



U.S. OFFICE OF SPECIAL COUNSEL

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Washington, D.C. 20036-4505  
202-254-3600

July 6, 2009

XXXXXX XXXXXXXX  
XXX XXXXXXXX Xx  
XXXXXXXX, XX XXXXX

Re: OSC File No. AD-XX-XXXX

Dear Xx. XXXXXXXX:

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 Act prohibits your current candidacy in the partisan election for XXXXXXXXX City Council. We understand you are employed as a Policy Aide to XXXXXXXXX Council Member Xxxx XXXXXXXX. For the reasons explained below, you are not subject to the Hatch Act's restrictions on political activity.

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 or local 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. 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). An employee covered by the Act may not, among other things, be a candidate for public office in a partisan election, i.e., an election in which any candidate represents, for example, the Republican or Democratic Party.

As noted above, the Hatch Act only applies to employees of executive branch agencies. XXXXXXXXX Ethics Officer Xxxx Xxxx advised you to seek guidance from OSC regarding your status under the Hatch Act because XXXXXXXXX operates under a "strong Council/weak Mayor" form of government. Pursuant to this division of power, the City Council participates in some activities traditionally reserved for the executive branch of government. For example, the City Charter provides for an Executive Committee consisting of the Mayor, who is the chair, and between one and four Council Members. XXXXXXXXX City Charter ch. 3 § 4. The Executive Committee must approve the Mayor's nominations for the positions of Police Chief, Fire Chief, and Director of Public Works, among others, before the full City Council votes on the appointment. Id. The City Council also performs certain regulatory functions typically fulfilled by the executive, including caring for and controlling City highways and streets, id. at ch. 8 § 1, and acting as the Board of Health. Id. at ch. 14 § 1.

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Notwithstanding the “strong Council/weak Mayor” system, the City of XXXXXXXXX retains the traditional separation of powers model established in the United States Constitution, and the Mayor and City Council exercise the quintessential functions of their respective branches. To illustrate, the Mayor “shall take care that the laws of the State and ordinances of the City are duly observed and enforced.” *Id.* at ch. 3 § 1; compare U.S. Const. art. II, § 3 (the President of the United States “shall take Care that the Laws be faithfully executed”). Indeed, “executive power” is defined as “[t]he power to see that the laws are duly executed and enforced.” *Black’s Law Dictionary*, 8th ed. (2004). What’s more, the City views the Mayor as its “chief executive officer.” Op. City Atty. to D. Fraser at 2 (Jun. 30, 1982) (interpreting XXXXXXXXX’s Open Meeting Law as not applicable to a meeting of a mayoral task force because it is not a “governing body,” which, in XXXXXXXXX, is the City Council). Thus, the Mayor represents the executive branch of government in XXXXXXXXX, even though the mayoral power is somewhat reduced compared to that of a paradigmatic governmental organization.

Likewise, the City Council performs the fundamental role of a legislature, and is recognized as such in court opinions. See e.g. *Kahn v. Griffin*, 701 N.W. 2d 815 (Xxxx. 2005) (applying XXXXXXXX legislative redistricting statute to conduct of XXXXXXXX City Council election). The United States Constitution vests Congress with “[a]ll legislative Powers herein granted.” U.S. Const. art. I, § 1. “Legislative power” is “[t]he power to make laws and to alter them; a legislative body's exclusive authority to make, amend, and repeal laws.” *Black’s Law Dictionary*, 8th ed. (2004). In Minneapolis, the City Council has the power “to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the City.” XXXXXXXX City Charter ch. 4 § 4. Consequently, regardless of what additional powers it may have compared to other legislatures, the City Council is the legislative branch of the XXXXXXXX government.

Based on the above, we have concluded that, despite the City Council’s nontraditional powers, it is the legislative branch of the City government. Because you are employed by the City Council (*i.e.*, the legislative branch of government) you are not an executive branch employee. Therefore, the Hatch Act does not apply to you and your candidacy for XXXXXXXX City Council is not prohibited. Please contact me at (202) 254-3642 if you have any additional questions.

Sincerely,

Carolyn S. Martorana  
Attorney, Hatch Act Unit