

THE RUTHERFORD INSTITUTE

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JOHN W. WHITEHEAD

Founder and President

October 12, 2016

Mr. Rick Natale
National Ground Intelligence Center
Building 4465
2055 Boulders Road
Charlottesville, VA 22911-8318
rick.j.natale.civ@mail.mil

VIA CERTIFIED MAIL AND ELECTRONIC MAIL

Re: Michael Sienda / First Amendment Activity at National Ground Intelligence Center

Dear Mr. Natale:

The Rutherford Institute¹ has been contacted by Michael Sienda regarding directives he has received from you to remove political messages he has displayed on personal vehicles driven to his employment at the National Ground Intelligence Center (NGIC) and parked at a lot across Boulder Road from NGIC buildings. It is our belief that the directives are not required by the Hatch Act, 5 U.S.C. §§ 7321 et seq., and infringe upon his right to freedom of expression guaranteed by the First Amendment to the United States Constitution. On his behalf and for the reasons set forth below, we demand that you rescind the directives and allow Mr. Sienda to display the signs on his personal vehicles.

According to Mr. Sienda, in early September 2016 he drove a box truck to his employment and parked it in the employee parking lot on the north side of Boulders Road. The van had displayed on each side signs reading "Trump 2016 Pence" that were approximately three feet tall and 5 feet wide. Soon thereafter, you contacted Mr. Sienda and informed him that he must either remove the political signs from the vehicle or not park the vehicle on government property asserting that the display of the signs violated the Hatch Act. Mr. Sienda complied with the directive. More recently, Mr. Sienda drove his personal Jeep to his employment with a sign

¹ The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Our mission is to educate the public on civil rights issues and to provide free legal representation to those whose fundamental liberties have been threatened or infringed.

on the rear window which read “Trump 2016: Make America Great Again”, and parked it in a NGIC lot. On October 5, you sent Mr. Sienda an email directing him not to park the vehicle on government property until an opinion could be obtained from the Office of Special Counsel.

We believe the directives are an overextension of the restrictions of the Hatch Act and result in an infringement of Mr. Sienda’s First Amendment rights. While the Hatch Act restricts the political activities of federal government employees, the guiding principle for applying the Act is set forth in the first section of the Act as follows: “It is the policy of Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation.” 5 U.S.C. § 7321. Far from prohibiting the display of signs on personal vehicles federal employees drive to work, the Hatch Act regulations affirmatively provide that “[a]n employee may place a bumper sticker on his or her privately owned vehicle and park his or her vehicle in a parking lot of an agency or instrumentality of the United States Government[.]” 5 C.F.R. § 734.306. The applicable Hatch Act regulations do not expressly prohibit bumper stickers or other signs on personal vehicles over a certain size.

On the other hand, in February 2011, the Office of Special Counsel issued an advisory opinion, a copy of which is attached,² stating expressly that political bumper stickers and signs may be displayed by federal employees on their vehicles while parked at federal facilities regardless of the size of the sign. Adhering to a previous OSC advisory opinion, the current Chief of the Hatch Act Unit³ wrote “a federal employee may place a political sign, poster or bumper sticker, regardless of size, on his personal vehicle and park it in a federal parking lot.” The same advisory opinion also points out that it is not a violation of the Hatch Act for an employee to have more than one bumper sticker or other partisan materials displayed on a vehicle.

Thus, the directives Mr. Sienda has received to remove the signs expressing support for candidates for the upcoming election are not required by the Hatch Act either because the signs are too large or because of the number of signs he displays. Although the OSC opinions “caution” employees against displaying partisan materials in a way that makes the vehicle appear to be a “campaign mobile,” the OSC has provided no guidance on what would give such an appearance and has not indicated that displays such as those on Mr. Sienda’s vehicle are prohibited. Because Mr. Sienda’s displays are not “expressly prohibited” by the Hatch Act or its implementing regulations, he has the constitutional right to participate in the political process by maintaining these displays under 5 U.S.C. § 7321. In any event, any restriction on giving the appearance of a “campaign mobile” does not justify prohibiting him from displaying any of his signs on his car while parked at a NGIC lot as has been done in the directives he has been given.

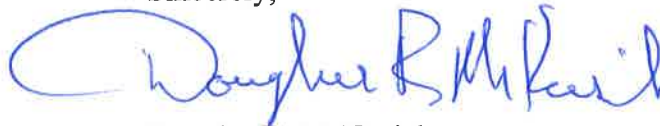
² This document is also available at <http://www.iecjjournal.org/files/2011-osc-bumper-sticker-opinion.pdf>. The opinion was rendered in response to a request for an advisory opinion, which provides context and can be found at <http://www.iecjjournal.org/files/2011-osc-petition-for-reulmaking-bumberstickers.pdf>.

³ Ana Galindo-Marrone is listed as the current Chief of the Hatch Act Unit at the website of the Office of Special Counsel. See <https://osc.gov/pages/about.aspx>

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As such, Mr. Sienda is within his rights to post signs endorsing the Trump-Pence ticket on his personal vehicles while parked in NGIC lots and this display is not forbidden, much less “expressly prohibited” by the Hatch Act. The directives prohibiting him from doing so improperly restrain his exercise of First Amendment rights and should be rescinded. In order that we may advise Mr. Sienda of his options for rectifying this situation quickly, we will need a response to this letter on or before the close of business on October 19, 2016.

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas R. McKusick". The signature is fluid and cursive, with a large initial "D" and "M".

Douglas R. McKusick
Senior Staff Attorney

Cc: Timothy Coffield, Esq.
Mike Sienda

Enc.



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

February 8, 2011

Mr. Sean Croston
7842 Muirfield Court
Potomac, MD 20854

Re: Petition for Rulemaking

Dear Mr. Croston:

This letter is in response to your request for the Office of Special Counsel (OSC) to issue a public advisory opinion or interpretive rule concerning OSC's guidance regarding federal employees' ability to place political bumper stickers or other signs on their privately owned vehicles and park the vehicles in a federal parking lot or facility. OSC is authorized to investigate and prosecute violations of the Hatch Act, and to issue advisory opinions under the Act. 5 U.S.C. §§ 1215(a), 1212(f). However, the authority to promulgate regulations regarding the Hatch Act is vested in the Office of Personnel Management. 5 U.S.C. § 1103(a)(5). Although OSC does not have the authority to promulgate regulations regarding the Hatch Act, we are issuing this letter in an effort to address your concerns and clarify our position on the issue you raised.

We have carefully reviewed the concerns you raised in your request. You believe that OSC has issued inconsistent guidance regarding federal employees' ability to place political bumper stickers or other political signs on their privately owned vehicles and park the vehicles in a federal parking lot. You believe that OSC's guidance on this issue has become increasingly restrictive and you seek a public advisory opinion or interpretive rule clarifying OSC's position.

In your request, you cite to three advisory opinions OSC issued addressing the matter outlined above. The first example is an advisory opinion issued by OSC on October 30, 1996, the second example is an advisory opinion issued by OSC on October 31, 2008, and the third example is an email opinion issued by OSC on May 19, 2010, that was issued in response to an inquiry you submitted to the Hatch Act inbox.

After reviewing your concerns, we have determined that the wording of the email advisory opinion issued on May 19, 2010, does not accurately describe OSC's position on this issue. The wording of the email advisory opinion incorrectly suggests that OSC is applying a stricter standard than was previously applied in the October 30, 1996, and October 31, 2008, advisory opinions. However, this is not the case.

OSC's position regarding federal employees' ability to place partisan political signs or bumper stickers on their private vehicles is accurately stated in the advisory opinions issued on October 30, 1996, and October 31, 2008. OSC advises that the Hatch Act does not prohibit a federal employee from placing a partisan political sign or bumper sticker on his or her privately owned vehicle and

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parking it in a federal parking lot or facility. This position is in accordance with the applicable regulation, 5 C.F.R. § 734.306, Example 7, which states that a federal employee may have a bumper sticker on his private vehicle and parks the vehicle in a federal parking lot. In addition, OSC advises that a federal employee would not violate the Hatch Act if he has one bumper sticker for candidate A and another for candidate B on his private vehicle. However, OSC's position has always been, and continues to be, that federal employees must not display partisan political materials, including bumper stickers, in a way that makes the vehicle appear to be a campaign mobile.

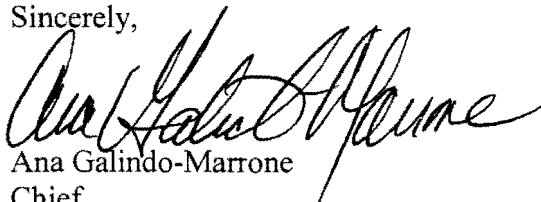
As stated above, we have determined that the wording of the email advisory opinion issued on May 19, 2010, did not accurately describe OSC's position on this issue. However, the advisory opinions issued on October 30, 1996, and October 31, 2008, correctly articulate OSC's position and are not inconsistent either with each other or with the applicable regulation, 5 C.F.R. § 734.306, Example 7. The wording of the two advisory opinions differs only because the questions posed focused on different aspects of the issue.

The advisory opinion issued on October 30, 1996, was in response to a question regarding whether a federal employee can place a political sign, regardless of size, on his private vehicle and park the vehicle in a federal lot. OSC advised that such activity is not prohibited by the Hatch Act and that a federal employee may place a political sign, poster or bumper sticker, regardless of size, on his personal vehicle and park it in a federal parking lot.

The advisory opinion issued on October 31, 2008, was in response to a question regarding whether a federal employee may have one bumper sticker in support of one candidate and another bumper sticker in support of a different candidate on his personal vehicle, and park the vehicle in a federal parking lot. OSC advised that such activity would not violate the Hatch Act, but cautions employees against displaying partisan materials or bumper stickers in such a way that makes the vehicle appear to be a campaign mobile. Again, this opinion addresses a different issue than the advisory opinion issued on October 30, 1996, (which focused on the size of the partisan political material), but is not inconsistent with the advice given in that opinion.

We hope that this response addresses your concerns and serves to clarify our position on this issue. Please contact OSC Attorney Terilyn Dentine at (313) 226-4441 ext. 6230 if you have any questions regarding this matter.

Sincerely,



Ana Galindo-Marrone
Chief
Hatch Act Unit