



OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2006-1007

**To:** Scott Conover, Director of Litigation  
Ocean-Monmouth Legal Services  
25 Broad Street, Suite 13  
Freehold, NJ 07728

**Date:** October 16, 2006

**Subject:** Application of Part 1608 to Newly Hired Attorney

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You asked for an Opinion regarding the application of the restrictions on political activity in Part 1608 to a potential new attorney you are looking to hire. This Opinion responds to that request.

***Questions Presented***

Ocean-Monmouth Legal Services (OMLS) is interested in hiring as an attorney a person who is currently holding political office as a local councilman. You ask whether, if OMLS hires this person, may the attorney retain his position as a councilman. You also ask whether the attorney could run for reelection for his seat on the council.

***Brief Answers***

Yes, if OMLS hires the attorney who is currently holding office as a councilman, he may retain his position on the council.

Whether the attorney, may run for reelection depends on whether the attorney would qualify as a "staff attorney" and on whether the election for the office itself is non-partisan, not on whether the attorney runs as a non-partisan candidate. If the attorney is not a "staff attorney" or if the election for the office is non-partisan, the attorney may stand for reelection. If the attorney is a staff attorney and the election for the office is partisan, the attorney may not be a candidate in that election.

***Background***

OMLS is interested in hiring as an attorney a person who is currently holding office as a councilman for a local government. As we understand it, OMLS seeks to hire this person as a full-time "staff attorney" as that term is defined in 45 CFR Part 1600 of LSC's regulations. It is not clear to us whether the seat the attorney occupies is a partisan elective office or not.

*Analysis*

Section 1006(e)(2) of the LSC Act (“the Act”) and LSC regulations at 45 CFR Part 1608, Prohibited Political Activities, apply certain “Hatch Act” restrictions to LSC and its grantees. (The Hatch Act restricts the political activities of Federal, State and local governmental employees.) The Act and LSC’s regulations set forth restrictions on the political activities of LSC and its staff and grantees and their attorneys. Although there are restrictions on *seeking* partisan political office (discussed in greater detail below), there is nothing in the Act or the regulation which prohibits a grantee from hiring an attorney who is currently a political office holder. As noted in a previous opinion from this office, this is a deliberate choice, based on the regulations implementing the Hatch Act.<sup>1</sup> Thus, OMLS may offer the attorney a position and the attorney may accept without having to relinquish his seat on the council.

As noted above, however, the attorney may well be prohibited from running for reelection. Section 1608.5(c) prohibits grantee staff attorneys from being a “candidate for partisan elective office.” The first question to be addressed is whether the attorney to be hired would be a “staff attorney.”

“Staff attorney” is defined by the LSC Act as:

an attorney who receives more than one-half of his annual professional income from a recipient organized solely for the provision of legal assistance to eligible clients under this title. 42 U.S.C. §2996a(7).

By regulation, LSC defines “staff attorney” as

an attorney more than one-half of whose annual professional income is derived from the proceeds of a grant from the Legal Services Corporation or is received from a recipient, subrecipient, grantee, or contractor that limits its activities to providing legal assistance to clients under the Act.

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’ and is prohibited by §1006(e)(2) of the LSC Act and §1608.5(c) of the LSC regulations from being a candidate for any partisan political election.” OLA External Opinion EX-2003-1004 (March 7, 2003).

Because we do not have specific information about whether the attorney at issue would, upon employment, be receiving more than one half of his income from OMLS, we cannot offer a definitive assessment as to whether the attorney would meet this definition of “staff attorney.” If he did not, the restriction on candidacy in a partisan elective office would not apply and the attorney would be free to seek reelection. If, however, the attorney would fit the definition of a

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<sup>1</sup> See, 5 CFR §151.122 and Letter from Stephen Walters, Acting General Counsel, LSC to James Wayne, Bayou Lafourche Legal Services, Inc., dated February 9, 1979.

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“staff attorney,” whether he could run for reelection depends on whether the election is a for a partisan office or not.

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 this will be the case at the time of the election for the attorney’s council seat, then the attorney (again, assuming he is a “staff attorney”) would be prohibited from running for reelection. 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.<sup>2</sup> Typically, non-partisan elections are so designated by state or local law. *See*, Hatch Act Advisory of January 16, 2002, Office of Special Counsel.

You should also be aware that if the attorney is hired and retains his seat on the council, he will have to be careful to avoid any of the other activities prohibited by Part 1608. These include intentionally identifying OMLS with any partisan or non-partisan political activity or with the campaign of any candidate for public or party office. 45 CFR §1608.4. If you need further guidance on the application of Part 1608 after the attorney has joined your staff (should you hire him), please do not hesitate to ask.

Very truly yours,

A handwritten signature in black ink, appearing to read "Victor M. Fortuno". The signature is written in a cursive, somewhat stylized script.

Victor M. Fortuno  
Vice President & General Counsel  
Office of Legal Affairs

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<sup>2</sup> The Office of Special Counsel is the independent Federal agency responsible for administering the Hatch Act.