



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

AO – 2010-003

SUBJ: Candidacy in Local Election Without Party Affiliation Not Sufficient to
Render Candidacy Permissible under 45 CFR Part 1608

DATE: September 13, 2010

Question Presented

We have been asked whether a recipient staff attorney may run for and accept an elected position as a School Board Member while employed with a recipient without violating the LSC Act or regulations if the attorney does not identify him/herself with a partisan political party.

Brief Answer

The LSC Act and Corporation regulations at 45 CFR Part 1608 prohibit recipient staff attorneys from being candidates for any partisan elective public office. A partisan elective office is one in which any of the candidates representing a political party. The fact that a particular candidate chooses not to represent a political party for the purpose of the election does not make the election “nonpartisan.” In this case, there are candidates identified with political parties in the School Board Member election which the staff attorney is interested in. Accordingly, it is a partisan elective public office and the staff attorney cannot run for or accept that office without violating § 1006(e)(2) of the LSC Act and § 1608.5 of the LSC regulations.

Factual Background

As we understand the facts, a recipient staff attorney qualified as a candidate for membership on the local School Board. The staff attorney filled out the required Notice of Candidacy form, noting that he is affiliated with “no party” and submitted the form along with the required qualifying fee or nominating petition to the relevant authority. On the same day, the staff attorney’s name and information was published onto the state’s Secretary of State’s website, publicly announcing his candidacy for a seat on the School Board. Several weeks later, the staff attorney’s only other opponent in the election was disqualified, leaving him to be the sole remaining candidate for the office. As a result, under the terms of local election law applicable to this election, on election day (November 2, 2010) if the staff attorney remains in the race, he will be deemed elected by the people.

Analysis

Recipient staff attorneys¹ are prohibited by the LSC Act and implementing LSC regulations from being candidates for partisan elective public office. 42 U.S.C. §2996e(e)(2)²; 45 C.F.R. §1608.5(c). Recipient staff attorneys are not prohibited from being a candidate for a public office in *nonpartisan* elections. An election is partisan if “any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected”³ As long as even one candidate for the office represents a party that falls within the specified parameters, then the election is partisan. As this Office has previously noted:

A “partisan office” is one in which any candidate for the office runs as a representative of a party who had candidates for presidential electors who received votes in the last election for presidential electors. *See* Letter from Suzanne Glasow, LSC Senior Assistant General Counsel to Merceria Ludgood, Executive Director, Legal Services Corporation of Alabama, dated March 19, 1992. Thus, in effect, if there is any candidate for the council seat running as a representative of a political party, the election is considered one for partisan office. . . . If however, the office is a non-partisan office in which no candidate runs as a representative of a political party, the attorney would not be barred from running for reelection.⁴ Typically, non-partisan elections are so designated by state or local law. *See*, Hatch Act Advisory of January 16, 2002, Office of Special Counsel.

OLA External Opinion EX-2006-1007 (October 16, 2006). Thus, even if a staff attorney runs as an independent candidate (without any party affiliation), the presence of a partisan candidate in the campaign triggers application of the restriction to the staff attorney.

¹ The definition of “staff attorney” is found in section 1002(7) of the LSC Act and in LSC regulations at 45 C.F.R. §1600.1. This Office has previously interpreted these provisions to mean that “any attorney employed by one of LSC’s basic field programs who receives more than one half of his salary from that program is considered a ‘staff attorney’.” OLA External Opinion EX-2003-1004 (March 7, 2003). Applying this interpretation, this office has previously held that any recipient attorney receiving more than one half of his salary from that recipient is, accordingly, prohibited by from being a candidate for any partisan political election. OLA External Opinion EX-2006-1007 (October 16, 2006). We understand that the attorney in question meets the definition of “staff attorney.”

² The LSC Act applies the requirements of Chapter 15 of the Hatch Act to LSC employees and to recipient staff attorneys. Chapter 15 of The Hatch Act (5 U.S.C. §1501 et seq.) restricts the political activity of individuals principally employed by state, county or municipal executive agencies who work in connection with programs financed in whole or in part by federal loans or grants. The constitutionality of applying these restrictions to staff attorneys was upheld in *Smith v. Ehrlich*, 430 F.Supp. 818 (D.C. 1976). (Plaintiff was a staff attorney of a legal services agency funded by LSC, subject to regulation by the LSC Act, who sought re-election to the Board of Trustees of the School District of Greenville County, South Carolina.)

³ 5 U.S.C. §1503. The Hatch Act prohibition applies to candidacy in all federal, state, and local elective public offices.

⁴ The Office of Special Counsel is the independent Federal agency responsible for administering the Hatch Act.

Applying the standards set forth herein, we conclude that the recipient staff attorney's candidacy for the School Board position is prohibited by the LSC Act and Part 1608. Although the staff attorney is not himself identified with a political party, the challenger (prior to being disqualified from the race) was identified with the Democratic party. In addition, candidates for other School Board positions (representing other districts) are identified with partisan parties.⁵ As the staff attorney has already filed papers declaring his candidacy, he is currently in violation of the Act and regulations and must withdraw from the ballot (or resign his position with the recipient).

A handwritten signature in black ink, appearing to read "Mattie Cohan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mattie Cohan
Senior Assistant General Counsel

⁵ Further, to our knowledge there is no state or local law designating the School Board election as a nonpartisan election.