U.S. OFFICE OF SPECIAL COUNSEL
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Washington, D.C. 20036-4505
202-254-3600

July 18, 2012

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Re: <u>OSC File No. AD-████</u>

Dear ███████

This letter is in response to your request for an advisory opinion from U.S. Office of Special Counsel (OSC) concerning the Hatch Act. OSC is authorized pursuant to 5 U.S.C. § 1212(f) to issue opinions under the Act. Specifically, you ask whether an employee of the ████████████ Social Services Agency (███SSA) who is covered by the Hatch Act may be candidate in California's voter-nominated primary elections under section 1503 of the Hatch Act, which permits nonpartisan candidacies. We reviewed this matter, and as explained below, the Hatch Act generally prohibits a covered employee's candidacy in voter-nominated primary elections because they are presumptively partisan elections for purposes 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 or her principal position or job, he or she performs duties in connection with an activity financed in whole or in part by federal funds. <u>In re Hutchins</u>, 2 P.A.R. 160, 164 (1944); <u>Special Counsel v. Gallagher</u>, 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. <u>See</u> <u>Special Counsel v. Williams</u>, 56 M.S.P.R. 277, 283-84 (1993), <u>aff'd</u>, <u>Williams v. M.S.P.B.</u>, 55 F.3d 917 (4th Cir. 1995).

An employee covered by the Act is prohibited from, among other things, being a candidate for public office in a partisan election. 5 U.S.C. § 1502(a)(3). Yet the Act permits a covered employee's candidacy in a nonpartisan election –an election where none of the candidates is to be nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, for example the Democratic and Republican Parties. 5 U.S.C. § 1503. If a state law provides for a nonpartisan ballot for a local office, there is a presumption that the election will be within the scope of the nonpartisan exception under section 1503. <u>In re</u>

Broering, 1 P.A.R. 778, 779 (1955). But the presumption may be rebutted with evidence showing that partisan politics entered the campaigns of the candidates. Id. Endorsements by state or national political parties, or the local political committee of a national party, may rebut the presumption. In re Broering 1 P.A.R. at 779. Additionally, the Merit Systems Protection Board has held that a candidate appearing on a ballot designated as a "Democrat" or "Republican" rebutted the presumption that a local election was nonpartisan because they were "representing" a party, even when the parties remained neutral as to the candidates. Special Counsel v. Yoho, 15 M.S.P.R. 409, 412 (1983).

In your request for an advisory opinion, you ask whether an employee of the ▮▮▮▮▮, California, Social Services Agency (▮SSA) who is covered by the Hatch Act may be a candidate in California's voter-nominated primary elections. The 2012 election cycle will be the first time all counties in California will hold voter-nominated primary elections, a result of Proposition 14: "Top Two Candidates Open Primary Act," passed on June 8, 2010. Voter-nominated primary elections select candidates for the formerly partisan congressional and state elective offices, including state constitutional offices, U.S. Congress and state legislative offices. Cal. Const. Art II, § 5. The California Constitution still provides for partisan elections for Presidential candidates and political party and party central committees. Cal. Const. Art II, § 5 (c). It also provides for nonpartisan elections for judicial, school, county and city offices.[1] Cal. Const. Art II, § 6.

In voter-nominated primary elections, all candidates appear on a single primary ballot. A candidate may have his or her political party preference, or lack of political party preference, indicated on the ballot. Cal. Const. Art II, § 5 (b). The California Election Code requires a uniform phrase, "Party Preference: _____" be used on all ballots. Cal. Elec. Code § 13105(a) (Deering 2012). The county elections official must insert either the candidate's party preference (e.g., Dem. or Rep.), "none" or "not given" into the blank.[2] All voters may vote in the voter-nominated primary election for any candidate without regard to the political party preference disclosed by the candidate or by the voter. Cal. Const. Art II, 5 (b). The candidates who are the top two vote-getters, regardless of party preference, compete in the general election. Id. A political party or party central committee "shall not nominate a candidate for any congressional or state elective office" in the voter-nominated primary. It also states, however, "this subdivision shall not be interpreted to prohibit a political party or party central committee from endorsing, supporting, or opposing any candidate for a congressional or state elective office." Id.

Whether an ▮SSA employee covered by the Hatch Act may be a candidate in voter-nominated primary elections depends upon whether voter-nominated primary elections are

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[1] For nonpartisan offices, the California Constitution prohibits a political party or party central committee from nominating a candidate, and the party preference, if any, of a candidate for nonpartisan office does not appear on the ballot. Cal. Const. Art. II, § 6.

[2] The Secretary of State's Office provided guidance on ballot formatting in a Memorandum from the Elections Division to all County Clerks, Feb. 10, 2012.

nonpartisan elections for purposes of section 1503, or more specifically, whether they are elections where none of the candidates are to be nominated or elected as representing the Democratic or Republican Parties.

The voter-nominated primary elections are not nonpartisan elections for the purposes of section 1503. First, the California Constitution does not designate voter-nominated primary elections as nonpartisan elections. Voter-nominated elections are not found under section six of article two, "nonpartisan offices" but rather under section five, "Voter-nominated primary election; Top two vote-getters; Indication of party preference; Partisan elections for presidential candidates." Second, even if voter-nominated elections were designated nonpartisan by the California Constitution, and therefore presumed nonpartisan for purposes of section 1503, the presumption would be rebutted. The California Constitution allows candidates in the voter-nominated primaries to list a party preference following their names on the ballot, as described above. Since the Board has found that a candidate appearing on a ballot listed as a "Democrat" or "Republican" rebutted the presumption that an election was nonpartisan, the party preference likewise would rebut any such presumption. See Special Counsel v. Yoho, 15 M.S.P.R. at 412.

In short, California's voter-nominated elections are presumptively partisan elections for purposes of the Hatch Act.[3] As such, an ██SSA employee covered by the Hatch Act may not be a candidate in voter-nominated primary elections. Please feel free to contact me at 202-254-3641 with any questions you might have about this matter.

Sincerely,

Kathryn J. Lefeber
Attorney
Hatch Act Unit

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[3] Arguably, if in a particular voter-nominated primary election all of the candidates were to run without designating a political party as their party preference then the election could be considered a nonpartisan election for purposes of section 1503 of the Hatch Act.