Barton Child Law & Policy Clinic	Emory University School of Law 1301 Clifton Road Atlanta, Georgia 30322	Phone: 404.727.6664 Fax: 404.727.6820 E-mail: childlaw@law.emory.edu Internet: www.childwelfare.net

THE RIGHTS OF GEORGIA STATE EMPLOYEES TO PARTICIPATE IN POLITICAL ACTIVITY

MARY MARGARET OLIVER
Visiting Professor

MELISSA DORRIS
Barton Law and Policy Fellow

The Rights of Georgia State Employees to Participate in Political Activity

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. FEDERAL HATCH ACT 1

III. CONSTITUTIONAL CLAIMS RELATING TO FIRST AMENDMENT . . . 3

IV. GEORGIA STATE LAW RELATING TO POLITICAL ACTIVITY OF STATE EMPLOYEES 4

A. Distribution of Campaign Literature in State Vehicles – Enacted 1933 5

B. State Board of Pardons and Paroles – Enacted 1943 5

C. Department of Public Safety – Enacted 1949 6

D. Coercion of Political Activity – Enacted 1977 6

E. Part-Time Positions in Political Subdivision – Enacted 1965 7

F. Signature on Recall Petitions – Enacted 1989 8

G. Rules and Regulations of State Personnel Board 8

H. Department of Human Resources 11

I. Financial Contributions to Campaigns. 11

V. CONCLUSION 12

APPENDIX I 19

APPENDIX II 24

TABLE OF AUTHORITIES

STATUTORY AUTHORITY (FEDERAL):	CITED AT:
5 U.S.C. § 1501(4) (2002)	n. 11
5 U.S.C. § 1502(a)(1) (2002)	n. 13
5 U.S.C § 1502(a)(2) (2002)	n. 14
5 U.S.C. § 1502(a)(3) (2002)	n. 15
5 U.S.C. § 1502(b) (2002)	n. 17
5 U.S.C. § 1503 (2002)	n. 16
5 U.S.C. § 7323(a) (2002)	n. 9
5 U.S.C. § 7324(a) (2002)	n. 10
5 U.S.C. §§ 1501-1508 (2002)	n. 6
5 U.S.C. §§ 7323-7326 (1994)	n. 7

STATUTORY AUTHORITY (STATE):	
GA. CODE ANN. § 15-11-24.3(d) (2002)	n. 72
GA. CODE ANN. § 16-10-9 (2002)	n. 65
GA. CODE ANN. § 20-2-51 (2002)	n. 65
GA. CODE ANN. § 21-4-10 (2002)	n. 60
GA. CODE ANN. § 21-4-10 (effective 1989)	n. 41
GA. CODE ANN. § 35-2-12 (2002)	n. 46
GA. CODE ANN. § 35-2-12 (effective 1949)	n. 41
GA. CODE ANN. § 42-9-15 (effective 1943)	n. 41
GA. CODE ANN. § 42-9-15(a) (2002)	n. 45
GA. CODE ANN. § 45-2-1 (2002)	n. 54
GA. CODE ANN. § 45-2-6(b) (2002)	n. 64
GA. CODE ANN. § 45-10-70 (2002)	n. 53
GA. CODE ANN. § 45-10-70 (effective 1985)	n. 41
GA. CODE ANN. § 45-11-10 (effective 1977)	n. 41
GA. CODE ANN. § 45-11-10(a) (2002)	n. 48
GA. CODE ANN. § 45-11-10(b)(c) (2002)	n. 49
GA. CODE ANN. § 45-20-2 (2) (2002)	n. 64, 71
GA. CODE ANN. § 45-20-2 (effective 1975)	n. 42
GA. CODE ANN. § 45-20-4 (effective 1975)	n. 42
GA. CODE ANN. § 45-20-4(b)(3) (2002)	n. 61
GA. CODE ANN. § 45-20-6(a) (2002)	n. 43, 69-70
GA. CODE ANN. § 45-20-6(a) (effective 1975)	n. 42
GA. CODE ANN. § 50-19-8 (2002)	n. 44
GA. CODE ANN. § 50-19-8 (effective 1933)	n. 41
GA. COMP. R. & REGS. r. 478-1-.03, Sec. 3.501 (2001)	n. 62, 66
GA. COMP. R. & REGS. r. 478-1-.03, Sec. 3.501(B) (2001)	n. 67
GA. COMP. R. & REGS. r. 478-1-.03, Sec. 3.502 (2001)	n. 68

CASE LAW (UNITED STATES SUPREME COURT):

United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) . . . . . . n. 20-21
Waters v. Churchill, 511 U.S. 661 (1994) . . . . n. 22-23
Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) . . . . n. 34, 37-39
Rankin v. McPherson, 483 U.S. 378 (1987) . . . . n. 28
Connick v. Myers, 461 U.S. 138 (1983) . . . . n. 28
Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) . . . . n. 28
United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548 (1973) . . . . n. 19
Broadrick v. State of Oklahoma, 413 U.S. 601 (1973) . . . . n. 33
Pickering v. Bd. of Educ. of Township High School District 205, Will County, Illinois, 391 U.S. 563 (1968) . . . . n. 24-27
United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75 (1947) . . . . n. 1, 18

CASE LAW (FEDERAL COURT – 5th Circuit):
Vojvodich v. Lopez, 48 F.3d 879 (5th Cir. 1995) . . . . n. 29
Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971) . . . . n. 30-32

CASE LAW (FEDERAL COURT – 11th Circuit):
Brett v. Jefferson County, Georgia, 123 F.3d 1429 (11th Cir. 1997) . . . . n. 35-36
MacKenzie v. Snow, 675 F. Supp. 1333 (N.D. Ga. 1987) . . . . n. 55-57

CASE LAW (STATE COURT – GEORGIA):
Caldwell v. Bateman, 312 S.E.2d 320 (Ga Sup. Ct. 1984) . . . . n. 50-52

OPINIONS OF THE ATTORNEY GENERAL:
Ga. Op. Atty. Gen. No. 00-7 (2000) . . . . n. 47
Ga. Op. Atty. Gen. No. 84-71 (1984) . . . . n. 40, 83-88
Ga. Op. Atty. Gen. No. 98-5 (1998) . . . . n. 59

LEGISLATIVE MATERIAL:
Annals of Cong. 1876 (1791) . . . . n. 2

SECONDARY LEGAL:
Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 Hous. L. Rev. 775 (2000) . . . . n. 3-6, 8

OTHER:
Georgia Department of Human Resources/Office of Human Resource Management, *Employee Handbook*, ch. VIII (2000) (visited Aug. 16, 2002), *available in* http://www2.state.ga.us/departments/dhr/handbook.pdf . . . . n. 12
Georgia Department of Human Resources, Division of Family and Children Services, *Personnel Policy 1202* (effective August 16, 1999) (visited Aug. 16, 2002), *available in* http://www2.state.ga.us/departments/dhr/1202.pdf . . . . . . n. 73-77

Georgia Department of Human Resources/Office of Human Resource Management, *Employee Handbook*, ch. VIII (2000) (visited Aug. 16, 2002) 42, *available in* http://www2.state.ga.us/departments/dhr/handbook.pdf . . . . n. 79-81

Georgia Department of Human Resources, Division of Family and Children Services, *Personnel Policy 1202*, Attachment 1 (Form 1202-1) (available upon request from the Division of Family and Children Services) . . . . n. 78, 82

Board of Regents Policy 802.1603 (visited Aug. 16, 2002), *available in* http://www.usg.edu/admin/policy/800.phtml . . . . n. 58

I. Introduction

Voting and participation in traditional political campaigns are personal choices for most people, and how a person votes is frequently regarded as a private matter. For state employees there are specific statutes that protect their personal and private choices. Historically, statutes relating to political participation by state employees were passed to protect employees from abusive patronage systems, but more recently, as state statutes have sought to limit or define political activity, the courts have focused more on an employee's First Amendment constitutional right to freedom of speech and association, and balancing that important right with governmental efficiency in delivering public services.[1]

Although the primary purposes of statutes relating to political participation by state employees were reform, governmental efficiency, and protection of an individual's right to vote and express an opinion, many employees and administrators believe that the statutes are for the purpose of preventing any visible or active partisan political participation. This belief may be a direct result of the inconsistent and problematic means by which employees are actually informed of the rules about political activity, whether by written or oral communications.

The purpose of this article is to examine the First Amendment constitutional protection of freedom of speech that is enjoyed by all citizens and to outline the state and federal laws that attempt to limit this constitutional protection based on an individual's status as a government employee. Court cases and official opinions that have interpreted these statutes will be reviewed, and inconsistencies in the law or specific rules for different state agencies will be discussed with specific references for Georgia state employees. The purpose of this constitutional, statutory and regulatory review is to enable employees to know their rights and responsibilities, and to give support to those state employees who choose to participate in politics in their personal lives in addition to the private act of voting.

II. Federal Hatch Act

In 1791, the United States Congress attempted to pass legislation "to prevent Inspectors (of distilled spirits), or any officers under them, from interfering, either directly or indirectly, in elections, further than giving their own votes."[2] Ten years later, in 1801, Thomas Jefferson called for the political neutrality of government employees stating that federal employees should not "attempt to influence the votes of others nor take part in the business of electioneering."[3]

Restrictions contained in various executive orders issued by the President of the United States were compiled into Civil Service Rule I, which prohibited merit system employees from using their official authority or influence either to coerce the political action of any person or body or to interfere with any election.[4] In 1907, President Theodore Roosevelt amended Rule I to include a provision

explicitly stating that individuals under the scope of the Rule could take no active part in political management or in political campaigns.[5]

Motivated to achieve neutrality in civil service, the United States Congress passed the Hatch Act in 1939. Section 9(a) of the act was basically a restatement of Civil Service Rule I.[6] Coinciding with a shift in ideologies, Congress later attempted to restore to public employees the right to voluntarily participate, as private citizens, in the political process while protecting them from improper political solicitations by enacting the Hatch Act Reform Amendments in 1993.[7] In effect, the Reform Amendments of 1993 lifted the restrictions on active participation in political management or political campaigns by federal employees and narrowed prohibitions on political activity.[8] Specifically, Section 7323(a) states that "an employee may take an active part in political management or in political campaigns," but an employee may not:

1. Use his official authority or influence for the purpose of interfering with or affecting the result of an election;

2. Knowingly solicit, accept, or receive a political contribution from any person, unless such person is (A) a member of the same federal labor organization; (B) not a subordinate employee; and (C) the contribution is for the multi-candidate political committee of such federal labor organization;

3. Run for the nomination or as a candidate for election to a partisan political office; or

4. Knowingly solicit or discourage the participation in any political activity of any person who (A) has an application for any compensation, grant, contract ruling license permit or certificate pending or (B) is subject to an ongoing audit or investigation.[9]

In addition, Section 7324 clarifies what constitutes prohibited political conduct by public employees while on duty in any room or building occupied in the discharge of official duties and while wearing a uniform or official insignia or driving a government vehicle.[10]

A state employee subject to Hatch Act prohibitions is 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 thereof.[11] State employees falling within this definition, including Georgia Department of Human Resources (DHR) employees,[12] may not:

1. Use their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;[13]

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;[14] or

3. Be a candidate for elective office.[15] However, a state employee is not prohibited from being a candidate in any election where none of the candidates represent a political party.[16]

A state employee may vote as he chooses and expresses his opinion on political subjects and candidates.[17] The statute protections and prohibitions are detailed further in 45 CFR 73.735, Sections 601-603.

The United States Supreme Court has upheld the constitutionality of the Hatch Act's prohibitions on partisan political activities of federal employees.[18] In *U.S. Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, the Court held that the Act's prohibitions were neither unconstitutionally vague nor fatally overbroad.[19] The Court's most recent comments on the act are found in *U.S. v. Treasury Employees Union*.[20] In dicta, Justice Stevens notes that the act aims to protect the free expression rights of employees by shielding them from coercion, rather than restricting those rights.[21]

III. Constitutional Claims Relating to First Amendment

The United States Supreme Court has determined that the government, functioning as an employer, has broader control over the speech of its employees than it does over the citizenry in general.[22] Because the government has an important interest in maintaining the efficient operation of the bureaucracy, the speech of its employees may be more limited.[23]

In *Pickering v. Board of Education*,[24] the Supreme Court established a test to balance this interest of the state with the political interests of the employee as a citizen. In order to determine if the employee's speech should be protected the Court must consider these factors:

1. The closeness of the parties' working relationship;
2. The detrimental effect of the speech on the employer;
3. The relevancy of the employee's speech to the particular job; and
4. The public's concern with subject of the speech.[25]

In *Pickering* a teacher was dismissed for writing a letter to the local newspaper critical of the school board's allocation of funds.[26] The Court applied the above test to conclude that the teacher's speech should be protected because his comments were not "knowingly or recklessly false" and further, that the public had a significant concern with the subject on which he was speaking.[27] In subsequent opinions the Court has clarified certain prongs of this analysis and affirmed that this four-part balancing test is the standard to be used in judging

employees' claims that they were terminated unfairly on the grounds of constitutionally protected speech.[28] As a result, in application this test has become a sliding scale upon which 'public concern' is weighed against the disruption caused.[29]

Following the decision in *Pickering,* the Fifth Circuit U.S. Court of Appeals in *Hobbs v. Thompson*[30] struck down a local ordinance enacted by the City Council of Macon, Georgia that prohibited firefighters and police officers from engaging in any political activity whatsoever, including taking part in any election, soliciting votes, contributing money to any candidate, and identifying themselves for or against any candidate. The plaintiffs, firefighters in the Macon Fire Department, were reprimanded in accordance with the ordinance for displaying bumper stickers on their private vehicles in support of a candidate for the General Assembly.[31] The Court struck down this ordinance as overbroad on its face because it was "not precisely confined to remedy specific evils [that] would deal a serious blow to the effective functioning of our democracy."[32]

In *Broadrick v. Oklahoma*,[33] the Supreme Court established that the state of Oklahoma did not violate employees' constitutional rights by enacting legislation similar to the Hatch Act to regulate their political activity. Also, the Supreme Court has held that promotions or demotions and terminations of low-level government employees based on their political activities are in violation of the First Amendment right to free expression.[34] For example, in *Brett v. Jefferson County, Georgia*,[35] an elected sheriff chose not to reappoint deputy sheriffs on the basis of their support for another unsuccessful candidate for the office of Sheriff. The Eleventh U.S. Court of Appeals held that retention of an employee's services could not be conditioned on the employee's partisan support unless it met a vital government interest.[36]

The Supreme Court also addressed the First Amendment rights of government employees in *Rutan v. Republican Party of Illinois.*[37] In this case the Court held that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on First Amendment rights of employees.[38] Additionally, the hiring of a government employee may not be conditioned upon political association and activity in the absence of a vital government interest.[39]

IV. Georgia State Law Relating to Political Activity of State Employees

The Georgia Attorney General has opined that there are three categories of prohibitions that identify what conduct is permissible versus impermissible political activity applicable to state employees under specific circumstances:

1. State law that applies to all state employees;
2. Federal Hatch Act that is applicable to certain state employees; and

3. Rules and Regulations of the State Personnel Board, which are applicable to state and local employees in the classified service of the State Merit System. [40]

The following discussion reviews these statutes and regulations, how the courts have interpreted them, and where questions of interpretation may remain. In addition, regulatory prohibitions or protections issued by different state agencies will be reviewed. The Georgia General Assembly has not revisited any of its statutory or regulatory prohibitions on political activity since enactment of the federal Hatch Act Reforms of 1993, and therefore, there are inconsistencies between the allowances of the Hatch Act as amended and the limitations imposed by state law.

There are six state statutes that relate to political activity by state employees.[41] In addition, in 1975 Georgia created the state merit system and specifically granted to the State Personnel Board permission to promulgate rules and regulations governing political activity.[42] In 1996, the Georgia General Assembly redefined classified and unclassified service, altering who is covered under the state merit system and who is not.[43]

The following discussion examines the six state statutes chronologically, the rules and regulations of the State Personnel Board, and the statutory changes to the State Merit System. In addition, several state agencies, including the Department of Human Resources, have regulated political activity through agency personnel rules and regulations adopted by their respective boards. These provisions will also be analyzed.

A. Distribution of Campaign Literature in State Vehicles – Enacted 1933

O.C.G.A. § 50-19-8 prohibits the distribution of campaign literature and the solicitation of votes while driving a vehicle when the state is at that time paying gas mileage.[44]

B. State Board of Pardons and Paroles –Enacted 1943

O.C.G.A. § 42-9-15 states:

> No member of the board or full-time employee thereof . . . shall hold any other public office . . . nor shall he serve as a representative of any political party or any executive officer or employee of any political committee…nor be engaged on the behalf of any candidate for public office in solicitation of votes . . ..[45]

C. Department of Public Safety - Enacted 1949

O.C.G.A. § 35-2-12 states:

> "No person in the employ of the [D]epartment [of Public Safety] shall either directly or indirectly, contribute any money or any other thing of value to any person, organization, or committee for political campaign or election in county or state primaries or general elections."[46]

The Attorney General in the official Opinion 2000-7 stated that this statute may be constitutionally enforced to prohibit employees of the Department from making financial contributions, except if the employee is running for office and makes the contribution to his or her personal campaign.[47]

D. Coercion of Political Activity – Enacted 1977

O.C.G.A. Sec, 45-11-10(a) states:

> It shall be unlawful for any officer or employee of this state to coerce or attempt to coerce or command directly or indirectly any other State officer or employee to pay, lend, or contribute any part of his salary or to kick back any sum of money or anything else of value to any party, committee, organization, agency, or person for political purposes.[48]

Paragraph (b) sets forth the same language as applicable to officers or employees of any county, city, school district or other political subdivision of the state, and paragraph (c) defines a violation of the statute as constituting a misdemeanor.[49]

In *Caldwell v. Bateman,*[50] the Supreme Court of Georgia examined the constitutionality of Georgia's Campaign, and Financial Disclosure Act based on allegations and investigations that Commissioner of Labor, Sam Caldwell, had used state employees for his campaign and that the employees' time had not been disclosed pursuant to disclosure requirements. The court ruled that the Campaign and Financial Disclosure Act exempted disclosure of volunteer activities, and that if employees were campaigning during work time, the state had other remedies unrelated to the disclosure laws.[51] Therefore, the State Campaign and Financial Disclosure Commission had no authority to investigate allegations of state employees campaigning on state time.[52]

E. Part-time Positions in Political Subdivision – Enacted 1985

O.C.G.A. § 45-10-70 states:

> No rules or regulations of any state agency, department, or authority shall prohibit nonelective officers or employees of this state from offering for or holding any elective or appointive office of a political subdivision of this state or any elective or appointive office of a political party or political organization of this state, provided that the office is not full time and does not conflict with the performance of the official duties of the person as a state employee.[53,54]

While the Hatch Act, as reformed in 1993, appears to limit a public employee's right to launch a candidacy for election to *any* partisan political office, the law of the state of Georgia appears to permit state employees to hold any part-time elective office or appointive office so long as the office does not conflict with the performance of the duties of the person as a state employee. Thus, under state law, a public employee may, for instance, run for a part-time political seat at the county, municipal, or school board level provided such position does not create a conflict with the employee's civil service position. However, state employees interested in announcing their candidacy for such positions should be cautioned that both the Supreme Court of Georgia and the Attorney General of Georgia have upheld broad actions taken and policies enacted by public employers that may fairly be construed as efforts to remove the appearance of any political influence on the employee's duties as a public employee.

For instance, in *MacKenzie v. Snow*,[55] a state employee sought advice from his supervisor as to whether he could run for local level Democratic Party Office, and raised the conflict between O.C.G.A. § 45-10-70 and O.C.G.A. § 42-9-15. The plaintiff, a State Board of Pardons and Parole employee, ran for the political party position, was elected, and was then terminated from his job based on O.C.G.A. § 42-9-15. He sued, and the court ruled that the Board of Pardons and Paroles was authorized to terminate Mr. MacKenzie's employment, stating:

> Not only do the applicable rules of statutory interpretation lead to the conclusion that section 42-9-15 should be given full effect, but such a construction is sound when viewed in the context of the evolution of the pardons and paroles process in Georgia . . . . The evolution of the statutory scheme and history of the Board demonstrates the movement in this state toward removing even the appearance of any political influence from the Board's decision making process.[56]

The court further ruled in reconciling the two statutes that section 45-10-70, passed in 1985, does not expressly repeal or impliedly repeal section 42-9-15, passed in 1943.[57]

The Board of Regents also enacted an agency policy that prohibits employees of the Board from seeking or holding elective office at the state or federal level.[58] The Attorney General ruled in Official Opinion 98-5 that the Board of Regents may constitutionally prohibit its employees from seeking or holding elective office while actively employed by the University System.[59]

F. Signature on Recall Petitions – Enacted 1989

O.C.G.A. § 21-4-10 states: "No employee of the state shall circulate a recall application or petition."[60]

G. Rules and Regulations of State Personnel Board

O.C.G.A § 45-20-4, enacted in 1975, confers upon the Commissioner of Personnel Administration the duty and responsibility to submit to the Governor rules and regulations adopted by the State Personnel Board which "shall define and prohibit improper political activity by any departmental employee of the State Personnel Board or any employee covered under the terms of this article . . . ."[61]

The rules and regulations of the State Personnel Board set forth specific prohibitions concerning political activity that are applicable only to classified employees covered under the merit system.[62] "'Classified service' includes all employees of state departments as defined in this Code section; all employees of local departments of health and county departments of family and children services; and local employees of the Department of Defense as defined by law."[63] All other employees are in unclassified service and are not subject to the rules and regulations.[64] Section 3.501 states in relevant part that classified employees shall not:

> (A) Be a candidate for full-time elective office;[65]. . .
>
> (C) Be a poll watcher at the polls for any election;
>
> (D) Seek or use any coercive political pressure to secure a job, pay increase, or other advantage in employment; . . .
>
> (H) Participate in political activity while on duty or under color of office or position; . . .
>
> (J) Endorse candidates in political advertisement, broadcast, campaign literature or other means of "mass communication";

(K) Address a convention, caucus, or rally in support of or in opposition to a specific candidate.[66]

Section 3.501(B) states a classified employee shall not "direct, manage, control or participate in a political campaign except as permitted in [paragraph] 3.502."[67] The relationship between these two specific provisions is central to interpreting an employee's right to participate in campaigns in specific ways.

In relevant part, State Personnel Board regulation 3.502 states that classified employees acting in their capacities as private citizens may:

(C) Express a personal opinion privately and publicly on political candidates and issues, provided that any public expression does not conflict with any other provision of this rule;

(D) Display a political picture, badge or button as long as such display is not under color of office or while on duty or on state property;

(E) Display a political bumper sticker on a privately owned vehicle upon which the State is not paying for mileage;

(F) Run for or hold an office of a city or county, political party or political organization so long as the office is not full-time and does not conflict with the employee's official duties;

(G) Participate in the non-partisan activities of a civic, community, social, professional, employee or similar organization;

(H) Be a member of a political party or other political organization;

(I) Attend partisan and non-partisan political meetings and rallies as a spectator;

(J) Sign a petition for specific legislative action or to place candidate's name on a ballot;

(K) Be active in connection with such questions as constitutional amendments, referenda, approval of municipal ordinances or other questions or issues of a similar character;

(L) Serve as a non-partisan paid worker at the polls in an election;

(M) Participate fully in public affairs in a manner which does not materially compromise their efficiency or integrity as employees, or the neutrality, efficiency or integrity or their agency;

(N) Write a personal letter to a newspaper or other publication expressing a personal view on public issues;

(O) Contribute to a government program for financing federal, state or local elections;

(P) Direct, manage, control, participate in, contribute to and accept contributions for their own campaigns for any office permitted.[68]

The 1996 amendment to O.C.G.A. § 45-20-6 altered the definition of "classified service," originally defined in O.C.G.A § 45-20-2, to apply to "all positions filled by agencies prior to July 1, 1996, except those included by law in the unclassified service and except as provided in Code Section 15-11-24.3."[69] These positions remain covered by the historical structure of the State Merit System and subject to the rules and regulations of the State Personnel Board. In effect, based on political arguments for reform of the merit system that gave too much job protection to state employees, the State Merit System classification of employees was eliminated except for employees hired before July 1, 1996. Those employees hired earlier were "grandfathered-in," affording them all previously existing protections and treating them, along with newly hired employees, as "unclassified."[70]

Over time, as classified positions are refilled, there will no longer be classified employees and arguably no application for the State Merit System and State Personnel Board Rules 3.501 and 3.502. At this time, however, the category of "classified employees" which remains for employees hired earlier would include:

1. "All employees of state departments, local departments of health and county departments of family and children services and local employees of the Department of Defense who were hired prior to July 1, 1996[71];" and

2. "persons who were probation and intake employees of the juvenile court of a county on June 30, 1996, but who were transferred as probation and intake employees to and became a part of the state-wide juvenile and intake services system fully funded through the department before January 1, 1999"[72]

Due to the indeterminate transition period of the State Merit System, the applicability of Sections 3.501 and 3.502 of the State Personnel Board Rules and Regulations may be problematic. Based in part on Attorney General Opinion 84-71, discussed below, there presently exists inconsistency and inequality of treatment of employees working in the same state office, in the same job, but who were hired at different times based on the elimination of "classified" employees. In addition, any agency provisions adopted independently that have been modeled on State Personnel Board Rules 3.501 and 3.502 should be revisited.

H. Department of Human Resources

Georgia's Division of Family and Children Services (hereinafter referred to as DFCS) incorporated, in their entirety, Sections 3.501 and 3.502 of the state personnel board rules and regulations into their policy manual on August 16, 1999.[73] The provisions set out in the policy manual are said to be applicable to all DHR employees.[74] According to the policy manual, DHR employees are "protected from undue political pressure, influence or coercion by Federal and State laws, as well as Department policy."[75] The policy is supposed to "limit political activity while assuring that the right to participate in the political process is preserved."[76]

However, before a DFCS employee can participate in political activity, she must submit a "Request for Political Activity Authorization" form.[77] The form not only needs to be completed when an employee seeks to run or accept appointment for a political position, but also must be completed before an employee can "participate" in any organization, political group, committee and such.[78] Based on changes to the State Merit System, the federal Hatch Act Reforms of 1993, as well as other constitutional arguments, the requirement of submission of an "authorization form" should be re-examined.

As stated previously, Department of Human Resources employees, including DFCS employees, are subject to the provisions of the Hatch Act, which is discussed above.[79] The DHR *Employee Handbook*[80] stipulates that employees are personally responsible for understanding the limitations on political activity. Questions about political activity "should be directed to [a] supervisor, human resources/personnel representative or the Office of Human Resources Management – Employment Practices and Concerns Section."[81] However, in the DFCS policy manual, as set forth above, the employee must submit a form and obtain approval before participating in political activity.[82] Why DFCS employees should be required to submit a form for approval, but other DHR employees are not so required is problematic.

I. Financial Contributions to Campaigns

In Attorney General Opinion No. 84-71, the Attorney General was asked if "an employee in either the classified or unclassified service [may] make a contribution to a partisan political campaign in terms of either of the following: (1)

off-duty time, or (b) financial contribution, other than that permitted to a governmental program for financing Federal, State, or local elections?"[83] In response, the opinion attempted to reconcile the provisions of State Personnel Board Rules and Regulations Section 3.501 with Section 3.502. Construing these provisions together, the Attorney General ruled that an employee in the classified service may not make a contribution or donation of any kind, to any political activity other than contributions for governmental programs for financing federal, state, or local elections.[84] Further, employees in the classified service are similarly prohibited from being involved in a political campaign regardless of whether such involvement occurs during on-duty time or off-duty time.[85] Additionally, no employee in the classified service may make any public endorsement in any political advertisement, broadcast, or campaign literature, nor may he express any opinion about any political candidates or issue in an address before any convention, caucus, rally, or similar gathering.[86] Unclassified employees "may make a political contribution or otherwise make any political statement or endorsement so long as such activity does not come within any of the prohibitions set forth in state law, or in the Federal Hatch Act or in any policy of the employing department."[87]

As discussed above, the elimination of the classified/unclassified structure for all employees hired after July 1, 1996, raises questions about the scope of this opinion. In addition, the broadly worded language "prohibited from being involved in a political campaign regardless of whether such involvement occurs during on-duty or off duty time" seems directly contradictory to the provisions of Section 3.502, and contrary to the Hatch Act Reform Amendments enacted in 1993 and discussed hereinafter.

In effect, since elimination of the designation of classified and unclassified employees, no newly hired state employees are subject to restrictions laid out in Attorney General Opinion No. 84-71. The opinion turned on the "classified" designations and therefore, does not appear to have relevance today. However, even with the elimination of the designations, "there is nothing to prohibit any department head from enacting internal regulations that are more restrictive than those set forth in state law, federal law, or State Merit System Rules and Regulations so long as those restrictions do not conflict" with any of these applicable laws.[88]

V. Conclusion

Congress has effectively simplified the statutory rules against political activity by government employees covered by the Hatch Act Reforms of 1993. By contrast, the Georgia General Assembly has not reviewed its statutory and regulatory prohibitions against political activity since the changes in federal law, nor has the state re-evaluated its regulatory scheme that defines political activity in terms of the significantly revised definitions of "classified" and "unclassified" employees following elimination of the State Merit System in 1996. The resulting collection

of state laws and regulation gives insufficient guidance to state employees and creates clear inconsistencies that cannot be reconciled.

Acknowledgements

Contributions to this article were made by students of the Barton Child Law and Policy, including Kate Parsons, Rebecca Bruck, and Angela Riccetti, and summer interns of the Child Advocacy Project administered by the Barton Clinic including Laurie Ann Fallon and Adam Long.

[1] See United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

[2] Annals of Cong. 1876 (1791).

[3] Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities: Good Government or Partisan Politics?*, 37 Hous. L. Rev. 775, note 20 (2000) (*citing* 8 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents,* 1789-1897, at 99 (1898)).

[4] *Id.* at 780.

[5] *Id.* at 781.

[6] *Id. See* 5 U.S.C. §§ 1501-1508 (2002).

[7] 5 U.S.C. §§ 7323-7326 (1994).

[8] Rafael Gely & Timothy D. Chandler, *Restricting Public Employees' Political Activities*, 37 Hous. L. Rev. 775, 787.

[9] 5 U.S.C. § 7323(a) (2002).

[10] 5 U.S. C. § 7324(a) (2002).

[11] 5 U.S.C. § 1501(4) (2002).

[12] Georgia Department of Human Resources/Office of Human Resource Management, *Employee Handbook*, ch. VIII (2000) (visited Aug. 16, 2002), *available in* <http://www2.state.ga.us/departments/dhr/handbook.pdf>.

[13] 5 U.S.C. § 1502(a)(1) (2002).

[14] 5 U.S.C § 1502(a)(2) (2002).

[15] 5 U.S.C. § 1502(a)(3) (2002).

[16] 5 U.S.C. § 1503 (2002).

[17] 5 U.S.C. § 1502(b) (2002).

[18] United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

[19] United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548 (1973).

[20] United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 471 (1995).

[21] *Id.* at 471.

[22] Waters v. Churchill, 511 U.S. 661, 671 (1994).

[23] *Id.* at 672.

[24] Pickering v. Bd. of Educ. of Township High School District 205, Will County, Illinois, 391 U.S. 563, 564 (1968).

[25] *Id*. at 570 – 571.

[26] *Id.* at 564.

[27] *Id.* at 575.

[28] *See* Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (stating that the employee has the burden to prove that his speech is protected). *See also* Connick v. Myers, 461 U.S. 138, 146 (1983) (noting that when the employee's expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community the government has wide latitude in regulation); *cf.* Rankin v. McPherson, 483 U.S. 378, 391 (1987) (reasoning that when employee in question serves no confidential, policymaking, or public contact role an employer's interest in regulating speech is small because "the danger to the agency's successful functioning from that employee's private speech is minimal).

[29] Vojvodich v. Lopez, 48 F.3d 879, 885 (5th Cir. 1995).

[30] Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971).

[31] *Id*. at 457.

[32] *Id.* at 471.

[33] Broadrick v. State of Oklahoma, 413 U.S. 601 (1973).

[34] Rutan v. Republican Party of Illinois, 497 U.S. 62, 73 (1990).

[35] Brett v. Jefferson County, Georgia, 123 F.3d 1429 (11th Cir. 1997).

[36] *Id*. at 1433.

[37] Rutan, 497 U.S. 62 (1990).

[38] *Id*. at 74.

[39] *Id*. at 77.

[40] Ga. Op. Atty. Gen. 84-71 (1984).

[41] GA. CODE ANN. §§ 50-19-8 (effective 1933), 42-9-15 (effective 1943), 35-2-12 (effective 1949), 45-11-10 (effective 1977), 45-10-70 (effective 1985) and 21-4-10 (effective 1989).

[42] *See* GA. CODE ANN. §§ 45-20-2, 45-20-4, 45-20-6(a) (effective 1975).

[43] *See* GA. CODE ANN. § 45-20-6(a) (2002).

[44] GA. CODE ANN. § 50-19-8 (2002).

[45] GA. CODE ANN. § 42-9-15(a) (2002).

[46] GA. CODE ANN. § 35-2-12 (2002).

[47] Ga. Op. Atty. Gen. No. 00-7 (2000).

[48] GA. CODE ANN. § 45-11-10(a) (2002).

[49] GA. CODE ANN. § 45-11-10(b)(c) (2002).

[50] Caldwell v. Bateman, 312 S.E.2d 320 (Ga Sup. Ct. 1984).

[51] *Id.* at 323.

[52] *Id.* at 324.

[53] GA. CODE ANN. § 45-10-70 (2002).

[54] *See* GA. CODE ANN. § 45-2-1 (2002) (stating that an employee of the state may receive compensation arising from membership upon any commission, board, panel, or other fact-finding or policy-making agency appoint by the President of the United States or other federal authority, where such appointment is of a temporary nature).

[55] MacKenzie v. Snow, 675 F. Supp. 1333 (N.D. Ga. 1987).

[56] *Id*. at 1337.

[57] *Id.*

[58] Board of Regents Policy 802.1603 (visited Aug. 16, 2002), *available in* <http://www.usg.edu/admin/policy/800.phtml>.

[59] Ga. Op. Atty. Gen. No. 98-5 (1998).

[60] GA. CODE ANN. § 21-4-10 (2002)

[61] GA. CODE ANN. § 45-20-4(b)(3) (2002).

[62] GA. COMP. R. & REGS. r. 478-1-.03, Sec. 3.501 (2001).

[63] GA. CODE ANN § 45-20-2 (2) (2002).

[64] GA. CODE ANN. § 45-2-6(b) (2002).

[65] *See* GA. CODE ANN. § 16-10-9 (2002) (stating that state employees shall not accept an office or employment in more than one branch of government at any given time). *See also* GA CODE ANN. § 20-2-51 (2002) (prohibiting employees of the Department of Education or members of the State Board of Education from obtaining a position on a local school board).

[66] GA. COMP. R. & REGS. r. 478-1-.03, Sec. 3.501 (2001).

[67] GA. COMP. R. & REGS. r. 478-1-.03, Sec. 3.501(B) (2001).

[68] GA. COMP. R. & REGS. r. 478-1-.03, Sec. 3.502 (2001).

[69] GA. CODE ANN. § 45-20-6(a) (2002).

[70] *See id.*

[71] *See* GA. CODE ANN. § 45-20-2 (2) (2002).

[72] GA. CODE ANN. § 15-11-24.3(d) (2002).

[73] Georgia Department of Human Resources, Division of Family and Children Services, *Personnel Policy 1202* (effective August 16, 1999) (visited Aug. 16, 2002), *available in* <http://www2.state.ga.us/departments/dhr/1202.pdf>.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Georgia Department of Human Resources, Division of Family and Children Services, *Personnel Policy 1202*, Attachment 1 (Form 1202-1) (available upon request from the Division of Family and Children Services).

[79] Georgia Department of Human Resources/Office of Human Resource Management, *Employee Handbook*, ch. VIII (2000) (visited Aug. 16, 2002) 42, *available in* <http://www2.state.ga.us/departments/dhr/handbook.pdf>.

[80] *Id.*

[81] *Id.* at 43.

[82] Georgia Department of Human Resources, Division of Family and Children Services, *supra* note 78.

[83] Ga. Op. Atty. Gen. No. 84-71 (1984).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*