TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	
	:	No. 80-603
of	:	
	:	JULY 2, 1981
GEORGE DEUKMEJIAN Attorney General	:	
Jack R, Winkler Assistant Attorney General	:	
Lawrence Keethe Deputy Attorney General	:	

The Honorable Mary Ann Graves, Director, California Department of Finance, has requested an opinion on the following question:

Are state employees whose activities are indirectly financed by the federal government through the Statewide Cost Allocation Plan subject to the Hatch Act?

CONCLUSION

Those state employees whose activities are indirectly financed by the federal government through the Statewide Cost Allocation Plan are subject to the Hatch Act if their "principal employment" is a position in the executive branch of state government which is not exempt under the Act in which the normal and foreseeable duties are "connected with" an "activity financed in whole or in part with federal funds," as the quoted words have been defined in the statute, by the federal courts and by the rulings of the United States Civil Service Commission.

ANALYSIS

Many federal government programs are administered by state government agencies using funds provided by the federal government. Program costs are classified as direct or indirect costs. Indirect costs are defined as those costs not readily identified with the federal program itself but are nevertheless incurred by the state for the joint benefit of the program and of other activities carried on by the department. Such indirect costs may be incurred by the state agency administering the program and by other state agencies providing central services. The federal government includes in its program grants, an amount considered its fair share of these indirect costs which is negotiated each year between the state and federal governments.

The Statewide Cost Allocation Plan ("the Plan") is a plan prepared by the Department of Finance which allocates costs incurred by central services agencies to the state agencies administering federal programs. It is prepared annually pursuant to federal regulations and subject to federal approval with the objective of having the federal government pay its fair share of the indirect costs of the federal programs. The Plan provides: for standardized rates for central services through centralized federal-state negotiations. The administering state agencies include an indirect cost rate proposal in their annual request for federal funds based on the Plan. The federal funds granted for indirect costs are transferred to the General Fund and are appropriated to the agencies providing the central services in the regular budget process. Some ten million dollars is thus distributed annually to more than a dozen state agencies providing central services which benefit federal programs administered by other state agencies.

We are asked whether the state officers and employees who provide the central services paid for in part by federal funds as indirect costs under the Plan are subject to title 5, United States Code sections 1501–1508 (the Hatch Act).[1]

Section 1502 provides:

> "(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

[1] All unidentified section references are to the Reorganized Education Code.

of value to a party, committee, organization, agency, or person for political purposes; or

"(3) be a candidate for elective office.

"(b) A State or local officer or employee retains the right to vote as he chooses and to express his opinions on political subjects and candidates.

"(c) Subsection (a)(3) of this section does not apply to—

"(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

"(2) the mayor of a city;

"(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

"(4) an individual holding elective office."

Section 1501 provides:

"For the purpose of this chapter—

"(1) 'State' means a State or territory or possession of the United States;

"(2) 'State or local agency' means the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof;

"(3) 'Federal agency' means an Executive agency or other agency of the United States, but does not include a member bank of the Federal Reserve System; and

"(4) 'State or local officer or employee' means 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 party 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; or

"(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

The purpose of the Hatch Act is to prohibit political activities among employees in the states whose employment is made possible by use of federal funds. (*Northern Virginia Regional Park Authority* (1970) 307 F. Supp. 888, 891.) The constitutionality of the Hatch Act as applied to state officers and employees was upheld in *Oklahoma v. U.S. Civil Service Commission* (1947) 330 U.S. 127; see also *Palmer v. U.S. Civil Service Commission* (1962) 297 F.2d 450.

Enforcement of the Hatch Act is made the responsibility of the United States Civil Service Commission ("Commission"). All proceedings to enforce the act are brought by and before the Commission. (See §§ 1503–1508 and 45 C.F.R. § 1069.8–8.) We must look to the interpretation of the Hatch Act by the Commission as reported in the Political Activity Reporter ("P.A.R.") for guidance where court decisions are lacking.

"[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. (*Red Lion Broadcasting Co. v. F.C.C.* (1969) 395 U.S. 367, 381.)

It is significant, therefore, that Congress has not interfered with the Commission's interpretation of section 1501.

Since the question presented concerns the applicability of the Hatch Act to the state officers and employees who provide the central services paid for in part by federal funds as indirect costs under the Plan we must apply the definition of "state officer or employee in section 1501(4) to those personnel. To facilitate this analysis we shall separate the definition into its component parts.

State officer or employee means:

(1) an individual employed by the state

(2) whose principal employment

(3) is in connection with

(4) an activity financed in whole or part by federal funds.

We will examine the application of each of these components to the personnel in question.

1. *Individual employed by the state.* The Hatch Act does not apply to all individuals who are employed by the state. We note two categorical exceptions provided in the statute. "State or local agency" is defined by section 1501(2) to mean only the executive branch and thus the Hatch Act is not applicable to those employed in the legislative or judicial branches of state government. Individuals employed by an educational or research institution supported by the state are exempted from the Hatch Act by section 1501(4)(B). It should also be noted that the act's proscription against candidacy for elective office does not generally apply to those officers holding elective offices. (See § 1502(c).)

2. *Principal employment*. The United States Civil Service Commission has construed the word "employment" as used in section 1501(4) to mean position or job. In the Commission's view it is unnecessary to break down a person's job into two types of functions and weigh one against the other to determine whether the person is subject to the act. It is only when the same person holds two or more different jobs or positions that it is necessary to determine which is the principal employment. (*In re Fleming* (1943) 2 P.A.R. 1, 6.) *In Matturi v. U.S. Civil Service Commission* (1955) 130 F. Supp. 15 (U.S.D.C., New Jersey), *Matturi* was an officer of the Newark Housing Authority, serving without compensation, while he was actively engaged in the private practice of law. The court held that he was not subject to the Hatch Act because his principal employment was the practice of law.

3. *In connection with*. Under section 1501(4) the principal employment must be "in connection with" the federally financed activity. The quoted words focus upon the relationship between the functions performed in the principal employment and the federally funded activity. The statute expressly provides that if an individual exercises no functions in connection with a federally funded activity he is not covered by the Hatch Act. (§ 1501(4)(A).) The United States Civil Service Commission has construed this language to mean that the officer or employee must *individually* exercise some function in respect to the federally financed activity Mere employment with an agency which is engaged in a federally financed activity is not enough to bring the individual's position, job or employment into "connection with" that activity. (*In re Slaymaker* (1943) CSC No. 5–31–43 reported in 2 P.A.R. 56. 60.)

The United States Civil Service Commission has formulated "rules of jurisdiction" which incorporate its interpretation of the Hatch Act. Its "General Rule of Section 12a [§ 1501(4)] Jurisdiction" states:

> "An officer or employee of a State or local agency is subject to the Act if, as a normal and foreseeable incident to his principal position or job, he performs duties in connection with an activity financed in whole or in part by Federal loans or grants; otherwise he is not."

(*In re Fleming*, *supra*, 2 P.A.R. 1, 6.) Its "Secondary Rule of Jurisdictional Limitation states:

> "An employee of a State or local agency is not within the 'principal employment' requirement of Section 12(a) [§ 1501(4)) of the Hatch Act, if the only duties in respect to any activity financed in whole or in part by Federal loans or grants which he performs as a normal and intended incident of his principal job or position, are so inconsequential in comparison with other duties of his said job or position as to make applicable the maxim *de minimis non curat lex*. "[2]

(See discussion of the application of the *de minimis* rule in *Palmer v. U.S. Civil Service Commission* (1962) 291 F.2d 450.)

The limitation of Hatch Act coverage afforded by the "in connection with" language extends beyond the nonexistent and *de minimis* relationship between the principal employment and federally funded activities. *In re Stanley J. Brown* (1974) 3 P.A.R. 273 involved Hatch Act charges against 24 employees of the City of Chicago. At page 300 the Commission stated:

> "Coverage under the Act is not affected by the source of an officer's or employee's salary. *In the Matter of W.E. Ramshaw*, 2 P.A.R. 768, 770. A test is whether 'his connection with' the Federally financed activity was merely a casual or accidental occurrence and 'not a normal or foreseeable incident of his employment.' *In the Matter of Charles M. Slaymaker*, 2 P.A.R. 56, 62. There is no indication in the record that Respondent Crawford's connection with the Federally financed activity was merely a 'casual or accidental occurrence. Once the Government has shown that a Respondent's principal employment is in an activity financed in whole or in

[2] The *de minimis* maxim of the common law is codified in Civil Code section 3533 thus: "The law disregards trifles."

part by Federal funds, the Commission has jurisdiction under the statute over the Respondent; it would be necessary for the Respondent to rebut this by showing that his connection was merely a 'casual or accidental occurrence.' This has not been done."

In re Harry Dieberstein (1944) 2 P.A.R. 131 involved Hatch Act charges against the Right of Way Engineer of Arizona's Highway Department. At pages 133–135 the Commission stated:

"Mr. Duberstein's duties were limited to procuring rights-of-way, or other required real estate. We find that when he obtained a right-of-way, it was not shown whether the Commission would seek Federal aid for the highway; nor whether an application, if made, would be approved. The Federal government pays nothing on the cost of the right-of-way. Its allowance for 'engineering services' takes no consideration of those of the right-of-way engineer.

". . . . . .

"The respondent's counsel contends that these facts show that Mr Duberstein is not subject to the Act. it seems to us that this wrongly interprets Section 12(a) as limited to those whose principal employment *is in or upon* an activity financed in part by Federal grants. Congress did not so declare. The statutory term is *'in connection with.*' The *three words* open a wider field, we think, than if Congress had stopped with 'in.'

"Does procuring a right-of-way have 'connection with' construction of a highway? We think it does. It may be said to have the same connection that the foundation has to the superstructure of a building. Without the right-of-way or the foundation, construction of the highway or of the building is impossible.

… … … …

"As we see it, this amounts to saying that the right-of-way is part of the state's contribution to the joint enterprise. The Federal government contributes a sum of money, the state contributes money and a right-of-way. It is common knowledge that in the government's current construction of such things as airports and hospitals, it is the custom to require the local community to furnish the necessary real estate. This is part of the local contribution. The principle is the same, in our opinion, in respect to state

contribution of the land for construction of highways of the so-called Federal system.

"Decision whether a person is subject to the Act sometimes calls for close distinctions. A person familiar with our prior Reports and Orders might raise a question whether there is any divergence between the findings in the instant case and those in *In the Matter of Todd*, [2 P.A.R. 491 and *In the Matter of Pearson* [2 P.A.R. 70]. In the *Todd* case we stated that a person employed by a State Highway Department exclusively in maintenance work is not subject to the Act, because the Federal government pays nothing for maintenance. Superficial consideration might suggest that a person whose service to the Highway Department *ended* before Federal aid *began* should have the same jurisdictional status as one whose services *began* after Federal aid *ended*. But maintenance is not a component part of constructing a highway, as is procuring the right-of-way; nor can it be regarded as a contribution to the jointly financed construction enterprise. In the *Pearson* case we said:

"These facilities, he stated, 'were many and varied in type, ranging from a simple farm or residential entrance driveway, to construction of a gas pipe line or electric transmission line.' It was his duty to consider applications for permits for such construction, and to see that the work was carried out 'with the least detriment to the highway."

"A large percentage of these improvements, and consequently a substantial portion of Mr. Pearson's duties, must have been in relation to construction of highways of the so-called 'Federal system.' Therefore, from one point of view, the respondent's principal employment was 'in connection with' Federally financed activities. But it can more accurately, be said to have been '*in association* with' such activities. Between the work of an engineer engaged directly on the Federally financed construction of a highway and the work of an engineer supervising construction of privately financed improvements connecting 'with the highway, there is a distinguishable difference in the relation to the Federally financed project.

"Accordingly, we reached the conclusion that Mr. Pearson was not subject to the Act. The distinction between the *Pearson* and *Duberstein* cases, as we see it, is that in the former the respondent's work was only collaterally related to the Federally financed construction; whereas, procuring a right-of-way was directly in connection therewith. Mr.

Duberstein's services contributed to the Federally financed construction; Mr. Pearson's did not."

Summarizing these interpretations we conclude that a principal employment is not "in connection with" a federally funded activity if the functions performed by the employee bear no or only a *de minimis* relation to such activity or are only collaterally related thereto. A casual or accidental occurrence which is not a normal or foreseeable incident of the employment relating the job with the federally funded activity is not a sufficient connection between the two to bring the job under the Hatch Act.

4. *Activity financed in whole or par by federal funds.* The Hatch Act applies only to individuals employed by the state 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." 1501(4).) The term "grant" includes federal funds paid to reimburse the state. (*In re Engelhardt* (1961) 2 P.A.R. 632, 638.) In such case the requirements of the Hatch Act attach when the obligation to reimburse is made. (*In re Bollettier* (1962) 2 P.A.R. 674.)

A specific, demonstrable link between the federal finds and a state employee's compensation is not essential to make the employee subject to the Hatch Act. The test is whether the principal employment is in connection with a federally funded activity. (*In re Hilburn* (1964) 2 P.A.R. 701, 704–705.)

With this examination of the statutory test for the application of the Hatch Act to state officers and employees we return to the question presented. Are state officers and employees who provide the central services paid for in part by federal funds as indirect cost under the Plan subject to the Hatch Act? The statute expressly exempts certain categories of state officers and employees. Thus officers and employees in the legislative and judicial branches of state government and those employed by an educational or research institution supported by the state are expressly exempt. For other state officers and employees it is not possible to provide a categorical response to the question without more specific information regarding the functions they perform. This becomes apparent when the following cases are considered in connection with the statutory definition of state officers or employees subject to the Hatch Act.

In *Palmer v. U.S. Civil Service Commission* (1962) 297 F.2d 450, Palmer was the Director of the Department of Conservation in Illinois. The Commission charged him with violating the Hatch Act. The federal district court ordered the case dismissed holding that the Hatch Act violated Palmer's vested rights. The Court of Appeal reversed the district court's decision pointing our that the United States Supreme Court had held the Hatch Act constitutional in *Oklahoma v. U.S. Civil Service Commission* (1947) 330 U.S. 127. Palmer was in charge of nine divisions anti estimated he spent 50 percent of his time

on the parks division but could make no allocation of his time to the other divisions. He spent less than one percent of his time on federal aid projects because he had two coordinators who supervised the administration of over 20 federal aid projects in the department. The Court of Appeal rejected Palmer's *de minimis* argument pointing out that he had administration of all nine divisions of the department, six of which received federal funds, he was responsible for major policy decisions at the state level and had approved the project plan for each federal aid project. State law gave him specific responsibility for state development of federal aid projects and his duties in connection with federally financed activity took up at least half of his time. The court concluded Palmer plainly met the test that his principal employment was in connection with an activity financed in part by federal funds.

In re Palmore (1972) 3 P.A.R. 137 concerned the application of the Hatch Act to certain officers of Kentucky's Department of Agriculture. A federal grant funded an inspection program conducted by the Meat Inspection Division. Thirteen percent of the federal grant was retained by the department as a whole to pay the indirect costs of the meat inspection program' and was used to pay salaries and other expenses incident to administration. The department was headed by an elected commissioner. A deputy commissioner, the State Veterinarian, and five officers in the Meat Inspection Division were charged with Hatch Act violations. In the early days of the inspection program the deputy commissioner and the State Veterinarian each charged five percent of their time to the program. The State Veterinarian headed the program until the Meat Inspection Division was created to take over its operation. The deputy commissioner had general supervision of all the divisions in the department. The Commission stated that since half the cost of the meat inspection program was paid with federal funds and 13 percent of the federal contribution was used by the department as a whole to pay for the indirect costs of administering the program, both the deputy commissioner and the State Veterinarian were principally employed "in connection with" a federally funded activity and thus subject to the hatch Act. The Commission added that the fact that the meat inspection program was under his supervision provided a much more substantial basis for holding that the deputy commissioner was employed "in connection with" a federally financed activity. The Commission added that there would be no question that the Hatch Act covered the five officers in the Meat Inspection Division directly employed in the meat inspection program.

The facts that state officers and employees are not employed in the state department administering a federally funded program, or that they perform only central services paid for in part by federal funds, or that the costs for these central services are considered 'indirect" in relation to other costs of the federally funded activity simply do not provide a sufficient factual predicate to determine whether their principal employment is in connection with a federally funded activity. Our response must therefore be qualified

by the test set forth in the Hatch Act itself as interpreted by the courts and the United States Civil Service Commission.

If the principal employment of a person is a position in the executive branch of state government which is not exempt and the normal and foreseeable duties of that position are connected with an activity financed in whole or in part with federal funds, the person is subject to the Hatch Act. The fact that the duties are considered "indirect" in relation to the federally funded activity or that person is not paid with federal funds does not preclude Hatch Act coverage. Responsibility for making decisions relating to the federally funded activity provides sufficient connection therewith for Hatch Act coverage though such responsibility is delegated to subordinates. Whether the duties of the position contribute to the accomplishment of a federally funded activity is a significant factor in determining whether it establishes the requisite connection with that activity or is only collaterally related thereto for Hatch Act purposes.

While we have attempted, in this opinion, to point out some of the significant factors regarding the application of the Hatch Act to state employees, in the final analysis the United States Civil Service Commission will determine the application of the act to state employees and others on an individual case-by-case basis subject to review by the federal courts.

*****