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December 16, 2019

Mx. Xxxx Xxxx
XXXXXX XXXXXX

Re: OSC File No. AD-xx-xxxxxx

Dear Mx. Xxxx:

This letter from the U.S. Office of Special Counsel (OSC) responds to your request for an advisory opinion regarding the Hatch Act.¹ You asked how the Hatch Act applies to members of a commission (Commission), all of whom are special Government employees (SGEs) under 18 U.S.C. § 202(a). As described below, the Commission’s members are “less restricted” employees for purposes of the Hatch Act and—like all SGEs—are subject to the relevant Hatch Act restrictions only while on duty.

1. The Commission’s SGEs are less restricted employees under the Hatch Act.

The Hatch Act governs the political activity of individuals, other than the president and the vice president, employed or holding office in an executive agency, including the Commission.² Employees covered by the Hatch Act fall into one of two categories: less restricted and further restricted. Employees in both categories are prohibited from: using their official authority or influence to interfere with or affect the result of an election; knowingly soliciting, accepting, or receiving political contributions; running for the nomination or as a candidate for election to a partisan political office; knowingly soliciting or discouraging the political activity of any person with matters pending before the employee’s employing office; and engaging in political activity while on duty, in any federal room or building, wearing a government uniform or insignia, or using a government-owned or -leased vehicle.³ Additionally, further restricted employees may not take an active part in political management or campaigning, such as by volunteering for a partisan political campaign or holding political party office.⁴

¹ OSC is authorized by 5 U.S.C. § 1212(f) to issue opinions interpreting the Hatch Act.

² See 5 U.S.C. § 7322(1). The term “executive agency” includes any independent establishment in the executive branch. See 5 U.S.C. §§ 104-105; see also 6 Op. O.L.C. 292, 293 (1982) (if an entity is “within the Executive Branch, it is an ‘Executive agency’ within the meaning of the Hatch Act”).

³ See 5 U.S.C. §§ 7323-7324. Certain Senate-confirmed appointees and commissioned officers within the Executive Office of the President are exempt from the last prohibition and may engage in political activity on duty under certain circumstances. However, none of the Commission’s SGEs fall within the exemption. Therefore, we do not discuss the exemption in this advisory opinion.

⁴ See 5 U.S.C. § 7323(b)(2); 5 C.F.R. §§ 734.401-.413.

Whether an employee is further restricted depends upon the employee's agency and position. All employees of any agency or office listed in 5 U.S.C. § 7323(b)(2)-(3) are further restricted. Additionally, all employees holding a position described in 5 U.S.C. § 7323(b)(2)(B)(ii), *i.e.*, all administrative law judges, contract appeals board members, administrative appeals judges, and career members of the Senior Executive Service, are further restricted.

The Commission has 21 members, all of whom are SGEs appointed by the President. None of the members are subject to Senate confirmation. Because the Commission is not listed in 5 U.S.C. § 7323(b)(2)(B)(i) and its members do not hold a position described in 5 U.S.C. § 7323(b)(2)(B)(ii), Commission members are not further restricted employees. Accordingly, when Commission members are subject to the Hatch Act, they are subject to the less restricted employee provisions described in 5 U.S.C. §§ 7323(a), 7324(a), and 5 C.F.R. §§ 734.301-307.

2. The Commission's SGEs are only subject to the Hatch Act while representing the Commission.

SGEs, as relevant here, are employees who serve for 130 days or fewer during any period of 365 consecutive days.⁵ Unlike most federal civilian executive branch employees, SGEs are only subject to the Hatch Act while on duty.⁶ The Hatch Act regulations define "on duty" as the time when an employee is either (1) in a pay status other than certain forms of leave or excused absence, or (2) representing any agency or instrumentality of the United States government in an official capacity.⁷ Thus, an SGE is subject to the Hatch Act when either in a pay status or representing the United States government. Conversely, an SGE is not subject to the Hatch Act when neither in a pay status nor representing the United States government.

Only the second of the "on duty" criteria applies to the Commission's members. Because the members are uncompensated, they are never in a pay status for purposes of the first criterion.⁸ However, the members do represent the Commission in an official capacity any time that they perform work on behalf of the Commission. Accordingly, members are on duty, and therefore subject to the Hatch Act, any time that they perform work on behalf of the Commission.

Note that the Hatch Act restrictions only apply during the time that a member is working in that member's official capacity on behalf of the Commission. For example, a member who performs Commission work for two hours on a particular day is only subject to the Hatch Act

⁵ See 18 U.S.C. § 202(a) ("the term 'special Government employee' shall mean an officer or employee . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties").

⁶ See 5 C.F.R. § 734.601 ("An employee who . . . is a special Government employee as defined in 18 U.S.C. § 202(a) is subject to the provisions of the applicable subpart of this part when he or she is on duty.")

⁷ See 5 C.F.R. § 734.101.

⁸ The fact that a Commission member may be reimbursed for travel expenses does not put them in a pay status for purposes of the on duty definition.

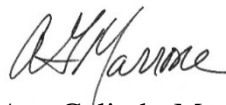
during those two hours; the member is not subject to the Hatch Act for the remaining 22 hours of the day.⁹

Provided that they are off duty, Commission members may engage in political activity that full-time federal employees may not. For example, a member is not prohibited by the Hatch Act from running for partisan political office, although a member who does so may not engage in any campaign-related activity while performing Commission work.¹⁰ Similarly, a member may solicit, accept, and receive political contributions while off-duty.

The one Hatch Act prohibition that we have advised applies to SGEs while they are off duty is the restriction on using one's official authority or influence to interfere with or affect the result of an election. We reiterate that position here. While an SGE is generally not subject to the Hatch Act while off duty, a Commission member may not use their official title when engaging in off-duty political activity by, for example, including their Commission title in the signature block of a political fundraising letter. Doing so gives the appearance that the member is acting in an official capacity and, therefore, on duty. We consider such activity to be prohibited by the Hatch Act.

Please contact Hatch Act Unit attorney Eric Johnson at (202) 804-7044 if you have any additional questions.

Sincerely,



Ana Galindo-Marrone
Chief, Hatch Act Unit

⁹ Prior to 1994, SGEs and other intermittent employees were subject to the Hatch Act restrictions during the entire 24 hours of any day during which the employee performed work on behalf of the government. *See* 6 Op. O.L.C. 292, 295 (1982) (noting that, as of 1982, intermittent employees were “subject to the political activity restrictions of the law while in an active duty status only and for the entire 24 hours of any day of actual employment”) (quoting Federal Personnel Manual at 733-35) (emphasis added). However, since passage of the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001, the application of the restrictions has been limited to just those periods when an SGE or other intermittent employee is actually performing work on behalf of the government.

¹⁰ *See* 5 C.F.R. § 734.601, Ex. 1.