

## Merit Board Political Activities

This discussion should start with the Federal Constitution. The U.S. Bill of Rights lists off the many rights of the citizens that shall not be infringed upon by the government. Three such Amendments are as follows:

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

(Amendment Nine to the Constitution was ratified on December 15, 1791. It clarifies that the document is not a comprehensive list of every right of the citizen, and that the yet-unnamed rights are entitled to protection by the law. The original text is written as such:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”)

### Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The general proposition here is that citizens should be able to practice free speech and the freedom of assembly at all times. Additionally, the rights listed here are not a comprehensive list of rights retained by the people and that other rights are to be protected as much as the ones listed out specifically. Any rights not given to the United States by the Constitution is reserved to the States, or to the people.

These ideas were passed down through the Constitution of the State of Tennessee. The following sections of the Tennessee Constitution reflect the ideas of our United States constitution:

### Tennessee Constitution

ARTICLE I. Declaration of Rights.

Section 8. **That no man shall be** taken or imprisoned, or **disseized of his freehold, liberties or privileges**, or outlawed, or exiled, or in any manner destroyed or deprived of **his life, liberty or property**, but by the judgment of his peers, or the law of the land.

Section 19. That the printing press shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. **The free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.** But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

Section 23. **That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address of remonstrance**

Section 25. That no citizen of this state, except such as are employed in the army of the United States, or militia in actual service, shall be subjected to punishment under the martial or military law. That martial law, in the sense of the unrestricted power of military officers, **or others, to dispose of the persons, liberties or property of the citizen, is inconsistent with the principles of free government, and is not confided to any department of the government of this state.**

Miscellaneous provisions

Section 8. **The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested.**

Section 16. **The declaration of rights hereto prefixed is declared to be a part of the Constitution of the state, and shall never be violated on any pretense whatever. And to guard against transgression of the high powers we have delegated, we declare that everything in the bill of rights contained, is excepted out of the general powers of the government, and shall forever remain inviolate.**

These ideas are further reflected in the Knox County Charter:

- **Sec. 1.01. - Powers and functions.**

The Knox County Government shall exercise any power or perform any function which is not denied by the Constitution of the State of Tennessee. It is the intent of this Charter that limitations on the powers of County Government shall be strictly construed, and that grants of power to County Government shall be liberally construed.

- **Sec. 1.03. - Public corporation powers.**

The government described herein shall be a public corporation vested with any and all powers which counties are, or may hereafter be, authorized or required to exercise under the Constitution and all applicable laws of the State of Tennessee, including, but not limited to, the power to do all things necessary or convenient for the provision of public services or public works projects now or hereafter authorized or contemplated by the Constitution and all applicable laws of the State of Tennessee.

- **Sec. 1.04. - Public corporation rights.**

The government of Knox County shall be a public corporation, with the right of perpetual succession, capable of suing and being sued, capable of purchasing, receiving and holding real and personal property and of selling, leasing, or disposing of the same to the fullest extent permitted, and having all express, implied and inferred rights necessary or convenient to the exercise of its public corporation powers.

- **Sec. 1.05. - Rights reserved to the people.**

No provisions of this Charter, and no action by any officer or employee of the County acting under its authority, shall infringe upon rights, privileges and powers now or hereafter reserved or guaranteed to individual persons or to the people by the Constitution of the United States of America or the Constitution of the State of Tennessee.

**Sec. 2.02. - Other powers.**

**The Commission is vested with all other powers of the government of Knox County not specifically, or by necessary implication, vested in some other official of the County by the Constitution of the State of Tennessee, by this Charter or by law not inconsistent with this Charter.** However, neither the Commission nor the Chair of the Commission shall exercise any powers or perform any functions of the County Government which are vested, by the terms of this Charter, in the Executive Branch, Judicial Branch, Board of Education, and elected Charter and Constitutional Officers as defined by the Constitution of the State of Tennessee. Whenever any statute of the State of Tennessee purports to authorize the monthly or quarterly county court (or county chairman[(woman)] or county judge), the county commission (or chairman[(woman)] of the county commission) or the county executive to perform any administrative or executive act or function, then such act or function shall be performed by the Mayor of Knox County except as otherwise provided in this Charter.

By resolution, the Commission may appoint members to those boards and commissions the Commission deems necessary in the furtherance of its duties and responsibilities under this Charter or as provided by state law. All such appointees shall be residents of Knox County at the time of their appointment and at all times while serving on said board or commission. The Commission shall have the authority, by resolution, to remove and discharge all such members for good cause shown.

**Sec. 2.03. - Membership and election; district, seats, reapportionment and redistricting.**

The Commission shall adopt its own rules of order and procedure. **All resolutions, ordinances and emergency ordinances shall be adopted in accordance with the Constitution, all applicable laws of the State of Tennessee and this Charter.**

The Key Takeaways from these sections are that our local government has the power to pass laws with the power vested in it. All other powers are reserved to the citizens. Our commission can pass laws that are not inconsistent with the Constitution, all applicable laws of the State of Tennessee, and the Knox County Charter.

The Hatch Act of 1939, An Act to Prevent Pernicious Political Activities, is a United States federal law. Its main provision prohibits civil-service employees in the executive branch of the federal government, except the president and vice president, from engaging in some forms of political activity. It became law on August 2, 1939. The 1939 Act forbids the intimidation or bribery of voters and restricts political campaign activities by federal employees. It prohibits using any public funds designated for relief or public works for electoral purposes. It forbids officials paid with federal funds from using promises of jobs, promotion, financial assistance, contracts, or any other benefit to coerce campaign contributions or political support. It provides that persons below the policy-making level in the executive branch of the federal government must not only refrain from political practices that would be illegal for any citizen, but must abstain from "any active part" in political campaigns, using this language to specify those who are exempt.

In its current state, the Hatch act has several relevant sections.

## **§ 1501. Definitions**

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For the purpose of this chapter [[5 USCS §§ 1501](#) et seq.]—

- (1) “State” means a State or territory or possession of the United States;
- (2) “State or local agency” means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof, or the executive branch of the District of Columbia, or an agency or department thereof;
- (3) “Federal agency” means an Executive agency or other agency of the United States, but does not include a member bank of the Federal Reserve System; and
- (4) “State or local officer or employee” means an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or Federal agency, but does not include—
  - (A) an individual who exercises no functions in connection with that activity; or
  - (B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by—
    - (i) a State or political subdivision thereof;
    - (ii) the District of Columbia; or
    - (iii) a recognized religious, philanthropic, or cultural organization.

## **§ 1502. Influencing elections; taking part in political campaigns; prohibitions; exceptions**

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

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

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

(b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.

(c) Subsection (a)(3) of this section does not apply to—

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State, municipality, or the District of Columbia who is not classified under a State, municipal, or the District of Columbia merit or civil-service system; or

(4) an individual holding elective office.

Several Court cases have helped interpret the Hatch act and its' application across the country.<sup>12345</sup> The Hatch act and its various interpretations have been cited on many occasions as the basis for enforcing restrictions on political activity. However, the common discussion in each analysis covers the ability of the government to restrict the political activity of its employees, **not** citizens volunteering. The Hatch act does in fact deal directly with the political activities of its employees, however it does not

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<sup>1</sup> Congress intended 5 USCS § 1502(a)(3) to be interpreted narrowly; purpose of statutory language is to provide that state and local officers may take active part in political management and political campaigns except that they may not be candidates for elective office; court construes regulatory definitions of "election", as including "special election" held as result of particular emergency; term "election" excludes interim appointment by city council. Buffalo v. United States Dep't of Labor, 729 F.2d 64, 1984 U.S. App. LEXIS 26223 (2d Cir. 1984).

<sup>2</sup> City employee's expression of interest in interim appointment to city council is not in violation of Hatch Act (5 USCS §§ 1501 et seq.) since risks encountered when those covered by act seek votes of general public do not arise when those persons seek appointment to office. Buffalo v. United States Dep't of Labor, 729 F.2d 64, 1984 U.S. App. LEXIS 26223 (2d Cir. 1984).

<sup>3</sup> City employee's active participation in political campaign is not in itself sufficient to cause violation of Hatch Act (5 USCS §§ 1501 et seq.) even though unit of agency for which employee works is federally funded; attendance at fund raisers, display of sign and bumper stickers, and attendance at several political rallies do not constitute violations of Hatch Act; city employee's use of control over advertising and promotion on city buses to aid campaign for election of partisan candidate and involvement during work hours in campaigning constitutes use of official authority and influence for political purposes. McKechnie v. McDermott, 595 F. Supp. 672, 1984 U.S. Dist. LEXIS 23144 (N.D. Ind. 1984), rev'd, remanded, 775 F.2d 859, 1985 U.S. App. LEXIS 24407 (7th Cir. 1985).

<sup>4</sup> Member of city housing authority who was not paid and who carried on private law practice was properly found to be principally employed in private employment and was therefore not subject to provisions of predecessor to 5 USCS §§ 1501 et seq. Matturri v. United States Civil Service Com., 229 F.2d 435, 1956 U.S. App. LEXIS 3585 (3d Cir. 1956).

<sup>5</sup> Lawyer who was legal adviser to state department of public welfare, which was recipient of grants from federal government, did not violate predecessor to 5 USCS § 1501 in making radio address opposing candidacy of certain candidate for United States Senate, proof showing that 75 per cent of his employment was in active practice of his profession as lawyer, while only 25 per cent could be attributed to his employment as legal adviser to department of public welfare. Anderson v. United States Civil Service Com., 119 F. Supp. 567, 1954 U.S. Dist. LEXIS 4419 (D. Mont. 1954).

create any provisions for restricting political activities of citizens volunteering with the local government. In fact “State or local officer or employee” is specifically defined as an individual employed by a State or local agency whose **principal employment** is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or Federal agency. . .

Tennessee’s “Little Hatch Act” is designed to prohibit political intimidation or coercion of or by any public officer or employee. Tenn. Code Ann. § 2-19-202(b). The Tennessee Little Hatch Act has the following relevant code sections:

## **2-19-201. Part definitions.**

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As used in this part, unless the context otherwise requires:

- (1) “Election” includes all elections, local, municipal, primary, general, state, federal and special and any election in the state or any county, municipality or other political subdivision thereof, but does not include referenda or issues submitted to a vote of the people, political convention or caucus;
- (2) “Public funds” and “public lands, offices, buildings, vehicles and facilities” include those owned and supported principally by public money appropriated from the state treasury. “Public lands, offices, buildings, vehicles, and facilities” include those owned and used by a local education agency (LEA);
- (3) “Public officers and employees” means all employees of the executive branch of the state government, or any department, division, or agency thereof, and all appointed officers and employees of any educational institution, establishment, corporation or agency supported principally by state funds, including teachers. Popularly elected officials, officials elected by the general assembly, qualified candidates for public office, members of the governor's cabinet, and members of the governor's staff are expressly excluded from this part, except for § 2-19-202; and
- (4) “Teacher” means any person employed in a public school system as a teacher, helping teacher, teacher's aide, librarian, principal, supervisor, director of schools, or member of the administrative staff.

## **2-19-202. Interference with election or nomination.**

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- (a) It is unlawful for any public officer or employee to use such person's official position, authority or influence to interfere with an election or nomination for office or directly or indirectly attempt to intimidate, coerce or command any other officer or employee to vote for or against any measure, party or person, or knowingly receive or pay assessments of any kind or character for political purposes or for election expenses from any other officer or employee.
- (b) It is the intent of this section to prohibit any political intimidation or coercion of any public officer or employee.<sup>6</sup>

## **2-19-203. Soliciting contributions for political purposes.**

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- (a) It is unlawful for any public officer or employee knowingly to solicit directly or indirectly any contribution of money, thing of value, facilities or services of any person who has received contracts, compensation, employment, loans, grants or benefits, or any person whose organization, agency or firm has received such benefits financed by public funds, state, federal or local, for political purposes or campaign expense.
- (b)
  - (1) As used in this subsection (b), unless the context otherwise requires, “contribution” means any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, payment, gift, or subscription, of money or thing of value, including, but not limited to, use of a facility or provision of personal services, for use on behalf of any candidate for political office, or for any political purpose or campaign expense.
  - (2) It is unlawful knowingly to solicit, accept, or collect, directly or indirectly, any contribution from a public officer or employee if the solicitor or the solicitor's principal is, directly or indirectly, in a supervisory capacity over such officer or employee or is otherwise able to control the retention, promotion, demotion, or terms or conditions of employment of such officer or employee.

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<sup>6</sup> The Tennessee Hatch Act, § 2-19-201 et seq., would not prohibit a county teacher from qualifying and running as a candidate for partisan political office. However, only the U.S. Office of Special Counsel (“OSC”) is authorized to issue advisory opinions under the federal Hatch Act, including opinions on whether an individual’s proposed political activity is prohibited under the Act. OAG 17-54, 2017 Tenn. AG LEXIS 53 (12/13/2017).

(3) This subsection (b) shall not be construed to prevent voluntary contributions from political action committees and associations of public officers and/or employees.

## **2-19-204. Promises of benefits for political activity.**

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It is unlawful for any public officer or employee, directly or indirectly, to promise employment, position, work, compensation, contracts, loans, grants, appropriations or other benefits provided principally from public funds as a consideration, favor or reward for any political activity, support or opposition to any candidate, party or measure in any election.

## **2-19-205. Deprivation, attempts to deprive, or threats to deprive persons of benefits.**

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It is unlawful for any public officer or employee, directly or indirectly, to deprive, attempt to deprive, or threaten to deprive any person of employment, position, work, compensation, contracts, loans, grants, appropriations or benefits provided principally from public funds for any political activity, support or opposition to any candidate, party or measure in any election.

Opinion No. 98-030 by the Tennessee Attorney General, they noted that in an analysis surrounding the Little Hatch act “Federal law impacts this analysis because it prohibits certain state or local officers or employees from running for office. The provisions of 5 U.S.C. §§ 1501 - 1508, known as the "Hatch Act" , prohibit political activities of certain state and local employees whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency, subject to certain exceptions. State employees falling within this definition may not be a candidate for elective office. Nonpartisan candidacies, however, are permitted.”

Over the past several months, there have been several opinions written by the Law Director’s office about the issue of political activities on Volunteer boards. The Issue with the many opinions of the Law Directors office is they remain off point and contain many pieces of conflicting information.

The first opinion issued on October 21, 2022 by the Law Directors office discusses the following questions.

**Query 1:** Is § 42-53(c) of the KCSO Employees' Merit System ordinance constitutional?

**Query 2:** Is an appointee to the Merit Board required to swear a solemn oath to uphold the KCSO Employees' Merit System ordinance governing the merit system?

The opinion answered both of these questions affirmatively. However, the language analyzed was taken from a court case involving federal employees. The other cases cited continue to reference the power of the legislature to impose restrictions on government employees without any relevant analysis on the application of those laws to private citizens acting in a volunteer capacity. The next cases analyzed discussed how “No man is above the law of his country” and “Obedience to the law is demanded as a right; not asked as a favor”. The problem with this analysis is that it seems to suggest that citizens should blindly submit to the laws and that the government has never made a law that was unconstitutional.

In a follow up memorandum and opinion on November 18, 2022, the Law Directors office once again dove into the government’s legitimate interest in creating and maintaining a workforce free from public perceptions of political bias. They dive into an analysis of the Hatch act and what it prohibits, however fail to address the cases across the country that mention the Hatch act and its

application to employees and not volunteer citizens. They then discuss section 19 of the Private Acts of 1970 which discusses the prohibition on political activities by deputies. Once again, this analysis is misguided as they are employees of the government. However later in the opinion the Law directors office goes on to say that “service on the Merit System Board is voluntary and uncompensated. If a member of the Board does not wish to be covered by these restrictions, he or she need not apply for the position.” After this they perform another analysis of Federal employees and how important it is to maintain an apolitical stance as an employee of the government. This analysis is completely off point with the preceding statement made by the Law director’s office that the Merity System Board is both voluntary and Uncompensated.

The Merit System Board of Directors is an extension of County commission given the responsibility of furthering the duties and responsibilities of County Commission under the Knox County Charter or as provided by State law. These restrictions apply to no other board for a reason. To suggest that this board should be different from any other board is wrong. To suggest that members of this board be prevented from exercising their constitutional rights for any amount of time is wholly inappropriate. There is no authority that provides that there is some right in government to deprive private citizens of their constitutional rights. Chief Justice John Roberts has said “By ensuring that no one in government has too much power, the Constitution helps protect ordinary Americans every day against abuse of power by those in authority”. The question of whether or not the merit board should be an apolitical board, is not a question for the county commission to answer with legislation. The County Commission does not have the power to create a law inconsistent with the laws of the state of Tennessee and there is no legitimate argument or basis for allowing this Unconstitutional legislation to stand.