



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 218

Washington, D.C. 20036-4505

202-254-3600

Mx. XXXXXX X. XXXXXXXX

XXX XXXXXXXXX

XXXXXXX, XX XXXXX

Re: OSC File No. AD-XX-XXXX

Dear Mx. XXXXXXXXX:

This letter is in response to your request for an advisory opinion concerning the Hatch Act. The Office of Special Counsel is authorized pursuant to 5 U.S.C. § 1212(f) to issue opinions interpreting the Act. Specifically, you ask whether the Hatch Act prohibits a member of the Metropolitan Police Department Reserve Corps (MPDRC) from becoming a candidate in a partisan election. For the reasons explained below, we have concluded that members of the MPDRC are not subject to the restrictions of the Hatch Act.

The Hatch Act, 5 U.S.C. §§ 7321-7326, applies to any individual “employed or holding office in . . . the government of the District of Columbia, other than the Mayor or a member of the City Council or the Recorder of Deeds.” 5 U.S.C. § 7322(1)(C).¹ Although the Hatch Act does not further define what it means to be “employed” or “holding office,” we must determine whether members of the MPDRC are either employed or holding office in the government of the District of Columbia in order to determine whether they are covered by the Hatch Act.

The purpose of the MPDRC is to “assist full-time, sworn police personnel in both the day-to-day and emergency delivery of law enforcement services,” and its members shall “fulfill police duties and responsibilities as determined by the Chief [of Police.]” DC ST § 5-129.51(a)-(b). All members of the MPDRC must commit to serve a minimum of 16 hours per month and 192 hours per year. They also take an oath following initial training and sign a Volunteer Services Agreement.² They are not compensated for their services and are not eligible for employment benefits; however, they do receive workers’ compensation coverage. Finally, members of the MPDRC only have authority to perform their volunteer police duties while in the presence of a paid officer and during their scheduled “tour,” or shift.³

¹ Those individuals meeting this definition are subject to the Act’s prohibitions, which include: using one’s official authority to affect the result of an election, 5 U.S.C. § 7323(a)(1); knowingly soliciting, accepting, or receiving political contributions, 5 U.S.C. § 7323(a)(2); becoming a candidate in a partisan election, 5 U.S.C. § 7323(a)(3), and; knowingly soliciting or discouraging the participation in any political activity of anyone with business before the employing agency of those covered by the Act. 5 U.S.C. § 7323(a)(4).

² The Volunteer Services Agreement includes the member’s schedule and the name of his supervisor.

³ Paid police officers retain their police authority even when off duty.

A. Members of the MPDRC Are Not Employees of the District of Columbia.

The DC Code defines “employee” as an individual “who is paid by the District of Columbia government from grant or appropriated funds for his or her services.” DC ST § 1-319.05(1). A “volunteer,” or one who “donates his or her services to a specific program or department of the District of Columbia government, by his or her free choice and without payment for the services rendered,” DC ST § 1-319.05(2), is only considered to be an “employee” of the District of Columbia government for the purposes of non-liability for claims against the District. DC ST § 1-319.03(c). See also DC ST §§ 2-411-2-416. Volunteers for the government of the District of Columbia are not eligible for employment benefits, DC ST § 1-319.03(b), except for workers’ compensation.

The United States Code defines “employee” as an individual who satisfies three criteria. First, he must be “appointed” in the civil service. 5 U.S.C. § 2105(a)(1). Indicia of civil service appointment include payment through the civil service system, an oath of office, and signing a Standard Form (SF) 50 or 52. Watts v. Office of Personnel Management, 814 F.2d 1576, 1579 (Fed. Cir. 1987) citing Horner v. Accosta, 803 F.2d 687 (Fed. Cir. 1986). Second, he or she must be “engaged in the performance of a Federal function under authority of law or Executive act.” 5 U.S.C. § 2105(a)(2). Finally, the individual must be subject to the supervision of an individual who has the authority to appoint the individual, as stated above, “while engaged in the performance of the duties of his position.” 5 U.S.C. § 2105(a)(3).

Based on the above, we have concluded that members of the MPDRC are not employees of the District of Columbia government. Specifically, they are not appointed to the civil service because, while they do take an oath, they are not paid through the civil service system and neither the SF 50 nor the SF 52 is used. As stated above, appointment in the civil service is one of three required elements of being an “employee” according to the United States Code. Moreover, the District of Columbia itself does not consider members of the MPDRC to be its employees. Accordingly, members of the MPDRC are not “employed” by the District of Columbia for purposes of the Hatch Act.

B. Members of the MPDRC Are Not Holding Office in the Government of the District of Columbia.

The DC Code does not expressly define the term “officer,” but it states that “[a]ll civil officers in the District shall, before they act as such, respectively subscribe and take an oath or affirmation to support the Constitution of the United States, and faithfully to discharge the duties of their respective offices . . .” DC ST § 1-501. Additionally, the Code defines the term “office,” in reference to what is meant by the term “elective office.” See DC ST § 1101.01(3). Specifically, the DC Code states that “[t]he term ‘office’ means the office of Mayor of the District of Columbia, Chairman or member of the Council of the District of Columbia, member of the Board of Education of the District of Columbia, or an official of a political party.” Id. This provision, however, cannot be interpreted to define who is “holding office” for purposes of the Hatch Act because the Act explicitly exempts the Mayor and the City

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Council of the District of Columbia from coverage. 5 U.S.C. § 7322(1)(C). Therefore, the DC Code does not conclusively define “officer” or “holding office.”

The United States Code defines “officer” as “an individual who is required by law to be appointed by either the President, a court of the United States, or the head of an Executive Agency.” 5 U.S.C. 2104 § (a)(1)(A)-(C). Cases interpreting statutory references to the term “officer” generally have held that “such references are limited to officials who are subject to the provisions of the Appointments Clause [of the United States Constitution].”⁴ Motion Systems Corp. v. George W. Bush, et al., 437 F.3d 1356 (Fed. Cir. 2006). Accordingly, it appears that those “holding office” under the Hatch Act include individuals in high level, policy making positions in either the federal government or the government of the District of Columbia. These individuals also often have decision making authority and supervise other individuals.

We do not believe that a member of the MPDRC is comparable to an “officer” as described in the Constitution and the United States Code. Specifically, members of the MPDRC only have police authority during their scheduled tour, and then only while in the presence of a paid officer. Thus it appears that members of the MPDRC do not have the supervisory or decision making authority that would make them like the officers described in the Constitution and the United States Code.

In conclusion, we have determined that members of the MPDRC are neither employed nor holding office in the government of the District of Columbia. Accordingly, they are not subject to the restrictions of the Hatch Act, and thus are not prohibited from being candidates in partisan elections.⁵

Please contact me at (202) 254-3650 if you have any additional questions.

Sincerely,

Amber Bell Vail
Attorney, Hatch Act Unit

⁴ The Appointments Clause states,

“the President shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointment are not herein otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they may think proper, in the President alone, in the courts of law, or in the heads of departments.”

U.S. Const. Art. 2, Sect. 2.

⁵ Please note that members of the MPDRC, while not covered by the Hatch Act, are subject to the District of Columbia Personnel Regulations regarding the political activity of volunteers. See D.C. Personnel Regs. § 4000.15 (providing that “[v]olunteers shall not engage in political activities during the time voluntary services are being performed”). In addition, by signing the Volunteer Services Agreement, members of the MPDRC agree that they “will not engage in any form of political activity during the hours [they] render service for the D.C. government.”