




HDLI's 2018 SPRING LEGAL CONFERENCE

***Limitations on the Activities of PHAs and Their
Employees -Election Time Political Activities,
Leasing of PHA Spaces and Structures, & More!
Panel Discussion***

ELECTION TIME ACTIVITIES MATERIALS

***Prepared by Lisa L. Walker
HDLI CEO & General Counsel***

May 18, 2018




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LEGAL CLE CONFERENCE**

***Limitations on the Activities of
PHAs And Their Employees During
Election Time Political Activities***

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Election Do's & Don'ts


- › An employee is legally entitled to partake in almost any political activity on his or her own time.
- › No law prohibits an employee from running for or holding office in non-partisan elections, electioneering, campaigning, or contributing money, as long as these activities are done outside of the workplace and without any sanctioning by the employer.



Election Do's & Don'ts

- › Federal law, known as the Hatch Act, limits the extent to which most PHA officers and employees can participate in a variety of partisan political activities.
- › First Amendment rights (freedom of speech, freedom of association and freedom of expression). *States thru Fourteen Amendment
- › Your local and/or state law also may have similar or even more protective restrictions.

Hatch Act, 5 U.S.C. §§ 7321-7326



Election Do's & Don'ts

- ▶ The Hatch Act is applicable to your employees "whose principal employment is in connection with an activity financed in whole or in part by loans or grants made by the United States or a Federal agency."
- ▶ Thus, the Hatch Act applies to employees who are involved with public housing, Section 8, and other federal programs as their "principal" employment and whose salaries are paid in whole or in part by those programs.
- ▶ Applies to federal, state, and local employees.



Election Do's & Don'ts

- ▶ Generally, unless state or local law states otherwise, the Hatch Act does NOT apply to PHA Commissioners.



Election Do's & Don'ts

- ▶ Partisan activities are those that are influenced by, or affiliated with, or supportive of, the interest or policies of any political party or candidate. Non-partisan activities are not prohibited by the Act.
- ▶ So, if an employee wants to participate in a nonpartisan election, even run for office on company time, it is not prohibited by the Act - although it might be prohibited by PHA policy.




Election Don'ts

› The Hatch Act prohibits three specific activities:


- 1) Being a candidate for political office in a partisan election
- 2) Using official authority or influence for the purpose of interfering with or affecting the results of an election or a nomination for office, and
- 3) Directly or indirectly coercing contributions from subordinates in support of a political party of candidate.

Your PHAs activities must be closely scrutinized under these factors.




Partisan Office

▶ An election is partisan if any candidate is to be nominated or elected as representing a political party, for example, the Democratic or Republican Party.



Partisan Office


› All other employees whose salaries are not paid by federal funds, even if they are otherwise covered by Hatch Act restrictions, are free under the Hatch Act to run for partisan office.



SPEECH FORUMS

Speech Forums (1st Amend)

- ▶ State and local bodies may enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication
- ▶ The availability of alternative channels of communication is a factor bearing upon the reasonableness of a government's restriction




Speech Forums (1st Amend)

Forum #1 - Quintessential public areas

- ▶ In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed

Public streets and parks



Speech Forums (1st Amend)

Forum #1 - Quintessential public areas

- › In these quintessential public forums, the government may not prohibit all communicative activity.
- › For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.



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Speech Forums (1st Amend)

Forum #2 - State-created communication areas

- › Public property which the state has opened for use by the public as a place for expressive activity.
- › The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.



Speech Forums (1st Amend)

Forum #2 – State-created communication areas

- › Public property which the state has opened for use by the public as a place for expressive activity.
- › The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.
- › Same standards as apply in a traditional public forum



Speech Forums (1st Amend)

Forum #3 – Nonpublic areas

- › Not open to public; private uses only
- › State and local bodies may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.
- › Body, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.



Speech Forums (1st Amend)

Forum #3 – Nonpublic areas

- › State and local bodies may restrict speech in nonpublic areas only in such a manner that is reasonable and viewpoint-neutral



Speech Forums (1st Amend)

Forum #3 – Nonpublic areas

- ▶ A government-owned, public housing authority complex which is dedicated for residential use by eligible low income families is a "non-public forum" for purposes of the First Amendment

Lavean v. Randall, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005); *De La O v. Housing Authority of the City of El Paso, Texas*, 417 F.3d 495, 503 (5th Cir. 2005); *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994); *Crowder v. Housing Authority*, 990 F.2d 586, 591 (11th Cir. 1993); *Daily v. New York Housing Authority*, 221 F. Supp.2d 390, 399 (S.D.N.Y. 2002)



Election Do's

- ▶ Employees may:
 - Register and vote as they choose
 - Assist in voter registration drives
 - Express opinions about candidates and issues
 - Contribute money to political organizations



Election Do's

- ▶ Employees may:
 - Attend Political Fundraising Functions
 - Attend And Be Active At Political Rallies And Meetings
 - Join And Be Active Members Of A Political Party Or Club
 - Sign And Circulate Nominating Petitions
 - Campaign For Or Against Referendum Questions, Constitutional Amendments And/Or Municipal Ordinances
 - Campaign For Or Against Candidates In Partisan Elections



Election Do's

- › Employees may:
 - Make Campaign Speeches For Candidates In Partisan Elections
 - Distribute Campaign Literature In Partisan Elections
 - Campaign For And Hold Office In Political Clubs Or Parties
 - Volunteer To Work On A Partisan Political Campaign
 - Participate In Any Activity Not Specifically Prohibited By Law Or Regulation



Election Do's

- › While engaging in permitted activities employees must be acting in their personal capacity, not their official capacity.
- › For example, they should not identify their official title when engaging in any of these activities.



Canvassing

- › U.S Supreme Court has held that citizens have a special interest in residential privacy.
- › Individuals are not required to welcome unwanted speech into their own homes, and that the government can protect this freedom.

Frisby v. Schultz, 487 U.S. 474, 484-85, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988); *Lavean v. Randall*, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)



Employee Running For Office

- Pre-2013 Hatch Act - salary paid in full or part by federal funds = CAN'T RUN
- Modernization Act of 2012 (eff January 2013) amendment to Hatch Act -
- Public employees whose salaries are not paid in full by federal funds = CAN run for public office UNLESS state or local law forbids it

5 U.S.C.A. § 1502(a)(3)



Employee Running For Office

5 U.S.C.A. § 1502(a)(3) reads:

(a) A State or local officer or employee may not—

... (3) if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency, be a candidate for elective office.



Social Media - Do's

- YOU CAN fill in the "political views" field on your personal profile, which also has your official title listed
- YOU CAN advocate for or against a political party, partisan political group, or candidate for partisan public office in posts on a blog, Facebook, Twitter, or any other social media platform
 - BUT YOU CAN'T do this while on duty or in the workplace
 - BUT YOU CAN'T make reference to your official title while engaged in these efforts



Social Media - Don'ts

- ▶ **DON'T** create a social media page in the employees official capacity and use the page to advocate for or against a political party, partisan political group, or partisan candidate (including "friending," "liking," or "following" those entities' pages)
- ▶ **DON'T** include on the PHA official website information or links concerning a political party, candidate, or partisan political office, or partisan political group -



The PHA - Do's

PHAs CAN:

- ▶ Arrange and conduct nonpartisan voter registration and GOTV activities
- ▶ Engage in nonpartisan educational activities designed to encourage residents to register to vote and to vote on election day
- ▶ Educate all candidates on public interest issues



The PHA - Don'ts

PHAs should NOT:

- ▶ **Make any political contribution**
- ▶ **Endorse any candidate**
- ▶ **Make any expenditure on behalf of a candidate, political party or partisan organization**
- ▶ **Provide the use of staff or facilities to a candidate or political party**
- ▶ **Allow agency employees to participate in partisan activities on agency time**



The PHA - Don'ts

PHAs should NOT:

- › Fail to disavow immediately and in writing any partisan action on the part of an agency employee that appears to have been taken on behalf of the agency
- › Coerce or appear to coerce anyone to register or vote
- › Offer any reward or penalty for registering or voting or failing to do so



The PHA - Don'ts

PHAs should NOT:

- › Partner or coordinate with other organizations without adequate due diligence and assurances that they will not engage in partisan activities with respect to jointly undertaken activities or appear to involve the agency in partisan activities
- › Take any position or make any public statement favoring or opposing any candidate or political party
- › Discriminate among candidates in allowing access to facilities or residents



Resident Councils


- › Nonprofit organizations, including incorporated non-profit resident organizations, can lose their tax-exempt status if they engage in partisan political activities.
- › Nonprofit organizations may freely engage in voter registration drives and Get-Out-The-Vote activities, as long as these activities are conducted, both in letter and spirit, in a non-partisan manner.



EXAMPLES


Example

- ▶ Your coworker sends you an e-mail that contains very negative statements about Candidate Senator Barack Obama
- ▶ Specifically warns recipients to “remain alert” about his candidacy, and states that it has information recipients should consider in their “choice.”
- ▶ Implies that, if elected President, Senator Obama would be part of a plan to destroy the United States.



Example - cont'd

- ▶ The e-mail ends with a declaration that the sender does not want Senator Obama leading this country and a plea for recipients to forward the e-mail to everyone they know.
- ▶ You forward it to others inside and outside of your office without adding any content.



Example - cont'd

Does your forwarding of this e-mail without comment violate the Hatch Act?



Example - cont'd

▶ **YES.**

- ▶ Even under these circumstances, if a covered employee sent this e-mail while on duty and/or in the employer's office or building, the employee has violated the Hatch Act.



Example - cont'd

- ▶ This was a real 3/18/08 opinion letter rendered by the Hatch Act Unit of the U.S. Office Of Special Counsel

Consult the "Resources" slide at the end of this presentation for a link to all OSC advisory opinions.




CASE LAW

Case Law -1

- ▶ E.D. of housing agency
- ▶ Salary is paid in part by federal funds.
- ▶ Wants to run as a candidate in the Democratic Party primary for Member of the New Jersey General Assembly

Can the E.D. run?


Abernathy v. Garcia, 2013 N.J. Super. Unpub. LEXIS 1001
(W.D. Mich. Sep. 29, 2005)



Case Law -1

- ▶ Yes, because Hatch Act allows it and NJ state law follows Hatch Act.

Abernathy v. Garcia, 2013 N.J. Super. Unpub. LEXIS 1001



Case Law - 2

- › PHA employees defendants placed signs on Saranac Housing Commission residential buildings prohibiting political activity on property owned or operated by the Housing Commission. "no political activity, no solicitation."
- › A year later an active Democratic party member attempted to post information about a Democrat presidential election caucus site on the bulletin boards of buildings operated by the Housing Commission, coupled with an offer to provide transportation to the caucus site.

Lavean v. Randall, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)



Case Law - 2

- › But the residential buildings were locked and plaintiff was denied access into the buildings.
- › Housing Commission refused him access to talk to residents about how to get rides to Democratic caucus site
- › Election worker sues Housing Commission under 1st Amendment for right to post and canvas

Will election worker win?

Lavean v. Randall, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)



Case Law - 2

No.

Lavean v. Randall, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)



Case Law - 2

- › Court held signs in this instance were viewpoint-neutral because they did not draw distinctions based on the topic of speech at issue or the point of view of the speaker
- › Because the signs were viewpoint-neutral, they survive scrutiny as long as they were "reasonable in light of the purpose served by the forum"
- › The restriction needs only to be reasonable, it need not be the most reasonable or the only reasonable limitation.

Lavean v. Randall, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)



Case Law - 2

Court held that, given that the nonpublic forum at issue consisted of controlled access or "secured entry" residential buildings, the primary purpose of which was to provide homes for individual citizens, a ban on political activity and solicitation WAS reasonable

Lavean v. Randall, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)



Case Law - 2

- › Court held that residents of the Housing Commission buildings are entitled to enjoy privacy "within their own walls"
- › Election worker was not prohibited from distributing the material to the residents by alternative means, such as handing out notices on public sidewalks or posting notices in public areas near the buildings
- › The Housing Commission's ban on political activity and solicitation was reasonable to protect the resident's right to be free from unwanted speech & provide security


Lavean v. Randall, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)



Case Law – 3

- › There had been an ongoing dispute between a PHA executive director and the Resident Advisory Board as to whether the Resident Advisory Board properly represented tenants of the Authority and were responsive to tenant needs
- › There was a pending Resident Advisory Board v. Philadelphia Housing Authority lawsuit seeking an injunction to prohibit an upcoming election


Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



Case Law – 3

- › Parties settled, and PHA stipulated not to participate in the election or take a position
- › Compliance with the stipulation necessarily required the full cooperation and assistance of all PHA employees


Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



Case Law – 3

- › PHA feared additional litigation and violence if its employees interfered with an upcoming Tenant Advisory Board election
- › So PHA barred its employees from discussing upcoming tenant council election with tenants and made them sign a memorandum agreeing not to interfere, take any position in the election, or even discuss it with residents

Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



Case Law - 3

Memo read:

"No PHA employee shall engage in any form of interference during the upcoming tenant plebiscite to determine whether residents of PHA-managed properties want to be represented by the RAB Corporation..."

It is the policy of this Authority to encourage all tenants to exercise their right to choice . . . but there should be no attempt by PHA employees to discuss RAB politics with tenants, either pro or con.

Any employee who engages in such activity will be subject to immediate dismissal."



Case Law - 3

- › 65 to 70 failed to sign the memo. Except for the four plaintiffs in this action, all of those 65 to 70 employees are still working for the PHA and were not dismissed from their jobs for their failure to sign the memo. Many were absent.
- › Four employees who refused to sign the ban on free speech grounds were terminated, although they did not actually violate the ban.

Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



Case Law - 3

- › Employees sued PHA, seeking a declaratory judgment requesting that their terminations of employment by the defendants be adjudged a violation of their right to freedom of speech

Do the employees win?


Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



Case Law – 3

No.


Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



Case Law – 3

- ▶ Court held that, as a public employer, the authority had the constitutional ability to impose a prior restraint on the political speech of its employees


Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



Case Law – 3

- ▶ Court held the PHA had a significant and immediate governmental interest in preventing interference with the Resident Advisory Board plebiscite.
- ▶ The restriction applied evenhandedly to all employees and was not aimed at persons partisan to the Resident Advisory Board or their point of view.


Alderman v. Phila. Hous. Auth., 365 F. Supp. 350 (E.D. Pa. 1973)



PENALTIES & ENFORCEMENT


Penalties

- ▶ **Violations of the Act can result in very harsh penalties against the PHA and the employee.**
- ▶ **For example, if an employee violates the Act the PHA must either fire the employee or forfeit monies equivalent to two years' pay.**
- ▶ **Additionally, the PHA can be penalized in subsequent federal funding awards.**



Enforcement


- ▶ **The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency.**
- ▶ **OSC promotes compliance by government employees with legal restrictions on political activity by providing advisory opinions on, and enforcing, the Hatch Act.**



Enforcement


- ▶ You can and should contact OSC with any questions you have about compliance BEFORE your PHA or employees acts.
- ▶ Office of Special Counsel Hatch Act Unit
 Website: www.osc.gov
 Phone: 1-800-85-HATCH
 Email: hatchact@osc.gov

Also contact your local government ethics office



Training


- ▶ Given the serious sanctions that apply to both inadvertent and deliberate violations, it is critically important that PHAs TRAIN all of your staff on these issues.
- ▶ Be sure to confer with your local attorney on the implications of the Hatch Act and local law on voting initiatives in which your PHA may be interested in pursuing.



RESOURCES

Resources


- ▶ The federal Hatch Act is codified at 5 U.S.C. §§ 7321-7326
- ▶ Office of Special Counsel Hatch Act Unit website, www.osc.gov
Phone: 1-800-85-HATCH
Email: hatchact@osc.gov
- ▶ OSC Advisory Opinions, accessible at: <https://osc.gov/pages/advisory-opinions.aspx>



Resources

Cases:

- ▶ *Abernathy v. Garcia*, 2013 N.J. Super. Unpub. LEXIS 1001 (N.J. April 30, 2013)
- ▶ *Lavean v. Randall*, No. 1:04-CV-188, 2005 U.S. Dist. LEXIS 46747 (W.D. Mich. Sep. 29, 2005)
- ▶ *Alderman v. Phila. Hous. Auth.*, 365 F. Supp. 350 (E.D. Pa. 1973)



*END OF
PRESENTATION*
