

MARCH 13, 1958

HONORABLE DWIGHT R. G. PALMER, *Commissioner*  
*State Highway Department*  
1035 Parkway Avenue  
Trenton, New Jersey

## MEMORANDUM OPINION—P-12

DEAR COMMISSIONER PALMER:

You have asked for our opinion concerning the applicability of the Hatch Act to the employees of the State Highway Department. You specifically raise the question as to whether the employees of the Maintenance Division are subject to the Hatch Act, inasmuch as no Federal funds are contributed for maintenance or repairs on State highways.

The Hatch Act bars political activity by any officer or employee of any State agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency. Section 12(a) of the Hatch Act, 5 U.S.C.A., Sec. 118k(a) provides:

"No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term 'officer or employee' shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices."

Section 12 (b) of the above act charges the United States Civil Service Commission with the investigation and determination of alleged violations of the act. 5 U.S.C.A. Section 118k(b). Section 12(d) authorizes the Commission to adopt such reasonable laws as it deems necessary to execute its functions under the act. 5 U.S.C.A. Section 118k(d).

In accordance therewith, the Commission has promulgated a "General Rule of Section 12(a) Jurisdiction" as follows:

"An officer or employee of a State or local agency is subject to the act if, as a normal and foreseeable incident to his principal position or job, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not."

The United States Supreme Court reviewed this section of the Hatch Act in *Oklahoma v. United States Civil Serv. Comm.*, 330 U.S. 127 (1947) and ruled that a member of the Oklahoma Highway Commission was subject to the Hatch Act prohibition against political activity. The State of Oklahoma had been ordered by the Civil Service Commission to suspend from office the Oklahoma Highway Commission member, who was acting as Chairman of the Democratic State Central Committee and ex officio as a member of a "Victory Dinner" committee for the purpose of raising funds for the Democratic Party. Upon the State's refusal to suspend the State Highway Commission member, Federal highway funds would be withheld from the State, according to the Civil Service Commission order. That order was upheld by the United States Supreme Court in an opinion which sustained the constitutionality of the Hatch Act.

The United States Civil Service Commission construed General Rule of Section 12(a) Jurisdiction in detail in the case of *In the Matter of Slaymaker and the State of Illinois*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b, 1-1 (U.S. Civ. Serv. Comm. 1943). In that case, Highway Department employees of the State of Illinois whose sole employment was with the Highway Department, contended that they were not subject to the Hatch Act because the greater part of their duties concerned the State system of highways which did not receive Federal grants, rather than the Federal system of highways which did receive Federal aid. The Commission stated:

"For an employee of a State or local agency to be subject to the act, it is not prerequisite that his salary be derived, in whole or in part, from Federally contributed funds. We so held in *In the Matter of Huiet and the State of Georgia*, Docket No. 86; Pike and Fischer Admin. Law, Dec. Note 375. If an employee upon a project supported in part through Federal contributions finds in that employment a field, a means, or (desiring to please politically minded superiors) an incentive for pernicious political activity, that activity is advanced in substantially the same way by the Federal funds whether they are applied to his salary, or to other expenses of the project that makes his employment possible. \* \* \*

"\* \* \* When we consider jurisdiction, the first problem is definition of 'principal employment',—or more simply, of 'employment'. The respondent's position is that 'employment' means the *things a person does*. Therefore he would interpret 'principal employment' according to what, as a convenient descriptive term, we may call the 'scale theory': viz., that when part of an employee's work is upon Federally financed projects, and part is not, we weigh the two types, and unless the first outweighs the second, the employee is exempt from the Act.

"\* \* \* However, \* \* \* we do not agree with the respondent's interpretation of the term 'principal employment.'

"\* \* \* It is now our considered opinion that 'employment' should be taken to mean 'position' or 'job'. Therefore, in determining whether a person is subject to Section 12(a), two questions are asked: First, 'What is his principal employment, i.e., position or job?' \* \* \* Second, 'Is that employment (position or job), 'in connection with a Federally financed activity?' The question is not whether the employment is wholly 'in', but whether it has 'connection with' such activity.

"\* \* \* Thus we follow what, in contrast with the term 'scale theory,' we shall call the analytical interpretation of the expression principal employment. Under it, we do not divide and weigh the things which an employee does. We merely analyze the position or job to determine, first—whether it is his 'principal' one, and second—whether it involves (as a normal and foreseeable incident thereof) performance of duties in connection with a Federally financed activity. \* \* \*"

The following decisions uphold the above construction of the General Rule of Section 12(a) Jurisdiction: *In the Matter of Anderson and the State of Montana*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-37 (U.S. Civ. Serv. Comm. 1950); remanded on other grounds, 119 F. Supp. 567 (D. Mont. 1954); *In the Matter of Kennedy and the State of Maryland*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b-1-20 (U.S. Civ. Serv. Comm. 1946); *In the Matter of Stewart and the Commonwealth of Pennsylvania*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-20 (U.S. Civ. Serv. Comm. 1945); *In the Matter of Duberstein and the State of Arizona*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-19 (U.S. Civ. Serv. Comm. 1944); *In the Matter of Hutchins and the State of Arizona*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-14 (U.S. Civ. Serv. Comm. 1944), affirmed 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-19 (U.S. Dist. Ct., D. Ariz. 1945); *In the Matter of McEachren and the State of Arizona*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-8 (U.S. Civ. Serv. Comm. 1944); *In the Matter of Flemming and the State of Illinois*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-3 (U.S. Civ. Serv. Comm. 1943).

Thus it will be seen that the construction placed upon the act by the Commission is broad enough to encompass State Highway Department officers and employees who perform duties in connection with a Federally financed activity; merely because the greater part of the employee's duties concerns a State system of highways not financed by Federal grants does not work as an exclusion from the coverage of the act.

The cases and rules of the Commission reveal, however, that under two circumstances State Highway Department officers and employees may be outside the Hatch Act. The first exception concerns employees engaged exclusively in maintenance work. The Commission held in the case of *In the Matter of Joseph L. Todd and the State of Illinois*, 3 Pike & Fischer Ad. L. (1st ser.) (Decisions) 41b. 1-5 (U.S. Civ. Serv. Comm. 1943), that a person employed by a State Highway Department exclusively in maintenance work is not subject to the act, because the Federal Government pays nothing for maintenance and does not participate in that work.

The second area of exclusion is stated in the Commission's "Secondary Rule of Jurisdictional Limitation":

"An employee of a State or local agency is not within the 'principal employment' requirement of Sec. 12(a) of the Hatch Act, if the only duties in respect to any activity financed in whole or in part by Federal loans or grants which he performs as a normal and intended incident of his principal job or position, are so inconsequential in comparison with other duties of his said job or position as to make applicable the maxim 'de minimis non curat lex'."

The last stated rule was applied in the *Todd* case, *supra*, to exclude from coverage of the act an employee who spent only about 1/10 of 1 per cent of his time on Federally financed activities.

We advise you that, under the conclusive standards set forth in the above cited United States Civil Service Commission rules and decisions, the employees of the Maintenance Division are not subject to the Hatch Act prohibition against political activity and that other officers and employees of the State Highway Department must be held to be governed by the Hatch Act, unless the particular circumstances of their employment fit within the two exceptions recognized in *In the Matter of Joseph L. Todd and the State of Illinois*.

Very truly yours,

HAROLD KOLOVSKY  
*Acting Attorney General*

By: DAVID D. FURMAN  
*Deputy Attorney General*

MARCH 26, 1958

HON. CARL HOLDERMAN, *Commissioner*  
*Department of Labor and Industry*  
20 West Front Street  
Trenton, New Jersey

MEMORANDUM OPINION—P-13

DEAR COMMISSIONER HOLDERMAN:

You have asked whether the Division of Workmen's Compensation can refuse to permit the search of its records by Accident Index Bureau, Inc., a New Jersey corporation organized:

"to prepare and maintain records of accidents and such other information as may be of interest to employers, insurers, and insurance companies; and to issue reports thereof whenever necessary, and such other services as might be rendered by any natural persons to business or industry."

Accident Index Bureau, Inc., in a publication entitled "How Much Do You Really Know About the Man You Are About To Hire?" states:

"\* \* \* All too often the employer finds that he has unwittingly put on his payroll a workmen's compensation 'professional'. It is only when an injury is reported and a claim filed that the hapless employer finds that he has 'been taken'. Then it's too late. (In New Jersey alone last year, 81% of claims paid were for 'permanent partial disabilities'. In innumerable cases, no time or pay was lost. You pay for this in your premium. Many other States show similar liberal tendencies to give away the employers' money, through his insurance companies, money which he eventually re-pays in higher premiums.)