



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 201
Washington, D.C. 20036-4505

January 10, 2001

Assistant United States Attorney
U.S. Department of Justice

Re: OSC File No. _____

Dear

This letter is in response to your request for an advisory opinion concerning the Hatch Act. We understand that you are an Assistant United States Attorney and are considering submitting your name to the _____ County Republican Party in hopes of obtaining its endorsement as a candidate for the May 2001 primary for judgeship.

You describe the process you wish to participate in as a "screening process," whereby individuals who are interested in pursuing this elected position are permitted through closed meetings to set forth their legal qualifications for judgeship to committee persons and executive committee persons. Additionally, interested individuals may submit their legal qualifications in writing to committee and executive committee persons. You also explained that this process does not require a public filing of any nature or that you publicly declare your candidacy. Lastly, we understand that if you were to obtain the endorsement of the party you still would not be the designated candidate for the party because to become the party's nominated candidate you would have to file a nomination petition.

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. Nonetheless, a covered employee may not be a candidate for public office in a partisan election, i.e., an election in which any candidate represents, for example, the Democratic or Republican party. You indicated in correspondence to our office that under _____ law judicial candidates are permitted to cross-file, i.e., to seek the nomination of both the Democratic and Republican party. Because the election for judgeship will have candidates representing the Democratic and Republican parties it is a partisan election. The fact that under _____ law a judicial candidate is permitted to cross-file does not transform the election into a nonpartisan election.

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Historically, the Civil Service Commission (Commission) held that “the prohibition against candidacy extends not merely to the formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy.” See In re Lukasik, 3 P.A.R. 34, 35 (1969); In re Rooks, 3 P.A.R. 17, 24 (1969) (both quoting Political Activity of Federal Officers and Employees, Pamphlet 20, P. 15, a Commission publication serving as a compilation of its prior determinations). Because the Hatch Act has been interpreted to prohibit preliminary activities regarding candidacy, any action that can reasonably be construed as evidence that the individual is seeking support for or undertaking an initial “campaign” to secure nomination or election to office would be viewed as candidacy for purposes of the Hatch Act.

While we understand that the process for selection that you present for our review does not entail any type of public campaign, we have concluded that the submission of your qualifications to a local political party is an act which seeks support for nomination to office, and thus, would violate the Hatch Act. The scenario you describe requires interested parties to offer themselves as candidates for selection by the party. Once an individual places himself in a position to be nominated or endorsed by a political party, he has become a candidate for purposes of the Hatch Act. The fact that you have not filed a nominating petition or publicly declared your candidacy is not determinative.

We note that in your December 8, 2000, letter to our office you posited that Rooks and Lukasik are factually distinguishable from your situation. You explained that these cases, which also appeared in a March 19, 1999, OSC advisory opinion regarding candidacy posted on our website, involved persons who actually filed public documents and ran in primary elections. In contrast, you offer that you are not requesting to run in a primary and that the “screening process” does not entail any type of public filing.

OSC’s purpose in citing Rooks and Lukasik is not to provide examples of cases concerning activity considered “preliminary activity” leading to an announcement of candidacy. Indeed, these cases involved individuals who had publicly declared their candidacies and not individuals engaged in preliminary or “testing the waters” activity. These cases are cited for the general principle articulated by the Commission that the prohibition against candidacy extends not merely to a formal announcement of candidacy but also to preliminary activity leading to such an announcement.

Next, in your December 4, 2000, letter to OSC, you stated that you reviewed the many resources our office has made available on our website regarding candidacy and

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prohibited activities (e.g., circulating nominating petitions, fundraising, putting a campaign committee together, etc.). You further stated that the "screening process" does not require that you undertake any of the enumerated prohibited activities. However, as I am sure you understand, issues that arise under the Hatch Act are very fact specific and cover a wide array of conduct. Therefore, the information and examples presented on our website are illustrative and not an exhaustive compilation of activities prohibited by the Hatch Act.

Also, you state in your December 4 letter that you reviewed three Merit Systems Protection Board cases¹ to determine what the Board considers a violation of the Hatch Act. These cases are not relevant to your situation, but instead, involve persons who publicly declared their candidacies and ran in elections. As such, they are not controlling in the issuance of this advisory opinion.

To conclude, for the reasons stated above, the "screening process" you wish to participate in is prohibited by the Hatch Act, as it constitutes preliminary activity in furtherance of candidacy. Consequently, while you remain a federal employee you should not submit your qualifications to the County Republican Party to seek its endorsement as a judicial candidate in a partisan election. Please call me at 800-854-2824 if you have any questions.

Sincerely,



Ana Galindo-Marrone
Attorney

¹ Special Counsel v. Yoho, 15 M.S.P.R. 409 (1983), rev'd on other grounds, Special Counsel v. Purnell, 36 M.S.P.R. 274 (1988); Special Counsel v. Sims, 20 M.S.P.R. 236 (1984); Special Counsel v. Mahnke, 54 M.S.P.R. 13 (1992).