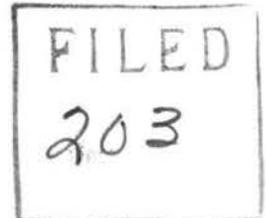


HATCH ACT: The employees of a not-for-profit
STATE EMPLOYEES: corporation organized for the sole
purpose of promoting some functions
of comprehensive health planning and to receive, via contract,
federal funds which have been provided the State of Missouri by
reason of 42 U.S.C.A. §246(a), are precluded from campaigning
for elective office by the provisions of the Hatch Act for the
reason that the agency concerned qualifies as "the executive
branch of a State, municipality, or other political subdivision
of a State, or an agency or department thereof" the employees
of which are prohibited from actively participating in a political
campaign by Title 5 U.S.C.A. §1052(a).

OPINION NO. 203

December 4, 1972

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



Dear Mr. Sally:

This opinion is in response to your request for an official
opinion from the Office of the Attorney General regarding the
following question of law:

"Are the employees of a not-for-profit corporation organized to promote some functions of comprehensive health planning, but not established as a Section 314(b), PL. 89-749 (as amended) agency, covered by the provision of the Hatch Act, or any other federal rules or regulations, that would preclude them from being a partisan candidate in a legislative contest, said agency receiving contract funds from the Missouri Department of Community Affairs, Office of Comprehensive Health Planning which are entirely federal grant funds given to the Department by the U. S. Department of Health, Education and Welfare?"

Your request involves the applicability of a federal law, the Hatch Act, to a particular set of factual circumstances. In order that this office might address the question, you have provided us with the facts which prompted your request. The applicability of the Hatch Act to these facts will be determinative

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of your opinion request. Within the Missouri Department of Community Affairs, there exists a division called the Office of Comprehensive Health Planning. The Office of Comprehensive Health Planning has executed a contract with Mid-Missouri Area-wide CHP Agency, Inc., whereby the latter has agreed:

"[T]o provide the Office of Comprehensive Health Planning with regional information on demographic, socioeconomic, ethnic and health characteristics; inventories of health resources; and identification of major consumer and provider groups in the region to develop plans for home health care services, emergency medical services, planning for capital cost financing of medical facilities, and 'review and comment' on projects per request of the Office of Comprehensive Health Planning. . . ."

These services are to be performed in an area which has been designated as Mid-Missouri Regional Planning Commission Region. Mid-Missouri Areawide CHP Agency, Inc. has been incorporated as a not-for-profit corporation with a certificate of incorporation filed with the Missouri Secretary of State. It is implicit in the information provided that Mid-Missouri was incorporated solely for the purposes enumerated above. Payments made by the Office of Comprehensive Health Planning to Mid-Missouri Areawide CHP Agency, Inc. are largely provided by federal grants made to the Missouri Department of Community Affairs to be used for health purposes. The authority by which these federal grants have been made available to the Office of Comprehensive Health Planning is 42 U.S.C.A. §246(a). The federal government, in the person of the Surgeon General, may also grant federal funds to certain qualified local areawide CHP agencies with the approval of the state-wide agency. The authority for such grants is 42 U.S.C.A. §246 (b). The Mid-Missouri Areawide CHP Agency, Inc. has not as yet been designated under the above subsection to receive direct grants of funds from the federal government. Areawide CHP agencies designated as appropriate to receive such federal funds directly by 42 U.S.C.A. §246(b) can be either public or not-for-profit private organizations. It is anticipated that the Mid-Missouri Areawide CHP Agency, Inc. will, in the future, be designated as an areawide comprehensive health planning agency for purposes of the above subsection.

In April of 1972, an employee of Mid-Missouri Areawide CHP Agency, Inc. filed for the elective office. Before filing, the employee notified the Office of Comprehensive Health Planning and the Mid-Missouri Areawide CHP Agency, Inc. of his intentions to do so. This individual was employed by the Mid-Missouri Areawide CHP

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Agency on a one-half time basis. He did not resign his position upon filing for public office. He did, however, resign at a later date.

The question presented under the above facts is whether, by campaigning for elective office, an employee of Mid-Missouri Area-wide CHP Agency, Inc. is in violation of the Hatch Act. The Hatch Act can be found in Title 5, Chapter 15 of the United States Code. Title 5, Section 1502, U.S.C.A. provides that:

"(a) A State or local officer or employee may not--

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

(3) take an active part in political management or in political campaigns."

Title 5, Section 1501 defines "State or local agency" as "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." That section defines "State or local officer or employee" as:

"[A]n 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, . . ."

The employee of Mid-Missouri Areawide CHP Agency, Inc. under question has filed for an elective office. As a candidate for office this individual is taking an active part in a political campaign as prohibited by Chapter 5, U.S.C.A., Section 1502(a) (3). Northern Virginia Regional Park Authority v. United States Civil Service Commission, 437 F.2d 1346 (4th Cir. 1971), cert. den. 403 U.S. 936; In re Higginbotham, 340 F.2d 165 (3rd Cir. 1965), cert. den. 382 U.S. 853.

The employee concerned contributes approximately one-half of his time to his employment by Mid-Missouri Areawide CHP Agency, Inc. We believe this qualifies as "principal employment" as

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required by the Hatch Act definition of "State or local officer or employee." The case of Palmer v. United States Civil Service Commission, 297 F.2d 450 (7th Cir. 1962), cert. den. 369 U.S. 849, involved the Director of the Illinois Conservation Department. He was also a precinct committeeman and chairman of his county party committee. The Court of Appeals for the Seventh Circuit found that his activities taking up at least fifty percent of his time in regard to the state conservation program, which used federal funds, was in violation of the Hatch Act in consideration of his political involvements. Id. at 454. In Smyth v. United States Civil Service Commission, 291 F.Supp. 568 (E.D.Wisc. 1968), the court held that part-time employment in a federally financed public job could qualify as principal employment for purposes of the Hatch Act definition. That case further held that the burden of going forward with the evidence was on petitioner to show that his principal employment was other than that which would have been in violation of the Hatch Act. Id. at 573. We believe that, absent a showing to the contrary by the individual involved, the principal employment requirement of Title 5, Section 1501(4) is met in the case as presented wherein an individual works half-time for Mid-Missouri Areawide CHP Agency, Inc.

It remains to be determined whether the individual involved is an employee of a "State or local agency", i.e., is the Mid-Missouri Areawide CHP Agency, Inc., "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." Although Mid-Missouri has been registered with the Secretary of State as a not-for-profit corporation, we have nevertheless concluded that it qualifies as a "State or local agency" for purposes of the Hatch Act.

Federal law, rather than state, should be determinative of whether or not a particular entity is a "State or local agency" within the meaning of the Hatch Act. NLRB v. Natural Gas Utility District, 402 U.S. 600, 602-603, 29 L.Ed.2d 206, 208, 91 S.Ct. 1746 (1971). Were the question before us one involving civil rights, federal case law would clearly indicate that Mid-Missouri should be considered as the state's alter ego. In Poindexter v. Louisiana Financial Assistance Commission, 275 F.Supp. 833 (E.D. La. 1967), aff'd 389 U.S. 571, 19 L.Ed.2d 780, 88 S.Ct. 693 (1968), the state's grant in aid program to parents desiring to send their children to private segregated schools was held unconstitutional "state action".

"The United States Constitution does not permit the state to perform acts indirectly through private persons which it is forbidden to do directly. . . .

* * *

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"The payment of public funds in any amount through a state commission under authority of a state law is undeniably state action. . . ." Id. at 835, 854.

In Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938, 11 L.Ed.2d 659, 84 S.Ct. 793 (1964), racial discrimination by nonprofit privately owned hospitals was held to be "state action" primarily because the hospitals had applied for and received federal funds for physical plant expansion.

"In our view the initial question is, rather, whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either their instrumentality or their agent in a strict sense. . . .

* * *

"Here the most significant contacts compel the conclusion that the necessary 'degree of state [in the broad sense, including federal] participation and involvement' is present as a result of the participation by the defendants in the Hill-Burton program. The massive use of public funds and extensive state-federal sharing in the common plan are all relevant factors. We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans. . . .

"[W]e find it significant here that the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health. . . ." Id. at 966-967.

The corporate purposes of Mid-Missouri, as stated in its Articles of Incorporation is:

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"To effect Comprehensive health planning through cooperative involvement of consumers and providers in the Mid-Missouri area and contribute to the overall Comprehensive Health Planning in the State of Missouri; by relating to state agencies."

Pursuant to Article I of its contract with the Department of Community Affairs, Mid-Missouri is obligated:

". . .to provide the Office of Comprehensive Health Planning with regional information on demographic, socioeconomic, ethnic and health characteristics; inventories of health resources; and identification of major consumer and provider groups in the region to develop plans for home health care services, emergency medical services, planning for capital cost financing of medical facilities, and 'review and comment' on projects per request of the Office of Comprehensive Health Planning. This information and plans are a major contribution to the statewide comprehensive health planning process and the Missouri CHP Plan."

Since the great majority of Mid-Missouri's operating capital comes from funds paid to it under the contract mentioned immediately above, and considering the nature of this agency's activities, we conclude the corporation should be regarded as a "State or local agency" for Hatch Act purposes.

"That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Evans v. Newton, 382 U.S. 296, 15 L.Ed.2d 373, 377, 86 S.Ct. 486 (1966).

In relation to the meaning attached to the term "political subdivision" by federal law, we refer you to language in the opinion of Commission of Internal Revenue v. Shamberger's Estate, 144 F.2d 998, 1004-1005 (2nd Cir. 1944), cert. den. 89 L.Ed. 631, 323 U.S. 792 (1945):

"The term "political subdivision" is broad and comprehensive and denotes any division of the State made by the proper authorities

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thereof, acting within their constitutional powers, for the purpose of carrying out a portion of those functions of the State which by long usage and the inherent necessities of government have always been regarded as public. The words "political" and "public" are synonymous in this connection. . . . It is not necessary that such legally constituted "division" should exercise all the functions of the State of this character. It is sufficient if it be authorized to exercise a portion of them. * * *

* * *

"Here the activities, even though some of them might have been exercised by private corporations under appropriate legislation, are exercised for a public purpose by an agency [Port of New York Authority] set up by the states and given many public powers, though not of taxation or control through the suffrages of citizens. It minimizes its public and political character to treat such an agency as a private corporation merely because of the lack of taxing power which is only one of the attributes of sovereignty."

We believe that the conclusion that Mid-Missouri qualifies as a "State or local agency" for Hatch Act purposes, as reached by an interpretation of federal law, is supported by certain laws of this state as regards the meaning of the term "political subdivision", as such term is used in Title 5, Section 1501 U.S.C.A. Section 251.020(6), RSMo 1969, defines political subdivision as "regional or other planning commissions and any other local public body. . . exercising governmental functions." We believe that advisory functions relating to the health and welfare of the general public qualify as "governmental functions" as that term is above defined in those Missouri cases dealing with the tort immunity of government where governmental functions have been exercised and have resulted in injury. See Auslander v. City of St. Louis, 56 S.W.2d 778, 780 (Mo. Banc 1932); Kansas City, Mo. v. J. I. Case Threshing Mach. Co., 87 S.W.2d 195, 202-203 (Mo. 1935). This conclusion is compatible with our earlier opinion that local law enforcement assistance councils (which are organized on a regional planning area basis as are areawide CHP agencies) qualify as political subdivisions under Section 251.020(6), RSMo 1969. Opinion of the Attorney General, No. 431, Culver, 1969.

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We believe that our conclusion in this opinion accurately comports with the purposes of the Hatch Act as those purposes were described by the Supreme Court of the United States in upholding the constitutionality of the Hatch Act.

"The conclusion of the Court, that there was no constitutional bar to regulation of such financial contributions of public servants as distinguished from the exercise of political privileges such as the ballot, has found acceptance in the subsequent practice of Congress and the growth of the principle of required political neutrality for classified public servants as a sound element for efficiency. The conviction that an actively partisan governmental personnel threatens good administration has deepened since Ex parte Curtis. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.

* * *

"The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of Government employees have been accustomed to work in politics--national, state and local--as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not over active politically." United Public Workers v. Mitchell, 330 U.S. 75, 97-100, 91 L.Ed. 754, 771-773, 67 S.Ct. 556 (1947) (Emphasis added).

And in a companion case:

"While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does

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have power to fix the terms upon which its money allotments to [the] state shall be disbursed.

". . . The 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, 143, 91 L.Ed. 794, 806, 67 S.Ct. 544 (1947).

CONCLUSION

Therefore, it is the opinion of this office that the employees of a not-for-profit corporation organized for the sole purpose of promoting some functions of comprehensive health planning and to receive, via contract, federal funds which have been provided the State of Missouri by reason of 42 U.S.C.A. §246(a), are precluded from campaigning for elective office by the provisions of the Hatch Act for the reason that the agency concerned qualifies as "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof" the employees of which are prohibited from actively participating in a political campaign by Title 5, Section 1502 (a), U.S.C.A.

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

Very truly yours,



JOHN C. DANFORTH
Attorney General