



U.S. OFFICE OF SPECIAL COUNSEL

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April 29, 2014

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Re: OSC File No. AD-14-XXXX

Dear Mr. ██████████:

This letter responds to your request for an advisory opinion concerning the Hatch Act. Pursuant to 5 U.S.C. § 1212(f), OSC is authorized to issue opinions on the Hatch Act. Specifically, you ask if Federal Aviation Administration (FAA) Aviation Medical Examiners are subject to the Hatch Act's political activity restrictions. We reviewed this issue, and for the reasons explained below, we conclude that an FAA Aviation Medical Examiner is not subject to the Hatch Act.

The Hatch Act (5 U.S.C. §§ 7321-7326) governs the political activity of federal civilian executive branch employees. The Act permits most federal employees to participate actively in partisan political management and partisan political campaigns. *See* 5 U.S.C. § 7323(a). However, the Act prohibits covered employees from, among other things, becoming a candidate in a partisan election, *i.e.*, an election in which any candidate is to be nominated or elected as representing, for example, the Republican or Democratic Party. 5 U.S.C. §§ 7323-7324.

The Hatch Act defines an employee as "any individual, other than the President or Vice President, employed or holding office in an executive agency..." 5 U.S.C. § 7322 (1)(A). Thus, to determine if an FAA Aviation Medical Examiner (AME) is subject to the Act's political activity restrictions, OSC analyzed whether an AME is an employee of or holds office with the FAA. Pursuant to 49 U.S.C. § 44702(d) and its implementing regulations (14 C.F.R. § 183 *et seq.*), the FAA Administrator and his or her authorized representatives, (*i.e.*, Regional Federal Air Surgeons), may designate a qualified physician as an AME, delegating to that physician the ability to perform physical exams and issue or deny medical certificates.¹

Regarding the designation, FAA Order 8520.2C Aviation Medical Examiner System explains that it is a privilege conveying responsibilities but not employment. *See* para. 7(a). The order also stipulates that a designation is effective for three years, automatically renews for another three-year term upon meeting certain conditions, and the FAA may terminate the designation "for cause" or "not for cause" at any time when it is in the agency's best interest. *See* para. 10(c), (f), and (g); *see also* FAA Order VS 1100.2A Managing AVS Delegation

¹ Under the authorizing statute and implementing regulations, the FAA may also appoint designees for various other services including pilot examiners and aircraft inspectors, among others.

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Programs at para. 9(g)(2) Managing Designees, (any designee may be terminated for any reason, at any time).² In fact, before receiving a designation each AME applicant must sign a statement acknowledging that a designation is a privilege, not a right, and the FAA can terminate the designation at any time. *See* FAA Order 8520.2C at para. 10(c)(1)(a). Likewise, according to information you provided, the contract the FAA typically enters into with AMEs generally reflects these terms and conditions.

Furthermore, you stated that the FAA does not pay AMEs, and they do not accrue benefits. Indeed, in consultation with FAA Human Resources, you said the FAA does not consider AMEs employees. In addition, the Second Circuit Court of Appeals held that for purposes of the Federal Tort Claims Act AMEs are independent contractors—not federal employees. *Leone v. U.S.*, 910 F.2d 46, 50 (2d Cir. 1990). In reaching its decision, the Circuit Court reasoned that while the FAA generally oversees AMEs, it provides neither day-to-day management nor daily supervision of AMEs, thus, it does not maintain the strict control required to establish an employer-employee relationship. *Id.*³ And under the principles of agency, the Court found that the following factors further supported its holding: AMEs are physicians with their own private medical practices or hospital affiliations who usually work without supervision and rely on their own professional judgment; AMEs supply their own equipment and workspace; they set their own fees; certificate applicants pay the AME fee; the FAA provides no insurance to AMEs; and the FAA does not pay workers' compensation or social security taxes for AMEs. *Id.* Thus, AMEs are not federal employees for purposes of the Hatch Act.

We now turn to whether, under the Hatch Act, AMEs hold office at the FAA. Neither the Hatch Act nor its implementing regulations define holding office. As such, we give the term its ordinary and common meaning. *See Rusin v. Dep't of the Treasury*, 92 M.S.P.R. 298, 306 (2002) (citing cases). Accordingly, for purposes of the Hatch Act the ordinary, common meaning of "holding office" is to possess or occupy, to be in possession or administration of a duty, trust, or authority conferred by the federal government. *Black's Law Dictionary* 736, 1112 (7th ed. 1999); *N.L.R.B. v. Coca-Cola Bottling Co.*, 350 U.S. 264, 268-69 (1956) (applying the common meaning of the word officer, *i.e.*, those who hold a defined office, after failing to find a definition of this otherwise common word in the statute itself or its legislative history). Indicia of holding office can include, for example, receiving an appointment, taking an oath, and performing a governmental function. *See e.g.*, 28 U.S.C. § 543-44 (statutorily authorizing the Attorney General to appoint attorneys to assist United States attorneys and requiring them to take an oath to execute faithfully his duties before taking office).

² We understand that FAA Order VS 1100.2A, sets general policy and procedure for the entire designation program regardless of the service the provided by the designee, while FAA Order 8520.2C sets policy and procedure specifically for the AME designation program.

³ Under a similar analysis, AMEs are not considered personal service contractors. *See* 48 C.F.R. § 37.104(c)(2) (pursuant to Federal Acquisition Regulation 37.104 the key characteristic of a contract for personal services is the government exercising relatively continuous supervision and control over the individual performing the contract).

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Concerning the designation at hand, AMES are not appointed. They are not required to take an oath before becoming an AME. And AMEs perform physical, medical examinations, which are not governmental functions. Thus, for purposes of the Hatch Act, FAA designated AMEs do not meet the common, ordinary definition of holding office.

Based on the foregoing, OSC finds that AMEs are neither employed by nor holding office in an executive agency. Accordingly, OSC concludes that FAA designated AMEs are not subject to the Hatch Act's political activity restrictions. If you have questions, feel free to contact me at 202-254-3681.

Sincerely,



Leslie J. Gogan
Attorney
Hatch Act Unit