



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

November 2, 2006

Xx XXXXXX XXXXXX

Re: OSC File No. AD-07-XXXX

Dear Xx Xxxx:

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. In your request, you state that you are the former Director of the Community Development Block Grant ("CDBG") Program for Xxxxx Xxxx, Xxxxx. According to the information you provided, you retired from your position as Director of the CDBG Program on October 2, 2006. However, you state that you are currently still receiving a bi-weekly paycheck from federal funds. You explain that you are receiving this paycheck as compensation for unused sick and vacation leave that you accumulated during your employment as the Director of the CDBG Program, and that you will continue to receive this bi-weekly paycheck through July of 2007. You ask whether you are currently subject to the provisions of the Hatch Act. For the reasons stated below, we believe you are presently covered by the Act, and will continue to be through July of 2007.

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 agency is subject to the Hatch Act if, as a normal and foreseeable incident of his principal position or job, he performs duties in connection with an activity financed in whole or in part by federal funds. 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). An employee covered by the Hatch Act 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. 5 U.S.C. § 1502(a)(3).

According to the information you provided, as of October 2, 2006, you are no longer performing any duties as the Director of the CDBG Program, although you continue to receive a bi-weekly paycheck that is funded by federal grant money. However, according to Xxxxx Xxxx, Administrative Assistant for Xxxx Xxxx, Director of Human Resources for Xxxx Xxxx, you are not officially retired from your position as the Director of the CDBG Program. Ms. Wade explained that, at this time, you are considered to be on terminal leave and your

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retirement from the agency will not be effective until July 28, 2007. Xxxxxx explained that another employee is currently performing your duties and has been given the title of Acting Director of the CDBG Program. However, we understand that your position will not officially be filled until your retirement is effective on July 28, 2007.

In sum, although you are not currently performing duties as the Director of the CDBG program, because you are receiving a paycheck that is funded by federal grant money we believe you are currently covered by the provisions of the Hatch Act. In addition, based on the information we received from Xxxxxx, you are not retired, but rather, you are currently on terminal leave from your position. It is well-established that the Hatch Act continues to apply to covered employees while they are on leave from their Hatch Act covered positions. State of Minnesota Department of Jobs and Training v. Merit Systems Protection Board, 875 F.2d 179, 183 (8th Cir. 1989) (en banc); Special Counsel v. Blackburne, 58 M.S.P.R. 279, 283 (1993). In addition, the case law addressing leaves of absence, and the legislative history of the Hatch Act cited therein, make no distinction between different kinds of leaves of absence. See State of Minnesota, 875 F.2d 183 (“[It is] unmistakably clear that covered employees are subject to the prohibitions of the [Hatch] Act *regardless of leave status*”). Accordingly, the Hatch Act’s prohibitions will continue to apply to you while you are using your leave. Thus, if you wish to become a candidate for a partisan public office before your retirement is effective, you must either retire or resign from your position as Director of the CDBG Program, and it must be a complete separation from employment.

In addition, please note that this 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.” 86 Cong. Rec. 2938-2940 (September 1939), quoting, Civil Service Commission Form 1236 “Political Activity and Assessments” (explanation by Senator Hatch of Hatch Act Prohibitions); C.S.C. v. Letter Carriers, 413 U.S. 548, 573, 581 (1973) (Supreme Court adopting and appending Civil Service Commission Form 1236 to its decision, and explaining that Congress intended this form to serve as its definition of the general proscription against partisan activities); see also, In re Parker, 3 P.A.R. 7, 12 (1969) (quoting Civil Service Commission Pamphlet) (relying on this longstanding principle, the Commission concluded that a county employee’s activities violated the Hatch Act’s prohibition against candidacy). Because the statute has been interpreted to prohibit preliminary activities regarding candidacy, any action which 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 Act.

If you have any questions concerning this matter, please contact me at (202) 254-3705.

Sincerely,

Terilyn Dentino

Attorney
Hatch Act Unit