



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 218

Washington, D.C. 20036-4505

202-254-3600

**PLEASE NOTE THAT THIS OPINION PERTAINS ONLY TO TEMPORARY
SEASONAL EMPLOYEES UNDER A 1039 APPOINTMENT**

May 6, 2010

Xx. XXXXXXXX XXXXXX

XXX x. xxxx, xxx xx

XXXXXXXX, XX xxxxx

Sent via U.S. Mail and E-mail to: XXXXXXXXXXXXXXXXXXXX

Re: OSC File No. AD-xx-xxxx

Dear Xx. XXXXXX:

This letter is in response to your request for an advisory opinion concerning the Hatch Act. Pursuant to 5 U.S.C. § 1212(f), the United States Office of Special Counsel (OSC) is authorized to issue advisory opinions under the Act. Specifically, you asked whether the Hatch Act prohibits your participation as a candidate in the November 2010 election for House District in Gallatin County, Montana. We understand you have worked as a temporary seasonal employee for the United States Department of Agriculture (USDA) Forest Service for several years. You indicated you are hired and terminated each year under a "1039 appointment" and typically work for the USDA Forest Service between approximately June and October. You indicated you again intend to apply for a 1039 appointment this year. We have reviewed this matter, and as explained below, conclude the Hatch Act does not prohibit your candidacy in a partisan election while you work as a 1039 employee for the USDA Forest Service, provided you do not campaign while you are on duty.

The Hatch Act (5 U.S.C. §§ 7321-7326) governs the political activity of federal civilian executive branch employees, including USDA Forest Service employees. While most employees are permitted to engage in a variety of political activities, they are prohibited from, among other things, engaging in political activity while on duty, in a federal room or building, while wearing an official uniform or insignia, or using a government vehicle. 5 U.S.C. § 7324. Political activity has been defined as activity directed toward the success or failure of a political party, candidate for a partisan political office or partisan political group. 5 C.F.R. § 734.101. Additionally, federal civilian executive branch employees are prohibited from running for the nomination or as a candidate for election to a partisan political office. 5 U.S.C. § 7323.

As a temporary seasonal employee for the Forest Service, you are hired and terminated each year under a 1039 appointment. Pursuant to this appointment, you work approximately six months each year, and you reapply for the position every year with a "rehire status." You are hired as part of the excepted service under 5 U.S.C. § 2103. The conditions of a 1039 appointment are set forth in 5 C.F.R. § 213.103-4 and specifically require you to work "less than

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6 months (1040 hours)” per year.¹ You indicated you have never been permitted to work more than 1039 hours in any year you have worked for the Forest Service.

A federal executive branch employee who works on an occasional or irregular basis is subject to the restrictions of the Hatch Act only when the employee is on duty. 5 C.F.R. § 734.601. The Hatch Act regulations define occasional as “. . . acting or serving for the occasion or only on particular occasions.”² 5 C.F.R. § 734.101. Because you work less than 1039 hours per year, we consider you to be an employee who works on an occasional basis. Accordingly, the restrictions of the Hatch Act only apply to you when you are on duty as a temporary employee for the Forest Service.³

Please contact me at (202) 254-3638 if you have any questions regarding this matter.

Sincerely,

Justin M. Martell
Attorney
Hatch Act Unit

¹ If one divides 1039 hours by eight-hour work days, the result is 129.875 days. Accordingly, as long as you are classified a 1039 appointment, you are required to work less than 130 days per year.

² 1039 appointments are similar to another classification of government employee called “special government employee” (SGE). SGEs are appointed to positions where they work no more than 130 days per year. 5 C.F.R. § 734.601; 18 U.S.C. § 202(a). SGEs are specifically found in the Hatch Act regulations to be employees who work on an occasional or irregular basis. 5 C.F.R. § 734.601. This is analogous to the 1039 appointment requirement that dictates you work “less than 6 months (1040 hours)” per year. Accordingly, this office determines you qualify as an occasional employee under 5 C.F.R. § 734.601.

³ This office understands that 1039 employees who are permitted to work more than 1039 hours in one year automatically lose their 1039 appointment status and convert to a classification called “temporary appointments not to exceed one year.” Employees who automatically convert to temporary appointments not to exceed one year are permitted to work up to a full year, and can even extend their employment an additional year. Accordingly, you should be aware that if, at any point, you work more than 1039 hours in one year, this office will no longer consider you an occasional employee under 5 C.F.R. § 734.601. Thus, you would be prohibited from being a candidate in a partisan election.