AGENDA #_____

CITY OF MADISON, WISCONSIN

REPORT OF: **CITY ATTORNEY**

TITLE: **Limiting Political Activities of Election Workers**

AUTHOR: **Michael P. May**

DATED: **May 16, 2007**

PRESENTED **June 5, 2007**
REFERRED
REREFERRED
REPORTED BACK
ADOPTED POF
RULES SUSPENDED
ID NUMBER

TO THE MAYOR AND COMMON COUNCIL:

RE: Ordinance creating Section 3.35(8)(g) of the Madison General Ordinances to establish limitations on political and campaign activities of election employees.
Ordinance / Legistar No. 06493

This ordinance proposes new restrictions on political activities by certain employees of the City of Madison who are involved in oversight of elections. This report is to provide background on the legal basis for such restrictions.

The Madison General Ordinances, Code of Ethics, impose some limitations on City employees with respect to campaign activity, Sec. 3.47(8), MGO (now renumbered to sec. 3.35(8)). However, these restrictions primarily relate to activities conducted while working for the City. The City's Ethics Code does reference the Federal Hatch Act, 5 U.S.C. Sec.1502. The Hatch Act imposes certain restrictions on federal employees running for office. The Act applies to state or municipal employees if their position is funded by a federal grant.

State law does provide some limited restrictions on state employees. As with City of Madison employees, they are limited in any political activity while they are working, sec. 230.40, Wis. Stats.. At least two state agencies (the Elections Board and the Legislative Audit Bureau) have statutes which limit employees' political activities to those that are strictly non-partisan. Secs. 5.05(4) and 13.94, Wis. Stats. This has been interpreted by those agencies as limiting employees from campaigning for or making contributions to partisan elections.

Some states, however, have imposed much greater restrictions on employees. The United States Supreme Court has held that such restrictions, if not overbroad or vague, are constitutional. In *United State Civil Service Comm'n v. Nation Ass'n of Letter Carriers,* 413 U.S. 548 (1973), the Court upheld key provisions of the federal Hatch Act, stating that Congress surely had the power to enact a law covering federal employees that:

> "...[f]orbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or a political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention..." *Id.* at 556.

In so doing, the Court upheld its determination dating back to the 1940s, *United Public Workers v. Mitchell*, 330 US 75 (1947). The U.S. Supreme Court subsequently upheld statutes requiring a public employee to leave office before they can run for another office, or prohibiting solicitation for candidates, as constitutional. *Clements v. Fashing*, 457 US 957 (1982), *reh. denied* 458 U.S. 1133 (1982); *Broadrick v. Oklahoma*, 413 US 601 (1973).

The rationale for such restrictions has been set forth in numerous cases, and this statement by the U.S. Supreme Court in *National Letter Carriers, supra,* is instructive:

> It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without any bias or favoritism for or against any political party or group or the members thereof. 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.
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> 413 U.S. at 564-565.

Lower federal courts have also generally upheld such restrictions. See, for example, *West v. Congemi*, 28 F. Supp. 2d 385 (Ed. LA 1998); *Fletcher v. Marino*, 882 F. 2d 605 (2nd Circuit 1989); and *Wisconsin State Employees Ass'n Council 24 v. Wisconsin Natural Resources Board*, 298 F. Supp. 339 (W.D. Wis. 1969) (upholding Wisconsin's mini Hatch Act, Sec. 230.40, Wis. Stats.)

Where courts have struck down limitations on political activity, it normally has been where the restriction has not been carefully drawn. In these instances, the courts have struck down the laws as being vague, in not giving adequate notice of what activity was being prohibited, or as overbroad, in restricting some activities that do not bear a close relationship to the remedy sought by the laws. See, e.g., *State Bd. for Elementary & Secondary Educ. v. Howard*, 834 S.W. 2d 657 (Ky. 1992); *Gray v. Toledo*, 323 F. Supp. 1281 (N.D. Ohio, 1971).

While some cases seem to draw a distinction between regulating partisan and non-partisan political activities, see, e.g., *Mancuso v. Taft*, 476 F. 2d 187 (1st Cir. 1973), those cases have either been explicitly recognized as no longer being good law, *Magill v. Lynch*, 560 F. 2d 22 (1st Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978), or have been recognized as being out of step with modern legal rulings. *Wachsman v. City of Dallas*, 704 F. 2d 160 (5th Cir. 1983), *reh. denied*, 710 F. 2d 837 (5th Cir. 1983), *cert. denied* 464 U.S. 1012 (1983).

General discussion of the issues of limitations on political activities by public employees can be found in the annotation, *Validity, construction, and effect of state statutes restricting political activities of public officers or employees,* 51 A.L.R. 4th 702, and in 16A *McQuillin, Law of Municipal Corporations,* secs. 45.47-45.48 (3d Ed.)

It is my opinion that the ordinance as drafted is neither vague nor overbroad and should withstand constitutional challenge. First, the ordinance only applies to city employees who are directly involved in election activities. This would include persons in the City Clerk's Office and poll workers hired by the City. Second, the limitations do not relate to making contributions or being involved in assisting on a campaign, but are aimed at officers and directors who would be much more politically active. By limiting its scope to officers or directors of political parties, campaign committees, and PACs or conduits, the ordinance makes no limitations on members of parties or individuals who may wish to contribute or participate in an election. Third, the ordinance is narrowly drawn with definitions that should put person on notice of prohibited activity.

Finally, the limitations only apply to one who participated in these political activities within one year of the date of an election, and, in the case of a candidate or officer of a campaign committee, only in the district or districts where the person was a candidate or ran a campaign.

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