



U.S. OFFICE OF SPECIAL COUNSEL

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March 30, 2012

XXXXXXXX XXXXXX

Via E-Mail to: xxxxxxx@xxxxxxxxxxx

Re: OSC File No. AD-XX-XXXX

Dear Mx. XXXXXXX:

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 ask whether the Act prohibits you from being a candidate in the partisan election for county legislature in XXXXXXX County, XXXXXXX. We understand that you are employed by the American Red Cross with the XXXXXXX State Citizen Preparedness Program. As explained below, you are not subject to the Hatch Act's restrictions; thus, the Act does not prohibit you from running for partisan political office.

The Hatch Act applies to individuals employed or holding office in a federal executive agency. 5 U.S.C. § 7322(1)(A). Among other things, covered employees are prohibited from being candidates for public office in partisan elections. 5 U.S.C. § 7323(a)(1). To determine whether you are subject to the Hatch Act, OSC had to consider whether the Red Cross is a federal executive branch agency. We understand that the American Red Cross is a "Federally chartered instrumentality of the United States" that Congress has designated as a "Treaty Obligation Organization." 36 U.S.C. § 300101. According to its charter, constituent chapters of the Red Cross are considered "local units" of the national organization. See 36 U.S.C. § 300103(b). It is also a tax-exempt charity under § 501(c)(3) of the Internal Revenue Code. Its constituent chapters, branches, and auxiliaries may claim tax-exempt status pursuant to the national organization's determination letter from the Internal Revenue Service. According to its general counsel's office, the Red Cross does not consider itself to be an agency of the United States and its employees do not participate in federal employee benefits programs. In fact, federal law provides that when the Red Cross assists the armed forces, its employees "may not be considered as employees of the United States." 10 U.S.C. § 2602(e).

Courts have addressed the question of whether the American Red Cross is a governmental entity. The Supreme Court held that because the Red Cross is an instrumentality of the United States, it is immune from state employment compensation taxes. Dep't of Employment v. United States, 385 U.S. 355 (1966). The Court stated that the Red Cross is "so closely related to governmental activity as to become a tax-immune instrumentality" because the Department of Defense audits its finances, its principal officer is appointed by the President, and, pursuant to statute and Executive Order, the Red Cross has "the right and obligation to meet this Nation's commitment under various Geneva Conventions." Id. at 359. Finally, the Court noted that the President and Congress have repeatedly relied upon the Red Cross's "status virtually as an arm of the Government." Id. at 359-60. However, the Court also mentioned "several respects in which the Red Cross differs from the usual government agency . . . in that its employees are not

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employees of the United States, and that government officials do not direct its everyday affairs,” much like national banks, which are also tax-immune instrumentalities. Id. at 360.

In another federal case, the Ninth Circuit Court of Appeals concluded that the Red Cross is not an “agency” of the federal government for purposes of the Freedom of Information Act (FOIA). Irwin Mem’l Blood Bank v. Am. Nat’l Red Cross, 640 F.2d 1051 (9th Cir. 1981). The definition of “agency” under FOIA is broader than the definition of “agency” found in other sections of the United States Code. See id. at 1053, citing H.R. Rep. No. 93-876, 03d Cong., 2d Sess. The court determined that the Red Cross does not meet even the broader definition of agency found in FOIA because the requisite level of federal control over the organization’s operations is lacking. Id. at 1054-55. Specifically, the court noted that most of the Red Cross’s workers are volunteers, its paid employees are covered by its own pension plan, and the United States does not appropriate funds to the organization. Id. at 1056. Rather, the Red Cross relies on donations and grants, which it must apply for like any other non-federal entity. See id. In addition, although the federal government exercises some supervision, it does not direct the Red Cross’s everyday affairs. Id. at 1056-57. Instead, the organization falls within the framework of the International Red Cross, which requires national chapters to possess “autonomous status which allows it to operate in conformity with the fundamental principles of the Red Cross,” which include “impartiality [and] political, religious and economic independence.” Id. at 1057. Accordingly, the court concluded that although the Red Cross is the government’s “close ally,” it is not an “agency.” Id. at 1057-58.

Based on the above, OSC has concluded that the American National Red Cross is not an “agency” within the executive branch for purposes of the Hatch Act, and thus its employees are not subject to the Act’s restrictions. Specifically, the Supreme Court stated that employees of the Red Cross are not federal employees, and Congress does not consider them to be federal employees when they provide assistance to the armed forces. Moreover, the Red Cross is not considered an “agency” for purposes of FOIA, which contains a particularly broad definition of that term. Accordingly, you are not covered by the Hatch Act, and thus the Act does not prohibit you from being a candidate for XXXXXX County legislature.

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

Sincerely,



Carolyn S. Martorana
Attorney, Hatch Act Unit