IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

GEORGE W. SWEENEY,	:	
	:	C.A. No: K10A-08-002 RBY
Appellant,	:	
	:	
v.	:	
	:	
DELAWARE DEPARTMENT OF TRANSPORTATION,	:	
	:	
	:	
Appellee.	:	

Submitted: March 1, 2012
Decided: May 25, 2012

Upon Consideration of Appellant's
Appeal from the
Merit Based Employee Relations Board
AFFIRMED

ORDER

Roy S. Shiels, Esq., Brown, Shiels & O'Brien, LLC, Dover, Delaware for Appellant.

Kevin R. Slattery, Esq., Department of Justice, Wilmington, Delaware for Appellee.

Young, J.

SUMMARY

George Sweeney (Appellant) was terminated from his employment with the Delaware Department of Transportation (DelDOT) for violating the Merit Based Employee Rules. Appellant's termination was affirmed by the Merit Based Employee Relations Board (the Board). Appellant appeals the Board's decision to this Court. The Board's decision is supported by substantial evidence and free from legal error. The decision below is **AFFIRMED**.

FACTS

George Sweeney (Appellant) was employed by the Delaware Department of Transportation (DelDOT) as an Information Technology Services Manager. Appellant was classified as a merit employee under 29 *Del. C.* § 5903. Pursuant to Merit Rule 15.3.4., as a merit employee, Appellant was subject to termination for violation of the Merit Rules. Pursuant to Merit Rule 15.3.2., as a merit employee, Appellant was prohibited from engaging in "political activity" during work hours or while engaged in the business of the State. Merit Rule 15.3.2. is codified as 29 *Del C.* § 5954, and is modeled after the Federal Hatch Act.

During his employment, Appellant was running for political office. Marti Dodson, DelDOT's Director of Technology and Support Services, discovered that Appellant made three posts on a website named Newszap.[1] The three posts consisted of the following:

"Regardless, this is about the election. My election is for Levy Court.

[1] Newszap is a public website consisting of numerous forums in which people discuss various matters of public concern. The website purports to facilitate "town hall" style discussion.

In my race, I have a standard greeting for almost everyone I can get to come to the door. Let me put it out here for everyone to debate. I am the only candidate for this office who has lived here in Kent County for 48 years. I believe that my historical perspective is an asset in that it is good to know where we have been when making land use decisions about where we are going. I believe in 'Infrastructure before Development,' which is a nice catch phrase that everyone is using, but I also believe that you and I as taxpayers should never have our taxes increased to pay for new infrastructure. When these developers bring in all these homes, they should be paying for roads, schools, fire company, and police improvements, not you and I as taxpayers. For examples, Camden residents just had their property taxes increased, a tax increase that will pay for infrastructure. I am the only candidate who stood up in opposition to the Camden Comprehensive Plan that annexed that land, while my opponent was in favor of it, stating that it was good that the town was annexing farmland. I suppose he also opposed the latest annexation of 170 acres into Camden, where they plan to put 1200 homes. My opponent was at that meeting and sat there and said nothing. My opponent seems to forget that he represents more Camden residents than just those few who are involved in special interests."

"The Kent County Forum has this entry from today. As a candidate, you spend months making sure everyone knows where the problem is, who is behind it. Most of it is an attempt to general conservation with people you are talking to. Then the ideas start to formulate, somewhere around 60 days before the election, based on all the input from thousands of people talked to."[2]

"Mr. Edmanson is self-serving and grandizing. He associates with special interests and thinks that when he is the lone vote that he stands

[2] This language was followed immediately by a re-posting of the previous post.

> out. Look at his campaign funding. Nearly $3,000 in donations from Development Special Interests, and it shows in his voting pattern. The residents of the 5th District need someone who understands where we have been; someone with a history in the district; someone who will represent them better on Levy Court, making new development come clean with funding for the infrastructure that is lagging so far behind."[3]

Dodson considered the posts to constitute "political activity." Each post was made on Appellant's State computer during work hours. As a result of the postings, Appellant was terminated pursuant to the Merit Rules and § 5954.

Appellant appealed his termination to the Merit Employee Relations Board (the Board). Appellant argued that his termination violated his First Amendment right to engage freely in political speech. In the alternative, Appellant argued that his speech was not, in fact, political.

The Board refused to entertain Appellant's First Amendment argument, opining that it does not have jurisdiction over constitutional claims. The Board did, however, consider Appellant's alternative argument that his internet postings did not constitute political speech. The Board applied a three-factor test, established by the Federal Office of Special Counsel, to determine if his speech constituted "political activity." As represented by the Board, the test considers: 1) the content and purpose of the message; 2) the number of recipients and the relationship they have with the speaker; and 3) whether the message was sent from a government building or by a government employee while on duty.

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[3] Mr. Edmanson was Appellant's opponent in the pending, contemporaneous election.

The Board found Appellant's postings to have been "political activity." Consequently, the Board found his discharge to have been appropriate under the Merit Rules and under § 5954.

STANDARD OF REVIEW

An appeal from an administrative board's final order to this Court is restricted to a determination of whether the Board's decision is supported by substantial evidence and free from legal error.[4] Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."[5] It is more than a scintilla but less than a preponderance of the evidence.[6] It is a low standard to affirm and a high standard to overturn. "The Court does not weigh the evidence, determine credibility or make its own factual findings."[7] Questions of law are reviewed *de novo*.[8]

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[4] 29 *Del. C.* § 10142(d); *Wilson v. Breakers Hotel & Suites*, 2010 WL 2562214 (Del. Super. June 24, 2010).

[5] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

[6] *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 567 F.Supp 110 (D.Del. 1983)).

[7] *Bd. of Educ. of Capital Sch. Dist. v. Johns*, 2002 WL 471175 (Del. Super. Mar. 27, 2002).

[8] *Am. Fed'n of State, County and Mun. Employees, Council 81 v. State Pub. Employees Relations Bd.*, 2011 WL 2176113 (Del. Super. May 25, 2011).

DISCUSSION

While opposing counsel cannot agree upon the number or form of issues specifically, from the Court's perspective, Appellant's arguments on appeal to this Court may be grouped into four categories. First, Appellant contends that the Board should have applied Merit Rule 12's "just cause" standard for termination in lieu of 29 *Del. C.* § 5954. Second, Appellant argues that his termination was a violation of his First Amendment Right to free speech. Third, Appellant argues that § 5954 is unconstitutionally vague and overbroad. Fourth, Appellant argues that the Board erred by applying the test delineated by the Federal Office of Special Counsel to determine if his internet postings were, in fact, "political activity."

In sections II and III, the Court will address the propriety of Appellant's constitutional claims. The Board was not required to address any such claim at the hearing.[9] "The interest in encouraging the use of administrative expertise is not implicated when a constitutional violation is alleged because such allegations are particularly suited to the expertise of the judiciary."[10] On appeal, the Court will consider these issues *de novo*.[11]

I. 29 *Del. C.* § 5954 Supersedes the Merit Rules.

Appellant contends that, in lieu of § 5954, the Board should have applied the

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[9] *Greene v. Dept. of Servs. to Children, Youth and Their Families*, 2009 WL 5176536 (Del. Super. Nov. 24, 2009).

[10] *Id*. (quoting *Adkins v. Rumsfeld*, 389 F. Supp. 2d 579 (D. Del. 2005)).

[11] *Id.*

"just cause" standard for discipline pursuant to the Merit Rules. According to Appellant, discipline of a Merit Employee who violates the State's "Acceptable Use Policy" is, generally, determined under a "just cause" standard.[12] By contrast, § 5954 mandates termination of a State employee who engages in "political activity" at work or while engaged in the business of the State. Appellant argues that, because he is alleged to have engaged in "political activity" on a State computer, he should be disciplined pursuant to the Merit Rules for having violated the "Acceptable Use Policy."

Pursuant to Merit Rule 1.2, in the event of a conflict, the Delaware Code supersedes the Merit Rules.[13] Insofar as § 5954 and Merit Rule 12 are inconsistent, § 5954 takes precedence. Although Appellant may have been disciplined under the Merit Rules had his internet postings not been considered "political activity," the Board was correct in applying § 5954, because his postings were considered "political activity."

II. 29 *Del. C.* § 5954 Does Not Infringe Upon Appellant's First Amendment Right to Free Speech.

Appellant argues that his campaign related postings were political speech and, as such, protected by the First Amendment. Appellant contends that the Court should apply a strict scrutiny test to determine whether or not the statute under which he was

[12] The State's "Acceptable Use Policy" describes permissible and non-permissible computer use by State employees.

[13] 19 Del. Admin. C. 3001-1.0.

terminated passes constitutional muster. To that extent, Appellant argues that § 5954 is not narrowly tailored to a compelling state interest.

"Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees."[14] In many cases, "courts have upheld broad viewpoint neutral bans on political participation by government employees while working or on government property because governments have a strong interest in maintaining a nonpartisan civil service."[15]

In cases where the State, as an employer, regulates the speech of its employees, the Court must balance the interests of the State with the interests of the allegedly aggrieved employee.[16] In cases such as the one at bar, the Court must weigh the State's interest in maintaining a nonpartisan civil service against Appellant's interest in engaging in political activity. "Neutral governmental employer policies limiting the political activity of their employees" have been found to comport with the *Pickering* balancing test where those policies are "applicable only to such employees while on duty or on the governmental employer's property."[17]

Appellant was terminated under § 5954. The statute mandates termination where an employee in the classified service engages in political activity "during the

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[14] *Waters v. Churchill*, 511 U.S. 661 (1994).

[15] *James v. Texas Collin County*, 535 F.3d 365 (5th Cir. 2008).

[16] *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County Ill.*, 391 U.S. 563 (1968).

[17] *James*, 535 F.3d at 380.

employee's hours of employment or while engaged in the business of the State."[18] Although the statute does impose a more stringent penalty than the State's "Acceptable Use Policy" due to the subject matter of the message, it does not violate Appellant's First Amendment rights. § 5954 is viewpoint neutral. It does not infringe upon Appellant's right to engage in political activity on his own time. Moreover, it protects the State's interest in maintaining a nonpartisan civil service. Similar statutes have been upheld in other jurisdictions, as will this one be here.[19]

III. 29 *Del. C.* § 5954 Is Not Unconstitutionally Vague Or Overbroad.

Appellant's second argument on appeal claims that § 5954 is unconstitutionally vague and overbroad.[20] § 5954 prohibits an employee in the classified service from engaging in "any political activity" or soliciting "any political contribution, assessment or subscription during the employee's hours of employment or while engaged in the business of the State." Specifically, Appellant contends that the term "political activity," as used in the statute, requires a person of reasonable intelligence to speculate as to its meaning. Further, Appellant contends that the term "political activity" encompasses protected speech impermissibly.

"Where a statute is challenged on the basis of overbreadth and

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[18] 29 *Del. C.* § 5954.

[19] *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *James*, 535 F.3d at 380.

[20] Appellant also challenges 29 *Del. C.* § 2509A for being vague and overbroad. The Board did not rely on that statute. Rather, Appellant argued that the language of that statute should be relied upon in determining the meaning of "political activity" under § 5954. The Board did not adopt Appellant's construction. The Board did not rely upon § 2509A in the order. Therefore, the Court will not address Appellant's challenge of the statute on appeal.

> vagueness, 'a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail.' If the statute implicates no constitutionally protected conduct, the challenge should be upheld 'only if the enactment is impermissibly vague in all of its applications. A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague,' if a due process violation is implicated."[21] "A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated behavior is forbidden by the statute, or if it encourages arbitrary or erratic enforcement."[22]

§ 5954 is not overbroad. The statute prohibits "political activity" by a State employee while at work. Such a prohibition is permissible. The statute does not prohibit "political activity" beyond that scope. Accordingly, the statute does not implicate protected speech. It is not, therefore, overbroad.

Similarly, § 5954 is not impermissibly vague. The statute affords a person of reasonable intelligence fair notice of the conduct that it seeks to regulate. Although the term "political activity" is subject to some degree of interpretation, it is specific enough to satisfy a challenge for vagueness. Moreover, the statute prohibits solicitation of contributions, assessments and subscriptions specifically. These examples are geared towards preventing campaign activity during working hours. Campaign activity is precisely the activity in which Appellant engaged.

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[21] *State v. Baker*, 720 A.2d 1139 (Del. 1998) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)).

[22] *Id.* (citing *Sanders v. State*, 585 A.2d 117 (Del. 1990)).

IV. The Board's Application Of The Office of Special Counsel's Three-Factor Test To Identify "Political Activity" Under 29 *Del. C.* § 5954 Was Appropriate.

Appellant's final argument is that the Board erred by applying the Federal Office of Special Counsel's three-factor test in determining that the posts he made on the internet did, in fact, constitute "political activity." Rather, Appellant suggests that the Board should have engaged in an effort of statutory interpretation to deduce legislative intent.

§ 5954 is modeled after the Federal Hatch Act.[23] The Office of Special Counsel has applied the instant three-factor test to the Act on the Federal Level. Without the guidance of any Delaware precedent, the Board considered following the Federal model to be the best course of action. This Court agrees.

Moreover, the test that the Board applied addresses the relevant considerations. The test considers: 1) whether the content of the message is intended to encourage the support of a particular political party or candidate; 2) the extent of the audience; and 3) whether the message was sent from a government building.

The factors address the activities that the Hatch Act, and Delaware's version thereof, intend to present. § 5954 seeks to preserve a nonpartisan civil service. The test factors address that issue specifically. Accordingly, the Board did not commit legal error in adopting the Office of Special Counsel's test.

[23] 5 U.S.C. § 7324.

CONCLUSION

_____The decision below is **AFFIRMED**.

_____**SO ORDERED**.

/s/ Robert B. Young
J.

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