



U.S. OFFICE OF SPECIAL COUNSEL

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202-254-3600

June 17, 2009

XXXXXX X. XXXXX
XXXXXXXXXXXX
XXXXXX, XX XXXXX

Re: OSC File No. AD-09-XXXX

Dear Mx. XXXXX:

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 list a number of activities and ask whether you may engage in any of them without violating the Hatch Act. You also make several statements to describe your understanding of the law. We understand that you are employed as a XXXXX XXXXX for the Department of XXXXXXXX, and you may decide to become a candidate in the partisan election for XXXXXXXX of XXXXXXXX XXXXXX, XXXXX.¹ Below is an explanation of the Act's prohibitions, a response to each activity you describe, and clarification of the statements you made in your request for an advisory opinion.

A. The Hatch Act in General

Employees of the Department of XXXXXXXX are covered by the Hatch Act, 5 U.S.C. §§ 7321-7326. The Hatch Act generally permits federal employees to actively participate in partisan political management and partisan political campaigns. 5 U.S.C. § 7323. However, covered employees are prohibited from being candidates in a partisan election, i.e., an election in which any candidate represents, for example, the Republican or Democratic Party. 5 U.S.C. § 7323(a)(3). The Act also prohibits federal employees from using their official authority or influence to affect the result of an election and soliciting or accepting contributions for partisan political purposes. 5 U.S.C. § 7323(a)(1)-(2). Finally, federal employees may not engage in political activity while on duty, in uniform, or in a government building or vehicle. 5 U.S.C. § 7324(a).

The Hatch Act's prohibition against candidacy "extends not merely to the formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy." 86 Cong. Rec. 2938-2940 (September 1939), quoting Civil Service Commission Form 1236 "Political Activity and Assessments" (explanation by Senator Hatch of Hatch Act Prohibitions); C.S.C. v. Letter Carriers, 413 U.S. 548, 573, 581 (1973) (Supreme Court adopting and appending Civil Service Commission Form 1236 to its decision, and explaining that

¹ You stated that you plan to resign your employment with the Department of XXXXXXXX if you decide to become a candidate for XXXXXXXX.

Congress intended this form to serve as its definition of the general proscription against partisan activities); see also, In re Parker, 3 P.A.R. 7, 12 (1969) (quoting Civil Service Commission Pamphlet) (relying on this longstanding principle, the Commission concluded that a county employee's activities violated the Hatch Act's prohibition against candidacy).

Because the Hatch Act has been interpreted to prohibit preliminary activities regarding candidacy, any action that can reasonably be construed as evidence that an individual is seeking support for or undertaking an initial "campaign" to secure a nomination or election to office would be viewed as candidacy for purposes of the Hatch Act. The following are examples of preliminary activities directed toward candidacy that would violate the Hatch Act: taking the action necessary under the law of a state to qualify for nomination or election; soliciting or receiving contributions or making expenditures; canvassing for voter support; conducting polls for name recognition; meeting with individuals to plan the logistics and strategy of a campaign; circulating nominating petitions, or; giving consent to or acquiescing in such activities by others on the employee's behalf. We address the issues raised in your letter in light of these principles.

B. Responses to the Activities Listed in Your Request

As you consider whether to become a candidate for Xxxxxxx, you ask OSC to provide guidance as to the propriety of the following activities:

1. *"Publicly acknowledge that I am considering a candidacy for the Office of Xxxxxxx."*

Doing this while you are a federal employee would be a violation of the Hatch Act if your purpose is to garner support for your candidacy. The Act would not prohibit you from discussing your intentions with family and close friends; however, making overtures to others in an effort to solicit their support, i.e., to "test the waters," would be a violation. As explained above, candidacy does not begin upon formal announcement or filing official paperwork with the relevant election authority. Rather, the Act prohibits "any act in furtherance of candidacy." Based on Congress's and the Supreme Court's guidance, as explained above, publicly acknowledging that you are considering running for the office of Xxxxxxx could be considered an act in furtherance of candidacy depending on the circumstances. Because the answer to your question may vary based on the setting, we invite you to contact OSC with more specific information about your planned activities when the time comes for you to decide whether to run for Xxxxxxx. At that time, we can provide you with advice tailored to the situation.

2. *"Establishing an exploratory committee (of volunteers) to gauge the level of support my candidacy might garner within the local community should I decide to declare myself a candidate. By support I'm referring to personal endorsements and not financial or other tangible contributions."*

Engaging in the activity you describe here also would violate the Hatch Act. As explained above, canvassing for support, like the personal endorsements you mention, constitutes "candidacy" for purposes of the Act, and thus is prohibited.

3. *“Query and canvass the community to determine the issues and topics of concern to the local citizenry with regard to xxxxxxxx xxx xxxxxx xxxxxxxxx, for the purpose of establishing a campaign platform.”*

Provided you do not present yourself as a candidate for the office of Xxxxxxxx or attempt to solicit support for your candidacy, you would not violate the Hatch Act by canvassing the community to determine what issues are of importance among its citizens. Federal employees are permitted to “be politically active in connection with a question which is not specifically identified with a political party [or candidate], such as a constitutional amendment, referendum, approval of a municipal ordinance, or any other question or issue of a similar character.” 5 C.F.R. § 734.203(b). Indeed, any “testing the waters” activity that is purely issue-oriented would not implicate the Hatch Act. Nor would the incurring of expenses for such an activity violate the Act. Thus, we have concluded that the activity you describe here would be permitted, with the caveat that you must not identify yourself as a candidate for Xxxxxxxx or seek support from voters.

4. *“Solicit signatures for the purpose of qualifying as a candidate should I choose to actually declare myself a candidate. (In Xxxxxx you can qualify as a candidate by either obtaining signatures supporting your candidacy or by paying a qualifying fee.)”*

This activity is a clear violation of the Hatch Act. As noted above, the preliminaries leading up to a formal announcement of candidacy constitutes becoming a candidate for purposes of the Act. Such “preliminaries” include taking the action necessary under the law of a State to qualify for nomination for election. Thus, engaging in any activity necessary to qualify as a candidate for Xxxxxxxx, whether it is soliciting signatures or paying a fee, is a violation of the Hatch Act.

C. Clarification of Your Statements About Permitted and Prohibited Activities

You also state your interpretation of certain provisions in the Act, about which we would like to provide some clarification:

1. *“I am not considered to be a candidate until I solicit, accept, or receive political contributions, make expenditures, or have someone do so on my behalf.”*

Although the activities you describe here are indeed prohibited, as explained above, you could be considered a “candidate” even if you do not engage in them. The Hatch Act’s prohibition against soliciting or accepting political contributions exists independently of its proscription of becoming a candidate in a partisan election. See 5 U.S.C. § 7323(a). Thus, engaging in the activity you describe would violate both the candidacy prohibition and the prohibition against soliciting or accepting political contributions.

U.S. Office of Special Counsel

Page 4

2. *"I cannot under any circumstances engage in any political activities while on duty or while within Federal facilities or on Federal properties."*

This statement is correct. Federal regulations define "political activity" as "an activity directed toward the success or failure of a political party, candidate for partisan office, or partisan political group." 5 C.F.R. § 734.101. Please note, however, that the Act's prohibitions against candidacy and soliciting or accepting political contributions, as they are defined above, extend to federal employees even when they are off duty and not on federal property.

3. *"I cannot cite my current position as a Federal Employee as a qualification for any contemplated candidacy."*

As explained above, you may not hold yourself out as a candidate or potential candidate for the office of Xxxxxx in any manner while employed by the federal government, even if you do not cite your current position as a qualification. If, however, you resign your employment and begin your candidacy as that term is defined above, the Hatch Act would not prohibit you from stating that you were formerly employed in the position in an effort to appeal to voters.

We hope this letter adequately addresses your concerns. Please contact me at (202) 254-3642 if you have any additional questions.

Sincerely,

Carolyn S. Martorana
Attorney, Hatch Act Unit