



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 201

Washington, D.C. 20036-4505

July 22, 2008

Ms. XXXX

Re: OSC File No. AD-07-XXXX

Dear Ms. XXXX:

This letter is in response to your request for an advisory opinion concerning the Hatch Act. Please accept our apology for the delay in responding to your request. The Office of Special Counsel (OSC) was conducting a comprehensive review of cases involving Boards and Commissions in the District of Columbia (DC). Specifically, you ask whether members of the DC Board of Zoning Adjustment (BZA) are covered by the Hatch Act. As explained below, members of the BZA are covered by the Hatch Act.

According to 5 U.S.C. § 7322, the Hatch Act applies to:

“any individual, other than the President and the Vice President, employed or holding office in – (A) an Executive agency other than the General Accounting Office; (B) a position within the competitive service which is not an executive agency; or (C) the government of the District of Columbia, other than the Mayor or a member of City Council or the Recorder of Deeds . . .”

See also, 5 C.F.R. § 734.101. The plain language of Section 7322 indicates that Congress intended the Hatch Act to apply not only to individuals who are employed, but also to those deemed to be holding office. Therefore, except for the Mayor, the Recorder of Deeds or City Council members, an individual who is employed or holding office within the DC government is covered by the Act.

The BZA is an independent body that is made up of five members, including a Chairman and Vice-Chairman, appointed by the DC Mayor with the advice and consent of the DC Council.<sup>1</sup> Of the five BZA members, one member represents the National Capital Planning Commission (NCPC) and another member represents the District of Columbia Zoning Commission (ZC). D.C. Stat. § 6-641.07 (a)-(b). The BZA is authorized to exercise powers granted by the Zoning Act of 1938. These powers include the authority to grant variances from zoning regulations and special land use exceptions, and to hear appeals of actions taken by the Zoning Administrator. D.C. Mun. Regs. tit.

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<sup>1</sup> In cases involving only Foreign Missions and Chanceries, the Executive Director of the National Capital Planning Commission becomes the sixth member of the BZA.

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11 § 3100; BZA website at <http://dcoz.dc.gov/services/bza/bza.shtm>. The BZA meets every Tuesday, and if necessary, the BZA may also schedule meetings on Wednesdays.

According to information we received from the BZA, the predominant duty of BZA members is to serve on the BZA on the days when it is meeting. However, on a rare occasion a member may be asked to conduct outreach. The Chairman and Vice-Chairman of the Board also attend oversight and budget hearings before the DC City Council. BZA members are entitled to compensation at the hourly rate of \$25 per meeting, not to exceed \$12,000 for each board member per year.<sup>2</sup> D.C. Stat. § 1-611.08.

After reviewing the information above, OSC has determined that BZA members are holding office in the DC government. As explained previously, the BZA administers the zoning regulations by, among other things, granting variances and special land use exceptions and hearing appeals of actions. BZA members have an assigned function and occupy an official position of duty, trust and authority within the DC government. Therefore, BZA members are covered by the Hatch Act.

Additionally, while individuals who work on an occasional or irregular basis are covered by the Hatch Act only when they are on duty, 5 C.F.R. § 734.601, BZA members meet at least every Tuesday, and as such, do not work on an occasional or irregular basis. See Kane v. M.S.P.B. 210 F.3d 1379 (2000) (an individual who worked every Saturday was not working on an occasional or irregular basis). Thus, the restrictions of the Hatch Act apply to BZA members at all times.

Please contact me at (202) 254-3609 if you have any questions.

Sincerely,

Mariama Liverpool  
Attorney  
Hatch Act Unit

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<sup>2</sup> Members can also receive reimbursement for transportation, parking, or mileage expenses incurred in the performance of their official duties.