



U.S. OFFICE OF SPECIAL COUNSEL

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202-254-3600

June 21, 2007

Xxx XXXXXXX XXXXXXX
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XXXXXXXX, XX XXXXXXX

Re: OSC File No. AD-07-xxxx

Dear XXXXXXX:

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, you ask whether XXXXXXX XXXXX would be covered by the provisions of the Hatch Act if you appoint him to the position of First Assistant District Attorney in the XXXXXXX County District Attorney's Office (XXDA).¹ You explained that Xx XXXXX currently is a candidate in the partisan election for District Attorney. We reviewed this matter, and as explained below, we believe that Xx XXXXXXX would be covered by the Hatch Act if he is appointed to the position of First Assistant District Attorney, and thus, his current candidacy would violate the Act.

Persons covered by the Hatch Act, 5 U.S.C. §§ 1501-1508, are subject to certain protections and restrictions with respect to their political activity. Thus, under section 1502, covered employees are protected from being coerced into political activity. On the other hand, the Act prohibits such employees from, among other things, being candidates for public office in partisan elections, i.e., elections in which any candidate represents, for example, the Republican or Democratic Party. 5 U.S.C. § 1502(a)(3).

Covered employees are those whose principal employment is with a state, county or municipal executive agency, and whose job duties are "in connection with" programs financed in whole or in part by loans or grants made by the United States or an agency thereof. 5 U.S.C. § 1501(4). Employees are subject to the Act if, as a normal and foreseeable incident of their principal employment, they perform duties in connection with the federally financed activities. In re Hutchins, 2 P.A.R. 160, 164 (1944); Special Counsel v. Gallagher, 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. Special Counsel v. Williams, 56 M.S.P.R. 277, 283-84 (1993), aff'd, Williams v. M.S.P.B., 55 F.3d 917 (4th Cir. 1995), cert. denied, 516 U.S. 1071 (1996) (unreported decision).

You explained that XXDA receives federal grant funding for four specific programs: XXXX XXXXXXX to reimburse the salary of an Assistant District Attorney who is cross-

¹ Xx XXXXXXX currently is employed as an Assistant District Attorney in the XXXXX XXXXXXX Unit of the XXDA. OSC recently has determined that he is not covered by the provisions of the Hatch Act in this position.

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designated as a Special Assistant United States Attorney (SAUSA); expenses related to the Domestic Violence Unit; expenses related to the Victim/Witness Unit; and funding for a Xxxx Xxxx Xxxxx program.

According to the XXDA Regulation and Policy Manual, the First Assistant District Attorney acts in the place of the District Attorney when he is unavailable or when the District Attorney delegates such authority. The manual also states that the First Assistant District Attorney assists and advises the District Attorney in carrying out his responsibilities. You explained that, in your absence, the First Assistant District Attorney is in charge of the XXDA and all of its employees. You also explained that the First Assistant District Attorney assists and advises you when strategizing on how to proceed in criminal investigations or prosecutions.

We understand that the First Assistant District Attorney has no ability to control how federal funding is spent and no supervisory, managerial or operational responsibility over any federal funding coming into the XXDA. However, coverage under the Hatch Act is not dependent on an employee having these kinds of responsibilities. As the chief law enforcement officer for Xxxxxx County, the District Attorney has oversight over all the divisions of XXDA.² Thus, because XXDA has four programs receiving federal grant funding, the District Attorney has duties in connection with federally funded activities. Because the First Assistant District Attorney is tasked with assisting and advising the District Attorney in carrying out his responsibilities and acting in the District Attorney's absence, it necessarily follows that the First Assistant District Attorney also has duties in connection with these federally funded activities. See Special Counsel v. Williams, 56 M.S.P.R. 277, 283-84 (1993), aff'd, Williams v. M.S.P.B., 55 F.3d 917 (4th Cir. 1995), cert. denied, 516 U.S. 1071 (1996) (unreported decision).

Accordingly, we believe that Xx Xxxxx would be covered by the provisions of the Hatch Act if he is appointed to the position of First Assistant District Attorney in the XXDA. Therefore, the Hatch Act would prohibit him from being a candidate in a partisan election, and his current candidacy for District Attorney would be in violation of the Act. Please contact me at (202) 254-3650 if you have any questions regarding this matter.

Sincerely,

/s/

Erica Stern Hamrick
Attorney
Hatch Act Unit

² See Xxxxxx County Office of the District Attorney website, www.xxxxxxxxxx.xxx.