U.S. OFFICE OF SPECIAL COUNSEL
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202-254-3600

July 6, 2011

Mx. Xxxxx Xxxxxx
Xxxxx Xxxxxx
Xxxxx, XX xxxxx

Re: OSC File No. AD-xx-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, in your written request for an advisory opinion, you state that an employee of the career senior executive service (SES), for whom you seek advice, was contacted by a Presidential campaign committee. You further state that the career SES employee was asked to "open her home to individuals from out-of-town who come to Chicago to work as a volunteer or staff member on a partisan political campaign for the presidency." In addition, the career SES employee was told that her name would be "included on a list of volunteers who are willing to provide free lodging." You have asked OSC whether the career SES would violate the Hatch Act by engaging in the above-described conduct. Below, please find our response.

The Hatch Act, 5 U.S.C. §§ 7321-7326, generally permits most federal employees to actively participate in partisan political management and partisan political campaigns. However, employees in certain agencies and positions, including employees in career SES positions, are prohibited from taking any active part in partisan political management or partisan political campaigns. See 5 U.S.C. § 7323 (b)(2) and 5 C.F.R. § 734.401(a). Therefore, the career SES employee for whom you seek advice is prohibited from engaging in any political activity that is "in concert" with a partisan group or candidate. See, e.g., Blaylock v. U.S. Merit Sys. Prot. Bd., 851 F.2d 1348 (11th Cir. 1988).

Under the Civil Service Commission (Commission), it was long held that "employees subject to the Act and Rule are prohibited from assuming general political leadership or from becoming prominently identified with any political movement, party or faction, or with success or failure of any candidate for election to public office." In re Gaylord, 3 P.A.R. 26, 31 (1969). See also In re Crawford, 1 P.A.R. 262, 263 (1946); In re Cannon, 1 P.A.R. 415, 416 (1948).

The Commission further held that "any political activity in [sic] behalf of a candidate for public elective office who is affiliated, sponsored, or endorsed by a party organization constitutes taking an active part in political management and in political campaigns within the meaning of [the Hatch Act]." In re Rogers, 1 P.A.R. 555, 556 (1949). Although these cases were decided

prior to the 1993 Hatch Act Amendments, as a further restricted employee, the career SES employee continues to be prohibited from taking an active part in political management or partisan political campaigns.

As set forth in your letter of request, in In re Christensen and State of Michigan, 2 P.A.R. 396, 398 (1951), the Commission, upon acknowledging that a partisan candidate had been lodged at the covered employee's home, held that "entertainment of a candidate cannot be regarded as in itself a prohibited political activity." Here, however, the career SES employee would not be providing lodging or entertainment to a candidate. Instead, her name would be prominently displayed on a list, published by a Presidential campaign committee, offering lodging to volunteers and staff of the partisan campaign. Her actions would be far more substantial than simply offering lodging to a friend or acquaintance in town to volunteer. Rather, she would be acting in concert with the campaign to house supporters – to provide them with free lodging so that they may contribute to the success of the campaign. Thus, she would be engaging in political activity on behalf of a partisan candidate for public office, and, furthermore, allowing her name to be prominently identified with the campaign.

In your request, you also cite In re Reynolds, 1 P.A.R. 803, 807-08 (1960). In that matter, the respondent was charged with several violations of the Act. Among the allegations was a charge that the respondent took a prominent part in a partisan political parade by loaning his automobile to the partisan candidate. The Commission held that:

> We would not find that [a covered employee] violated the statute and rule in that his station wagon was loaned to [a partisan political candidate] who used it once or twice in political caravans. It is not a violation to make a political contribution. We see no essential difference between donating money and contributing use of an automobile. [1]

In re Reynolds, 1 P.A.R. at 807-08. Relying on this holding, your letter suggests that a similar analysis should also apply to "providing lodging and incidental hospitality." However, the Commission goes on to say that, "[i]n either instance, special circumstances might make the contribution improper. For instance, if a loaned car had the name of the leader conspicuously displayed on it, the question might arise whether this amounted to a public declaration in favor of the candidate." In re Reynolds at 808.

Moreover, in In re Fitzwilliam, the Commission, when deciding whether the respondent violated the Hatch Act by permitting the after-hours use of his office for a meeting of Democrats, held that:

> [n]ot every type of political contribution by a Federal employee is legal. If it were conceded to be, a person might contribute *personal services* with

[1] The Commission also found it of note to expressly mention that the respondent and the partisan candidate lived on adjoining farms in a sparsely populated area. See In re Reynolds at 807.

> impunity. Contribution of money (under ordinary circumstances), it has long been established by precedents, is not regarded as taking "an active part in political management or political campaigns." But whether some other type of contribution should be so regarded, becomes a question for determination under all the evidence of the case. To supply a meeting place for a political organization or group might be in a different category from making a simple cash contribution.

In re Fitzwilliam, 1 P.A.R. 77, 81 (1949). In reaching its conclusion that the respondent did not violate the Act by allowing the use of his office, the Commission was influenced by the facts that the respondent "merely acceded to a friend's request," and that "[n]o election campaign was on at the time." Id.

While contributions made by the respondents in Reynolds and Fitzwilliam were not in violation of the Act, the Commission was steadfast that special circumstances could make political contributions illegal. We find that special circumstances do exist here. The career SES employee was not approached by a friend or neighbor, she was approached by a Presidential campaign committee, during an active election season, to assist the campaign. Were she to participate as requested by the campaign, her name would be prominently displayed on a list with other volunteers willing to lodge visiting campaign volunteers and staffers. In this fashion, her conduct would hardly be comparable to that of the respondent in Reynolds, who loaned his car to a neighbor on an adjoining farm in a rural area, or to that of the respondent in Fitzwilliam, who allowed a friend to use his office for an after-hours meeting at a time when no election campaign was active. On the contrary, the career SES employee would be actively supporting the campaign and its infrastructure by lodging volunteers and staffers.

Accordingly, we find that this activity would constitute taking an active part in political campaigns in violation of the Hatch Act. Thus, the career SES employee would violate the Hatch Act by allowing her name to appear on a list of volunteers willing to house out-of-town campaign volunteers and staffers, at the request of a Presidential campaign committee.

Please call me at (202) 254-3662 should you have any questions or concerns regarding this matter.

Sincerely,

/s/

Mary K. Larsen
Attorney, Hatch Act Unit