

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

INFORMAL BRIEF OF PETITIONER/APPELLANT

Case Number: 23-1649

Short Case Caption: Arnold v. OSC

Name of Petitioner: Keith L. Arnold

Instructions: Read the [Guide for Unrepresented Parties](#) before completing this form. Answer the questions as best as you can. Attach additional pages as needed to answer the questions. This form and continuation pages may not exceed 30 pages.

Attach a copy of the initial and final decision/order of the Merit Systems Protection Board or arbitrator. You may also attach other record material as an appendix. Any attached material should be referenced in answer to the below questions. Please redact (erase, cover, or otherwise make unreadable) social security numbers or comparable private personal identifiers that appear in any attachments you submit.

1. Have you ever had another case before this court? ☐ Yes ☒ No
- In a United States district court? ☒ Yes ☐ No
- Before the Equal Employment Opportunity Commission? ☒ Yes ☐ No

If yes, identify the title and number of each case.

They were in the early 1990's in St.Louis, MO area and I didn't bring any of those documents to Washington state with me. I think they were (my prior name as plaintiff), in EEOC and U.S. distict court: Keithian Arnold v. Germania Bank, Keithian Arnoid v. Community Federal, Keithian Arnold v. Boatmen's Trust Company, Keithian Arnold v. Boatmen's Bank Belleville, and Keithan Arnold v. Magna Bank. In U.S. district court but not the EEOC was Keithian Arnold v. Kmart. I don't have any of the case numbers anymore.

FORM 11. Informal Opening Brief (MSPB or Arbitrator Cases)

Form 11 (p. 2)
July 2020

2. Did the MSPB or arbitrator incorrectly decide or fail to take into account any facts? ☒ Yes ☐ No

If yes, what facts?

"...if an elected office is a "partisan political office" and at the same time has a "Nonpartisan election", then the Nonpartisan election condition takes priority over, overrides, and supersedes the partisan political office condition thereby allowing the partisan political office condition itself to remain but nullifying the partisan political office prohibition."(attached RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM], p 4). MSPB final order (attached) p 4 states "the primary elections for Washington's 8th Congressional District are partisan", then swithes to "A partisan political office is defined as "any office for which any candidate is nominated or elected as representing a party". This is a bait and switch from making a claim about an election (bait) then switching to a discussion about an office and never explaining how the election is partisan.

3. Did the MSPB or arbitrator apply the wrong law? ☒ Yes ☐ No

If yes, what law should be applied?

5 C.F.R. § 734.304...except as specified in § 734.207. § 734.207 Candidacy for public office. An employee may: (b) Run as a candidate in a non-partisan election (RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM], p 1; RESPONDENT'S SUPPLEMENTAL OBJECTION TO "PETITIONER'S MOTION FOR SUMMARY ADJUDICATION", p 2; RESPONDENT'S PETITION FOR REVIEW, p 1 [all 3 attached]). OSC attorney Martorana, OSC, alj Smith, and MSPB all wrongfully used the first part of this law but left out or ignored this the second part.

4. Did the MSPB or arbitrator fail to consider important grounds for relief?

☒ Yes ☐ No

If yes, what grounds?

The attached initial order p. 12 states "In 2014, both the Washington State Republican Pary and the Washington State Democratic Party nominated their respective candidates for election to Washington's 8th Congressional District." This use of the word "nominated" is wrong. These were not nominations but only endorsements at best. These endorsements are irrelevant. A nomination is an election run by the government that allows a candidate to advance to a later election. Washington's 2014 primary did not nominate candidates as representing a party. "This Nonpartisan election definition only refers to elections that are used as nominations not to political party endorsements that are called "nominations" for political party propaganda. ' [RESPONDENT'S SUPPLEMENTAL OBJECTION TO PETITIONER'S MOTION FOR SUMMARY ADJUDICATION", p.3; RESPONDENT'S PETITION FOR REVIEW, p 1]

FORM 11. Informal Opening Brief (MSPB or Arbitrator Cases)

Form 11 (p. 3)
July 2020

5. Are there other reasons why the MSPB's or arbitrator's decision was wrong?

☒ Yes ☐ No

If yes, what reasons?

Rule of law. The U.S. Constitution gives the power to make laws to Congress only. Like this court has no authority to extend the time to file a petition, all tribunals must obey the law including any exceptions in the law like 5 C.F.R. § 734.304. Also, if a violation hasn't been enforced by authorities such as the police in the past that doesn't prevent them from enforcing it in the present. Likewise failure to enforce the 5 C.F.R. § 734.304 exception in the past by any official, tribunal, or even this court does not justify not enforcing it now. Also, MSPB hears disputes between an employee and the employee's employing agency. I was working for the U.S. Dept. of Commerce and neither it nor any of it's subagencies was ever a party to this action, so OSC never had standing to sue.

6. What action do you want this court to take in this case?

I should receive payment of lost wages, lost benefits, all appropriate damages, and reinstatement to my NOAA position. All appropriate sanctions and disciplinary actions should be applied to OSC attorney Martorana, OSC, alj Smith, and MSPB.

Date: May 22, 2023

Signature: /s/ Keith Arnold

Name: Keith L. Arnold

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

SPECIAL COUNSEL,
Petitioner,

DOCKET NUMBER
CB-1216-16-0017-T-1

v.

KEITH L. ARNOLD,
Respondent.

DATE: January 17, 2023

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Carolyn S. Martorana, Esquire, Washington, D.C., for the petitioner.

Keith L. Arnold, Auburn, Washington, pro se.

BEFORE

Cathy A. Harris, Vice Chairman
Raymond A. Limon, Member
Tristan L. Leavitt, Member
Member Leavitt recused himself and
did not participate in the adjudication of this appeal.

FINAL ORDER

¶1 The respondent has filed a petition for review of the initial decision, which found that he had violated the Hatch Act by running for a partisan political office in two election cycles and ordered his removal from Federal service. Generally,

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See 5 C.F.R. § 1201.117(c).

we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative law judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the respondent's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the respondent has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

BACKGROUND

¶2 The respondent has served as an employee of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration since March 2010. Complaint File (CF), Tab 6 at 1, Tab 1 at 5. The Office of Special Counsel (OSC) filed a Complaint for Disciplinary Action (Violation of the Hatch Act) against the respondent, charging him with a single count of being a candidate for partisan political office in violation of 5 U.S.C. § 7323(a)(3) and 5 C.F.R. § 734.304 for the 2014 primary election for the office of U.S. Representative for the 8th Congressional District of the State of Washington (Washington's 8th Congressional District). CF, Tab 1. OSC subsequently amended its complaint to add a second count alleging that the respondent also ran in the 2016 primary election for the same office. CF, Tab 9. The respondent did not dispute that he ran in the named primary elections, but instead argued that the elections were nonpartisan because Washington's "Top 2" primary system meets

the pertinent regulatory definition of a nonpartisan election. CF, Tab 12 at 3-5. OSC filed a motion for summary adjudication, arguing that the respondent had admitted to all material facts and thus it was entitled to judgment as a matter of law. CF, Tab 22. The respondent also filed a motion for summary judgment.² Petition for Review (PFR) File, Tab 7. Subsequently, the administrative law judge issued an order denying the respondent's motion in its entirety and granting OSC's motion in part, finding OSC was entitled to judgment as a matter of law on both counts of its complaint, but finding a hearing necessary to determine the proper penalty to impose on the respondent. CF, Tab 25 at 8-9.

¶3 After holding the hearing, the administrative law judge issued an initial decision finding that OSC proved its case and that removal was the appropriate penalty for the violation. CF, Tab 35, Initial Decision (ID). In his timely filed petition for review, the respondent reiterates his argument that his candidacy was allowed under the exceptions enumerated in 5 C.F.R. § 734.207. PFR File, Tab 1. OSC responds in opposition to the respondent's petition for review. PFR File, Tab 3.

¶4 After the close of the record on review, OSC filed two motions to reopen the record to submit new and material evidence showing that the respondent ran two more times as a candidate for partisan political office in violation of 5 U.S.C. § 7323(a)(3), in the 2018 and 2020 primary election for Washington's 8th Congressional District. PFR File, Tab 8 at 5-6, 9-11, 26-29; Tab 10 at 5-7, 11-13. OSC argued that the new evidence not only supports the penalty of removal, but also supports an enhanced penalty to include a \$1,000.00 fine and debarment from Federal employment for 5 years. PFR File, Tab 8 at 6, Tab 10 at 7. The Acting Clerk of the Board granted both motions to submit a new pleading and afforded the respondent 15 days, in each instance, to respond to OSC's new

² A copy of the respondent's motion for summary judgment was missing from the record below but was supplemented on review.

evidence. PFR File, Tabs 9, 11. The respondent did not respond in either instance.

DISCUSSION OF ARGUMENTS ON REVIEW

The administrative law judge considered the respondent's arguments and correctly determined that he violated the Hatch Act.

¶5 The respondent claims that the administrative law judge and OSC “knowingly, willfully, and fraudulently” left out the exceptions contained within 5 C.F.R. § 734.304, and that under those exceptions he was allowed to run in the primary election for Washington’s 8th Congressional District. PFR File, Tab 1. 5 C.F.R. § 734.304 prohibits an employee from running for the nomination, or as a candidate for election, to a partisan political office, unless the employee falls into one of the following two exceptions, as enumerated in 5 C.F.R. § 734.207: either if an employee (a) runs as an independent candidate in a partisan election covered by 5 C.F.R. part 733; or (b) runs as a candidate in a nonpartisan election. We find that that the first exception is inapplicable here because Washington’s 8th Congressional District is not included in any of the municipalities covered by 5 C.F.R. part 733.³ 5 C.F.R. § 733.107(c). Therefore, the only issue in dispute is whether the respondent ran in a nonpartisan political election.

¶6 We reject the respondent’s argument and agree with the administrative law judge’s finding that the primary elections for Washington’s 8th Congressional District are partisan, and thus do not fall under the second exception enumerated in 5 C.F.R. § 734.207. ID at 13-14. A partisan political office is defined as “any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but does not include any office or position within a political party or affiliated organization.” 5 C.F.R.

³ The respondent does not argue that Washington’s 8th Congressional District is within one of the designated municipalities covered by 5 C.F.R. § 733.107. PFR File, Tab 1.

§ 734.101; *see also* 5 U.S.C. § 7322(2). There is no evidence in the record, or any argument made by the respondent, that undermines the administrative law judge's finding that the primary elections for Washington's 8th Congressional District included candidates from political parties whose candidates for Presidential elector received votes in the last preceding election. ID at 12. Further, the Board has confirmed that the office of United States Representative is a partisan political office. *Special Counsel v. Lewis*, 121 M.S.P.R. 109, ¶ 15 (finding that a respondent's candidacy for the U.S. House of Representative was a violation of the Hatch Act), *aff'd*, 594 F. App'x 974 (Fed. Cir. 2014); *see also Merle v. United States*, 351 F.3d 92, 96 (3d Cir. 2003) ("By the plain terms of the Hatch Act, the position of United States Representative is a partisan political office."). Therefore, because the office of U.S. Representative is a partisan political office, we agree with the administrative law judge that the respondent violated the Hatch Act when he ran in in the 2014 and 2016 primary elections for Washington's 8th Congressional District. ID at 14-15.

Removal is an appropriate penalty.

¶7 The administrative judge correctly applied the relevant *Douglas* factors and found that removal was the appropriate penalty to impose on the respondent. ID at 16-21; *Lewis*, 121 M.S.P.R. 109, ¶ 31 (concluding that the Board should apply the *Douglas* factors in independently determining the proper penalty from the range of penalties permissible under 5 U.S.C. § 7326); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981) (providing a nonexhaustive list of factors that may be relevant to a penalty determination, including, among other factors, whether the misconduct is intentional, repeated, and shows a poor potential for rehabilitation). The respondent does not dispute the administrative law judge's application of the *Douglas* factors, and upon review of the record, it is apparent that the administrative law judge reviewed all of the evidence and arguments by both parties and came to reasoned, logical conclusions. *See* ID; PFR File, Tab 1. Thus we see no reason to disturb his findings. *Crosby v. U.S.*

Postal Service, 74 M.S.P.R. 98, 106 (1997) (declining to disturb the administrative judge's findings where she considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health and Human Services*, 33 M.S.P.R. 357, 359 (1987) (finding no reason to disturb the administrative judge's findings when the initial decision reflected that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions).

¶8 As for OSC's request that the Board enhance the penalty imposed against the respondent because the respondent ran again for partisan political office in 2018 and 2020, we deny the request. PFR File, Tab 8 at 6, Tab 10 at 6-7. The enhanced penalty requested by OSC is based on the statutory authority provided for in the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat 1283, 1626 (NDAA for 2018). Section 1097(k)(2) of that Act, codified at 5 U.S.C. § 7326, authorizes those penalties for violations of 5 U.S.C. § 7323 "occurring after the date of enactment of this Act." The NDAA for 2018 became effective on December 12, 2017. Thus, by the plain language of the statute, the respondent's actions in 2014 and 2016 are not subject to the NDAA for 2018 and the enhanced penalties provided for in that statute cannot be imposed for the respondent's conduct. *Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶ 12 (2014) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 257 (1994) ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.")).

¶9 Furthermore, we find that enhancing the penalty imposed on the respondent for violations that occurred after the effective date of the NDAA for 2018 and after the issuance of the initial decision would be inconsistent with the statutory requirements. Pursuant to 5 U.S.C. § 1215(a)(1), if OSC determines that disciplinary action should be taken against an employee for, among other things, violating the Hatch Act, it "shall prepare a written complaint against the

employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board" Further, once a complaint is filed, certain procedural protections are afforded to the respondent pursuant to 5 U.S.C. § 1215(a)(2), including a reasonable time to answer the complaint orally and in writing, to have a hearing before the Board or an administrative law judge designated by the Board, and to have a written decision on the merits. OSC filed a complaint with the Board against the respondent for violations of 5 U.S.C. § 7323(a)(3) and 5 C.F.R. § 734.304 that occurred in 2014 and 2016, and the respondent was given an opportunity to respond to the charges, have a hearing in front of an administrative law judge, and have a written decision on the merits. 5 U.S.C. § 1215(a)(2); CF, Tab 9; ID. At no point has OSC filed a complaint against the respondent for violations of 5 U.S.C. § 7323(a)(3) related to his candidacy in 2018 or 2020 and thus, the respondent has not been afforded the procedural protections required by 5 U.S.C. § 1215(a)(2). Accordingly, because OSC did not comply with the requirements of 5 U.S.C. § 1215, we deny its request to enhance the respondent's penalty to include an additional fine and debarment as authorized by the NDAA for 2018.⁴

ORDER

The Board ORDERS the National Oceanic and Atmospheric Administration to REMOVE the respondent from his position of employment. The Board also ORDERS OSC to notify the Board within 30 days of the date of this Final Order whether the respondent has been removed as ordered. This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(b).

⁴ OSC may file a new complaint with the Board if it wishes to seek disciplinary action against the appellant for his 2018 and 2020 candidacies. Such a complaint must comport with the statutory requirements and must be filed consistent with the Board's regulations. 5 U.S.C. § 1215(a)-(b); 5 C.F.R. §§ 1201.122, 1201.123.

NOTICE OF APPEAL RIGHTS⁵

You may obtain review of this final decision. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant⁶ seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

⁵ Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

⁶ In this case, the respondent has the same appeal rights as an "appellant."

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. 5 U.S.C. § 7703(b)(2); see *Perry v. Merit Systems Protection Board*, 582 U.S. _____, 137 S. Ct. 1975 (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and

to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. 5 U.S.C. § 7702(b)(1). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's

disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.⁷ The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court’s website, www.cafc.uscourts.gov. Of particular relevance is the court’s “Guide for Pro Se Petitioners and Appellants,” which is contained within the court’s Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

⁷ The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

FOR THE BOARD:

/s/ for

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE**

**SPECIAL COUNSEL,
Petitioner,**

**DOCKET NUMBER
CB-1216-16-0017-T-1**

v.

**KEITH L. ARNOLD,
Respondent.**

DATE: January 10, 2017

INITIAL DECISION AND ORDER

I. SUMMARY

The U.S. Office of Special Counsel (OSC) seeks removal of Keith L. Arnold (Respondent) from his position with the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), because he repeatedly violated the Hatch Act by seeking elected partisan political office.

Respondent does not dispute that he was a candidate in the elections for the United States House of Representatives from Washington's 8th Congressional District in 2014 and 2016. However, Respondent asserts that his candidacies were non-partisan and that, per the provisions of 5 C.F.R. §734.207, *et al*, he was entitled to run as a candidate in a non-partisan election.

On September 20, 2016, the undersigned Administrative Law Judge issued an Order, partially granting OSC's Motion for Summary Adjudication. (Attachment A). In that Order, the undersigned Administrative Law Judge found that in 2014, Respondent was a candidate in the

partisan primary election campaign for United States Representative from Washington's 8th Congressional District, in violation of the Hatch Act. In the same Order, the undersigned Administrative Law Judge found that in 2016, Respondent was again a candidate in the partisan primary election campaign for United States Representative from Washington's 8th Congressional District, again in violation of the Hatch Act. Accordingly, the undersigned Administrative Law Judge found that there were no material facts in dispute and that OSC was entitled to a decision as a matter of law. However, the undersigned Administrative Law Judge left the question of a sanction to be resolved by evidence and testimony to be presented at a subsequent adversarial due process hearing.

That hearing on a potential sanction was convened on November 29, 2016. At that hearing, the undersigned Administrative Law Judge conducted an independent analysis of the evidence per the guidance provided in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). See *Special Counsel v. Lewis*, 121 M.S.P.R. 109 (2014); *affirmed Lewis v. MSPB*, 594 Fed. Appx. 974 (Fed. Cir. 2014).

After consideration of the entire administrative record, all of the evidence, testimony and arguments of counsel, the undersigned Administrative Law Judge hereby orders that Respondent be **REMOVED** from his federal employment for the reasons set forth below.

II. STATEMENT OF THE CASE

On May 25, 2016, OSC filed an Amended Complaint against Respondent, charging him with two Counts of being a candidate for partisan political office in violation of 5 U.S.C. §7323(a)(3) and 5 C.F.R. §734.304. The Amended complaint alleges Respondent ran as a candidate for the United States House of Representatives from Washington's 8th Congressional District in 2014 and in 2016. Respondent never contested the factual allegations contained in the Amended Complaint; but argues that the elections in question were not partisan.

A. Merit Systems Protection Board (MSPB) Jurisdiction

The MSPB has original jurisdiction to adjudicate this matter pursuant to 5 U.S.C. §1204(a)(1). Title 5 C.F.R. §1201.121 provides: “. . . [t]he Board has original jurisdiction over complaints filed by the Special Counsel seeking corrective or disciplinary action (including complaints alleging a violation of the Hatch Political Activities Act) . . .” *See also*, 5 U.S.C. §1216(a)(1) and 5 U.S.C. §§7321 - 7326. Accordingly, the Board has jurisdiction and the matter is properly before the undersigned Administrative Law Judge for adjudication.

B. Procedural History

On March 8, 2016, Petitioner filed its original Complaint against Respondent for violations of the Hatch Act.

On May 18, 2016, Respondent filed his “Response to Complaint: Motion to Dismiss.” However, Respondent’s Response failed to comport with the dictates of 5

C.F.R. §1201.124(d) which required Respondent to deny, admit or explain each fact alleged in a complaint.

On May 25, 2016, Petitioner filed its Amended Complaint for Disciplinary Action (Violation of the Hatch Act) (Complaint). The substance of the Complaint alleges that since March 2010 and at all times relevant to the Complaint, Respondent was a full-time employee of the National Oceanic and Atmospheric Administration (NOAA), an agency of the U.S. Department of Commerce. Petitioner alleges that Respondent is thus subject to the provisions of 5 U.S.C. §7321-7326.

The Complaint alleges that in 2010 and in 2012, and during the course of his federal employment, Respondent ran as a candidate in the primary election for United States Representative from Washington's 8th Congressional District. The Complaint describes how, in 2012, Respondent's employer repeatedly counseled him about the impropriety of his pursuit of office in a partisan political election. The Complaint then alleges in Count One that in 2014, Respondent was again a candidate in the partisan primary election campaign for United States Representative from Washington's 8th Congressional District, in violation of the Hatch Act.

The Complaint alleges in Count Two that in 2016, Respondent was again a candidate in the partisan primary election campaign for United States Representative from Washington's 8th Congressional District, again in violation of the Hatch Act.

The Complaint concludes that by running as a candidate in those two partisan elections, Respondent violated the Hatch Act and, as a result, ought be subject to appropriate disciplinary action pursuant to 5 U.S.C. §7326.

On June 13, 2016, Respondent filed his Answer to the Amended Complaint (Answer). In his Answer, Respondent again failed to admit, deny or explain the allegations in the OSC Complaint. His Answer did, however, assert, among other things, that his candidacies were non-partisan and that, per the provisions of 5 C.F.R. §734.207, *et al*, he was entitled to run as a candidate in a non-partisan election.

On June 22, 2016, the undersigned Administrative Law Judge issued a written Order directing Respondent to supplement his Answer, per the requirements of 5 C.F.R. §1201.124(d).

On June 24, 2016, Respondent filed his “Reply to Amended Complaint” which generally replied that he was without sufficient information to respond to most of the factual allegations contained in the OSC Complaint.

On September 9, 2016, the self represented Respondent filed his Motion for Summary Judgment.¹ On the same day, Petitioner filed its Motion for Summary Adjudication.²

On September 20, 2016, the undersigned Administrative Law Judge denied Respondent’s Motion for Summary Judgment *in toto* and granted Petitioner’s Motion for Summary Adjudication in part. The Order ruled that Respondent had violated the Hatch Act, but left unresolved the question of whether (or to what extent) a sanction was appropriate in this case.

¹ Respondent’s Motion also demanded “any and all appropriate compensation including but not limited to compensatory and punitive damages.” (Resp. Motion at 3). Respondent’s demand for compensation and/or damages was denied. The Administrative Law Judge is not empowered to award compensation or damages per the provisions of either 5 U.S.C. §§1212a(3)(A), 7326 or 5 C.F.R. §1201.43.

² The undersigned Administrative Law Judge also reviewed Petitioner’s Response in opposition to Respondent’s Motion for Summary Judgment, dated September 19, 2016 and Respondent’s Supplemental Objection to “Petitioner’s Motion for Summary Adjudication,” (sic), also dated September 19, 2016.

Thereafter, the undersigned Administrative Law Judge set November 29, 2016, as the date for a hearing on the question of sanctions in this case. Unfortunately, on November 17, 2016, Respondent sent an e-mail to the undersigned Administrative Law Judge indicating he might not participate in the November 29, 2016 hearing. The undersigned Administrative Law Judge immediately convened a telephonic pre-hearing conference with the parties to discuss Respondent's e-mail and to reiterate the necessity of Respondent's presence and meaningful participation at the November 29, 2016 hearing.³

On November 29, 2016, the undersigned Administrative Law Judge convened a video-teleconference hearing: Petitioner, represented by Carolyn Martorana, Esq., appeared in Washington, DC. The undersigned Administrative Law Judge appeared in New Orleans, LA. However, Respondent did not participate – despite the fact that video-teleconference facilities were made available to him and notice was given to him of how he could participate in the hearing via video-teleconference facilities near his place of employment in Seattle, WA.

III. PRINCIPLES OF LAW AND JURISDICTION

A. Office of Special Counsel

Title 5 U.S.C. §1216 assigns the Office of Special Counsel the authority to investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216).” 5 U.S.C.

³ The undersigned Administrative Law Judge repeatedly advised Respondent to attend and participate meaningfully in the November 29, 2016 hearing on a potential sanction. See Orders issued on September 20, 2016; September 23, 2016; October 25, 2016; November 3, 2016; November 14, 2016; November 18, 2016.

§1212(a)(5). Section 1216 also provides “. . .[t]he Special Counsel shall . . . conduct an investigation of any allegations concerning - ... (1) political activity prohibited under subchapter III, of chapter 73, relating to political activities by Federal employees;”. 5 U.S.C. §1216(a).

As discussed below and pursuant to 5 U.S.C. §7323(a), “...an employee may not . . . (3) run for the nomination or as a candidate for election to a partisan political office.”

B. The Hatch Act

The salient provision of the Hatch Act, here, is 5 U.S.C. §7323, which plainly states:

An employee may take an active part in political management or in political campaigns, *except an employee may not* ... (3) run for the nomination or as a candidate for election to a *partisan political office*. (emphasis added).

Title 5 U.S.C. §7322(1) and 5 C.F.R. §734.101 provide that “employee” – means any individual, (other than the President, Vice President, or a member of the uniformed services) employed or holding office in - (A) an Executive agency other than the Government Accountability Office; (B) a position within the competitive service which is not in an Executive agency; or (C) the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds.”

A “partisan political office” means:

any office for which any candidate is nominated or elected as representing a party any of whose

candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but shall exclude any office or position within a political party or affiliated organization; ...

5 U.S.C. §7322(2); 5 C.F.R. §734.101.

Violation of the Hatch Act does not require proof of specific knowledge⁴ that the individual was violating the law.

Precedent establishes that the Hatch Act is not an improper restraint on government employee free speech and is not void for vagueness. *See McEntee v. MSPB*, 404 F.3d 1320 (Fed. Cir. 2005); *Briggs v. MSPB*, 331 F.3d 1307 (Fed. Cir. 2003); *U.S. Civil Service Comm'n v. Nat'l Assn of Letter Carriers*, 413 U.S. 548 (1973)(Congress has power to enact statute forbidding political activity of federal employees who are to administer laws in accordance with will of Congress not will of employee or political party).

The Hatch Act Modernization Act of 2012 changed the penalty determination procedure of the Hatch Act and eliminated the presumption of removal. *See* 5 U.S.C. §7326.⁵ Recent case law requires the Board to make an independent determination of an appropriate penalty, including application of the *Douglas v. Veterans Administration* factors. *See Lewis*, 121 M.S.P.R. 109 (2014).

⁴ *C.f. United States v. Scarmazzo*, 554 F.Supp. 2d 1102 (E.D. Cal. 2008).

⁵ The Act now provides: "An employee or individual who violates section 7323 or 7324 shall be subject to removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000." Pub. L. 112-230 § 4, Dec. 28, 2012; 78 Fed. Reg. 39543, 546 (conforming changes to regulations).

C. The Administrative Law Judge

Title 5 C.F.R. §1201.125(a) provides “[a]n administrative law judge will hear a disciplinary action complaint brought by the Special Counsel.” Pursuant to an interagency loan agreement under the authority of 5 U.S.C. §3344 and 5 C.F.R. § 930.208, administrative law judges from the U.S. Coast Guard Office of Administrative Law Judges may be assigned to preside over MSPB cases when Administrative Law Judge is required. After the OSC issued its Complaint against Respondent, the MSPB issued its “Acknowledgment Order” on March 10, 2016, stating the case has been assigned to the undersigned Administrative Law Judge.

On September 20, 2016, the undersigned Administrative Law Judge partially granted OSC’s Motion for Summary Adjudication, finding that there were no genuine issues of disputed fact and that OSC was entitled to a decision as a matter of law. (Attachment A). In sum, that Order found that Respondent violated the Hatch Act by running in partisan political campaigns in 2014 and 2016. That Order is incorporated into this decision and, together with the Findings of Fact herein, constitute the undersigned Administrative Law Judge’s determination that the charges in the Amended Complaint are **PROVED**.

IV. FINDINGS OF FACT

The Findings of Facts in the September 20, 2016, Order Granting Partial Summary Adjudication are incorporated in this Order and are appended to this decision. (Attachment A). The following Findings of

Fact are based on the administrative record as a whole, including the testimony and evidence presented at the hearing held on November 29, 2016.

1. Respondent is and has been an employee of the United States Department of Commerce, National Oceanic and Atmospheric Administration since March, 2010. (OSC Ex. 14; Resp. May 18, 2016, Response to Complaint: Motion to Dismiss).

2. In September, 2010, Respondent attended federal employee training wherein he received instruction concerning the Hatch Act and wherein Respondent was instructed that a federal employee may not run as a candidate in a partisan election. (OSC Ex. 14).

3. On August 6, 2012, Respondent received an e-mail from Department of Commerce attorney Francisco Ruben informing Respondent that "federal employees cannot be a candidate in a partisan election" and that an "election for office in the U.S. Representatives is a partisan political election." (OSC Ex. 4, 14).

4. On December 13, 2013, Respondent received a letter from Office of Special Counsel attorney Mary K. Larsen informing Respondent that running for a seat in the U.S. House of Representatives is a Hatch Act violation that could result in a range of penalties, including removal. (OSC Ex. 5,6,14).

5. On April 9, 2014, Respondent received an email from the Department of Commerce ethics office informing Respondent that the Hatch Act prohibited federal employees from running for partisan political office. (OSC Ex. 14).

6. On May 15, 2014, Respondent received an email from Department of Commerce attorney Jeffrey Harrington informing Respondent that "political activity rules bar Federal employees from running for office in a partisan election." (OSC Ex. 14).

7. On June 5, 2014, Respondent received an email from Department of Commerce attorney Jeffrey

Harrington informing Respondent that the Hatch Act does not permit federal employees to run for Congress. (OSC Ex. 14).

8. On July 18, 2014, Respondent received an email from Department of Commerce attorney Jeffrey Harrington informing Respondent that Respondent's 2014 Congressional campaign was a Hatch Act violation and that Respondent needed to withdraw from that campaign. (OSC Ex. 7, 14).

9. On July 22, 2014 and July 29, 2014, Respondent received communications from the U.S. Office of Special Counsel telling Respondent that his 2014 Congressional campaign violated the Hatch Act and further informing Respondent that he either needed to withdraw from his campaign or to resign his federal employment. (OSC Ex. 10, 14).

10. Respondent was a candidate in the August 2014 primary election for United States Representative from Washington's 8th Congressional District. His candidacy included the creation of a political website (www.votekeitharnold.com). That website clearly identifies Respondent as a "Proud Federal Employee, NOAA." (OSC Ex. 14, 15; Resp. May 18, 2016, Response to Complaint: Motion to Dismiss; Resp. Answer).

11. Respondent was a candidate in the August 2016 primary election for United States Representative from Washington's 8th Congressional District. His candidacy included the creation of a political website (www.votekeitharnold.com). That website clearly identifies Respondent as a "Proud Federal Employee, NOAA." (OSC Ex. 14, 15; Resp. May 18, 2016, Response to Complaint: Motion to Dismiss; Resp. Answer).

12. Respondent took no steps to withdraw from either his 2014 or 2016 campaigns for election to Washington's 8th District Congressional seat. (OSC Ex. 14).

13. Respondent ran for Congress in partisan political elections, from the 8th District of Washington in 2006, 2008, 2010, 2012, 2014 and 2016. The incumbent in each election was a Republican. (Resp. May 18, 2016, Response to Complaint: Motion to Dismiss; OSC Ex. 9, 13; 5 C.F.R. §1201.64.).

14. In the 2014 and 2016 general elections for Congress from Washington's 8th District, both candidates represented a political party whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected. Thus, the election was partisan. (5 U.S.C. §7322; 5 C.F.R. §1201.64).

15. The office of United States Representative is a partisan political office. (Wash. Rev. Code §29A.04.110; OSC Ex. 8, 9).

16. Respondent failed to answer several inquiries by the United States Office of Special Counsel regarding that office's investigation into Respondent's candidacies for a partisan political office. (OSC Ex. 10, 11, 12).

V. ANALYSIS

In the prior Order, the undersigned Administrative Law Judge ruled that Respondent violated the Hatch Act by running as a candidate in partisan political elections in 2014 and 2016.

In that Order, the undersigned Administrative Law Judge noted that Respondent had admitted that he ran as a candidate for election to Congress from Washington's 8th Congressional District in 2014. In 2014, both the Washington State Republican Party and the Washington State Democrat Party nominated their respective candidates for election to Washington's 8th Congressional District. The incumbent was a Republican; officially noticed per the provisions 5 C.F.R. §1201.64. Both candidates represented a political party whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected. 5 U.S.C. §7322, 5 C.F.R. §1201.64.

Respondent admits that he ran as a candidate for election to Congress from Washington's 8th Congressional District in 2016. In fact, the August 2, 2016, primary

ballot upon which Respondent's name appeared as a candidate, plainly identified his electoral contest as a competition for a "partisan office." In 2016, both the Washington State Republican Party and the Washington State Democrat Party again nominated their respective candidates for election to Washington's 8th Congressional District in the pending November 8, 2016 election.⁶ The incumbent was a Republican; officially noticed per the provisions 5 C.F.R. §1201.64.

The United States Court of Appeals for the Federal Circuit in *McEntee*, *supra*, expressly ruled:

The definition of a 'partisan political office' expressly encompasses offices for which candidates are either nominated as representing a party or elected as representing a party ... In order to give meaning to all words of the statute, as we must, we do not read the term 'elected as representing a party' to require formal endorsement or selection by a major political party.

Id. at 1329.

Clearly, the office of Representative to the United States Congress is a partisan political office per the provisions of 5 U.S.C. §7322 and controlling appellate case law.

Respondent contends that because Washington state law did not require him to identify as a member of a particular party in the primary elections, those elections were not "partisan."

Admittedly, Washington employs a unique primary election process, referred to as the "Top 2" election which allows primary voters to choose among one field candidates listed on the ballot for a given office. Neither the candidates, nor the voters,

⁶ Per 5 C.F.R. §1201.64, the undersigned Administrative Law Judge also takes official notice that the pending 2016 general election for Washington's 8th Congressional District features a contest between Republican (incumbent) Dave Reichert and Democrat Tony Ventrella. Both represent a political party whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

must declare a party affiliation to run or vote in the primary, although they may do so.

Wash. Rev. Code. §§29A.36.170; 29A.52.112.

If a candidate does list his/her affiliation on the ballot, that preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate. Rather, the major political parties nominate their respective candidates for the general election after the primary. *Id.*

The two candidates who receive the most votes in the primary then qualify for candidacy in the general, provided that each receive at least one percent of all votes cast in the primary. *Id.* Here, it does not matter that the primary elections do not, on their face, determine the names of the nominees, only that the general election was eventually contested by named representatives of the two major political parties. Moreover, the eventual winner of both contests was/will be a declared member of a partisan political party. See *Special Counsel v. Lewis*, 121 M.S.P.R. 109 (2014)(aff'd, 594 Fed. Appx.974, 980 (Fed. Cir. 2014)(Respondent violated Hatch Act because he ran for U.S. Congress as an independent, where his opponents ran as a Republican and a Democrat, respectively.)

Thus, in the prior Order, the undersigned Administrative Law Judge found as matters of fact and law, that the 2014 and 2016 elections in which Respondent campaigned were partisan political elections. Hence, OSC was granted partial summary adjudication as a matter of law.

Accordingly, OSC **PROVED** that it was entitled to a judgment as a matter of law as to Counts One and Two of the Complaint. Moreover, in the original Order, the undersigned Administrative Law Judge specifically found that Respondent was, at all relevant times alleged in the Complaint, a federal employee subject to the provisions of 5

U.S.C. §7323(a)(3) and 5 C.F.R. §734.304 and that he ran as a candidate for a partisan political office in both 2014 and 2016, as alleged in Counts One and Two of the Complaint. Thus, the undersigned Administrative Law Judge specifically found that Respondent did commit violations of 5 U.S.C. §7323(a)(3) and 5 C.F.R. §734.304, as alleged in Counts One and Two of the Complaint.

The Hatch Act Modernization Act of 2012 establishes the Board's independent responsibility to determine the propriety of a penalty for an employee's violation of the Hatch Act. Respondent is not required to show why removal is inappropriate. *See* Pub. L. 112-230 §4, Dec. 28, 2012; and *See* 5 U.S.C. §7326 (eliminating presumption of removal). Recent case law provides the Board should conduct an independent analysis to determine an appropriate sanction after both parties submit argument and evidence as to the severity of the violation and other aggravating and mitigating factors under *Douglas*. *See Lewis*, 121 M.S.P.R. 109. As the Board explained in *Lewis*, the Administrative Law Judge may continue to consider the factors contained in *Purnell*, insofar as they are within or overlap the *Douglas* factors including "the nature and seriousness of the respondent's offense and whether there are mitigating circumstances, such as the respondent's reliance on the advice of counsel or his change in conduct once notified of that his conduct violates the Hatch Act." *Lewis*, 121 M.S.P.R. at 120.

A. The “Douglas Factors”

As noted above, in a Hatch Act case, the Board determines an appropriate penalty pursuant to 5 U.S.C. §7326. The Administrative Law Judge is obliged to examine the entire administrative record and apply the relevant factors from *Douglas* as set forth below. *See Douglas*, 5 M.S.P.R. at 305-6; *Lewis*, 121 M.S.P.R. 109.

(1) Nature and Seriousness of the “Offense”

Respondent’s candidacies for partisan political office are serious offenses in clear violation of the Hatch Act. Moreover, Respondent’s failure to adhere to guidance given to him by his agency and by OSC is properly considered as aggravating factors in this case.

a. Respondent’s Actions were Overt Political Activity and Serious Violations of the Hatch Act

In *Lewis*, the Board found that an “active candidacy for partisan political office [which is] conspicuous and substantial, warrants removal from federal service.” *Lewis*, 121 M.S.P.R. at 121-22. In this case, the facts demonstrate Respondent decided to continue to run for partisan office in violation of the Hatch Act, even after repeated warnings from agency and OSC attorneys. As in *Lewis*, the substantial and conspicuous nature of Respondent’s actions in pursuing partisan political office support OSC’s proposed penalty of removal.

b. Conclusion on Nature and Seriousness of the Offenses

The facts of this case demonstrate the conspicuous and substantial nature of Respondent's Hatch Act violations. The undisputed facts show

Respondent conducted an open and public campaign for partisan political office and continued his candidacy even after repeated and specific advice regarding his violations of the Hatch Act. The undersigned Administrative Law Judge specifically notes that Respondent's campaign website, www.votekeitharnold.com, clearly identifies Respondent as a "Proud Federal Employee, NOAA." Accordingly, the first *Douglas* factor weighs significantly in favor of removal as the appropriate sanction in this case. *Lewis*, 121 M.S.P.R. 109; *See Villada v. USPS*, 115 M.S.P.R. 268 (2010); *see also OSC v. Ware*, 114 M.S.P.R. 128 (2010).

(2). **Respondent's Position and its Prominence**

Respondent's supervisor, Ms. Angela Hunter, testified that Respondent's duties at NOAA as an accounting technician include significant fiduciary obligations. (Tr. at 18).

(3). **Respondent's Past Disciplinary Record**

Respondent had no prior disciplinary record. In fact, his supervisor, Ms. Angela Hunter testified that she was aware of no episode, during the course of his NOAA employment, when Respondent was either disruptive or derelict in the performance of his duties. (Tr. at 19).

(4). **Respondent's Past Work Record**

Respondent's performance evaluations suggest that he meets or exceeds many of his performance standards as an accounting technician. (OSC Ex. 2, Tr. at 14).

(5). **Effect of the Offense on Respondent's Ability to Perform and Effect on Supervisor's Confidence**

There was no evidence presented that Respondent's work or ability to continue working was negatively impacted by his Hatch Act violations. Respondent's supervisor, Ms. Angela Hunter opined that the other members of Respondent's work group did not know Respondent had been a candidate for Congress. (Tr. at 21 – 22).

(6). **Consistency of Penalty and Disparate Treatment**

There was no evidence that Respondent was subjected to disparate treatment from others similarly situated. However, OSC noted prior cases where the Board removed employees for participating in a partisan election. *See Lewis*, 121 M.S.P.R. at 128, 29 citing *Special Counsel v. Greiner*, 117 M.S.P.R. 117 (2011); *Special Counsel v. Briggs*, 110 M.S.P.R. (2008).

(7). **Notoriety of the Offense**

Board precedent defines the “notoriety of the offense” as the impact of a respondent's behavior on the agency's reputation. *See Special Counsel v. Lee*, 114 M.S.P.R. 57 (2010) (overruled on other grounds by *Beatrez v. MSPB*, 413 Fed. Appx. 298 (Fed. Cir. 2011)). In evaluating the notoriety of the offense, the Board consistently considers the extent to which an employee's conduct has been disseminated through the media. *See Taylor v. Dep't of Navy*, 35 M.S.P.R. 438 (1987).

Respondent's campaign website "proudly" exclaims his service as a NOAA employee. Thus, the public is led to believe federal employees can also serve in Congress is misleading and undermines public confidence. As of this writing, Respondent still maintains his partisan political website, www.votekeitharnold.com. Thus, Respondent's actions were, and are, open and notorious to the public. Respondent's conduct directly disregards the intent of the law to minimize the impact of partisan politics on civil service. The United States Supreme Court made clear,

A major thesis of the Hatch Act is that to serve this great end of government—the impartial execution of the laws—it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and **not run for office on partisan political tickets**. . . .

‘[T]he prohibitions against active participation in partisan political management and partisan political campaigns constitute the most significant safeguards against coercion [of federal employees].’ (emphasis added).

U.S. Civil Service Comm’n v. Nat. Assoc. of Letter Carriers, 413 U.S. 548 (1973).

By publicly defying the Hatch Act and refusing legal guidance to cease the partisan political campaigns, Respondent's actions violated “the prohibitions against active participation” in partisan political campaigns, which the Supreme Court considers “the most significant safeguards against coercion” of federal employees. *Id.*

(8). **Was Respondent on Notice of Rules or Conduct?**

OSC presented evidence showing that Respondent attended his agency's Hatch Act training. (OSC Ex. 3). Moreover, OSC provided overwhelming evidence of its extensive efforts to communicate with Respondent regarding his several candidacies and of the OSC's and Department of Commerce's efforts to advise Respondent to cease those partisan political candidacies. Respondent was clearly provided with ample notice that his repeated course of conduct violated the Hatch Act. (OSC Ex. 10, 11, 12).

(9). **Potential for Rehabilitation – will other sanctions deter future misconduct?**

Despite repeated warnings, Respondent continued his campaigns and did not comply with lawful directions to cease his election efforts. Thus, OSC contends that a sanction less than removal will not deter future misconduct.

Based on the evidence in the record, I find that Respondent knew termination from federal employment could be a consequence for his Hatch Act violations. The record demonstrates Respondent was not deterred by the adverse consequences of the Hatch Act. The record further reveals that the undersigned Administrative Law Judge repeatedly urged Respondent to attend the November 29, 2016 hearing and participate meaningfully in his defense.

Where an individual is advised of the Hatch Act prohibitions and continues to run for partisan political office while maintaining

employment with the federal government, it is clear that sanction short of removal would not deter future misconduct.

Respondent adamantly refused to cease his campaigns despite repeated warnings to the contrary. I find that under the facts and circumstances presented in this case, other sanctions would not provide deterrence and, therefore, this factor weighs in favor of removal as the appropriate sanction.

(10). **Mitigating Circumstances**

Respondent's supervisor, Ms. Angela Hunter, testified that Respondent did not campaign or attempt to solicit funds or votes while on duty at NOAA. In fact, Ms. Hunter testified that neither she nor Respondent's fellow-workers knew Respondent was a political candidate. (Tr. at 21 – 22).

The undersigned Administrative Law Judge concludes that the evidence, taken as a whole, and analyzed in light of the *Douglas* factors, strongly suggests Respondent should be removed from his position of federal employment.

VI. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Counts 1 and 2 are **PROVEN** based on the undisputed facts found in this Initial Decision and in the September 20, 2016 Order granting Partial Summary Adjudication.

2. Respondent is and has been a federal employee of the United States Department of Commerce, National Oceanic and Atmospheric Administration since 2010. Thus, he is and has been subject to the provisions of 5 U.S.C. §7323, otherwise known as the Hatch Act.

3. Respondent was a candidate in the partisan primary election campaigns for United States Representative from Washington's 8th Congressional District in 2014 and 2016.

4. By participating in the partisan primary election campaigns for United States Representative from Washington's 8th Congressional District in 2014 and 2016, Respondent violated the Hatch Act.

5. Respondent violated 5 U.S.C. §7323(a)(3) and 5 C.F.R. §734.304.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, Respondent is **REMOVED** from federal employment with the Department of Commerce, National Oceanic and Atmospheric Administration as the appropriate sanction for violation of the Hatch Act.

PLEASE TAKE NOTICE, under 5 C.F.R. §1201.113, this Initial Decision will become **FINAL** on February 14, 2017, thirty-five days from the date of this decision unless a party files a petition for review on or before that date or the Board reopens the case on its own motion.

PLEASE TAKE FURTHER NOTICE, any party may file a petition for review with the Merit Systems Protection Board in accordance with the procedures set forth in **Attachment (B)**.

Done and dated this 10th day of January, 2017.

FOR THE BOARD:

Bruce T. Smith

**BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE**

ATTACHMENT A

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE**

**SPECIAL COUNSEL,
Petitioner,**

**DOCKET NUMBER
CB-1216-16-0017-T-1**

v.

**KEITH L. ARNOLD,
Respondent.**

DATE: September 20, 2016

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

**ORDER GRANTING IN PART/DENYING IN PART PETITIONER'S MOTION
FOR SUMMARY ADJUDICATION**

**Hon. Bruce Tucker Smith
Administrative Law Judge**

On September 9, 2016, the self represented Respondent filed his Motion for Summary Judgment.⁷ On the same day, Petitioner filed its Motion for Summary Adjudication.⁸

This Order **DENIES** Respondent's Motion in total, and **GRANTS** Petitioner's Motion in part and **DENIES** Petitioner's Motion in part.

⁷ Respondent's Motion also "demands any and all appropriate compensation including but not limited to compensatory and punitive damages." (Resp. Motion at 3). Respondent's demand for compensation and/or damages is hereby denied. The Administrative Law Judge is not empowered to award compensation or damages per the provisions of either 5 U.S.C. §§1212a(3)(A), 7326 or 5 C.F.R. §1201.43.

⁸ The undersigned Administrative Law Judge has also reviewed Petitioner's Response in opposition to Respondent's Motion for Summary Judgment, dated September 19, 2016 and Respondent's Supplemental Objection to "Petitioner's Motion for Summary Adjudication," (sic), also dated September 19, 2016.

BACKGROUND

On May 25, 2016, Petitioner filed its Amended Complaint for Disciplinary Action (Violation of the Hatch Act) (Complaint). The substance of the Complaint alleges that since March 2010 and at all times relevant to the Complaint, Respondent was a full-time employee of the federal National Oceanic and Atmospheric Administration (NOAA), an agency of the U.S. Department of Commerce (DOC). Petitioner alleges that Respondent is thus subject to the provisions of 5 U.S.C. §7321-7326 (Hatch Act).

The Complaint alleges that in 2010 and in 2012, and during the course of his federal employment, Respondent ran as a candidate in the primary election for United States Representative from Washington's 8th Congressional District. The Complaint describes how, in 2012, Respondent's employer repeatedly counseled him about the impropriety of seeking elected office in a partisan political election. The Complaint then alleges in Count One that in 2014, Respondent was again a candidate in the partisan primary election campaign for United States Representative from Washington's 8th Congressional District, in violation of the Hatch Act.

The Complaint alleges in Count Two that in 2016, Respondent was again a candidate in the partisan primary election campaign for United States Representative from Washington's 8th Congressional District, again in violation of the Hatch Act.

The Complaint concludes that by running as a candidate in those two partisan elections, Respondent violated the Hatch Act and, as a result, ought be subject to appropriate disciplinary action pursuant to 5 U.S.C. §7326.

On June 13, 2016, Respondent filed his Answer to Amended Complaint (Answer). In his Answer, Respondent asserts, among other things, that his candidacies

were non-partisan and that, per the provisions of 5 C.F.R. §734.207, *et al*, he was entitled to run as a candidate in a non-partisan election.

MOTIONS FOR SUMMARY JUDGMENT

The Merit Systems Protection Board Regulations contained at 5 C.F.R. Part 1201, govern “Practices and Procedures” before the Board. Those regulations do not specifically provide for summary judgment motions, decisions or adjudications; but neither does 5 C.F.R. § 1201.55. Conversely, § 1201.55 does not preclude the applicability of such motions.

In cases such as this, the Board generally looks to the Federal Rules of Civil Procedure “for guidance concerning the treatment of motions before it.” *Special Counsel v. Parra*, 49 M.S.P.R. 123, 125 (1991). Moreover, the United States Court of Appeals for the Federal Circuit has tacitly upheld the propriety of summary judgment proceedings, under Fed. R. Civ. P. 56, in Board proceedings such as these. *McEntee v. Merit Sys.Prot. Bd.*, 404 F.3d 1320, 1322 (Fed. Cir. 2005). Thus, Fed. R. Civ. P. 56 (Rule 56) governs the resolution of the instant Motions.

Rule 56 provides that motions for summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

A. UNDISPUTED MATERIAL FACTS

The instant Motions pose two dispositive questions of fact:

1. Was Respondent a federal employee at the relevant times alleged in the Complaint?

2. Did Respondent run as a candidate in a partisan political election while he was federally employed?

Both of these questions are answered in the affirmative.

1. Respondent's Federal Employment

In his Answer to Petitioner's Requests for Admissions, Respondent admitted that he began his employment with NOAA in March, 2010. (Pet. Ex. 7, Req. for Admiss. 11).

Respondent also freely admits that he is a federal employee who ran for the above-described Congressional seat. In his present Motion, Respondent specifically admits:

Therefore, I, Keith Arnold, respondent, an employee, 'may run as a candidate in a non-partisan election' such as U.S. Representative in Washington State in accordance with 5 C.F.R.734.304 and 5 C.F.R. Ch. I § 734.207. (sic)(emphasis added).

Respondent made a nearly identical admission in his Answer.

Accordingly, I, Keith Arnold, respondent, an employee, 'may run as a candidate in a non-partisan election' such as US Representative elections in accordance with 5 C.F.R. Ch. I § 734.207, in Washington State." (sic)(emphasis added).

Also enlightening are Respondent's plain admissions contained in his May 18, 2016, Response to Complaint: Motion to Dismiss.

I ran for Congress in the 8th District of Washington in 2006, 2008, 2010, and 2012. I started working at NOAA in March 2010.⁹

Curiously, Respondent's July 8, 2016, Reply to Amended Complaint denies the allegations contained in paragraphs 31 - 33 of the Complaint that he ran in a partisan political election for Congress in 2016. However, Respondent's own campaign website plainly advances his 2016 Congressional campaign wherein he

⁹ This admission is contrary to Respondent's denials of paragraphs 27 - 29 of the Complaint.

describes himself as a “Proud Federal Employee, NOAA,” just as he had done in 2014 as well. (Pet. Ex. 4).

Thus, the undersigned Administrative Law Judge finds as a matter of fact that Respondent was employed by NOAA at the times he ran for Congress from Washington’s 8th Congressional District in 2010 and 2012 as generally alleged in the Complaint, and in 2014 as specifically alleged in Count One of the Complaint and in 2016 as specifically alleged in Count Two of the Complaint.¹⁰

2. Partisan Political Elections

Respondent contends that the 2010, 2012, 2014 and 2016 8th Congressional District primary elections were not partisan. Accordingly, he believes that he was entitled to run in those elections for Congress because 5 C.F.R. §734.207(b) allows an employee to “run as a candidate in a non-partisan election.” Unfortunately for Respondent’s argument, the Congressional elections at issue were, in fact, partisan.

Title 5 U.S.C. §7322 defines “partisan political office” as:

Any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but shall exclude any office or position within a political party or affiliated organization.

Likewise, Wash. Rev. Code §29A.04.110 plainly describes the position of United States Representative as a partisan office. “The following are partisan offices ... (1) United States senator and United States representative.” *Id.*

Respondent admits that he ran as a candidate for election to Congress from Washington’s 8th Congressional District in 2014. (Pet. Ex. 7, Req. for Admiss. 1; Pet. Ex.

¹⁰ See also Petitioners Exhibit 4, Respondent’s political website, www.votekeitharnold.com.

5). In 2014, both the Washington State Republican Party and the Washington State Democrat Party nominated their respective candidates for election to Washington's 8th Congressional District. (Pet. Ex. 12, 13, 19.) The incumbent was a Republican. Both candidates represented a political party whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected. 5 U.S.C. §7322, 5 C.F.R. §1201.64.

Respondent admits that he ran as a candidate for election to Congress from Washington's 8th Congressional District in 2016. (Pet. Ex. 7, Req. for Admiss. 8; Pet. Ex. 16). In fact, the August 2, 2016, primary ballot upon which Respondent's name appeared as a candidate, plainly identified his electoral contest as a competition for a "partisan office." (Pet. Ex. 18). In 2016, both the Washington State Republican Party and the Washington State Democrat Party again nominated their respective candidates for election to Washington's 8th Congressional District in the pending November 8, 2016 election.¹¹ (Pet. Ex. 16). The incumbent is a Republican. 5 C.F.R. §1201.64.

The United States Court of Appeals for the Federal Circuit in *McEntee*, *supra*, expressly ruled:

The definition of a 'partisan political office' expressly encompasses offices for which candidates are either nominated as representing a party or elected as representing a party ... In order to give meaning to all words of the statute, as we must, we do not read the term 'elected as representing a party' to require formal endorsement or selection by a major political party.

Id. at 1329.

¹¹ Per 5 C.F.R. §1201.64, the undersigned Administrative Law Judge also takes official notice that the pending 2016 general election for Washington's 8th Congressional District features a contest between Republican (incumbent) Dave Reichert and Democrat Tony Ventrella. Both represent a political party whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.

Clearly, the office of Representative to the United States Congress is a partisan political office per the provisions of 5 U.S.C. §7322 and controlling appellate case law.

Respondent contends that because Washington state law didn't require him to identify as a member of a particular party in the primary elections, those elections weren't "partisan."

Admittedly, Washington employs a unique primary election process, referred to as the "Top 2" election which allows primary voters to choose among one field candidates listed on the ballot for a given office. Neither the candidates, nor the voters, must declare a party affiliation to run or vote in the primary, although they may do so. Wash. Rev. Code. §§29A.36.170; 29A.52.112.

If a candidate does list his/her affiliation on the ballot, that preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate. Rather, the major political parties nominate their respective candidates for the general election after the primary. *Id.*

The two candidates who receive the most votes in the primary then qualify for candidacy in the general, provided that each receive at least one percent of all votes cast in the primary. *Id.* Here, it does not matter that the primary elections do not, on their face, determine the names of the nominees, only that the general election was eventually contested by named representatives of the two major political parties. Moreover, the eventual winner of both contests was/will be a declared member of a partisan political party. See *Special Counsel v. Lewis*, 121 M.S.P.R. 109 (2014)(aff'd, 594 Fed. Appx.974, 980 (Fed. Cir. 2014))(Respondent violated Hatch Act because he ran for U.S. Congress as an independent, where his opponents ran as a Republican and a Democrat, respectively.)

Thus, the undersigned Administrative Law Judge finds as a matter of fact that the 2014 and 2016 elections in which Respondent campaigned were partisan political elections.

B. JUDGMENT AS A MATTER OF LAW

The salient provision of the Hatch Act, here, is 5 U.S.C. §7323, which plainly states:

An employee may take an active part in political management or in political campaigns, *except an employee may not ... (3) run for the nomination or as a candidate for election to a **partisan political office**.* (emphasis added).

Here, it is undisputed that Respondent is a federal employee, currently in the service of NOAA. He has worked in that capacity at all relevant times to facts alleged in the Complaint. Likewise, he ran for the nomination or as a candidate for election to the House of Representatives from Washington's 8th Congressional District, a partisan political office, in 2014 and 2016.

Accordingly, Petitioner has proven that it is entitled to a judgment as a matter of law as to Counts One and Two of the Complaint.

CONCLUSION

Pursuant to Fed. R. Civ. P. 56, Respondent's Motion for Summary judgment is **DENIED**.

Pursuant to Fed. R. Civ. P. 56, Petitioner's Motion for Summary Adjudication is **GRANTED** on the question whether Respondent violated the Hatch Act as alleged in Counts One and Two of the Complaint. The undersigned Administrative Law Judge specifically finds that Respondent was, at all relevant times alleged in the Complaint, a

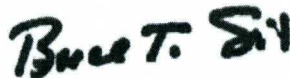
federal employee subject to the provisions of 5 U.S.C. §7323(a)(3) and 5 C.F.R. §734.304 and that he ran as a candidate for a partisan political office in both 2014 and 2016, as alleged in Counts One and Two of the Complaint. Thus, the undersigned Administrative Law Judge specifically finds that Respondent did commit violations of 5 U.S.C. §7323(a)(3) and 5 C.F.R. §734.304, as alleged in Counts One and Two of the Complaint.

Petitioner's Motion for Summary Adjudication is **DENIED** on the question whether, or to what extent, Respondent should be subject to disciplinary action, per the provisions of 5 U.S.C. §7326.

The question whether, or to what extent, Respondent should be subject to disciplinary action will be resolved by a subsequent, adverse, evidentiary hearing at a time and location to be announced by the undersigned Administrative Law Judge. The parties are instructed to prepare their respective presentations in light of *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981). Following the adverse, evidentiary hearing, the undersigned Administrative Law Judge will issue an Initial Decision, per 5 C.F.R. §1201.111.

IT IS SO ORDERED.

Done and dated this 20th day of September, 2016.

A handwritten signature in black ink that reads "Bruce T. Smith". The signature is written in a cursive, slightly slanted style.

HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

ATTACHMENT B

NOTICE TO RESPONDENT

This initial decision will become final on **February 14, 2017**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently only one member is in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least one additional member is appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice to the Respondent Regarding Your Further Review Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

- (a) The initial decision contains erroneous findings of material fact.
 - (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.

(2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a

pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed

electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE TO THE RESPONDENT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date this initial decision becomes final. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is

available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

If you are interested in securing pro bono representation for your court appeal, that is, representation at no cost to you, the Federal Circuit Bar Association may be able to assist you in finding an attorney. To find out more, please click on this link or paste it into the address bar on your browser:

<https://fedcirbar.org/Pro-Bono-Scholarships/Government-Employees-Pro-Bono/Overview-FAQ>

The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE CLERK OF THE BOARD

SPECIAL COUNSEL,

DOCKET NUMBER

[Hatch Act Unit]

CB-1216-16-0017-T-1

Petitioner,

V.

KEITH L. ARNOLD,

Respondent.

RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT [with ADDENDUM]

I, Keith L. Arnold, respondent, make this motion for summary judgment for respondent per 5 C.F.R. §1201.55 and Federal Rules of Civil Procedure (FRCP) Rule 56.

The Amended Complaint like the Complaint is Hatch Act Unit Overreach (“HAUO”) and deception. On Amended Complaint pages 1-2 HAUO states, “ Section 7323(a)(3) of Title 5 of the United States Code and 5 C.F.R. § 734.304 prohibit federal employees from running for the nomination or as a candidate for election to a partisan political office.”

This is overreach and deception and a cover up because it leaves out the end of the sentence in 5 C.F.R. § 734.304 to fraudulently change its meaning. The end of the sentence is: “except as specified in § 734.207.” [Addendum (Add) II] which is, also, included in my Appendix to “Respondent’s Answer [with Appendix] to Amended Complaint” (“AnAp”).

HAUO has even filed a Petitioner’s Motion for Summary Adjudication which willfully and knowingly leaves out the 5 C.F.R. § 734.304 exception and fraudulently attempts to change the meaning and truthful presentation of 5 C.F.R. § 734.304. Accordingly, this RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM] is, also, an objection and opposition to Petitioner’s Motion for Summary Adjudication

The truthful presentation of 5 C.F.R. § 734.304 is in Add II and AnAp II and is:

“§ 734.304

Candidacy for public office.

An employee may not run for the nomination or as a candidate for election to partisan political office, except as specified in § 734.207.

§ 734.207

Candidacy for public office.

An employee may:

- (a) Run as an independent candidate in a partisan election covered by 5 CFR part 733; and
- (b) Run as a candidate in a non-partisan election.

§ 734.101 Definitions.

For the purposes of this part:

Election includes a primary, special, runoff, or general election.

Nonpartisan election means—

- (1) An election in which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected; or”.

Further, the US Constitution states “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States”. [Add I]

HAUO Amended Complaint cites Washington State law in its charge #28, thereby agreeing Washington State law is an important part of federal election law.

Revised Code [State] of Washington (RCW) 29A.36.170 (1) states:

“ For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot” [Add III.]. Also, RCW 29A.52.112 (4) states: “Any party preferences are shown for the information of voters only and may in no way limit the options available to voters.”. [Add III]

The State of Washington Secretary of State website states:

“Washington is the first state in the country to establish a Top 2 Primary election system, rather than a party nominating system”; “ A candidate’s party preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate”; “ The two candidates who receive the most votes in the Primary advance to the

General Election, regardless of their party preference”; and “Political parties do not have a guaranteed spot on the General Election ballot. The two candidates who advance to the General Election may prefer the same party, different parties, or not state a party preference”. [Add IV]

In State of Washington Voters' Pamphlet August 19, 2008 Primary page 2, then WA Secretary of State Sam Reed statement excerpt says: “One new twist: Our new voter-approved primary no longer nominates a finalist from each major party, but rather sends the two most popular candidates forward for each office. It’s a winnowing election to narrow the field. Your candidates have listed the party they prefer, but that doesn’t mean the party endorses or affiliates with them”. [Add V]

The State of Washington Secretary of State website FAQ, “**Will there be both a Democrat and a Republican on the ballot at the General Election?**” is answered “Not necessarily. First, remember that the candidates are not appearing on the ballot representing a party; they are only representing themselves. Second, remember that the primary is for voters and candidates, not political parties. The parties do not own a spot on the General Election ballot. ”. [Add VI p. 13]

The State of Washington Secretary of State website FAQ, “**What is the difference between a Top 2 Primary and the Primary Elections in Other States?**” is answered (last paragraph of answer), “The purpose of the Top 2 Primary is *not* to select each party’s nominees. Political parties are free to conduct their nominating procedures according to their own rules, at their own conventions, caucuses and meetings. This frees the parties to develop their own criteria for nominations, endorsements, and other public declarations of support.” [Add, VI p. 13-14]

Therefore, the US Constitution states “ People of the several States” determine how to elect the US Representatives from their state. State of Washington RCW states “For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot” [Add III.]. This means a political party is not guaranteed the 2 advancing candidates will include someone who prefers (let alone represents) them. It may be neither of the 2 advancing candidates prefers any political party. RCW 29A.52.112 (4) states: “Any party preferences are shown for the information of voters only and may in no way limit the options available to voters”.

Therefore, in Washington State, US Representative elections no longer nominate candidates as

political party representatives and none of the candidates is nominated or elected as representing a political party making US Representative elections in Washington State nonpartisan elections as defined in 5 CFR Ch. I § 734.101(1).

5 CFR Ch. I § 734.101 states Nonpartisan election means

“An election in which none of the candidates is to be nominated or elected as representing a political party”.

Washington's Top 2 primary which advances the top 2 finishers disregarding party preferences and shows party preference for informational purposes only clearly meets this CFR definition of a nonpartisan election because none of the candidates is nominated or elected as representing a political party.

HAUO states, “OSC is amending its charges because the Respondent has engaged in additional prohibited activities”. [Amended Complaint page 1]. The sole basis of HAUO's complaint is “prohibited activities”. Those activities are running for Congress. As stated in my RESPONSE, I ran for Congress in the 8th District of Washington in 2006, 2008, 2010, and 2012. I started working as a federal employee at NOAA in Washington state in March 2010. I am a candidate for Congress in Washington state in 2016.

As noted above, HAUO Amended Complaint cites Washington State law in its charge #28, thereby agreeing Washington State law is an important part of federal election law. However, as shown above, running for Congress is not prohibited in Washington state due to the “except as specified in § 734.207” exception at the end of the sentence in 5 C.F.R. § 734.304. Since 5 C.F.R. § 734.304 ends with an exception, it is a limited prohibition not a total prohibition. Of course, an exception to a prohibition means where the exception condition exists, the prohibition does not exist. This clearly states that if an elected office is a “partisan political office” and at the same time has a “Nonpartisan election”, then the Nonpartisan election condition takes priority over, overrides, and supersedes the partisan political office condition thereby allowing the partisan political office condition itself to remain but nullifying the partisan political office prohibition.

The 5 CFR Ch. I § 734.207(b) non-partisan election exception (to the 5 C.F.R. § 734.304 limited prohibition) exists in Washington state, so the 5 C.F.R. § 734.304 prohibition does not exist in Washington state. That is why HAUO left the end of 5 C.F.R. § 734.304 out of its Amended Complaint. HAUO fraudulently, intentionally, and willfully tried to omit and coverup the exception to create a false prohibition.

In conclusion, in accordance with 5 CFR Ch. I § 734.207 (which is the 5 C.F.R. § 734.304 exception HAUO fraudulently omitted from its Amended Complaint), in Washington State, “an employee may run as a candidate in a non-partisan election” such as US Representative elections.

Therefore, I, Keith Arnold, respondent, an employee, "may run as a candidate in a non-partisan election" such as U.S. Representative in Washington State in accordance with 5 C.F.R. § 734.304 and 5 CFR Ch. I § 734.207.

Accordingly, this motion's truthful presentation of 5 C.F.R. § 734.304 shows that HAUO's amended complaint like HAUO's complaint is a baseless waste of government's and respondent's time, resources, and money and should not go forward and that I never should have been contacted by HAUO or any Office of General Counsel or "Ethics" (Amended Complaint charge #7) in the first place.

Wherefore, I, respondent, request summary judgment because the activities I engaged in in Washington State were not prohibited but were approved by law. Also, respondent demands any and all appropriate compensation including but not limited to compensatory and punitive damages.

Date: September 9, 2016

by: 

Keith L. Arnold

Respondent

ADDENDUM

I. From www.archives.gov: the Constitution for the United States of America Section. 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

II. 5 CFR Ch. I

Subpart A—General Provisions

§ 734.101 Definitions.

For the purposes of this part:

Election includes a primary, special, runoff, or general election.

Nonpartisan election means—

(1) An election in which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected; or

Partisan when used as an adjective means related to a political party.

Partisan political office means any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but does not include any office or position within a political party or affiliated organization.

§ 734.207

Candidacy for public office.

An employee may:

- (a) Run as an independent candidate in a partisan election covered by 5 CFR part 733; and
- (b) Run as a candidate in a non-partisan election.

§ 734.304

Candidacy for public office.

An employee may not run for the nomination or as a candidate for election to partisan political office, except as specified in § 734.207.

III. From Revised Code of Washington (RCW)

RCW 29A.36.170

Top two candidates qualified for general election—Exception (as amended by 2013 c 11).

(1) For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for an office for which no primary was held, the names of the candidates shall be listed in the order determined under RCW (~~(29A.36.130)~~) 29A.36.131.

(2) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, judge of the district court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed for that position on the ballot at the general election.

[2013 c 11 § 45. Prior: 2005 c 2 § 6 (Initiative Measure No. 872, approved November 2, 2004); (2004 c 271 § 193

repealed by the legislature); 2003 c 111 § 917; prior: 1992 c 181 § 2; 1990 c 59 § 95. Formerly RCW 29.30.085.]

RCW 29A.36.170

Top two candidates qualified for general election (as amended by 2013 c 143).

~~((1))~~ For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first and the candidate who received the next greatest number of votes will appear second. No candidate's name may be printed on the subsequent general election ballot unless he or she receives at least one percent of the total votes cast for that office at the preceding primary, if a primary was conducted. On the ballot at the general election for an office for which no primary was held, the names of the candidates shall be listed in the order determined ~~((under))~~ pursuant to RCW ((29A.36.130)) 29A.36.131.

~~((2) For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed for that position on the ballot at the general election.))~~
 [2013 c 143 § 1. Prior: 2005 c 2 § 6 (Initiative Measure No. 872, approved November 2, 2004); (2004 c 271 § 193 repealed by the legislature); 2003 c 111 § 917; prior: 1992 c

181 § 2; 1990 c 59 § 95. Formerly RCW 29.30.085.]

NOTES:

Reviser's note: RCW 29A.36.170 was amended twice during the 2013 legislative session, each without reference to the other. For rule of construction concerning sections amended more than once during the same legislative session, see RCW 1.12.025.

Short title—Intent—Contingent effective date—2005 c 2 (Initiative Measure No. 872): See notes following RCW 29A.52.112.

Effective date—1992 c 181: See note following RCW 29A.36.180.

Intent—Effective date—1990 c 59: See notes following RCW 29A.04.007.

RCW 29A.52.112

Top two candidates—Single county partisan office—Party or independent preference.

(1) A primary is a first stage in the public process by which voters elect candidates to public office.

(2) Whenever candidates for a partisan office are to be elected, the general election must be preceded by a primary conducted under this chapter. Based upon votes cast at the primary, the top two candidates will be certified as qualified to appear on the general election ballot, unless only one candidate qualifies as provided in *RCW 29A.36.170.

(3) No primary may be held for any single county partisan office to fill an unexpired term if, after the last day allowed for candidates to withdraw, only one candidate has filed for the position.

(4) For partisan office, if a candidate has expressed a party preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots as set forth in rules of the secretary of state. A candidate may choose to express no party preference. Any party preferences are shown for the information of voters only and may in no way limit the options available to voters.

[2014 c 7 § 1; 2013 c 11 § 50; 2005 c 2 § 7 (Initiative Measure No. 872, approved November 2, 2004).]

NOTES:

*Reviser's note: RCW 29A.36.170 was amended by 2013 c 143 § 1, removing the one candidate exception.

Short title—2005 c 2 (Initiative Measure No. 872): "This act may be known and cited as the People's Choice Initiative of 2004." [2005 c 2 § 1 (Initiative Measure No. 872, approved November 2, 2004).]

Intent—2005 c 2 (Initiative Measure No. 872): "The Washington Constitution and laws protect each voter's right to vote for any candidate for any office. The Washington State Supreme Court has upheld the blanket primary as protecting compelling state interests "allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary." *Heavey v.*

Chapman, 93 Wn.2d 700, 705, 611 P.2d 1256 (1980). The Ninth Circuit Court of Appeals has threatened this system through a decision, that, if not overturned by the United States Supreme Court, may require change. In the event of a final court judgment invalidating the blanket primary, this People's Choice Initiative will become effective to implement a system that best protects the rights of voters to make such choices, increases voter participation, and advances compelling interests of the state of Washington." [2005 c 2 § 2 (Initiative Measure No. 872, approved November 2, 2004).]

Contingent effective date—2005 c 2 (Initiative Measure No. 872): "This act takes effect only if the Ninth Circuit Court of Appeals' decision in *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003) holding the blanket primary election system in Washington state invalid becomes final and a Final Judgment is entered to that effect." [2005 c 2 § 18 (Initiative Measure No. 872, approved November 2, 2004).]

Reviser's note: On February 28, 2004, the United States Supreme Court refused to take the case on appeal; therefore the Ninth Circuit's decision stands.

IV. From State of Washington Secretary of State website link https://wei.sos.wa.gov/agency/osos/en/voters/Pages/top_2_primary.aspx

{text followed by website screenshot}

Top 2 Primary

Washington is the first state in the country to establish a Top 2 Primary election system, rather than a party nominating system. A Top 2 Primary narrows the number of candidates to two. The two candidates who receive the most votes in the Primary advance to the General Election, regardless of their party preference.

Candidates

Each candidate for partisan office may state a political party that he or she prefers. A candidate's party preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

Voters

In each race, you may vote for any candidate listed on the ballot. The two candidates who receive the most votes in the Primary advance to the General Election, regardless of their party preference. Washington voters do not declare party affiliation as part of voter registration.

Political parties

Political parties do not have a guaranteed spot on the General

Election ballot. The two candidates who advance to the General Election may prefer the same party, different parties, or not state a party preference. Parties are free to conduct their nominating procedures according to their own rules, at their own conventions, caucuses or meetings. This frees parties to develop their own criteria for nominations, endorsements, and other public declarations of support.

For more information see History of Washington State Primary Systems and Top 2 Litigation.

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For more information see [History of Washington State Primary Systems and Top 2 Litigation](#).



Washington Secretary of State
 Elections Division
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V. From State of Washington Voters' Pamphlet August 19, 2008 Primary page 2, by then WA Secretary of State Sam Reed

http://www.sos.wa.gov/_assets/elections/Voters' Pamphlet 2008 Primary.pdf

{page 2 text followed by pamphlet entire page 2 statement screenshot}

Introduction to the 2008 Primary Voters' Pamphlet

It's your choice ... it's your voice.

Congratulations on exercising your privilege and responsibility to take part in Washington's elections – never more important than in this watershed 2008 election year. Our new Top 2 Primary on August 19 will give you maximum choice, allowing you the independence and freedom to “vote for the person, not the party.”

When the courts threw out our cherished “blanket primary,” we immediately proposed a Top 2 system as a way to protect the freedom of citizens to vote for their favorite in each office. This new system was backed by the Legislature and strongly approved by the state voters in 2004 as the People's Choice Initiative, and we are pleased that the U.S. Supreme Court has upheld your rights.

We think you will like this easy, clear way of voting for your favorite candidate. It's as simple as this: You get to choose your favorite candidate for each office on the ballot, without regard to political preference. You are no longer restricted by the old “pick-a-party” system.

The Top 2 vote-getters for each office will advance to the November general election.

One new twist: Our new voter-approved primary no longer nominates a finalist from each major party, but rather sends the two most popular candidates forward for each office. It's a winnowing election to narrow the field. Your candidates have listed the party they prefer, but that doesn't mean the party endorses or affiliates with them. Some candidates prefer major parties, some prefer minor parties and some express no party preference. All have a chance to advance to the November ballot.

We believe you will enjoy this new way of voting. It's simple, easy and follows the longtime Washington tradition of wide-open voting. We invite you to visit www.vote.wa.gov for more information on your Top 2 Primary.

Sincerely,



A handwritten signature in cursive script that reads "Sam Reed".

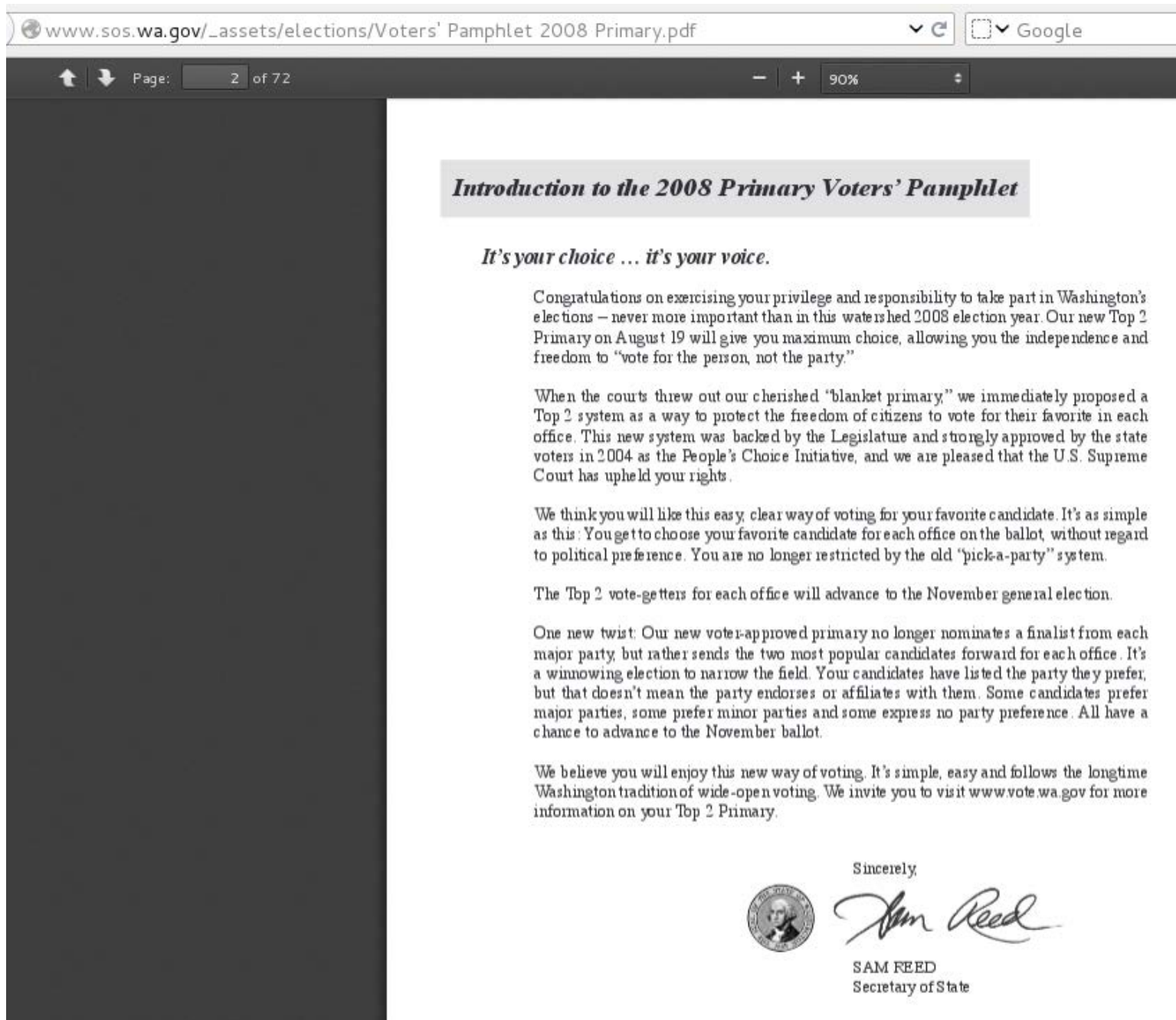
SAM REED
Secretary of State

Congratulations to 4th grader Gabriella Spring of Covington whose artwork is displayed on the cover of this Voters' Pamphlet.

***Secretary of State Voter Information Hotline (800)
448-4881***

TDD/TTY Hotline for the hearing or speech impaired (800) 422-8683

Visit our online voters' guide at www.vote.wa.gov



VI. From State of Washington Secretary of State website link <https://www.sos.wa.gov/elections/Top2PrimaryFAQ.aspx>

Top 2 Primary: FAQs for Voters

What is a Top 2 Primary?

A Top 2 Primary allows voters to vote for any candidate running in each race.

The two candidates who receive the most votes in the Primary Election qualify for the General Election. A candidate must also receive at least 1% of the votes cast in that race to advance to the General Election.

Candidates for partisan office may state a preference for a political party, which is listed on ballots and in voters' pamphlets. For example:

John Smith (Prefers Democratic Party)	Jane Doe (Prefers Republican Party)
--	--

Or candidates can choose to not state a party preference. For example:

John Smith
(States No Party Preference)

Regardless, the party preference information has no bearing on how the election is conducted or who is allowed to advance from the Primary to the General. Instead, which candidates are allowed to advance is based solely on how many votes they receive in the Primary.

What is a “party preference?”

Each candidate for partisan office may state a political party that he or she prefers. A candidate's preference does not imply that the candidate is nominated or endorsed by the party, or that the party approves of or associates with that candidate.

The party preference has no impact on how the election is conducted or which candidates are allowed to stay in the race to the General Election. The two candidates who receive the most votes in the Primary, and who receive at least 1% of the votes, advance to the General.

The candidate has up to 16 characters to describe the party that he or she prefers. This gives the candidate great freedom. Some candidates state a preference for an established major party, such as the Democratic Party or the Republican Party, while others state a preference for novel parties, such as the No New Taxes Party. Candidates are not restricted to stating a preference to an established major or minor party.

What offices are affected?

The Top 2 Primary applies to partisan office. In Washington, this includes the United States Senate and House of Representatives, the State Legislature, statewide partisan office such as Governor, and county partisan office such as County Commissioner.

The Top 2 Primary does **not** apply to elections for:

- President and Vice President; or
- Political Party Precinct Committee Officer (PCO).

While there are some slight variations, elections for *nonpartisan* office, such as city council or judge, are conducted in a similar manner to the Top 2 Primary. Generally, the two candidates in a nonpartisan race who receive the most votes in the Primary are the only candidates allowed to advance to the General Election.

If only 1 or 2 candidates file for an office, do they still have a Primary?

Yes. For partisan office, there is still a Primary even if only one or two candidates file. For nonpartisan office, there is no Primary and the candidates only appear in the General Election.

Will there be both a Democrat and a Republican on the ballot at the General Election?

Not necessarily. First, remember that the candidates are not appearing on the ballot representing a party; they are only representing themselves.

Second, remember that the primary is for voters and candidates, not political parties. The parties do not own a spot on the General Election ballot. Instead, the two candidates who appear on the ballot at the General Election are the two who received the most votes in the Primary. These candidates might prefer the same party, different parties, or not state a preference. In some races, all candidates who file declare a party preference for the same party.

Do Minor Party Candidates ever make it to the General Election?

Yes. Each year are candidates who prefer minor political parties, prefer parties created by the candidate, or who stated no party preference.

What is the difference between a Top 2 Primary and the Primary Elections in Other States?

Almost all other states in the country conduct *nominating* Primary Elections. In these states, the primary is for the political parties, because the purpose of the primary is to select each political party's nominee who will represent the party in the General Election.

For example, if five Republican candidates and 4 Democratic candidates file for the office of Governor, the purpose of a nominating primary is to select the one Republican candidate and one Democratic candidate who will advance to the General Election and represent their respective parties in the General Election, and are frequently required to be a registered member of the party in order to file as a candidate. In this type of election, the candidates are representing their political party when they appear on the ballot. If the state has party registration, the candidate usually must be a registered member of the party in order to file as a candidate of the party. Also, the voters are required to affiliate with a party in order to vote in the Primary and are restricted to voting only for candidates of that party.

In a Top 2 Primary, the primary is for the voters and candidates because the purpose is simply to winnow the number of candidates down to two. The candidates are not representing any political party when they appear on the ballot; they are only representing themselves. Candidates have great freedom to describe the party that they prefer. For example, a candidate might prefer the Pro-Life Republican Party, or the Labor Democratic Party. The party preference information for each candidate is informational only; it has no relevance to the election itself. Also, the voters do not have to affiliate with a party.

The purpose of the Top 2 Primary is *not* to select each party's nominees. Political parties are free to conduct their nominating procedures according to their own rules, at their own conventions, caucuses

and meetings. This frees the parties to develop their own criteria for nominations, endorsements, and other public declarations of support.

What is the difference between Washington's Top 2 Primary and California's new Primary?

California just passed Proposition 14. This ballot measure creates a primary system that is similar to a Top 2 Primary, though there are some significant differences. California has very established political parties, and party registration as part of voter registration.

As California implements the Top Two Primary, the state will have to address whether candidates are limited in their party preference options to the established political parties, such as the Republican or Democratic Party, or are free to describe their party preference in their own words, such as the No New Taxes Party.

How did the Top 2 Primary become law?

The Top 2 Primary was passed by the people in 2004 as an initiative. Initiative 872 passed by almost 60%.

In 2005, before the new law was implemented, the Washington state Democratic, Republican and Libertarian Parties sued in federal court. The lower courts imposed an injunction prohibiting the state from implementing the new Primary, but in March 2008 the U.S. Supreme Court upheld the new law.

The new Primary was used for the first time in the 2008 Primary and General. It was used for select partisan races in 2009, and now in the 2010 Primary and General.

Does Washington have Party Registration?

No. Washington does not have party registration as part of voter registration. Voters do not have to declare a party affiliation either when they register or vote.

Can a voter still write in a candidate?

Yes. Each race on the ballot will still have a write in line for a voter to write in the name of a candidate.

Contact Us

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE CLERK OF THE BOARD

SPECIAL COUNSEL,
[Hatch Act Unit]

DOCKET NUMBER
CB-1216-16-0017-T-1

Petitioner,

V.

KEITH L. ARNOLD,

Respondent.

CERTIFICATE OF SERVICE

I certify that this RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM] was sent by electronic mail on September 9, 2016 to:

Martorana, Carolyn cmartorana@osc.gov

Carolyn S Martorana, Office of Special Counsel, Hatch Act Unit, 1730 M Street, N.W., Suite 218, Washington, Dc 20036

Date: September 9, 2016

by: 

Keith L. Arnold

Respondent

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE CLERK OF THE BOARD

SPECIAL COUNSEL,
[Hatch Act Unit]

DOCKET NUMBER
CB-1216-16-0017-T-1

Petitioner,

V.

KEITH L. ARNOLD,

Respondent.

RESPONDENT'S SUPPLEMENTAL OBJECTION TO "PETITIONER'S MOTION FOR
SUMMARY ADJUDICATION"

I, Keith L. Arnold, respondent, file this supplemental objection (the first objection was RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM]) to Petitioner's Motion for Summary Adjudication per 5 C.F.R. §1201.55.

Petitioner's Motion for Summary Adjudication is additional Hatch Act Unit Overreach ("HAUO") and deception.

HAUO's PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS ("PoppD") states on pp 1-2 (including footnote 2):

"Arnold's motion asserts that the Complaint is not legally sufficient because even if

he ran in the election at issue, which he admits to doing, (see Resp't Mot. at 2), the Hatch

Act did not prohibit it because the election was not a partisan one.²

² The Hatch Act does not prohibit federal employees from being candidates in nonpartisan elections, that is, elections where *none* of the candidates is to be nominated or elected as representing a political party. See 5 C.F.R. §§ 734.101, 734.207(b)."

Also, PoppD states on pp 2-3:

"In any event, Arnold's motion is based on an incorrect interpretation the

Hatch Act.[sic] Specifically, he claims that the election for U.S. Representative was nonpartisan because Washington State holds open primary elections, in which the top two vote getters progress to the general election regardless of political affiliation, and the primary election does not serve as a mechanism for political parties to nominate candidates. (Resp't Mot. at 4.) While this is true of Congressional elections in Washington, the state's chosen election procedures do not affect the partisan character of the office of U.S. Representative. “

HAUO's opposition to respondent's motion to dismiss admits Washington state U.S. Representative elections are nonpartisan. Having an amended complaint that fraudulently leaves out (and hopes no one points out this deceptive omission) the exception at the end of 5 C.F.R. § 734.304 makes it look safe to confess Washington state U.S. Representative elections are nonpartisan and even arrogantly include *See* 5 C.F.R. §§ 734.101, 734.207(b) as a footnote.

HAUO didn't have RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM] (“RSUM”) before filing its Petitioner's Motion for Summary Adjudication (“PSUM”), but it did have Respondent's Reply to Amended Complaint (“Reply”).

HAUO's amended complaint states it's based is a “Section 7323(a)(3) of Title 5 of the United States Code and 5 C.F.R. § 734.304” prohibition. However, the Reply clearly shows HAUO knowingly, willfully, and fraudulently left out the exception to this prohibition in 5 C.F.R. § 734.304 to create a false prohibition. That is why HAUO's PSUM doesn't mention 5 C.F.R. § 734.304 in its text nor even in its footnotes. Indeed, PSUM abandons HAUO's misrepresentation of 5 C.F.R. § 734.304 and thereby abandons the basis of its Amended Complaint and mentions Section 7323(a)(3) of Title 5 only. HAUO, apparently, thought no one would notice it's Amended Complaint deceitfully and fraudulently omitted the 5 C.F.R. § 734.304 prohibition exception. Since Respondent showed HAUO's omission in his Reply, HAUO has gone from citing only part of 5 C.F.R. § 734.304 to hide its truthful presentation to completely excluding 5 C.F.R. § 734.304 as a desperate attempt to get the 5 C.F.R. § 734.304 prohibition exception's truthful presentation forgotten and thereby hidden. This omission is shown again in RSUM.

HAUO's PSUM memo tries to focus on Washington state use of terms such as “partisan office” and tries to treat it as having the same definition as in federal law. State's make their own definitions for terms which may or may not match federal definitions that happen to use the same terms. It's the definition given to a term that matters and not the term itself. The definitions emphasize that it's a state's actions that matter not their terms. A state using a term used by federal law is irrelevant, because the federal and state definitions of the terms are made by different bodies, so it's unlikely the definitions match or have the same use and it's the federal definition that matters not the term itself. That is why federal laws include definitions such as 5 C.F.R. § 734.101 Definitions cited on HAUO Amended Complaint page 2 first paragraph.

HAUO's PSUM memo talks about state terms and the actions of political parties to “prove” its fraudulent claim. It talks about political parties nominating a candidate but that nomination is not an election as defined in HAUO's Amended Complaint page 2 first paragraph citing of 5 C.F.R. § 734.101 Definitions. Therefore, those political party “nominations” are actually just endorsements.

5 C.F.R. § 734.101 Definitions clearly states:

“Nonpartisan election means—

(1) An election in which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected; or ”.

This definition of a Nonpartisan election says “in which” so it is only talking about in the election itself not in political party activities. This definition, also, says “is to be” not “has been”, so it is talking about what “is to be” the results of the election not what “has been” the results of a political party activity such as an endorsement vote. This clearly states that if the election itself does not elect or nominate any candidate as representing a political party then that election is a Non-partisan election. HAUO agreed with this in its PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS by admitting, “While this is true of Congressional elections in Washington...”. It does not matter if political parties endorse a candidate and call it a “nomination”. That political party “nomination” is not the nomination stated in this definition and is not an election as defined in HAUO's Amended Complaint page 2 first paragraph citing of 5 C.F.R. § 734.101 Definitions . This Nonpartisan election definition only refers to elections that are used as nominations not to political party endorsements that are called “nominations” for political party propaganda.

PSUM memo page one falsely states as its first sentence and the basis of its claim:

‘The only issue in dispute in this case is a legal one: whether the U.S. Representative from Washington state's 8th Congressional district is a "partisan political office" under the Hatch Act.’ and

“Thus, a finding that the U.S. Representative is a "partisan political office"-and thus that Arnold's candidacies were prohibited-resolves the only issue in this case.”

The true issue here is the truthful presentation of 5 C.F.R. § 734.304 which completely disproves HAUO's false claim and that is why PSUM tries to use abandonment of 5 C.F.R. § 734.304 to try to cover up 5 C.F.R. § 734.304's truthful presentation.

The answer to the true issue here as stated in RSUM page 4 is, “Since 5 C.F.R. § 734.304 ends with an exception, it is a limited prohibition not a total prohibition. Of course, an exception to a prohibition means where the exception condition exists, the prohibition does not exist. This clearly states that if an elected office is a “partisan political office” and at the same time has a “Nonpartisan election”, then the Nonpartisan election condition takes priority over, overrides, and supersedes the partisan political office condition thereby allowing the partisan political office condition itself to remain but nullifying the partisan political office prohibition. ”

HAUO's PSUM shows an activity (which respondent has always admitted anyway) but fails to show a

prohibition or prohibited activity. The prohibition it fraudulently tries to create is nullified by federal law. HAUO's PSUM's like its Amended Complaint's fails to show a meritorious basis making them both legally insufficient.

HAUO's PSUM conflates political party activities and state law terms and tries to substitute them for federal law because HAUO's complaint has no basis in its abandoned 5 C.F.R. § 734.304 bad faith, fraudulent misinterpretation of federal law.

PSUM mentions others at the Department of Commerce such as Ruben and Harrington who contributed to setting up HAUO's false complaint. This shows this false complaint was not just fraudulent but a fraudulent conspiracy. Also noteworthy, PSUM page 3 states, "Arnold attended in-person ethics training" referring to a session Respondent attended in 2010 because an email announcing it made it sound like routine job training and gave no indication that running for elected office or any so called "ethics" or "ethics training" would be included. This looks like those responsible for this email and session were, also, part of this fraudulent conspiracy. Therefore, this email was a deceitful trick, but respondent didn't realize this in time to save the misleading email.

This case is an unethical conspiracy led by HAUO to get away with filing a fraudulent ethics complaint.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM], previously submitted, is supported by and supports this supplemental objection.

Wherefore, Petitioner's Motion for Summary Adjudication should be denied.

Further, RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM] should be granted, and Respondent should be granted the relief demanded therein.

Date: September 19, 2016

by: 

Keith L. Arnold

Respondent

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE CLERK OF THE BOARD

SPECIAL COUNSEL,

DOCKET NUMBER

[Hatch Act Unit]

CB-1216-16-0017-T-1

Petitioner,

V.

KEITH L. ARNOLD,

Respondent.

CERTIFICATE OF SERVICE

I certify that this RESPONDENT'S SUPPLEMENTAL OBJECTION TO "PETITIONER'S MOTION FOR SUMMARY ADJUDICATION" was sent by electronic mail on September 19, 2016 to:

Martorana, Carolyn cmartorana@osc.gov

Carolyn S Martorana, Office of Special Counsel, Hatch Act Unit, 1730 M Street, N.W., Suite 218,
Washington, Dc 20036

Date: September 19, 2016

by: 

Keith L. Arnold

Respondent

UNITED STATES OF AMERICA
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OFFICE OF THE CLERK OF THE BOARD

SPECIAL COUNSEL,
[Hatch Act Unit]

DOCKET NUMBER
CB-1216-16-0017-T-1

Petitioner,

V.

KEITH L. ARNOLD,

Respondent.

RESPONDENT'S PETITION FOR REVIEW

I, Keith L. Arnold, respondent, file this petition for review per 5 C.F.R. §1201.115(b) [initial decision ATTACHMENT B, page 35, (b)] because the initial decision by Bruce Tucker Smith, ALJ, (“Smith”) was an erroneous interpretation of the law and, therefore, an erroneous application of the law to the facts of this case.

The Amended Complaint like the Complaint and Petitioner’s Motion for Summary Adjudication (“PSUM”) are Hatch Act Unit Overreach (“HAUO”) and deception.

Smith erroneously joins HAUO in knowingly, willfully, and fraudulently leaving out the “except as specified in § 734.207” exception at the end of the sentence in 5 C.F.R. § 734.304.

Smith p.13 states:

The United States Court of Appeals for the Federal Circuit in McEntee, supra, expressly ruled:

The definition of a 'partisan political office' expressly encompasses offices for which candidates are either nominated as representing a party or elected as representing a party ... In order to give meaning to all words of the statute, as we must, we do not read the term 'elected as representing a party' to require formal endorsement or selection by a major political party.

This agrees with Respondent's statement that what matters is the activities of the election itself and not the endorsement activities of any political party. That statement is: 'This Nonpartisan election definition only refers to elections that are used as nominations not to political party endorsements that are called “nominations” for political party propaganda. ' [RESPONDENT'S SUPPLEMENTAL OBJECTION TO “PETITIONER'S MOTION FOR SUMMARY ADJUDICATION” (“RsupObj”), p.3]

HAUO's amended complaint states it's based is a "Section 7323(a)(3) of Title 5 of the United States Code and 5 C.F.R. § 734.304" prohibition. However, Respondent's Reply clearly shows HAUO knowingly, willfully, and fraudulently left out the exception to this prohibition in 5 C.F.R. § 734.304 to create a false prohibition. That is why HAUO's PSUM doesn't mention 5 C.F.R. § 734.304 in its text nor even in its footnotes. Indeed, PSUM abandons HAUO's misrepresentation of 5 C.F.R. § 734.304 and thereby abandons the basis of its Amended Complaint and mentions Section 7323(a)(3) of Title 5 only. HAUO, apparently, thought no one would notice its Amended Complaint deceitfully and fraudulently omitted the 5 C.F.R. § 734.304 prohibition exception. Since Respondent showed HAUO's omission in his Reply, HAUO has gone from citing only part of 5 C.F.R. § 734.304 to hide its truthful presentation to completely excluding 5 C.F.R. § 734.304 as a desperate attempt to get the 5 C.F.R. § 734.304 prohibition exception's truthful presentation forgotten and thereby hidden. This omission is shown again in RESPONDENT'S MOTION FOR SUMMARY JUDGMENT [with ADDENDUM] ("RSUM").

HAUO's PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS ("PoppD") states on pp 2-3:

"In any event, Arnold's motion is based on an incorrect interpretation the Hatch Act.[sic] Specifically, he claims that the election for U.S. Representative was nonpartisan because Washington State holds open primary elections, in which the top two vote getters progress to the general election regardless of political affiliation, and the primary election does not serve as a mechanism for political parties to nominate candidates. (Resp't Mot. at 4.) While this is true of Congressional elections in Washington, the state's chosen election procedures do not affect the partisan character of the office of U.S. Representative. "

By the above statement "While this is true of Congressional elections in Washington", HAUO's opposition to respondent's motion to dismiss admits Washington state U.S. Representative elections are nonpartisan. Having an amended complaint that fraudulently leaves out the exception at the end of 5 C.F.R. § 734.304 (and hopes no one points out this deceptive omission) makes it look safe to confess Washington state U.S. Representative elections are nonpartisan . By this HAUO admits this complaint should not have been filed in the first place. **Also, this admission should have resulted in Smith dismissing the complaint then.**

The truthful presentation of 5 C.F.R. § 734.304 is in RSUM, Addendum ("Add") II and is:

"§ 734.304
Candidacy for public office.
An employee may not run for the nomination
or as a candidate for election to partisan
political office, except as specified in § 734.207.

§ 734.207
Candidacy for public office.
An employee may:
(a) Run as an independent candidate
in a partisan election covered by 5 CFR part
733; and

(b) Run as a candidate in a non-partisan election.

§ 734.101 Definitions.

For the purposes of this part:

Election includes a primary, special, runoff, or general election.

Nonpartisan election means—

(1) An election in which none of the candidates is to be nominated or elected as representing a political party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected; or”.

‘...running for Congress is not prohibited in Washington state due to the “except as specified in § 734.207” exception at the end of the sentence in 5 C.F.R. § 734.304.’ [RSUM p.4]

PSUM memo page one falsely states as its first sentence and the basis of its claim:

‘The only issue in dispute in this case is a legal one: whether the U.S. Representative from Washington state's 8th Congressional district is a "partisan political office" under the Hatch Act.’and

“Thus, a finding that the U.S. Representative is a "partisan political office"-and thus that Arnold's candidacies were prohibited--resolves the only issue in this case.”

The true issue here is the truthful presentation of 5 C.F.R. § 734.304 which completely disproves HAUO's false claim and that is why PSUM tries to use abandonment of 5 C.F.R. § 734.304 to try to cover up 5 C.F.R. § 734.304's truthful presentation.

The answer to the true issue here as stated in RSUM page 4 is, “Since 5 C.F.R. § 734.304 ends with an exception, it is a limited prohibition not a total prohibition. Of course, an exception to a prohibition means where the exception condition exists, the prohibition does not exist. This clearly states that if an elected office is a “partisan political office” and at the same time has a “Nonpartisan election”, then the Nonpartisan election condition takes priority over, overrides, and supersedes the partisan political office condition thereby allowing the partisan political office condition itself to remain but nullifying the partisan political office prohibition. ”

Therefore, ‘...running for Congress is not prohibited in Washington state due to the “except as specified in § 734.207” exception at the end of the sentence in 5 C.F.R. § 734.304.’ [RSUM p.4]

Therefore, I, Keith L. Arnold, respondent, should prevail in this case.

Date: February 14, 2017

by: 
Keith L. Arnold
Respondent

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE CLERK OF THE BOARD

SPECIAL COUNSEL,

DOCKET NUMBER

[Hatch Act Unit]

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Petitioner,

V.

KEITH L. ARNOLD,

Respondent.

CERTIFICATE OF SERVICE

I certify that this RESPONDENT'S PETITION FOR REVIEW was sent by electronic mail on February 14, 2017 to:

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Carolyn S Martorana, Office of Special Counsel, Hatch Act Unit, 1730 M Street, N.W., Suite 218,
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Date: February 14, 2017

by: 

Keith L. Arnold

Respondent