



U.S. OFFICE OF SPECIAL COUNSEL

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November 18, 2009

Xx. XXXXXX XXXXXX
XX XXXXX XXXXXX
XXXXXXXX, XX XXXXX

Re: OSC File No. AD-xx-xxxx

Dear Xx. XXXXXX:

This letter responds to a request for an advisory opinion concerning several questions you had about the Hatch Act and running for public office in a nonpartisan election. Pursuant to 5 U.S.C. § 1212(f), the U.S. Office of Special Counsel (OSC) is authorized to issue opinions under the Hatch Act. We understand that you intend to run in the 2010 nonpartisan elections for one or both of the following offices, Town Selectman and/or Town Moderator. We also understand that currently you are an employee of the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE).

In your request, you ask for advice on the following questions: 1) what campaign activity can turn a nonpartisan election into a partisan one; 2) can you solicit funds for your campaign and open a campaign account with the state Office of Campaign Financing; 3) can you receive funds from local partisan groups or politicians that represent political parties (e.g., the local Republican town committee or your Democratic State Senator donates \$500 to your campaign); 4) can you receive assistance for your campaign from a partisan group (e.g., the County Democratic committee conducts a phone bank for you); and 5) can you receive endorsements from politicians that serve in a partisan office (e.g., your Republican State Representative endorses your candidacy). We address each question below.

The Hatch Act, 5 U.S.C. §§ 7321-7326, governs the political activity of federal civilian executive branch employees. The Hatch Act generally permits most federal employees to actively participate in partisan political management and partisan political campaigns. 5 U.S.C. § 7323(a). But covered employees—like you, are prohibited from, among other things, running for the nomination or as a candidate for election to a partisan political office. 5 U.S.C. § 7323(a)(3). Federal regulation defines partisan political office as “any public office in which any candidate is nominated or elected as representing a political party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected,” *i.e.*, elections in which any candidate represents, for example, the Republican or Democratic Party. 5 C.F.R. § 734.101. While the Hatch Act prohibits candidacy in partisan elections, it does not prohibit covered employees from being candidates in nonpartisan elections. A nonpartisan election is one in which none of the candidates is nominated or elected as representing a political party. 5 U.S.C. § 7322(2).

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Because you work for DHS you are covered by the Hatch Act's political activity restrictions. You are permitted to be a candidate in a nonpartisan election only. As indicated, a nonpartisan election is one in which none of the candidates are nominated or elected as representing a political party, *i.e.*, Republican or Democratic Parties. 5 U.S.C. § 7322(2). OSC called the XXXXXXXX Town Clerk, who oversees elections and voter registration, and they confirmed that the elections for XXXXXXXX Town Selectman and Town Moderator are nonpartisan. So while you are subject to the Act's political activity restrictions, the Act does not prohibit you from being a candidate in these nonpartisan elections. With that said, we address each of your questions.

1) *What campaign activity may change a nonpartisan election into a partisan one?*

Answer: Usually a nonpartisan election is designated as such by state or local law. The law, however, creates only a rebuttable presumption that an election is nonpartisan. *See Special Counsel v. Yoho*, 15 M.S.P.R. 409, 413 (1983). Evidence showing that partisan politics actually entered a candidate's campaign may rebut this presumption. *See McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320 (Fed. Cir. 2005). But no bright-line rule exists that identifies the type or amount of conduct (either by the candidate or party) needed to prove that a statutorily designated nonpartisan election, in fact, became a partisan one. *McEntee*, 404 F.3d at 1334.

Each case will present a unique combination of facts that will either show that the candidate was politically independent or not. *See Campbell v. Merit Sys. Prot. Bd.*, 27 F.3d 1560, 1566 (Fed. Cir. 1994). So the ultimate answer regarding what activity may change a nonpartisan election into a partisan one rests on the totality of the circumstances. *See id.*¹ Accordingly, a nonpartisan election could become partisan if, for instance, one of the candidates were to: participate in and win a party caucus; hold himself out as having the party's political support by advertising this in his speeches, flyers or mailings; seek and advertise the political party's endorsement; or receive party support in the form of funding, supplies (*e.g.*, wooden stakes for signs, bulk mail permit), campaign volunteers, campaign publications (*e.g.*, flyers, posters) or use of party headquarters. Please note, that the foregoing list is illustrative only—not an exhaustive list of the unique combination of facts that could change a nonpartisan election into a partisan one.

¹ In a nonpartisan election the candidates are independent. Independent means “not relying on others”; “not dependent for support or supplies”; “[n]ot subject to bias or influence”; “not bound by party ; exercising a free choice in voting with either or any party.” *See Campbell*, 27 F.3d at 1568, quoting *Webster's New Int'l Dict. Of the English Language* 1094 (1932).

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2) *Can you solicit funds for your campaign and open a campaign account with the state Office of Campaign Financing?*

Answer: Yes, you can solicit funds for your campaign and open a campaign account in a nonpartisan election. The Hatch Act restriction on soliciting political contributions applies only to solicitations for a candidate for partisan political office, a political party or partisan political group. Because you are a candidate in a nonpartisan election, the Hatch Act does not prohibit you from soliciting political contributions for your candidacy.

3) *Can you receive funds from local partisan groups or politicians representing political parties?*

Answer: Yes, you can receive funds from local partisan groups or politicians representing political parties so long as you do not act in concert with a partisan political group. Merely receiving a contribution from partisan groups or politicians, without more, is not enough to rebut the presumption that a nonpartisan election became partisan.

4) *Can you receive assistance for your campaign from a partisan group?*

Answer: No, you may not receive assistance from a partisan political group to further your campaign in a nonpartisan election. For instance, using the example from your initial request, the County Democratic committee cannot conduct a phone bank for your campaign or conduct other similar activity, (*e.g.*, distribute campaign literature or host a fundraiser) on your behalf. To receive this assistance from such groups or organizations would insert partisan politics into the election.

5) *Can you receive endorsements from politicians serving in a partisan office?*

Answer: Yes, you may receive endorsements from local politicians serving in a partisan office. Merely receiving an endorsement from politicians, without more, is not enough to rebut the presumption that a nonpartisan election became partisan.

If you have any additional questions, please call me at (202) 254-3681.

Sincerely,

Leslie J. Gogan
Attorney
Hatch Act Unit