

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

VIA EMAIL TO:

July 28, 2014

[REDACTED]  
Executive Board Member  
D.C. Health Benefits Exchange Board  
[REDACTED]

Dear [REDACTED]

This responds to your request for advice concerning whether you permissibly may run for an at-large D.C. Council seat and engage in associated campaign activities, including fundraising, while also serving as an Executive Board Member of the D.C. Health Benefits Exchange (“HBX”) Board. Based upon the information your General Counsel provided in a phone call on April 1, 2014, to a member of my staff, a subsequent email sent by your General Counsel on June 1, 2014, and a conversation you had with a member of my staff on June 23, 2014, I conclude that, as long as you ensure that you meet the requirements set forth below, you permissibly may run for an at-large city council seat and you permissibly may engage in associated campaign activities, including fundraising.

You state that you are an Executive Board member of the HBX, a quasi-government instrumentality created by the District to implement the insurance marketplace provisions of the Affordable Care Act.<sup>1</sup> HBX is governed by an Executive Board made up of seven voting members and four non-voting, *ex-officio* members.<sup>2</sup> The Executive Board members are appointed by the Mayor with the advice and consent of the Council, pursuant to D.C. Official Code § 1-523.01(f).<sup>3</sup> The Board has broad authority including all the powers necessary to carry out the functions authorized by the Affordable Care Act.<sup>4</sup>

You state that you would like to run for an at-large D.C. Council seat while remaining an Executive Board member of the HBX. Running for an at-large Council seat would require you to engage in fundraising. You would like to know whether you are subject to restrictions regarding voting on Executive Board matters during the course of your campaign, whether there are limitations on your political activity due to your position as

<sup>1</sup> D.C. Official Code § 31-3171.02.

<sup>2</sup> D.C. Official Code § 31-3171.05.

<sup>3</sup> *Id.*

<sup>4</sup> 42 USCS § 18031.

an Executive Board member, whether you may refer to your position as an Executive Board member during your campaign, and whether there are limitations on the topics that you may discuss or the questions that you may answer during the campaign.<sup>5</sup>

The applicable provisions of the Code of Conduct that inform my decision are found in the Local Hatch Act<sup>6</sup> and Chapter 18, Title 6B of the D.C. Municipal Regulations (also known as the “DPM”).<sup>7</sup>

First, I will address the applicable provisions of the Local Hatch Act. The definition of “employee” in the Local Hatch Act includes “a member of a board or commission who is nominated pursuant to section 2(f) of the Confirmation Act of 1978...when the member is engaged in political activity that relates to the subject matter that the member’s board or commission regulates.”<sup>8</sup> HBX’s Board is nominated pursuant to section 2(f) of the Confirmation Act. Therefore, HBX Board members are considered “employees,” as that term is defined in the Local Hatch Act, only when they are engaged in the subject matter that their Board regulates.

Because 2(f) board members’ status as “employees” under the Local Hatch Act is limited to a specific subject matter, I do not find that the prohibition against filing as a candidate for election for partisan political office, found in D.C. Official Code § 1-1171.02(a)(3), would preclude a member of a 2(f) board from running for an at-large Council seat (a partisan office).<sup>9</sup> Additionally, because your status as “employee” under the Local Hatch Act is limited to a specific subject matter, I do not find that the prohibition against knowingly soliciting, accepting, or receiving political contributions from any person, found in section 3(a)(2) of the Local Hatch Act, would preclude a member of a 2(f) board from fundraising for a District regulated campaign.<sup>10</sup>

In sum, I find that the Local Hatch Act does not prohibit you from running for an at-large Council seat (a partisan office) or fundraising for your campaign (a District-regulated campaign). The prohibitions you face under the Local Hatch Act concern your activities as an HBX Board Member. D.C. Official Code § 1-1171.02(a)(1) prohibits the use of official authority or influence for the purpose of interfering with or affecting the result of an election.<sup>11</sup> Should you use your official authority or influence as an HBX Board Member to further your campaign or fundraising for your campaign, I would consider you an “employee” for purposes of this prohibition because you would be engaged in political activity that relates to the subject matter that your Board regulates.

Therefore, you may not use your position as an HBX Board Member to interfere with or affect the result of your own at-large D.C. Council election. This means that you cannot

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<sup>5</sup> You also inquired whether you may form a political campaign committee for a Council campaign, but that is a matter solely within the jurisdiction of the Board of Elections and the Office of Campaign Finance.

<sup>6</sup> “Prohibition on Government Employee Engagement in Political Activity Act of 2010,” effective March 31, 2011 (D.C. Law 18-335; 58 DCR 599), as amended by the “Prohibition on Government Employee Engagement in Political Activity Amendment Act of 2013,” effective May 7, 2013 (D.C. Law 20-4; D.C. Official Code § 1-1171) (the “Local Hatch Act”).

<sup>7</sup> Hereinafter, Title 6b of the D.C. Municipal Regulations will be referred to as the District Personnel Manual or DPM.

<sup>8</sup> D.C. Official Code § 1-1171.01(3)(C).

<sup>9</sup> D.C. Official Code § 1-1171.02(a)(3).

<sup>10</sup> D.C. Official Code § 1-1171.02(a)(2). In your case, even if I found that the prohibition against fundraising for a District regulated campaign applied to 2(f) board members as a complete preclusion, because you yourself are running for an at-large council seat, you would fall under the exception in D.C. Official Code § 1-1171.02(a)(2) for employees who have, themselves, filed as a candidate for political office.

<sup>11</sup> D.C. Official Code § 1-1171.02(a)(1).

use your position with the HBX Board to further your campaign. You may, in the context of campaign activities, speak truthfully about your position with the HBX Board, as to not make any material misrepresentations, but you may not use your HBX Board position in any campaign materials, as that would be viewed as using your official authority or influence for the purpose of interfering with or affecting the result of an election.

As to the question regarding the topics that you may discuss or the questions that you may answer during the campaign, I do not find that the Local Hatch Act prohibits you from discussing health benefits exchange issues. It would be impractical to allow you to participate in an election, but preclude you from being able to answer constituents' questions, especially questions about an issue as important as health insurance. Therefore, I do not interpret the Local Hatch prohibitions to preclude you from speaking about matters that HBX regulates.

You also are subject to the prohibitions found in D.C. Official Code § 1-1171.03. These prohibit you from engaging in political activity while you are on duty as an HBX Board Member, while you are in any room or building occupied in the discharge of official duties in the District government, including any agency or instrumentality thereof, while wearing a uniform or official insignia identifying you as an HBX Board Member, or while using any vehicle owned or leased by the District of Columbia, including any agency or instrumentality thereof.<sup>12</sup> Essentially, I view the Local Hatch Act's definition of "employee" as applying to you at any time you are engaged in HBX activities or any time you appear to be engaged in HBX activities.

In addition, you are subject to the prohibitions in D.C. Official Code § 1-1171.02(a)(4) and D.C. Official Code § 1-1171.03(b). D.C. Official Code § 1-1171.02(a)(4) states that you are prohibited from knowingly directing, or authorizing anyone else to direct, any of your subordinate employees to participate in an election campaign or requesting that your subordinate employees make a political contribution.<sup>13</sup> D.C. Official Code § 1-1171.03(b) states that you are prohibited from coercing, explicitly or implicitly, any of your subordinate employees to engage in political activities.<sup>14</sup> Although these prohibitions are likely common sense, again, they are important to keep in mind.

Now, I will address the applicable provisions of the DPM. DPM § 1899.1 defines "employee" as "an individual who performs a function of the District government and who receives compensation for the performance of such services ..., or a member of a District government board or commission, with or without compensation."<sup>15</sup> Therefore, as an HBX Board Member, you are an "employee" for the purposes of the DPM and the DPM's prohibitions apply to your activities.

DPM § 1800.3(g) states that employees shall not use public office for private gain.<sup>16</sup> This prohibition, like the prohibition found in D.C. Official Code § 1-1171.02(a)(1), prohibits you from using your position with the HBX Board in any campaign materials. The use of your position with the HBX Board for the purpose of furthering your private campaign

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<sup>12</sup> D.C. Official Code § 1-1171.03.

<sup>13</sup> D.C. Official Code § 1-1171.02(a)(4).

<sup>14</sup> D.C. Official Code § 1-1171.03(b).

<sup>15</sup> DPM § 1899.1.

<sup>16</sup> DPM § 1800.3(g).

for an at-large council seat amounts to using your public office for private gain. Therefore, such use of your position as an HBX Board Member is prohibited.

You also are subject to the DPM provisions concerning outside activities found in DPM § 1807. DPM § 1807.1(a) prohibits you from engaging in any activity that is reasonably likely to interfere with your ability to perform your job, or which may impair the efficient operation of the District government.<sup>17</sup> Therefore, if your campaign becomes so burdensome that it affects your ability to serve as an HBX Board Member, then you would be prohibited from engaging in the campaign and also maintaining your position as an HBX Board Member.

The DPM also has some provisions that are similar to those in the Local Hatch Act regarding the use of District government resources. DPM § 1807.1(b) prohibits you from using government time or resources for other than official business or government approved or sponsored activities.<sup>18</sup> Therefore, you may not use any District resources available to you because of your position with the HBX Board for your campaign.

DPM § 1807.1(c), like D.C. Official Code § 1-1171.02(a)(4) and D.C. Official Code § 1-1171.03(b), prohibits you from ordering, directing, or requesting subordinate officers or employees to perform any personal services not related to official District government functions.<sup>19</sup> DPM § 1807.1(f), like D.C. Official Code § 1-1171.02(a)(1) and DPM § 1800.3(g), prohibits you from engaging in any outside activity that permits you to capitalize on your official title or position.<sup>20</sup> Therefore, like D.C. Official Code § 1-1171.02(a)(1) and DPM § 1800.3(g), DPM 1807.1(f) prohibits you from using your position with the HBX Board in any campaign materials.

In conclusion, your proposed run for an at-large Council seat is permissible as long as you do not violate the above-referenced prohibitions.

Please be advised that this advice is provided to you pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*, which empowers me to provide such guidance. As a result, no enforcement action for violation of the District’s Code of Conduct may be taken against you in this context, provided that you have made full and accurate disclosure of all relevant circumstances and information in seeking this advisory opinion.

Finally, you are advised that the Ethics Act requires this opinion to be published in the District of Columbia Register within 30 days of its issuance, but that your identity will not be disclosed unless and until you consent to such disclosure in writing, should you wish to do so. I encourage individuals to so consent in the interest of greater government transparency. Please, then, let me know your wishes about disclosure.

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<sup>17</sup> DPM § 1807.1(a).

<sup>18</sup> DPM § 1807.1(b).

<sup>19</sup> DPM § 1807.1(c).

<sup>20</sup> DPM § 1807.1(f).

Please let me know if you have any questions or wish to discuss this matter further. I may be reached at 202-481-3411, or by email at [darrin.sobin@dc.gov](mailto:darrin.sobin@dc.gov).

Sincerely,



DARRIN P. SOBIN  
Director of Government Ethics  
Board of Ethics and Government Accountability

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