



U.S. OFFICE OF SPECIAL COUNSEL

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December 5, 2007

Mx. XXXX XXXXX

XX XXXXXX XXXXXX

XXXXXXXX, XX XXXXX

Re: OSC File No. AD-08-xxxx

Dear Mx. XXXXXX:

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 “educational exemption” applies to your position with the XXXXXX Department of Labor. In addition, you ask whether the Hatch Act prohibits you from being appointed to a vacant position on the XXXXXX City Council -- the same position for which you just ran 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 (4<sup>th</sup> Cir. 1995). An employee covered by the Act may not 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.

The Hatch Act does not apply to individuals employed by educational or research institutions, establishments, agencies, or systems that are supported in whole or in part by a state or political subdivision thereof, or by a recognized religious, philanthropic or cultural organization. 5 U.S.C. § 1501 (4)(B). The intent of this exemption was to exclude teachers from the prohibitions against engaging in political activity. In re Grindle, 1 M.S.P.R. 38, 41 (1979) (“Protection of academic freedom, and fear of governmental control of education and the teaching profession, were the principal factors that led Congress in 1942 to adopt the exemption in question.”); Special Counsel v. Suso, 26 M.S.P.R. 673, 678 (1985) .

This “educational exemption” was not intended to apply in every instance where an agency or institution performs an educational or research function, but only to those primarily involved in education and research. Suso, 26 M.S.P.R. at 678. There is a presumption that an agency falls within the scope of this exemption if the agency is part of the state’s education system. Grindle, 1 M.S.P.R. at 42. However, if an institution is not denominated by the state as an education

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agency and is not organizationally part of its educational system, it will not be viewed as educational unless it is primarily educational in function or purpose. Id.

Therefore, although your position as a Xxxxxx Xxxxxxx may be an extension of special education services for adults, the Xxxxxx Department of Labor is neither part of the state's education system nor primarily educational in function or purpose. Accordingly, the educational exemption described above does not apply to your position.

In regard to your question about being appointed to the Xxxxxxx City Council, generally the Hatch Act does not prohibit employees from being appointed to and holding public office. However, in this case, the office to which you want to be appointed is the same office for which you just ran in violation of the Hatch Act. Although your recent candidacy violated the Act, OSC did not open an investigation into the matter because you withdrew your candidacy once we informed you that the Hatch Act prohibited it. Because you attempted to come into compliance with the law, we did not view your violation as a knowing and willful one.

We understand that despite your best efforts to withdraw from the election, you won the election because your name remained on the ballot. However, you were elected in violation of the law (i.e., via a partisan election). Thus, although the Hatch Act does not prohibit an employee from being appointed to or holding public office, under these circumstances, OSC advises employees that if they are elected and accept the position, the Hatch Act Unit will consider the acceptance a significant aggravating factor warranting a recommendation to the Special Counsel to prosecute this matter. Cf. Special Counsel v. Bradford, 69 M.S.P.R. 247, 250 (1995) (finding that the accepting and holding of a seat obtained in violation of the law is relevant in the context of imposing an appropriate penalty); In re Schmitt, 1 P.A.R. 798, 799 (1959) ("refusal to accept the fruit of a prohibited contest may be considered evidence of good faith").

You explained that you have informed the city clerk that you will not accept the Xxxxxxx City Council seat that you just won. Because you did not accept the seat, there is now a vacancy in that position, and you ask whether you can accept an appointment to fill the vacant position. Again, OSC has not opened an investigation into this matter because you attempted to withdraw from the election and did not accept the seat you won in violation of the law. Accepting an appointment to this same position does not, in our opinion, evidence good faith on your part. Thus, if you were to accept an appointment to the vacant Xxxxxxx City Council seat, which you just won in violation of the Hatch Act, OSC would consider the acceptance an aggravating factor in this matter, which likely would cause us to open an investigation.

Sincerely,

/s/

Erica S. Hamrick  
Attorney  
Hatch Act Unit