



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

February 7, 2011

XX. XXXX X. XXXXXXXX.
XXXX XXXXXXXX, XXXX XX XXXXXXXX
XXX XXXXX XXX XX
XXXXXXXX XX, XXXXX

Re: OSC File No. AD-11-XXXX

Dear XX. XXXXXXXX:

This letter responds to a request for an advisory opinion concerning several questions you had about the Hatch Act and whether a Police Commander with the City of XXXXXXXX Police Department could become a candidate for public office in a partisan election. Pursuant to 5 U.S.C. § 1212(f), the U.S. Office of Special Counsel (OSC) is authorized to issue opinions under the Hatch Act.

According to your request for an advisory opinion, we understand that the Police Commander intends to become a candidate in the 2012 partisan election for Sheriff of XXXXXXX XXXXXXX, XXXXXXX. We also understand that the Police Commander is a high-level position with the Police Department and answers directly to the Police Chief. Likewise, based on the information provided, we know that the Police Commander oversees all law enforcement personnel, including personnel and programs that receive federal funding, including grants from the U.S. Department of Justice (DOJ). Similarly, we understand that in some cases the Police Commander was responsible for writing several current federal grants and is responsible for submitting grant reports. Lastly, in your request, you ask for advice on six specific questions. Below, we will provide a general explanation of the Hatch Act's provisions and then address each of your questions.

A. The Hatch Act – A General Explanation

The Hatch Act (5 U.S.C. §§ 1501-1508) both protects and restricts covered employees' political activity. Section 1502(a)(2), for instance, protects covered employees from being coerced into political activity. But the Hatch Act also prohibits covered employees from: using their official authority or influence for the purpose of interfering with or affecting the result of an election;¹ and 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)(1), (a)(3).

¹ To illustrate, although a covered employee may write a letter to the editor or post a comment on a blog advocating for or against a candidate for partisan political office, he must do so in his personal capacity and may not identify his official position or office.

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Covered employees are those individuals principally employed by a state, county or municipal executive agency who perform duties “in connection with” programs financed in whole or in part by loans or grants made by the United States or a federal agency. 5 U.S.C. § 1501(4). Coverage does not depend on whether the employee actually administers the federal funds or whether he has policy duties attendant to the federal funds. *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). What is more, coverage does not depend on the source of the employee’s salary. *See id.* Rather, the deciding factor is whether the employee, as a normal and foreseeable incident of his principal position or job, performs duties in connection with the federally funded activities. *In re Hutchins*, 2 P.A.R. 160, 164 (1944); *Special Counsel v. Gallagher*, 44 M.S.P.R. 57 (1990).

Furthermore, individuals who supervise employees who work on federally funded programs are subject to the Hatch Act because of their oversight duties and responsibilities relative to those employees and activities; this is so even if the supervisors’ salary is not federally funded and he has no direct duties in connection with those federally funded programs. *See In re Palmer*, 2 P.A.R. 590 (1959) *remanded*, *Palmer v. United States Civil Service Commission*, 191 F. Supp. 495 (S.D. Ill. 1961), *rev’d*, 297 F.2d 450, 454 (7th cir. 1962), *cert. denied*, 369 U.S. 849 (1962). With that said, we address each of your questions.

B. Answers to Your Specific Questions

- 1) *Will the Hatch Act apply to a Police Commander with the City of XXXXXXXX Police Department as it relates to his intent or interest in becoming a candidate in a partisan election for the Office of Sheriff of XXXXXXXX XXXXXXXX, XXXXXXXX?*

Answer: Yes. As stated previously, state and local executive agency employees are covered by the Hatch Act and subject to its provisions when they perform duties “in connection with” federally funded programs or activities. *See* 5 U.S.C. § 1501(4); *Williams*, 56 M.S.P.R. at 283-84; *Gallagher*, 44 M.S.P.R. at 57; *In re Hutchins*, 2 P.A.R. at 164. Additionally, individuals supervising employees working on federally funded programs or activities are subject to the Hatch Act via their oversight duties and responsibilities. *See In re Palmer*, 2 P.A.R. 590 (1959). Given the above-cited case law as well as the information outlined in your letter regarding the Police Commander’s duties and the federal funding the Police Department receives, OSC concludes that the Police Commander performs duties in connection with federally funded activities, and as such he would be covered by the Hatch Act and subject to its restrictions on political activity. As a result, the Police Commander would be prohibited from becoming a candidate in a partisan election, including the election for Sheriff of XXXXXXXX XXXXXXXX, XXXXXXXX.

- 2) *If the answer to the first question is yes, can the Police Commander, while off duty, conduct preliminary activities, such as exploratory discussions, strategy sessions, etc., before formally announcing his candidacy without violating the Hatch Act?*

Answer: No. The Hatch Act's 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).

Because the Hatch Act has been interpreted to prohibit preliminary activities regarding candidacy, any action that can be reasonably construed as evidence that the individual is seeking support for or undertaking an initial "campaign" to secure a nomination or election to office would be viewed as candidacy for purposes of the Hatch Act. The following are examples of preliminary activities directed toward candidacy that would violate the Hatch Act: taking the action necessary under the law of a state to qualify for nomination or election; soliciting or receiving contributions or making expenditures; canvassing for voter support; conducting polls for name recognition; meeting with individuals to plan the logistics and strategy of a campaign; circulating nominating petitions; or giving consent to or acquiescing in such activities by others on the employee's behalf.

Please note, that the foregoing list is illustrative only—not an exhaustive list of the facts or circumstances that could be reasonably construed as evidence that someone is seeking support for or undertaking an initial campaign to secure a nomination or election to office.²

- 3) *Can the Police Commander, while off-duty, query and/or canvass the community to determine the issues and topics of concern to the local citizenry with regards to his interest in running for the Office of Sheriff?*

Answer: Yes, but only if the Police Commander does not present himself as a candidate in a partisan election, like the Sheriff's election at issue, or attempt to solicit support for his candidacy. Given this guidance, the Police Commander would not violate the Hatch Act by canvassing the community to determine what issues are important to its

² The Hatch Act, however, would not prohibit the Police Commander from discussing his intentions with family and close friends. Nonetheless, should he make overtures to others in an effort to solicit their support, in other words begin to "test the waters," he would violate the Act.

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citizens. Thus, any “testing the waters” activity that is purely issue-oriented would not implicate the Hatch Act. Similarly, incurring expenses when engaging in such issue-oriented activities would not violate the Hatch Act. Thus, the activity you described in your question would be permitted but only with the caveat that the Police Commander must not identify himself as a candidate for Sheriff or seek support from voters.

- 4) *Can the Police Commander publicly acknowledge, either verbally, electronically, or using mass media, to communicate he is considering running for the Office of Sheriff?*

Answer: No. As explained above, the Police Commander may not hold himself out as a candidate or potential candidate in a partisan election while holding Hatch Act covered employment; and doing so would violate the Hatch Act if the Police Commander’s purpose was to garner support for his candidacy. As explained above, candidacy does not begin by formally announcing it or filing official paperwork with the relevant election authority. Rather, the Hatch Act prohibits “any act in furtherance of candidacy.” Therefore, if the Police Commander publicly acknowledged that he is thinking of becoming a candidate in a partisan election, like the Sheriff’s election, such a public statement could be considered an act in furtherance of candidacy depending on the circumstances. However, because the answer to your question may vary based on the circumstances, we invite you to contact OSC with more specific information about the Police Commander’s contemplated or planned activities when it is time for him to decide whether to become a candidate for Sheriff; then, we can give you advice tailored to the situation.

- 5) *If all of the above is answered in the affirmative, does the Police Commander have to resign, and if so, when should that take place?*

Answer: Yes, if the Police Commander wants to become a candidate in a partisan election, such as the election for Sheriff of XXXXXX XXXXXX, XXXXXXX, he would have to resign from his Hatch Act covered employment. Additionally, because the Hatch Act’s prohibition against candidacy extends not just to the formal announcement of candidacy but also to the preliminaries leading to such an announcement (*e.g.*, canvassing or soliciting support, conducting a poll for name recognition, permitting to be done any act in furtherance of candidacy) the Police Commander would have to resign before taking any steps that can be reasonably construed as evidence that he is seeking support for or undertaking an initial campaign to secure a nomination or election to office.³

³ Please note, that taking a sabbatical or leave of absence will not allow the Police Commander to become a candidate in a partisan election. State and local executive agency employees subject to the Hatch Act continue to be covered while on annual leave, sick leave, administrative leave, furlough or any other paid or unpaid leave.

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6) *If the Police Commander formally announces his intention to run for Sheriff, will he need to resign at that time?*

Answer: Yes, if the Police Commander formally announces his intent to become a candidate in a partisan election, such as the election for Sheriff of XXXXXXX XXXXXXX, XXXXXXX, he would have to resign from his Hatch Act covered employment.

Finally, as stated earlier, we understand that the Police Commander intends to participate in the 2012 partisan election for Sheriff of XXXXXXX XXXXXXX, XXXXXXX. Because a significant amount of time will lapse between this advisory opinion and the intended election, the Police Commander's Hatch Act status could change. Therefore, to be certain that the Police Commander's Hatch Act status will continue to prohibit him from participating in the 2012 partisan election, OSC recommends that the Commander contact us for additional guidance six months before he takes any steps in furtherance of becoming a candidate.

If you have any additional questions, please call me at (202) 254-3681.

Sincerely,

Leslie J. Gogan
Attorney
Hatch Act Unit