



U.S. OFFICE OF SPECIAL COUNSEL

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August 14, 2006

Mx. XXXXXXXX X XXXXXXXX
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XXXXXXX, XX XXXXX

Re: OSC File No. AD-06-XXXX

Dear Mx. XXXXXXXX:

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 the Rhode Island Housing and Mortgage Finance Corporation ("Rhode Island Housing") is a "state executive agency" within the meaning of the Hatch Act. For the reasons explained below, we have concluded that Rhode Island Housing is a state executive agency for purposes of the Hatch Act and, therefore, Rhode Island Housing employees who have duties in connection with federally funded activities are covered by the provisions of the Act.

As you know, 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).

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Generally, the Hatch Act applies to employees of state and local government executive agencies.¹ As you acknowledge in your request, Rhode Island Housing was created by the Rhode Island legislature pursuant to the Rhode Island Housing and Mortgage Finance Corporation Act as “a public corporation of the state, having a distinct legal existence from the state and not constituting a department of the state government.” R.I. Gen. Laws § 42-55-4(a) (2005). However, Rhode Island Housing is designated “a public instrumentality exercising public and essential governmental functions.” *Id.* In addition, by passing the Rhode Island Housing and Mortgage Finance Corporation Act, the Rhode Island legislature intended “to authorize the incorporation of a public corporation and instrumentality and *agency of the state*” for the purpose of carrying out the specified governmental functions. *Id.* (emphasis added). In fact, according to the Rhode Island Tax Administrator, it is the performance of these “essential governmental functions” that qualifies Rhode Island Housing for exemption from state sales and income tax as a “quasi-governmental agency.” In light of its quasi-governmental character, purpose, and functions, we have concluded that Rhode Island Housing constitutes a political subdivision of the state of Rhode Island for purposes of the Hatch Act. See Special Counsel v. Suso, 26 M.S.P.R. 673, 678 (1985) (considering the state statute that created the respondent’s employing agency and the governmental nature of the agency’s services in determining that the organization was a local government agency within the meaning of the Hatch Act).

In determining whether a state agency is part of the executive branch, the most important factor to consider is which branch of the state government controls the agency. Special Counsel v. Bissell, 61 M.S.P.R. 637, 643 (1994). You informed us that Rhode Island Housing is not subject to the direct control of the state government. However, Rhode Island Housing operates under the direction of seven commissioners, four of whom are appointed by the State governor, the chief executive of the State, with the advice and consent of the State senate. *Id.* The commissioners are responsible for hiring the Executive Director and play an advisory role in the hiring of other senior staff. The management structure of Rhode Island Housing indicates, in effect, control of Rhode Island Housing by the State executive branch. Therefore, we believe that Rhode Island Housing is an agency within the executive branch of the State of Rhode Island for purposes of the Hatch Act.

You point out in your request that Rhode Island Housing is financially separate from the State of Rhode Island. You explain that Rhode Island Housing does not receive funding from the State and that it is a self-supporting organization that receives and issues loans, sells bonds, and collects fees for the administration of HUD programs. We note,

¹ The Act also applies to employees of private, nonprofit organizations if the statutes through which these organizations derive their federal funding contain a provision stating that recipient organizations are deemed state or local government agencies for purposes of the Hatch Act. To date, the statutes authorizing Head Start funds and Community Service Block Grant (“CSBG”) funds are the only statutes that contain such a provision. See 42 U.S.C. §§ 9851, 9918(b).

however, that absence of state funding is not conclusive in determining whether an entity is a state agency.

Furthermore, an individual's status under his state's civil service system is not determinative of whether he falls within the definition of "state and local officer or employee" pursuant to 5 U.S.C. § 1501(4). Suso, 26 M.S.P.R. at 679. Therefore, the fact that Rhode Island Housing employees are not subject to the regulations of the Rhode Island Civil Service does not preclude them from being covered by the Hatch Act as state or local employees.

In addition, the Merit Systems Protection Board ("Board") typically has found state housing authorities to be state executive agencies within the scope of the Hatch Act. See, e.g., Special Counsel v. Carter, 45 M.S.P.R. 447 (1990); Special Counsel v. Purnell, 37 M.S.P.R. 184 (1988); In re Grandison, 1 M.S.P.R. 21 (1979). We understand that Rhode Island Housing is similar to a housing authority to the extent that it is a public corporation organized by state statute, administers the U.S. Department of Housing and Urban Development (HUD) Housing Choice Voucher Program (Section 8), and provides other services to low-income Rhode Island residents—activities generally carried out by local housing authorities. Furthermore, for limited purposes,² HUD has deemed Rhode Island Housing to be a housing authority under federal law. Thus, we believe that Rhode Island Housing's similarities to, and limited status as, a state housing authority further supports our determination that Rhode Island Housing is a state executive agency for purposes for the Hatch Act.

Lastly, given the nature of Rhode Island Housing's services, Rhode Island Housing employees are in a position to exert political influence on their constituents, and there is a distinct potential for coercion inherent in the corporation's function. Indeed, in In re Wimer, where the respondent violated the Hatch Act by running in a partisan election while principally employed by a county housing authority in connection with federal funds, the Civil Service Commission ("CSC") noted that "[t]here appears to be an aggravating aspect to candidacy by a Housing Authority official. . . . [T]enants in the development and applicants for occupancy might hesitate to oppose its Executive Director."³ Wimer, 2 P.A.R. 570, 576. This type of coercive influence is the kind of danger that the Hatch Act was intended to prevent. See 5 U.S.C. § 1502 (a).

² HUD categorizes Rhode Island Housing as a housing authority because this status is necessary for an organization to administer the Section 8 program. Rhode Island Housing administers this program in Rhode Island communities that do not have a local housing authority.

³ The CSC is the predecessor of today's Merit Systems Protection Board, which currently decides Hatch Act matters pursuant to 5 U.S.C. § 1204(a).

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Therefore, based on the language of the Rhode Island Housing and Mortgage Finance Corporation Act and the practical effect of Rhode Island Housing's structure and function, we believe that for purposes of the Hatch Act, Rhode Island Housing is an executive agency of the State of Rhode Island. Therefore, individuals principally employed by Rhode Island Housing are covered by the provisions of the Hatch Act if they have duties in connection with programs that are funded, in whole or in part, by federal loans or grants.

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

Sincerely yours,

Erica N. Stern
Attorney
Hatch Act Unit