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202-254-3600

Mr. Xxxx Xxxxx
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XXXxxxxxxxx.
Xxxxxxxxxx, XX. xxxxx

Re: OSC File No. AD-06-xxxx

Dear Mr. Xxxxxx:

This letter is in response 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 under the Act. Specifically, you seek clarification on the issue of federal employees conducting voter registration drives in the federal workplace. First, you ask OSC to update our 2004 advisory opinion dealing with the American Federation of Government Employees (AFGE)'s ability to conduct nonpartisan voter registration drives. Second, you ask OSC to clarify conditions under which voter registration efforts might continue even after AFGE makes an endorsement of a partisan political candidate. These issues are addressed below.

As you know, 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. Covered employees, however, are prohibited from, among other things, engaging in political activity while on duty, in a government office or building, while wearing an official uniform, or using a government vehicle. 5 U.S.C. § 7324. Political activity has been defined as activity directed toward the success or failure of a political party, candidate for a partisan political office or partisan political group. 5 C.F.R. § 734.101.

In April 2004, OSC advised you that the Hatch Act would prohibit a federal employee, while on duty or in his or her workplace, from participating in a partisan voter registration drive, e.g., a drive aimed at helping a political party or candidate succeed. We also advised you that in determining whether a voter registration drive is partisan, OSC considers all of the circumstances surrounding the drive. We provided you with several factors that are relevant in making this determination.[1] We then advised you that we believe it would be difficult for a union, or any other organization, to conduct a truly nonpartisan voter registration drive once it has endorsed a candidate for partisan political office because, at that point, the organization has become

[1] Those factors include: 1) the political activities of the sponsoring organization; 2) the degree to which that organization has become identified with the success or failure of a partisan political candidate, issue or party (e.g., whether it has endorsed a candidate); 3) the nexus, if any, between the decision to undertake a voter registration drive and other political objectives of the sponsor; 4) whether particular groups are targeted for registration on the basis of their perceived political preference; and 5) the nature of the publicity circulated to targets of the drive immediately prior to or during the drive.

identified with the success of the endorsed candidate. Our position on this issue has not changed since 2004.

In May 2004, OSC issued you an opinion advising that because AFGE had become identified publicly and repeatedly with the failure of then-Presidential candidate George W. Bush, it was unable to conduct a truly nonpartisan voter registration drive at that time, even though AFGE had not yet officially endorsed a candidate in the 2004 Presidential election. This conclusion was based on evidence showing that AFGE had encouraged its members to direct their efforts at President Bush's removal, planned to become involved in and make an impact on the 2004 Presidential election, and believed that voter registration was an important tool in advancing these goals.[2] This conclusion was also based on the fact that AFGE has a history of using voter registration as a tool to further its announced political objectives.

We recognize that President Bush is no longer a candidate for partisan political office and that the 2004 Presidential election is long over, and thus, AFGE is no longer identified with the failure of President Bush as a candidate. However, AFGE has done nothing since the 2004 election to indicate that it does not have partisan reasons for wanting to organize and conduct voter registration drives in the federal workplace. In fact, to the contrary -- in the January/February 2006 issue of *The Government Standard*, AFGE's newsletter, AFGE National President John Gage states:

> AFGE is coming out swinging for the upcoming midterm elections in 2006. We have sophisticated political mobilization plans and enhanced communications capabilities. We are ready to call upon and inspire our members to join our political efforts.

In the March/April 2006 issue of the *The Government Standard*, Mr. Gage states:

> We can win back Congress for the American people. And we've got a plan to do just that. We must increase the number of AFGE members, increase the number of active and informed AFGE members, and increase the number of AFGE members who vote.

In addition, an article in the same issue of AFGE's newsletter notes that, at the opening plenary session of AFGE's 2006 Legislative and Grassroots Mobilization Conference, Mr. Gage said that AFGE will continue its issue and voter mobilization efforts.[3] These statements of Mr. Gage suggest that AFGE is continuing to use voter registration as a means to further its objective of promoting candidates for partisan political office.

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[2] This evidence was found in articles and publications posted on AFGE's website.

[3] Even the AFGE Time Capsule, a five-part series from *The Government Standard* celebrating 70 years of AFGE history notes that, "[i]n the early eighties, the Legislative Department added more staff and was renamed the Political Affairs and Legislative Department. Greater emphasis was placed on voter registration, getting out the vote and fundraising under the Committee on Federal Employees Political Education (COFEPE), which was later renamed the AFGE Political Action Committee (AFGE-PAC)." See May/June 2002 issue.

When the purpose of a voter registration drive is to further a partisan political agenda, that drive should not take place in the federal workplace. As the District Court for the District of Columbia noted in 1984, "[t]he partisan evils which voter registration drives may breed do not all occur at the registration table: civil servants may face subtle or overt pressures to assist in conducting those drives, not to mention registering for a certain party themselves and voting as the union would wish them to." AFGE v. O'Connor, 589 F. Supp. 1551 (D.D.C. 1984), vacated, AFGE v. O'Connor, 747 F.2d 748 (D.C. Cir. 1984), cert. denied, NTEU v. O'Connor, 474 U.S. 909 (1985). The Hatch Act was intended to protect federal employees from these pressures, particularly while they are at work. Thus, if the purpose of the voter registration drives you inquire about is to further AFGE's partisan political agenda (*i.e.*, support candidates for partisan political office), as it appears to be from Mr. Gage's statements, then the Hatch Act would prohibit federal employees from participating in such a drive while on duty and/or in the federal workplace.

Notwithstanding the above, at this time we are unable to provide you with more specific guidance about whether AFGE might be able to conduct a truly nonpartisan voter registration drive. In 2004, your request for an opinion on this issue was made during a national Presidential election, and there was sufficient evidence to conclude that AFGE was engaging in a national effort to get one candidate elected. Unlike 2004, this year there are only Congressional, state and local elections, and thus, we do not expect to see the same kind of national effort by AFGE to get one candidate elected. In addition, it is impossible for us to know the extent of every local AFGE's political efforts, and it is the locals whom we imagine would be responsible for conducting most of the voter registration drives. Thus, without a particular voter registration drive to analyze, we are unable to provide you with further guidance on this issue at this time.

You also ask OSC to clarify conditions under which voter registration efforts might continue even after AFGE makes an endorsement of a partisan political candidate. Specifically, you seek confirmation that AFGE's tradition of coordinating with nonpartisan groups, such as the League of Women Voters, to conduct voter registration drives after AFGE endorses a candidate complies with the Hatch Act. You explained that use of space in government buildings often is not offered to outside groups, so AFGE may reserve space for voter registration and ask a nonpartisan group to conduct the drive so that impartiality is maintained.

Again, whether such a voter registration drive would be permissible in the federal workplace depends on the circumstances surrounding the drive, and in particular, whether the union is controlling the drive or appearing to be connected to it. If the union is still perceived as being involved with or coordinating the drive, then the concerns regarding partisanship discussed above will still be present, even if another group conducts the drive. For example, one factor to consider is where the drive will be held. If the drive is going to be held in a space that is typically used by the union, such as a union office or meeting room, then the drive may still be seen as being conducted by the union. Another factor to consider is who will *actually* be conducting the voter registration drive. For example, if the League of Women Voters is listed as the "host" of the drive, but union officials and/or members are actually doing the work of the drive, then the union will still be viewed as the one conducting the drive.

Other factors relevant to this issue include the type of publicity circulated prior to or during the voter registration drive and whether particular groups are targeted for registration on the basis of their perceived political preference. For example, if the materials advertising an upcoming drive mention the union or suggest that the nonpartisan organization is coming at the invitation of the union, then the union will be connected to the drive in employees' minds. Similarly, if materials advertising the drive are circulated only to union members, the voter registration drive may be perceived as a union activity. In addition, it would appear that a particular group, *i.e.*, union members, is being targeted based on their perceived political preference.

Therefore, while the Hatch Act would not prohibit federal employees from participating in a voter registration drive conducted by a nonpartisan organization under the scenario discussed above, there must be no suggestion or implication to employees that the union is in *any* way involved with or coordinating the drive. Because once the union has endorsed a candidate for partisan political office or otherwise become identified with the success or failure of such a candidate, the union would not be able to conduct a truly nonpartisan voter registration drive.

Lastly, as we repeatedly have stressed in the past, because of the 1993 amendments to the Hatch Act, most federal employees are now able to participate in partisan voter registration drives, provided they are not conducted while on duty, in a government office or building, while wearing an official uniform or insignia, or using a government vehicle.

Please contact me at (202) 254-3650 if you have additional questions regarding this matter.

Sincerely,

Erica N. Stern
Attorney
Hatch Act Unit