



U.S. OFFICE OF SPECIAL COUNSEL

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August 11, 2009

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

Via U.S. Mail and Facsimile to (XXX) XXX-XXXX

Re: OSC File No. AD-XX-XXXX

Dear Xx 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 interpreting the Act. Specifically, you ask whether the Hatch Act prohibits XXXXXXX XXXXXXX, as an employee of the XXXXXXX County Soil and Water Conservation District, from becoming a candidate in the partisan election for XXXXX XXXXX in XXXXX, XXXXXXX. For the reasons explained below, we have concluded that he is subject to the Hatch Act's restrictions on political activity.

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 being candidates for public office in partisan elections, that is, elections in which any candidate is running as a representative of, for example, the Republican or Democratic Party. 5 U.S.C. § 1502(a)(3).

Covered employees are those whose principal position or job 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 positions or jobs, 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. Merit Sys. Prot. Bd., 55 F.3d 917 (4th Cir. 1995), cert. denied, 516 U.S. 1071 (1996) (unreported decision). Generally, application of the Hatch Act is not affected by whether the federal funds are given in advance or as a reimbursement. See Special Counsel v. Alexander, 71 M.S.P.R. 636 (1996), aff'd, Alexander v. M.S.P.B., 165 F.3d 474 (6th Cir. 1999) (Medicaid program administered by the Michigan Department of Social Services was funded by federal "grants," even though its funding was referred to as a reimbursement).

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According to the information we received, Xx. XXXXXXXX is employed as a XXXXXXXX XXXXXXXX for the XXXXXXXX County Soil and Water Conservation District (District). You first raised the question whether the District is a “state or local executive agency” within the meaning of the Hatch Act. Specifically, you cited an opinion of the State Attorney General concluding that such districts are “political subdivisions” independent of both the State and county governments, and thus officers and employees of the District are not entitled to the same protection against personal liability incurred within the scope of their duties that is afforded to State or county employees. 1980 Op. Atty. Gen. 62. Notwithstanding this conclusion, the District is a local executive agency for Hatch Act purposes. Specifically, a more recent opinion of the State Attorney General finds that although districts are “legally independent of the county and the State,” they are “public entities” under New York law. 1996 Op. Atty. Gen. F6 citing N.Y. Pub. Officers Law § 18(1)(a). Moreover, State law provides that soil and water conservation districts may be created by county boards of supervisors “for the purpose of effectuating the legislative policy announced in [N.Y. Soil & Water Conserv. Dist. Law § 2].” N.Y. Soil & Water Conserv. Dist. Law § 5(1). Section two describes a policy of “conservation of the soils and water resources of this state . . . and for the prevention of soil erosion,” among other things. N.Y. Soil & Water Conserv. Dist. Law § 2(1). As such, the District is charged with carrying out, or executing, the laws of the State, and thus is an “executive agency” for purposes of the Hatch Act.¹

As stated above, employees of state or local executive agencies are subject the Hatch Act’s restrictions only if they have duties in connection with programs financed in whole or in part by federal loans or grants. Xx. XXXXXXXXXX’s duties include coordinating the Graze NY program in XXXXXXXX and XXXXXXXX Counties. His role with respect to the Graze NY program is to provide technical support to farmers who wish to adopt grazing systems and to help the farmers obtain financial assistance for this purpose. Specifically, he prepares a Prescribed Grazing Plan for each farmer based on an on-site evaluation of the property. He then assists the farmer in applying for funding from one of two sources. First, he applies to the New York Department of Agriculture and Markets for funding pursuant to the Agriculture Nonpoint Source and Abatement Control Program Grant, which is financed by the State Environmental Protection Fund.² If the application meets certain eligibility criteria, he may also refer the Prescribed Grazing Plan to the United States Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS) so the farmer can seek federal funding under the Environmental Quality Incentive Program (EQIP).³

Graze NY is funded with a continuing Congressional appropriation first secured by Congressman James Walsh and administered by the NRCS. The NRCS in turn provides the appropriated funds to New York’s Soil and Water Conservation Districts to employ grazing technicians, including Xx. XXXXXXXXXX. Specifically, the NRCS has entered into a cooperative

¹ The term “executive branch” is defined as “[t]he branch of government charged with administering and carrying out the law.” Black’s Law Dictionary, (8th ed. 2004).

² The Environmental Protection Fund consists of proceeds from the real estate transfer tax.

³ The NRCS Service Center shares office space with the District.

agreement with the District and, in fiscal year 2009, paid the District \$80,000 for expenses arising out of providing technical assistance to farmers in Xxxxxx and Xxxxxxx Counties in furtherance of the Graze NY program. The appropriation also pays for his salary. We understand that the most recent cooperative agreement expired on May 31, 2009, but the District Director stated that he is “absolutely sure” the District will sign a new agreement for fiscal year 2010, thereby continuing its receipt of funding. NRCS representative Xxxxx Xxxxxxx has already proposed a new contract for the District Director’s review.

EQIP is a conservation initiative managed by the NRCS. The purpose of EQIP is to “assist[] producers in complying with local, State, and national regulatory requirements concerning . . . soil, water, and air quality.” 16 U.S.C. § 3839aa(1)(a). Producers, *i.e.*, farm owners, propose a plan for implementing a grazing practice that has the effect of conserving natural resources. After completing the plan with technical assistance from NRCS or a third party, producers seek plan approval from NRCS. During this process, Xx. Xxxxxxx frequently assists NRCS by obtaining any additional information the NRCS needs to supplement the grazing plan. If the plan is approved, the producer enters into a direct contract with the Secretary of Agriculture, who agrees to “provide payments” to the producer to implement the plan on his farm. 16 U.S.C. § 3839aa-2(a)-(d)(1). Subsequently, Xx. Xxxxxxx inspects the farm to ensure compliance with NRCS standards and specifications. He also occasionally collects receipts from farmers and gives them to the NRCS staff to process reimbursements for expenses incurred in the course of implementing the plan. Xx. Xxxxxxx stated that his role in the EQIP application process is mostly out of convenience because he is familiar with the local producers and spends much of his time in the field conducting his Graze NY duties. The District Director confirmed that the District receives no compensation from NRCS or USDA for Xx. Xxxxxxx’s assistance. Further, at no time does the District control or possess the money used to make EQIP payments.

OSC has concluded that the Congressional appropriation used to finance the Graze NY program, including Xx. Xxxxxxx’s salary, is a “grant” for Hatch Act purposes. The Act’s legislative history reveals that an expansive definition of “grant” is consistent with the legislative intent behind the Act. Senator Hatch, discussing the application of the Act to state and local employees, explained that the purpose is to cover “employees in the states whose employment is made possible by the use of Federal funds *or appropriation from the Federal Treasury.*” Cong. Rec. 2338, 76th Cong., 3d Sess. (March 5, 1940) (emphasis added). Here, Xx. Xxxxxxx’s primary responsibility is to bring the Graze NY program to farmers in Xxxxxxx and Xxxxxxx Counties. Because the appropriation pays for his salary and the costs associated with the program, his employment “is made possible by the use of” funds from the Federal Treasury. Accordingly, the appropriation is a “grant” for Hatch Act purposes.

EQIP, on the other hand, is not a “grant” under the Hatch Act. Although Xx. Xxxxxxx has duties in connection with EQIP, the nature of the funding is such that it does not implicate the Hatch Act. Specifically, EQIP payments flow from the Secretary of Agriculture, through the NRCS, to individual farmers; at no time does Xx. Xxxxxxx’s employing agency, *i.e.*, the District, receive or administer the payments. Although the Act does not define the term “grant,” its penalty provision, section 1506, suggests that the “loans or grants” referred to in the definition

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of a covered employee must be received by the employee's employing agency. Section 1506 provides that if the Merit Systems Protection Board finds that a state or local employee has violated the Hatch Act and notifies the employee's employing agency of the finding but the employee is not removed, then "the Board shall make and certify to the appropriate Federal agency an order requiring that agency to withhold from its loans or grants *to the State or local agency to which notice was given.*" 5 U.S.C. § 1506(a)(2) (emphasis added). Thus, by its terms, the Act applies to individuals employed by a state or local agency and who have duties in connection with activities funded by loans or grants received by the employing agency. Thus, EQIP is not a "grant" under the Hatch Act, and Xx. XXXXXXXXXX's role in the EQIP program does not render him subject to the Act's restrictions.

Based on Xx. XXXXXXXXXX's role with respect to the Graze NY program, however, OSC has concluded that he is employed in connection with activities financed in whole or in part by a federal grant. Specifically, his primary duty is to implement the Graze NY program in XXXXXXX and XXXXXX Counties. The costs of Graze NY, to include his salary, are funded by a Congressional appropriation administered by the NRCS. As a result, he is subject to the provisions of the Hatch Act, which prohibit him from being a candidate in a partisan election.⁴

Please contact me at (202) 254-3642 if you have any additional questions.

Sincerely,

/s/

Carolyn S. Martorana
Attorney, Hatch Act Unit

⁴ Even though the last contract expired in May 2009, Xx. XXXXXXX's salary for the work he is doing now will ultimately be paid for with funding from the Congressional appropriation due to the District Director's certainty that the District will enter into a new agreement for another year. As a result, he continues to have duties in connection with a federally funded program in the interim period until a new agreement is signed. See *In re Arozena*, 2 P.A.R. 138 (1944) (work completed before federal aid is requested or granted, but that is ultimately the basis for receipt of federal grants, is "in connection with" the grants and thus implicates the Hatch Act).