



U.S. OFFICE OF SPECIAL COUNSEL

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February 25, 2008

Xx Xxxxx XXXXXXXX
XXXXX XXXXXXX
XXXXX XXXXXXX. XX

Re: OSC File No. AD-08-xxxx

Dear Mx XXXXXXX:

This letter is in response to your request for an advisory opinion concerning the Hatch Act. The Office of Special Counsel (OSC) is authorized pursuant to 5 U.S.C. § 1212(f) to issue opinions under the Act. Specifically, you ask whether the Hatch Act prohibits you from being a candidate in the partisan election for XXXXXXX County XXXXX xxxxxx while employed as the Assistant XXXXXXX xxxxxx. We reviewed this matter, and as explained below, this letter serves as notice that your current candidacy for XXXXXXX xxxxxx is in violation of the Hatch Act.

The Hatch Act, 5 U.S.C. §§ 1501-1508, restricts the political activity of individuals principally employed by state, county or municipal executive agencies in connection with programs financed in whole or in part by loans or grants made by the United States or a federal agency. It has long been established that an officer or employee of a state or local agency is subject to the Hatch Act if, as a normal and foreseeable incident of his principal position or job, he performs duties in connection with an activity financed in whole or in part by federal funds. In re Hutchins, 2 P.A.R. 160, 164 (1944); Special Counsel v. Gallagher, 44 M.S.P.R. 57 (1990). Coverage is not dependent on the source of an employee's salary, nor is it dependent upon whether the employee actually administers the funds or has policy duties with respect to them. See Special Counsel v. Williams, 56 M.S.P.R. 277, 283-84 (1993), aff'd, Williams v. M.S.P.B., 55 F.3d 917 (4th Cir. 1995). An employee covered by the Act may not, among other things, be a candidate for public office in a partisan election, i.e., an election in which any candidate represents, for example, the Republican or Democratic Party.

You explained that your main functions as the Assistant XXXXXXX xxxxxx are to test and program the elections equipment and train staff and poll workers on its use. According to your official position description, as Assistant XXXXXXX xxxxxx you are responsible for overseeing the administration and coordination of all election-related operations and for providing automated information system support, operational expertise and training to the XXXXXXX Department (the Department). Your duties include, among other things: acting with full authority in the absence of the XXXXXXX xxxxxx; overseeing training and participating in performance evaluations of the staff; assisting the XXXXXXX xxxxxx in personnel actions; researching and assisting the XXXXXXX xxxxxx with the preparation of the annual operating budget; overseeing all computer automation and technology, design, development, and implementation; and designing and developing database products.

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According to Xx XXXXXXXX, the Department receives two federal grants every year – the Voter Education Grant and the Poll Worker Recruitment and Training Grant.¹ Xx XXXXXXXX explained that these grants primarily are used to purchase paper items. For example, the Voter Education Grant has been used to purchase magnets reminding voters to vote and sample ballots that are mailed to voters. The Poll Worker Recruitment and Training Grant has been used to fund informational and recruitment letters sent to poll workers. This grant also was used to purchase an overhead projector, which is used for poll worker training.

Xx XXXXXXXX explained that the XXXXXXXX XXXXXX is responsible for applying for all federal grants and signing all grant applications. In addition, as head of the Department, the XXXXXXXX XXXXXXXX has oversight responsibilities over the whole Department. Thus, because the XXXXXXXX Department currently has two continuous federal grant programs, the XXXXXXXX XXXXXXXX has duties in connection with federally funded activities. As Assistant XXXXXXXX XXXXXXXX, you are tasked with overseeing the administration and coordination of all election-related operations, assisting the XXXXXXXX XXXXXXXX in carrying out her responsibilities, and acting in her absence. Therefore, it necessarily follows that you also have duties in connection with these federally funded activities. See Special Counsel v. Williams, 56 M.S.P.R. 277, 283-84 (1993), aff'd, Williams v. M.S.P.B., 55 F.3d 917 (4th Cir. 1995), cert. denied, 516 U.S. 1071 (1996) (unreported decision). Accordingly, you are covered by the provisions of the Hatch Act in your position as Assistant XXXXXXXX XXXXXXXX.

We understand, however, that currently you are not performing all of the functions of the Assistant XXXXXXXX XXXXXXXX position. You explained that when you became a candidate in the partisan election for XXXXXXXX County XXXXXXXX XXXXXX, the Department was concerned about a potential conflict of interest, or the appearance of such a conflict, between your job and your candidacy. Therefore, although you still hold the position, you currently are not performing many of the duties and responsibilities of Assistant XXXXXXXX XXXXXXXX. You explained that your supervisory duties and your authority to act in the XXXXXXXX XXXXXXXX's absence have been given to the XXXXXXXX. In addition, your access to passwords and keys for the election machines has been removed.

It is our understanding that these changes to your duties are not permanent and are in effect only for the duration of your candidacy. You indicated that should you lose the primary election on XXXXXXXX xx or the general election in XXXXXXXX, you will return to your regular duties as Assistant XXXXXXXX XXXXXXXX.

For purposes of determining Hatch Act coverage, the focus is on the requirements of an employee's position or job, not just the duties he actually performs. See In re Dean, 2 P.A.R. 615, 618 (1959); In re Slaymaker, 2 P.A.R. 56, 58 (1943). Therefore, although currently you are not performing all of the duties of the Assistant XXXXXXXX XXXXXXXX job, you continue to be employed in that position. As discussed above, the requirements of the Assistant XXXXXXXX XXXXXXXX job are such that an individual holding the position has duties in connection with

¹ Xx XXXXXXXX also indicated that over the past several years the Department has received federal grants for the purchase of equipment, such as touch screen voting machines and a Ballot on Demand machine.

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federally funded activities and is covered by the Hatch Act. Accordingly, while you are employed as the Assistant Xxxxx xxxxx, you are covered by the provisions of the Hatch Act. A temporary change in your duties is not enough to remove you from coverage under the Hatch Act.²

Thus, this letter serves as notice that OSC has reasonable grounds to believe that your current candidacy in the partisan election for Xxxxxx County Xxxxx xxxxxx is in violation of the Hatch Act. Rather than pursue disciplinary action against you at this time, we are providing you with an opportunity to come into compliance with the law. To do so, you may withdraw your candidacy or you may resign from your position as Xxxxxx County Assistant Xxxxxx xxxxx. Failure to pursue one of these options could result in disciplinary action charges being brought against you before the Merit Systems Protection Board.

If you choose to withdraw your candidacy, you must inform the appropriate election official that you are withdrawing from the election and follow his or her instructions as to what actions are necessary to effectuate your withdrawal. If you are unable to have your name removed from the ballot, you must publicly announce your withdrawal (e.g., press release, letter to the editor, etc.). Lastly, you must stop all campaign activities, including organizing or encouraging a write-in candidacy, and no longer hold yourself out as a candidate.

Please provide us with evidence of your decision (e.g., resignation letter to employer, withdrawal letter to elections official) by March 10, 2008. You may contact me at (202) 254-3673 if you have any questions regarding this matter.

Sincerely,

Erica S. Hamrick
Attorney
Hatch Act Unit

² Similarly, employees continue to be covered by the Hatch Act even while on an approved leave of absence, whether paid or unpaid. Employees have argued that they are not subject to the Hatch Act while in a leave status because they are not performing any duties, and thus necessarily are not performing duties that connect them to federal grants. See State of Minnesota Dep't of Jobs and Training v. Merit Sys. Protection Bd., 875 F.2d 179, 183 (8th Cir. 1989) (en banc). This argument is routinely rejected, however, and the Merit Systems Protection Board and Eighth Circuit Court of Appeals have held that an employee on leave remains covered by the Hatch Act because the duties of his position were connected to federal grants, even though he was not actually performing these duties because of his leave status. Minnesota Dep't of Jobs and Training, 875 F.2d at 183; see also Special Counsel v. Blackburne, 58 M.S.P.R. 279, 283 (1993); Special Counsel v. Hayes, 16 M.S.P.R. 166, 172 (1983).