n11 Kruly takes exception to findings that he coerced these employees to work on behalf of Cuomo in 1985. No evidence was introduced in support of such findings, and, to the extent the Recommended Decision can be read to make them, we modify it.

Kruly's exceptions to the recommended finding that his removal is warranted are addressed in Part III, *infra.*

C. *Respondent Rung's Exceptions*

Respondent Rung, the Director of Revenue Development, formerly Director of Operations, is charged with 13 counts of violating section 1502(a)(2) by coercing four employees to make contributions of money to, or perform work for, political causes. The CALJ found that the Special Counsel proved 11 of the 13 counts, R.D. 23-33, and that respondent's removal from office is warranted, R.D. 41-43.

Rung takes exception to the findings [**19] of coercion on the ground that the CALJ mistakenly relied on the testimony of employees that they felt Rung had coerced their contributions. Without disputing their testimony, n12 Rung contends that the employees' own evidence concerning the circumstances of the alleged solicitations shows that they were not coerced because there was no testimony that he made any threats or promises in his conversations with them. The respondent asserts that these employees, after receiving solicitations from party headquarters in the mail, thereafter sought him out to discuss their concerns, and that payments were not made to him, but to party headquarters. According to Rung, he did not ask these employees to contribute, but simply discussed with them what he himself was contributing, and he asserts that the CALJ has erred by inferring coercion merely from the occurrence of a discussion concerning political contributions between a supervisor and a lower-graded employee. However, an examination of the testimony reveals that the respondent's exception is based on a complete mischaracterization of the evidence. n13

n12 Rung previously challenged the credibility of witnesses Brunstad, Galluzzi, and Hedrick, but he has not filed an exception to the CALJ's finding which credits their testimony concerning solicitations by the respondent and finds their account of the facts, and that of witness Stone, more believable than Rung's version, which was offered by affidavit only. R.D. 11-14, 23, 32-33.

n13 Like respondent Gallagher, *see* page 11-12, *supra*, Rung also objects that there were too few witnesses to support the finding that political solicitation was rampant at the NFTA. This finding is not necessary to support the conclusion that Rung violated section 1502(a)(2). We note, however, the record of numerous violations by the respondent which the following discussion clearly shows.

[**20]

[*68] Rose Ann Brunstad, an employee working under Rung's supervision, testified that Rung approached her, dropped on her desk a series of 10 tickets to a fashion show sponsored by the Democratic Party, and asked her to get a table of 10 together. Brunstad testified that she felt compelled to sell the tickets because of her subordinate relationship to the respondent. R.D. 23-24. Anthony Galluzzi, employed as an airport maintenance supervisor, testified that Rung, his second-level supervisor, approached him in June 1982, placed a fundraising ticket on his desk, and asked him how he felt about it. Galluzzi said he unwillingly made a $ 100 contribution to the Democratic Party because he feared losing his job or being demoted again. Galluzzi testified that, although he initially decided not to purchase $ 100 political fundraiser tickets he received in the mail in September and October of 1982, he subsequently did so after speaking to Rung. The respondent suggested the first time that purchasing the ticket could benefit Galluzzi, and after asking Galluzzi's intentions as to the other ticket, he indicated he should buy it in a threatening tone of voice. Thereafter, Galluzzi testified, [**21] Rung took him aside and asked how he felt about becoming a member of the Democratic Chairman's Club for $ 1000, thereby avoiding monthly solicitations. Although he felt financially unable to do so, Galluzzi said he made the contributions through a loan arrangement obtained for him by Rung because he felt intimidated by Rung's comment that "people were still taking shots" at his job. R.D. 24-27.

Larry Hedrick testified that in 1980 or 1981, when he was the NFTA airports manager and a subordinate of Rung, he made a $ 250 contribution to the Erie County Democratic Party because Rung advised him that it was expected and he should get on the team and support the Party. Hedrick testified that in 1982 he made contributions in varying amounts after Rung inquired whether he intended to respond to a mail solicitation or suggested he contribute, because

he felt it was required to continue his employment. In November of 1982, Hedrick testified, Rung approached him in his office with an installment loan application and pledge form and suggested he use them to make a $ 1000 contribution. Hedrick ultimately signed the application/pledge form at Rung's insistence, fearing he had to do so to [**22] retain his job. He testified that for the same reason he performed work on several occasions for Gallagher's campaign at Rung's request. R.D. 27-31. Robert Stone, the Buffalo airport manager, testified that Rung, his second-level supervisor, walked into his office and placed a $ 1000 installment loan application and pledge form on his desk. After consulting with colleagues who had received comparable applications and had decided [*69] to sign up, Stone signed because Rung was his boss and he feared for his job if he did not. R.D. 31-32.

As this summary of the testimony of the witnesses against Rung demonstrates, the respondent frequently initiated conversations concerning political contributions and asked or advised subordinate employees to contribute under circumstances where they reasonably felt coerced. n14 Rung's actions fall squarely under the long-standing rule, discussed in Part II-B, *supra*, that a person in authority violates the Hatch Act if he willfully permits his official influence to be a factor in inducing a subordinate to make a political contribution. *In re Jarvis*, 3 P.A.R. at 719. We agree with the CALJ and find, as to the counts which he sustained, that [**23] the respondent repeatedly engaged in coercive solicitation of subordinate employees in violation of section 1502(a)(2). n15

n14 Contrary to Rung's assertion that the evidence supporting the counts against him sustained by the CALJ was of the same kind as the evidence supporting the two counts which were not sustained, the allegedly coerced employees in the latter counts testified that they gave voluntarily and were not coerced by the respondent. R.D. 25, 31.

n15 Rung takes exception to the CALJ's giving any weight to Gallagher's statement to the State Commission of Investigation that Rung probably solicited NFTA employees during Gallagher's 1982 campaign. This sworn statement is extensively corroborated, as our summary of the evidence shows, but in view of the overwhelming weight of the evidence supporting the CALJ's finding, we need not determine how much probative weight Gallagher's statement deserves.

Respondent Rung's exceptions to the CALJ's determination that his removal is warranted are discussed in the following section.

III. EXCEPTIONS TO THE PENALTY

The statute requires the Board to determine whether a respondent's violation of section 1502 warrants removal [**24] from office. *5 U.S.C. § 1505*(2). When the Special Counsel proves a serious violation and thus establishes a prima facie case that the removal penalty is warranted, the burden of producing evidence that removal is not warranted shifts to the respondent. *Special Counsel v. Purnell, 37 M.S.P.R. at 195; In re Pfitzinger*, 2 P.A.R. 298, 302 (1948), *aff'd, 96 F. Supp. 1 (D.N.J. 1951).* The primary factors which are considered in determining whether removal is appropriate are those which bear on the seriousness of the violation: the nature of the offense and the extent of the employee's participation. Other factors which may be relevant include the employee's motive and intent, whether the employee received advice of counsel, whether the employee had ceased the activities, the political coloring of the activities, and the employee's past employment record. *Purnell, 37 M.S.P.R. at 200.*

[*70] In his Recommended Decision, the CALJ concluded that all three of the respondents should be removed. His conclusion was based primarily on the serious nature of their offenses. He found that the respondents committed numerous violations of section 1502(a)(2), the most pernicious of the [**25] activities prohibited by the Hatch Act, and that respondent Gallagher's active run for partisan office in violation of section 1502(a)(3) was a conspicuous and unequivocal violation of the Act. The Recommended Decision also cites as aggravating factors common to all three respondents the active role which they took in these violations, the high-level positions which they occupied, and the adverse publicity which resulted for the agency from their coercive solicitation of subordinates, an activity which bears

no resemblance to protected political expression.

We now address the respondents' exceptions to the recommended penalty of removal. The principal exception raised by each of the respondents is to the CALJ's determination that individuals in high-level positions have a heightened responsibility to be aware of and avoid violations of public laws and that as senior officials steeped in matters political the respondents were chargeable with knowledge of the Hatch Act. R.D. 34-35, 39, 41-42. In support of his exception, respondent Gallagher objects that his position as Chairman did not presume or require legal training, that information about the Hatch Act was not available at [**26] the NFTA, and that lack of evidence showing he sought legal advice on the propriety of his actions is irrelevant because he had no reason to believe his actions were improper. Respondent Kruly, who has not disclaimed all knowledge of the Hatch Act, asserts that the fact he did not receive prior advice as to what the Hatch Act specifically prohibits should have been considered in mitigation. Respondent Rung makes similar arguments.

It is true that ignorance of the Hatch Act may be relevant to the penalty, but it has long been established that such lack of knowledge, which is routinely claimed by respondents, cannot be determinative. *Pfitzinger,* 2 P.A.R. at 301-02 (1948). If failure to know about the Act is attributable to lack of ordinary care, knowledge may be imputed. *Purnell, 37 M.S.P.R. at 204; In re Hansen,* 3 P.A.R. 53, 57 (1970). The Civil Service Commission, the Board's predecessor, declined to consider lack of knowledge of the Hatch Act in mitigation where the respondent had had extensive involvement in politics and public service and therefore should have known enough to familiarize himself with the Act's restrictions. *In re Paris,* 2 P.A.R. 224, 232-33 [**27] (1944); *In re Dean,* 2 P.A.R. 615, 619 (1959); *Hansen,* 3 P.A.R. at 58. Most pertinent here is the case cited by the CALJ, *In re Palmore,* 3 P.A.R. 137 (1972), involving a high-level official who originated a plan to solicit contributions from [*71] subordinate employees. The Commission found that Palmore's removal was clearly indicated despite his claim he was not told of the Hatch Act's restrictions. *Id.* at 145.

The respondents are high-level officials of the NFTA, and none of them has taken exception to the CALJ's findings that they had extensive involvement in politics or public service over the years. The record shows that Gallagher was appointed Chairman of the NFTA by the Governor of New York in 1981 and that prior to that time he was active in politics for many years and held elected positions at the county and state level. P.Ex. 59 at 2-3. Both Rung and Kruly have held highlevel positions immediately below the Executive Director since coming to the NFTA in 1980. P.Ex. 2. Rung is now the NFTA Director of Revenue Development and was Director of Operations until 1984. He has acknowledged that he was in the public service for several years before coming to the [**28] NFTA and was politically active for several years thereafter. n16 Kruly was the NFTA Director of Administration and Finance until 1987, when he became General Manager of Administration. He earned a master's degree in public affairs and worked as a legislative assistant for the county legislature and for the Speaker of the New York State Assembly prior to employment by the NFTA. Kruly has also acknowledged his involvement in political activity "all through my adult life" and his management of several campaigns for political office, including Gallagher's campaign for State Comptroller in 1982. P.Ex. 56 at 194-95; Tr. 770-72.

n16 Rung did not testify, but in an affidavit which he submitted he stated that he held governmental positions from 1972 to 1978, was a Democratic Committeeman from 1980 to 1982 and attended fundraisers for Cuomo between 1983 and 1985. Tab 86. The evidence discussed in Part II-C, *supra,* reveals that Rung was very active in soliciting political contributions at the NFTA.

We find that, as individuals serving in such responsible public positions and with substantial experience in the political arena, the respondents should have been sufficiently aware [**29] of the Hatch Act to have inquired as to whether their activities were within the Act's prohibitions. We agree with the CALJ's finding, R.D. 38-39, that Gallagher, as the head of an agency which applied for and received federal grants and loans in substantial amounts, had an obligation to familiarize himself with the conditions under which such assistance was provided, conditions which were set out in the application forms and grant agreements which the agency was required to sign. *See* Tr. 324-28; P. Ex. 48, 61, 62. n17 We also find that [*72] respondents Kruly and Rung were under the same obligation in view of

their responsibilities with respect to federal funding and federally-funded activities as Director of Administration and Finance and Director of Operations, respectively. *See* P. Ex. 7, 10-11. n18 In addition, the inherently coercive nature of solicitation of political contributions from subordinate employees should have alerted the respondents to the possible impropriety of such conduct. There is no evidence, however, that the respondents sought advice concerning the legality of their solicitation efforts or showed any concern for NFTA employees' freedom of political expression. [**30] Accordingly, we agree with the CALJ that under the circumstances knowledge of the Hatch Act's proscriptions must be imputed to the respondents and that lack of actual knowledge does not serve to mitigate the penalty of removal.

n17 We note that respondent Gallagher circulated a memorandum to NFTA department heads in May 1983 informing them that solicitation of political contributions at the NFTA was a misdemeanor under New York State civil service law. P.Ex. 50. Gallagher's awareness of a state law proscribing political solicitation gave him an additional reason to inquire whether there might be comparable federal laws applicable to recipients of federal funding.

n18 Kruly's admitted general awareness of the Hatch Act gave him an additional reason to seek authoritative advice concerning the propriety of his solicitation efforts, as the CALJ found, R.D. 40.

Gallagher also takes exception to the CALJ's finding in support of the penalty that all the respondents took an active role in the violations of section 1502(a)(2), R.D. 34, because there was no evidence or charge that Gallagher himself solicited employees for contributions. However, the evidence shows the respondent [**31] took an active part in the efforts to obtain contributions by enlisting Termini in the solicitations, by providing the names of NFTA employees to fundraisers and taking responsibility for their contributions on a fundraising committee, by insisting that Rung be kept at the NFTA because of his value as a fundraiser, and by naming Kruly to be his campaign manager. Gallagher's objection to the finding that the respondents' coercive tactics cast the agency in an unfavorable light, R.D. 34, is without merit. The respondent contends there was no proof of harm to the agency from the adverse publicity it received, but the newspaper articles submitted by the Special Counsel clearly reveal that the respondents' activities were embarrassing to the agency. P.Ex. 54.

Gallagher also asserts that his lack of actual knowledge of the Hatch Act should serve to mitigate his removal for running for partisan office, conduct which, unlike coercing contributions from subordinates, would not by its very nature alert the one undertaking it to question its propriety. Since the respondent has also been found to have participated in a plan to coerce contributions from subordinates, we need not address this [**32] exception. However, we note that the Civil Service Commission found that lack of knowledge of the Act did not support mitigation of the removal penalty [*73] for the conspicuous violation of candidacy for partisan office in a case where the candidate, because of his long experience in public service, should have known the terms of the statute. *Dean*, 3 P.A.R. at 619. n19

n19 Because we have adopted the CALJ's decision imputing knowledge of the Hatch Act to the respondents, Gallagher's objection to the CALJ's finding which discredits Gallagher's denial that he was aware of the Hatch Act before 1987 is irrelevant. Respondent Rung's tardily submitted affidavit disclaiming knowledge of the Hatch Act before 1984, vol. XXI, tab 4, is also irrelevant for the same reason.

Respondent Kruly objects that the CALJ has given insufficient weight to mitigating factors in his case: the insignificance of his violations compared to those of the other respondents and of violators in other cases, the absence of any violations after 1982, and his outstanding work history. We agree with the CALJ that Kruly's repeated and pernicious violations - coercing low-level clerical workers to perform political [**33] work - were not insignificant, and we decline to mitigate on the basis of a comparison of his offenses with those of others. We also find that the other mitigating factors on which he relies are outweighed by the aggravating factors of his high rank, his experience in politics, and his failure to inquire about the Hatch Act's specific prohibitions when he concedes general awareness of the Act.

Finally, respondent Rung contends that differences in the treatment of federal and state employees under the Hatch Act deny him his constitutional right to due process and the equal protection of the laws. We cannot address this contention because the Board lacks authority to adjudicate the constitutionality of a statute. *Malone v. Department of Justice, 14 M.S.P.R. 403, 406 (1983).* We note, however, that the Supreme Court has rejected other constitutional challenges to the Hatch Act in its application to state employees. *See State of Oklahoma v. U.S. Civil Service Commission, 330 U.S. 127 (1946).*

Accordingly, we agree with the CALJ and find that the removal of each of the respondents from his position at the NFTA is warranted.

PART IV: ORDER AND NOTICE TO RESPONDENTS

If [**34] the Niagara Frontier Transportation Authority does not remove respondents Raymond Gallagher, Robert Rung, and Kenneth Kruly from any position still held at the NFTA, it shall be subject to the sanction of a withholding of federal funds, as provided in *5 U.S.C. § 1506.* Respondents Gallagher, Rung, and Kruly shall not be reemployed by any state or local agency of the State of New York for a period of eighteen months after the date of removal or, [*74] if they are no longer employed by the NFTA, after the date of this order, as provided by *5 U.S.C. § 1506.*

The Special Counsel is ORDERED to notify the Board within sixty (60) days of this final decision whether the respondents have been removed from their positions with the NFTA. It is further ORDERED that after the first submission the Special Counsel shall thereafter submit to the Board at three six-month intervals evidence concerning whether or not any of the respondents has been reemployed by any state or local agency of the State of New York in violation of this order.

Pursuant to *5 U.S.C. § 1508,* the respondents are hereby notified of the right to file a petition for review in the United States District Court for the district in which [**35] the respondent resides within thirty (30) days of the date of mailing of the Board's final decision. This is the final order of the Merit Systems Protection Board.

Legal Topics:

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