



# County Technical Assistance Service

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## Public Employee Political Activity

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Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

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## Table of Contents

|  |   |
|--|---|
| Public Employee Political Activity ..... | 3 |
|--|---|

## Public Employee Political Activity

**Reference Number:** CTAS-126

The First Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment to the United States Constitution, guarantees the right of political expression and association, and a lawsuit may be brought under 42 U.S.C. § 1983 if a public employee is discharged, demoted, or otherwise subjected to punishment in retaliation for the exercise of the employee's constitutional rights to political expression and association. See, e.g., *Rutan v. Republican Party of Illinois*, 497 U. S. 62 (1990). There is a very limited exception to this rule. The Supreme Court has recognized that the government has an interest in securing employees who will loyally implement the policies of its democratically elected officials. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court found that politically loyal employees are necessary "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate."

While political patronage dismissals normally violate the First Amendment, the Court has recognized an exception that termination of public employees in policymaking or confidential positions may be based solely on political affiliation without violating the First Amendment. *Id.*; *Branti v. Finkel*, 445 U.S. 507 (1980). This exception is a very narrow one and applies to only a few county employees. An examination of the nature of the employee's responsibilities on a case-by-case basis is necessary. Several cases have been decided by the Sixth Circuit Court of Appeals that illustrate the limited nature of this exception: *Hager v. Pike County Board of Education*, 286 F.3d 366 (6<sup>th</sup> Cir. 2001) (teacher not within exception); *Heggen v. Lee*, 284 F.3d 675 (6<sup>th</sup> Cir. 2002) (deputy sheriffs not within exception); *York v. Purkey*, 2001 WL 845554 (6<sup>th</sup> Cir. 2001) (sheriff's employees not within exception); *Rose v. Stephens*, 291 F.3d 917 (6<sup>th</sup> Cir. 2002) (state police commissioner fell within exception); *Justice v. Pike Co. Board of Education*, 348 F.3d 554 (6<sup>th</sup> Cir. 2003) (teacher not within exception); *Summe v. Kenton County Clerk's Office*, 604 F.3d 257 (6<sup>th</sup> Cir. 2010) (chief deputy county clerk fell within exception); *Ray v. Davis*, 528 Fed. Appx. 453 (6<sup>th</sup> Cir. 2013) (business manager for county trustee fell within exception); *Peterson v. Dean*, 777 F.3d 334 (6<sup>th</sup> Cir. 2015) (county administrators of elections fell within exception).

County officials newly elected to office often want to terminate some or all of the employees in the office they are assuming. Such officials would be well advised to take some time to evaluate the office and the workload of the employees, then make a determination as to the staffing arrangements that the official believes will best enable the office to run efficiently. The official also should observe the skills and work habits of the employees. If the evaluation reveals that personnel changes need to be made, then the decision must be made on the basis of good management practices and not the political views or association of the individuals employed there. If the official believes that one or more employees are in policymaking or confidential positions, then the duties and responsibilities of the employees in question should be reviewed with the county attorney, taking into account the current case law on this topic, to make a determination as to whether those individuals fall under the exception.

Newly elected officials often want to terminate all employees and have them apply for employment, believing that this will eliminate First Amendment issues. However, a refusal to rehire is not treated any differently than a termination for purposes of First Amendment analysis. See *Heggen v. Lee*, 284 F.3d 675 (6<sup>th</sup> Cir. 2002).

State law also contains provisions protecting the rights of public employees to participate in political activity. Under T.C.A. § 7-51-1501, local government employees have the same rights as other citizens of Tennessee to run for public office and to participate in political activities, as long as the employee is not on paid time. The employee's time off for such purposes is limited to earned days off, vacation days, or any other arrangements worked out between the employee and the local governing body, pursuant to T.C.A. § 7-51-1503. Although there are no published court cases interpreting T.C.A. § 7-51-1501 at the time of this publication, the language of the statute appears to indicate that a county employee cannot be terminated simply for becoming a candidate for public office.

Conversely, state and federal laws contain provisions restricting political activity by certain county employees. One state law provision is the County Sheriff's Civil Service Law of 1974. T.C.A. §§ 8-8-401, *et seq.* The County Sheriff's Civil Service Law of 1974 is an optional law that only applies in a county if adopted by the county legislative body by a two-thirds vote. T.C.A. § 8-8-402. The law provides in T.C.A. § 8-8-419:

(a)(1) No person holding a position in the classified service shall take an active part in any political campaign while on duty.

(2)(A) No employee of the sheriff's department shall solicit money for political campaigns; provided, that such restriction shall not prohibit an employee, including a deputy sheriff, who is running for an elected office from soliciting and accepting campaign contributions for such person's own election campaign if the person is not on duty or in uniform when such activities occur.

(B) No employee of the sheriff's office shall make any public endorsement of any candidate in any campaign for elected office; provided that, if an employee or deputy sheriff is running for an elected office then such restriction shall not apply to that employee or deputy sheriff's own campaign.

(3) A deputy sheriff shall not use such position to reflect the deputy sheriff's personal political feelings as those of the sheriff's department or to exert any pressure on anyone to influence that person's political views.

(4) No employee while on duty, nor any officer while in uniform, shall display any political advertising or paraphernalia on such person's body or automobile.

(b) However, nothing in this part shall be construed to prohibit or prevent any such employee from becoming or continuing to be a member of a political club or organization and enjoying all the rights and privileges of such membership or from attending any political meetings, while not on duty. Such employee shall not be denied freedom in the casting of a vote.

(c) Any person violating the provisions of this section shall be dismissed from the service of the office of the sheriff.

Another law that restricts the political activity of certain county employees is the federal Hatch Act. The federal Hatch Act restricts the political activity of local government officials and employees who work in connection with programs financed in whole or in part by federal loans or grants. The act applies to a local government official or employee if the individual "performs duties in connection with an activity financed in whole or in part by federal funds." *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990). If an individual meets this standard, the Hatch Act applies even if the person's salary does not include any federal funds.

On December 19, 2012, Congress passed the Hatch Act Modernization Act of 2012 (this Act became effective on January 27, 2013). The Modernization Act amended the Hatch Act to allow local government employees whose salaries are paid partially by federal funds to run for partisan office. Prior to this change, local government employees were prohibited from running for partisan office if they worked in connection with programs financed in whole or in part by federal loans or grants. With the change, the federal Hatch Act no longer prohibits local government employees from running for partisan office unless the employee's salary is paid exclusively by federal loans or grants.

The Modernization Act did not change the federal Hatch Act's prohibitions against using one's official authority to affect the result of an election or coercing an employee to make a political contribution. A local government official or employee is still covered by these prohibitions if the individual works in connection with a program financed in whole or in part by federal loans or grants, even if the connection is relatively minor. A covered official or employee who runs for office would violate these provisions of the Hatch Act if the individual:

- uses any public funds to support his own candidacy;
- uses his office to support his candidacy, including by using official email, supplies, or other resources; or
- asks subordinates to volunteer for his campaign or contribute to the campaign.

The U.S. Office of Special Counsel (OSC) has exclusive jurisdiction to investigate and prosecute complaints alleging a violation of the Hatch Act. The OSC will issue advisory opinions to any person seeking advice about political activity under the Hatch Act. You may request such advice by phone, fax, mail or e-mail. The contact information for the OSC is listed below.

Hatch Act Unit

U.S. Office of Special Counsel

1730 M Street, N.W., Suite 218

Washington, D.C. 20036-4505

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