



U.S. OFFICE OF SPECIAL COUNSEL

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202-254-3600

July 6, 2011

XXXXXX XXXXX  
XXX XXXXXX XXXX  
XXXXXX, XX XXXXX

Re: OSC File No. AD-XX-XXXX

Dear Xx. XXXXX:

This letter responds 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 asked whether the Act prohibited you from being a candidate in the partisan election for County Board in XXXXXX County, XXXXXX, while employed as the Director of the XXXXXX XXXXXX Workforce Board (Workforce Board).<sup>1</sup> In addition, OSC received requests to investigate your candidacy from third parties, one of whom also alleged that you asked a subordinate employee to sign your nominating petition in violation of the Hatch Act. For the reasons explained below, we are closing our file in this matter.

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).

In addition, covered employees may not use their official authority or influence to affect the result of an election.<sup>2</sup> 5 U.S.C. § 1502(a)(1). Federal regulation provides that this prohibition means that employees may not use their authority to coerce any person to participate in political activity. 5 C.F.R. § 734.302(b)(2).<sup>3</sup> Attempting to influence the political activity of a subordinate employee is considered inherently coercive. Special Counsel v. Acconcia, (CB-1216-06-0007-T-1, February 26, 2007 (Initial Decision at 9), rev'd on other grounds, 107 M.S.P.R. 60 (2007), citing Special Counsel v. Purnell, 37 M.S.P.R. 184, 195 (1988), aff'd sub nom. Fela v. Merit Sys. Prot. Bd., 730 F. Supp. 779

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<sup>1</sup> You are no longer employed by the Workforce Board.

<sup>2</sup> Employees also are prohibited from coercing or attempting to coerce other employees into contributing anything of value for a political purpose. 5 U.S.C. § 1502(a)(2).

<sup>3</sup> This citation refers to the Hatch Act regulations that apply to federal employees. However, the language in the statute concerning the use of official authority or influence is identical for both state and local and federal employees. Thus, when determining whether conduct by state and local employees constitutes an unlawful use of official authority or influence, OSC uses the regulation that applies to federal employees as guidance.

## U.S. Office of Special Counsel

Page 2

(N.D. Ohio 1989). Where the supervisor-subordinate relationship exists, no particular words are required to establish coercion because virtually any language can be threatening. Special Counsel v. Gallagher, 44 M.S.P.R. 57, 76 (1990).

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).

You first questioned whether the Workforce Board is a municipal executive agency for Hatch Act purposes because it was organized as a nonprofit corporation and the Internal Revenue Service granted it tax-exempt status. After reviewing the matter, OSC has concluded that the Workforce Board is a municipal executive agency under the Hatch Act. Borrowing from state law regarding application of the state Tort Immunity Act, a nonprofit corporation is considered to be a local public entity if it is “tightly enmeshed with government either through direct governmental ownership or operational control by a unit of local government.” Carroll v. Paddock, 764 N.E. 2d 1118, 1125 (Ill. 2002) The court enumerated several factors to consider when determining whether a nonprofit corporation is a local public entity, including: 1) whether the entity was created and/or managed by private persons; 2) the composition of the corporation’s board of directors; 3) whether the corporation is subject to the control of a unit or agency of local government; and 4) whether other entities in the private sector perform the same kinds of functions as the nonprofit. Id. at 1124-25.

According to its bylaws, the Workforce Board was established by the federal Workforce Investment Act of 1998 (WIA) to serve the state’s Workforce Investment Area #11.<sup>4</sup> The bylaws state that the board members will be selected in accordance with the WIA, which provides that members shall be chosen by the chief elected officials in the Workforce Investment Area using guidelines established by the Governor. 29 U.S.C. § 2832(b)(1). Current XXXXXXX County Chairman XXXXXX XXXXX explained that he and the chief elected officials from XXXXXX and XXXXXX Counties also must approve the Workforce Board’s selection of the Director. In addition, also pursuant to the WIA, the Governor must certify the Workforce Board once every two years; failure to maintain the Governor’s certification

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<sup>4</sup> The WIA states that “[t]here shall be established in each local area of a State, and certified by the Governor of the State, a local workforce investment board, to set policy for the portion of the statewide workforce investment system within the local area.” 29 U.S.C. § 2832(a).

## U.S. Office of Special Counsel

Page 3

will result in the reappointment and certification of another board for the Workforce Investment Area. 29 U.S.C. § 2832(c)(2). Lastly, XXXXXXX County serves as the Workforce Board's fiscal agent. In fact, the WIA requires the relevant chief elected official to serve as the local grant recipient and be liable for the misuse of grant funds. 29 U.S.C. § 2832(d)(3)(B). In this capacity, the county receives grant funding from the United States Department of Labor (DOL) on behalf of the Workforce Board. The Workforce Board then requests reimbursement from the county for all of its expenses. Further, the XXXXX County Chairman is a required signatory on agreements between the Workforce Board and service providers. OSC understands that XXXXXXX County does not disburse the DOL funds to any other entity besides the Workforce Board and service providers who enter in to three-party contracts with the Workforce Board and XXXXXXX County, except for the sum it retains to pay 80 percent of the salary of the county employee responsible for processing the reimbursements.

Based on the foregoing, we have concluded that the Workforce Board is a state or local agency for purposes of the Hatch Act because its creation was mandated by federal law and because of its close relationship with local government, which exercises a degree of control over the Workforce Board and its funding. Moreover, no other entity in the private sector performs the functions that the Workforce Board performs. Therefore, an employee of the Workforce Board who has duties in connection with federally financed activities is subject to the restrictions of the Hatch Act.

We understand that you were employed as the Director of the Workforce Board when you became a candidate for XXXXXXX County Board. As mentioned above, the Workforce Board is funded largely by grants from DOL pursuant to the WIA as well as the Trade Act of 1974. These funds cover administrative costs, including salaries, as well as programmatic expenses. As Director, you were responsible for the day to day administration of the Workforce Board and its staff.<sup>5</sup> Among other things, you also were required to sign all disbursement checks along with an officer of the Workforce Board. Given your managerial role, as well as the fact that your salary was paid using federal funds, OSC has concluded that you had duties in connection with activities financed by federal grants when you were Director of the Workforce Board. As a result, you were covered by the Hatch Act and thus prohibited from being a candidate in a partisan election. We understand that even though you had not yet received OSC's opinion, you believed you were a covered employee and withdrew from the election in January 2010.

In addition, you asked your subordinate employee XXXXXXX XXXXXXX to support your campaign by signing your nominating petition. We understand that you approached Ms. XXXXXXX outside of work but not as part of a general canvass of her neighborhood. Ms. XXXXXXX told OSC that she did not feel coerced and that she genuinely supported your candidacy. Nonetheless, as explained above, the Merit Systems Protection Board typically

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<sup>5</sup> Members of the Workforce Board of Directors are not full time staff and are not compensated for their service. The Director, however, is a full time staff member.

**U.S. Office of Special Counsel**

Page 4

considers it to be inherently coercive for a supervisor to try to influence the political activity of a subordinate.

We understand that you have resigned your employment with the Workforce Board and you no longer hold public employment. Thus, even though OSC has concluded that you violated the Hatch Act, we are closing our file in this matter. Please contact me at (202) 254-3642 if you have any additional questions.

Sincerely,

/s/

Carolyn S. Martorana  
Attorney, Hatch Act Unit