

HATCH ACT:
CITY OFFICER:
STATE EMPLOYEE:

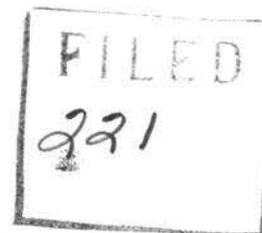
The employment, by the Missouri Department of Community Affairs, of a city councilman of Jefferson City, who intends to run for re-

election, to a position within the Department of Community Affairs, the salary of which would come entirely out of state funds, and which would be a position having no responsibility, either direct or supervisory, over the administration or disposition of any federal funds or any federally funded programs, would not be in violation of the Hatch Act, because said individual would fall within the exception of Title 5 U.S.C.A. Section 1501(4) (A) as "an individual who exercises no functions in connection with that activity," the activity in question being one financed in whole or in part by the federal government.

OPINION NO. 221

December 13, 1972

Mr. Gene Sally, Director
Department of Community Affairs
505 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Mr. Sally:

In your capacity as Director of the Missouri Department of Community Affairs, you have requested that the office of the Attorney General furnish you with an official Attorney General's opinion. This opinion is in response to your request and is addressed to your inquiry which follows:

"Would the employment of a City Councilman, elected in a partisan election with the stated intent to run for re-election be construed to place that person's employment under the provisions of the Hatch Act, if he was paid entirely out of state funds, if his services were never used as 'in-kind' match, and if he had no supervisory responsibility for the administration of any federally funded programs?"

To provide a further factual basis upon which the resolution of your legal inquiry can be made, you have furnished this office with a brief statement of the facts which prompted your inquiry. A duly elected city councilman of Jefferson City, Missouri, has applied for employment with the Missouri Department of Community Affairs. The Department has a position available and would like

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to offer that position to the applicant. The city councilman in question intends to run for reelection to the city council upon the expiration of his present term. The position within the Department of Community Affairs which is available and which would be filled by this individual is funded completely by state appropriations. The entire salary of the applicant would be paid out of state funds. The applicant's duties with the Department would be concerned with state functions and programs, although he would necessarily have occasional incidental contact with federally funded activities administered by or participated in by the Department of Community Affairs. The applicant's proposed employment would be in a position without authority to control the federal funding of any local agency, nor would his position have authority to participate in the decisions of the Department regarding the disposition of federal funds provided the state. The applicant would not participate in the direct administration of any federal programs and would be without supervisory authority over individuals involved in administering federally funded programs. State funds, with which the applicant would be solely concerned, are accounted for separately within the Department of Community Affairs from federal funds. For the current fiscal year, the activities of the Department of Community Affairs will be approximately 68% funded by the federal government. The individual would be employed specifically in the governmental services section of the Department of Community Affairs which is approximately 45% federally funded.

Your question is whether such an individual holding the proposed position with the Department of Community Affairs and choosing to campaign for reelection would be in violation of the Hatch Act. The resolution of this inquiry depends on how broadly the Hatch Act is to be construed.

Initially, we must determine if the proposed political activities of the applicant are those which the Hatch Act was intended to prohibit. The applicant presently holds the elective office of city councilman. He has expressed an intention to campaign for reelection upon the expiration of his present term. Title 5 U.S.C.A. Section 1502(a) (3), provides that "a State or local officer or employee may not . . . take an active part in political management or in political campaigns." Subsection (c) (4) exempts "an individual holding elective office." The federal case law on the subject makes it clear that the elective office exemption quoted above does not authorize an individual holding an elective office apart from his employment in a federally assisted agency to participate in political campaigns. Northern Virginia Regional Park Authority v. United States Civil Service Commission, 437 F.2d 1346 (4th Cir. 1971) cert. denied 403 U.S. 936; In Re Higginbotham, 340 F.2d 165 (3rd Cir. 1965) cert. denied 382 U.S. 853. We quote from the North-
ern Virginia Regional Park Authority case:

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"The legislative purpose of the subsection was to exempt a small but important number of elected state officers and employees whose official duties in their elective positions involve the administration of federally assisted projects. Thus 5 U.S.C. § 1502(c) exempts Governors, Lieutenant Governors, Mayors, elected heads of executive departments, and 'individual[s] holding elective office.' This last clause was designed to encompass a residual category of state officers, such as an elected state highway commissioner for example, whose elective position includes responsibility for federally funded programs. It was far from the purpose of the exemptive provision to tolerate political activity by an employee of an agency administering federal funds merely because he happens to have been elected to an entirely unrelated office." Id. at 1351-1352

If the applicant's employment to the proposed position within the Department of Community Affairs would make him otherwise subject to the Hatch Act, his actions in campaigning for reelection for the city council would be in violation of that Act.

There remains the more difficult question of whether the position within the Missouri Department of Community Affairs under consideration is such as would preclude its holder from prohibited political activity. Title 5 U.S.C.A. Section 1501(4) defines "State or local officer or employee" for purposes of the Hatch Act as:

". . . an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include --

(A) an individual who exercises no functions in connection with that activity; . . ."

There is no question but what the Missouri Department of Community Affairs is a "State or local agency" for purposes of the Hatch Act. Likewise, it is clear that the Missouri Department of Community Affairs receives federal loans and grants. Also, the facts given indicate that the individual would be principally employed by the Department of Community Affairs. Is the nature of the particular position under question such as would invoke the operation of the Hatch

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Act, i.e., is his employment by Community Affairs "in connection with an activity . . . financed . . . by the United States" and does the individual exercise any "functions in connection" with such an activity?

If the language employed by the Hatch Act, quoted immediately above, is to have any meaning at all, we must conclude that an individual employed under the circumstances as set forth in your opinion request would not be subject to the Hatch Act. Although the Department of Community Affairs is 68% federally funded, the position in question is to be remunerated entirely by state funds. The individual holding that provision is to have absolutely no connection or authority, either direct or supervisory, over any program which is federally funded. Not only would an individual holding the position have no decision making authority regarding the disposition of federal funds, nor supervisory authority over any employee by the Department of Community Affairs connected with the federal funding process, but, in addition, entirely separate accounting controls are to be applied to the position in question and the programs which the individual holding that position would have authority over. We have taken your representation that the position in question would sometimes come into contact with federally funded programs not to mean that an individual holding said position would have any direct or supervisory authority in relation to those programs. If such was the case, the Hatch Act would apply. We believe that our conclusion regarding the provision in question is consistent with the proposition that "[t]he end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship." Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947); see also, United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Under the facts as supplied by your opinion request, the position in question would have absolutely no authority in connection with the disposition of federal funds.

In reaching the conclusion that an individual holding the position hypothesized within the Department of Community Affairs would not be subject to the operation of the Hatch Act, we rely primarily on Title 5 U.S.C.A. Section 1501(4) (A). That is, an individual holding such position would be one "who exercises no functions in connection with that activity," that activity meaning one which was financed in whole or in part by the federal government. You will note that Section 1501(4) requires principal employment in connection with such an activity in order for the Hatch Act to apply. We expressly do not reach the question of whether the provision in question would involve "principal employment . . . in connection with an activity which is financed in whole or in part . . .

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by the United States" Federal case law regarding the Hatch Act makes it difficult to apply the "principal employment" provision to the circumstances presently presented by your opinion request.¹

Even if we were to accept the position that the mere fact of an individual's full time employment with a state agency which is partially federally funded fulfills the requirement of "principal employment" to invoke the applicability of the Hatch Act, we believe an individual holding the position in question with the Department of Community Affairs would fall within the exception to the Hatch Act as "an individual who exercises no function in connection with that activity" (an activity financed in whole or in part by the federal government). We quote as follows from Anderson v. United States Civil Service Commission, 119 F.Supp. 567, 573 (D. C. Mont. 1954):

" . . . [This exception] . . . means if his employment, principal employment, is with the State agency, by reason of subdivision (e) he would still not be subject to the Hatch Act if his particular duties with the State agency did not involve the exercise of some function in respect to a federally financed activity, . . . "

¹In Palmer v. United States Civil Service Commission, 297 F.2d 450 (7th Cir. 1962) cert. denied 369 U.S. 849, 8 L.Ed.2d 8, 82 S. Ct. 932 (1962), the Illinois Department of Conservation was approximately 8% federally funded. The Director of the Illinois Department of Conservation, Palmer, argued that his personal connection with federally funded activities should be viewed as de minimis. The Seventh Circuit found that, by reason of Palmer's supervisory capacity, "[h]is duties in connection with federally financed activities took up at least fifty percent of his time. Palmer plainly met the test that his 'principal employment' was 'in connection with any activity which is financed in whole or in part by loans or grants made by the United States or any Federal agency.'" Id. at 454. The Seventh Circuit, in applying the Hatch Act to Palmer, considered the specific position that Palmer held and the connection that position had with federally financed activities. It is implicit in that opinion that the principal employment of Palmer as Director of the Illinois Department of Conservation governs whether the Hatch Act would apply rather than the principal employment of the Department itself which was partially financed with federal funds. The District Court in Palmer, in overlooking the capacity of the employee as a supervisor, had held that Palmer was not principally employed in connection with federally aided projects

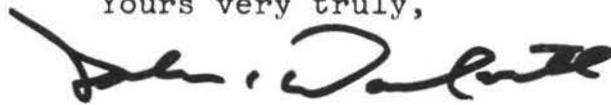
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CONCLUSION

Therefore, it is the opinion of this office that the employment, by the Missouri Department of Community Affairs, of a city councilman of Jefferson City, who intends to run for reelection, to a position within the Department of Community Affairs, the salary of which would come entirely out of state funds, and which would be a position having no responsibility, either direct or supervisory, over the administration or disposition of any federal funds or any federally funded programs, would not be in violation of the Hatch Act, because said individual would fall within the exception of Title 5 U.S.C.A. Section 1501(4) (A) as "an individual who exercises no functions in connection with that activity," the activity in question being one financed in whole or in part by the federal government.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Michael L. Boicourt.

Yours very truly,



JOHN C. DANFORTH
Attorney General

cont'd

and that .063% of his time only was personally spent on such projects and that such constituted a de minimis participation. Palmer v. United States Civil Service Commission, 191 F.Supp. 495 (S.D. Ill. S.D. 1961).

Other cases have considered only whether an individual's employment with the agency in question was principal, and, upon a finding in the affirmative on that issue, have concluded that if the state agency itself receives substantial federal funds that the individual is covered by the Hatch Act. See Anderson v. United States Civil Service Commission, 119 F.Supp. 567 (D.C. Mont. 1954); State of Ohio v. United States Civil Service Commission, 65 F.Supp. 776 (S.D. Ohio E.D. 1946); Smyth v. United States Civil Service Commission, 291 F.Supp. 568 (E.D. Wis. 1968); and State of Utah v. United States, 286 F.2d 30 (10th Cir. 1961).