STATEMENT OF

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BEFORE THE

OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE AND THE DISTRICT OF COLUMBIA SUBCOMMITTEE

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

ON

THE SCOPE AND ENFORCEMENT OF THE HATCH ACT

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Mr. Chairman and Members of the Committee: my name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE), which represents over 600,000 federal government workers. In 1993, AFGE was a strong supporter of modifications to the Hatch Act that clarified ambiguities in the law, allowed federal workers to become more politically active during off duty hours, and set standards that guarantee a strictly apolitical civil service.

AFGE continues to believe that appropriate application of the Hatch Act by the Office of Special Counsel (OSC) helps to preserve a politically neutral workplace while balancing the First Amendment rights of government workers. At the same time, AFGE strongly urges Congress to exert its oversight role during the next election cycle to monitor OSC Hatch Act investigations against federal workers for inconsistencies, disproportionate penalties for minor infractions and retaliation against union officials.

The Hatch Act was passed in 1939 with the intention of ensuring that the federal civil service would be politically neutral and the spoils system would be eliminated. On its face, the Hatch Act and its amendments establish three limitations on the political activities of Federal workers:

- Federal and postal employees cannot engage in political activity while on duty, in any building where the business of the government is being conducted, while wearing a uniform or official insignia identifying them as public employees, or while using a government vehicle.
- Federal employees are not permitted to run for partisan political office at any level.
- Federal employees are not allowed to solicit, accept or receive political contributions from the general public, a superior, or while inside a government building.

It is also important to note that the Hatch Act also serves to protect civic participation of federal workers, including the right to:

- Register and vote for the candidate of their choice,
- Run as candidates for public offices in nonpartisan elections,
- Assist in voter registration drives,
- Contribute money to, and engage in, fundraising for political organizations or candidates,
- Attend political fundraising functions, and
- Express opinions about candidates and issues.

The provisions of the Hatch Act appear to draw fairly bright-line distinctions between what activities are and are not permissible by federal employees. While the government has a compelling or overriding reason to

require that federal workers not politicize the workplace, the Supreme Court has held that actions to restrict the right of government employees to be politically active must be limited and must rest upon a clear showing by the government of a need for restriction, and that such restrictions be clearly defined and narrowly tailored to address only that particular need. Federal workers have a right to participate in partisan political activities fully and freely, except when that participation impacts the integrity of a competitive civil service free from political influences.

AFGE does have concerns about inconsistencies in interpretation of the Hatch Act. The drafters of the Hatch Act and its 1993 amendments never anticipated the extent to which technology would change how workers communicate with each other. Wide access to e-mail, the pervasiveness of information available via the internet, and instant and text messaging have profoundly broadened the ability of one worker to communicate with many individuals with a few strokes of the keypad. From the ease of sending attachments via e-mail to the almost instantaneous posting of videos on YouTube -- the scope and quantity of information readily available was almost beyond comprehension only a few years ago. Simply put, people, including federal employees, have much more to talk about than in 1939 or 1993, and a lot more people with whom they can share their thoughts.

In light of changes in communications technology, and to the public discourse as a whole, AFGE would like to bring to the attention of the Subcommittee issues where the application of the Hatch Act appears to lag behind the reality of the present-day workplace and caused an apparent heavy-handedness by the OSC in meting out discipline with little or no regard to the extent or influence of the alleged Hatch Act infraction by the federal employee.

1. **Computer Communications** – Recently AFGE members have faced OSC investigations that were extensive, time-consuming, and chilling based on allegations of relatively minor e-mail situations that run afoul of the current OSC's broad interpretation of the Hatch Act. In these situations, employees forwarded e-mails (often because they were requested to do so by the original sender of the e-mail) that included satire or jokes about political figures, announcements of events with political undertones or e-mails that are only political in nature upon closer review than the worker's initial cursory read. Political jokes or satire are sometimes only apparent when the reader reaches the tagline at the end of the e-mail, almost like a footnote. Often these e-mails are not shared with the entire workplace, but instead sent to a smaller group with whom the employee converses regularly. Prior to the advent of computer communications, the employee might have shared the information with a small group of colleagues around the proverbial "water cooler" or during coffee breaks. The e-mails are forwarded because the worker simply wanted to share a funny joke. Without much thought,

workers send these communications to colleagues by e-mail with a single click of the mouse. The mere act of forwarding an e-mail is not adopting the ideology of the e-mail's originator.

While AFGE does not condone political activity at the federal workplace in violation of the Hatch Act, we do believe that the forwarding of e-mail with political undertones to a small group of colleagues is better addressed through the agency's computer usage policy than an OSC official investigation. For example, the Department of Veterans Affairs' Automated Information Systems Security Policy clearly states that "electronic mail users must exercise common sense, judgment, and propriety in the use of this government resource." The VA Automated Information Systems Security Policy also includes a table of offenses and progressive discipline depending on the nature, scope, and occurrence of the offense. As such, the behavior would be scrutinized under the normal Douglas factors (Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981) to determine how seriously the employee's misbehavior affects the mission of the agency, which should result in a penalty for the misbehavior most appropriate to the situation. The Douglas factors include the nature and seriousness of the offense, whether the offense was intentional or inadvertent, the employee's past disciplinary record, and the potential for the employee's rehabilitation (such as a warning or counseling on the agency's computer policy). AFGE believes this is a much more appropriate disciplinary process when agency computer policies are violated instead of a lengthy OSC investigation.

During previous administrations, the OSC conceded that relatively minor Hatch Act offenses should be considered "water cooler speech", and issued an advisory which was removed from the OSC website by Special Counsel Scott Bloch. We believe the advisory offered a process more in line with expected workplace discourse. Constant misuse of e-mail after counseling, warning, or other progressive discipline might require OSC involvement. Currently, the OSC can and does take action on a first event, even to a limited distribution. A one-time mistake by an employee with little or no impact on the workplace should not be punished in the same manner as partisan campaigning at the federal worksite.

2. **Penalties** – A consideration of mitigating and aggravating factors such as those set forth in Douglas is necessary to determine the degree of penalty most appropriate for Hatch Act violations. The presumptive penalty for Hatch Act violations is termination, with 30 days suspension as the minimum penalty. Recommended settlements between the OSC and the employee are automatically appealed to the Merit Systems Protection Board (the Board), even if the parties are in agreement. The

Board must agree unanimously to the settlement—even one dissent from a Board member will result in the worker's termination. The only cases that are not subject to an automatic appeal to the Board are those where the Administrative Law Judge found that the worker should be terminated.

With the possibility of presumed termination hanging over federal employees who are the target of Hatch Act investigations, many federal workers agree to a penalty far more severe than the offense, but one where they will not lose their jobs. Under previous administrations, the OSC followed a version of progressive discipline short of seeking long suspensions or outright termination. However, the current OSC policy is that the Hatch Act does not provide for a warning to workers, or an opportunity to cease and desist from a violation before seeking the harshest penalties. The resources spent by the OSC in pursuing harsh penalties are better applied to far more serious cases where there was a clear intent and pattern of abusing the worker's federal employment for partisan political purposes.

3. **Statute of Limitations** – Unlike most federal workplace laws, the Hatch Act has no statute of limitations or even a deadline by which the OSC must file charges. In October of 2007, AFGE is representing workers—many of them union officials--in OSC investigations that date back to the 2004 election cycle. The lack of a deadline or statute of limitations for filing charges provides the opportunity for workers to be targeted for retaliation because of their political or union affiliation. To prevent this type of retaliation, the establishment of a statute of limitations of two years (which covers an election cycle) is more appropriate to address partisan political activities on the job.

Conclusion

It is normal for workers to discuss the nature and circumstances of their employment. When the employer is the federal government, it is only natural that workplace discussions will include some discourse on political efforts to close or move facilities or increase or decrease an agency's budget because they directly impact the worker's employment. Workers will seek information about their bosses—the President and Congress—and engage in discussions about working conditions with colleagues in the workplace. Congress should fully utilize its oversight role to monitor Hatch Act prosecutions so that federal employees can have free discourse about their jobs and the political decisions that affect them, while deterring those few employees who intentionally seek to use their civil service positions for partisan political purposes.

That concludes my statement. I will be happy to answer any questions.