

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



Office of Government Ethics

VIA EMAIL TO:

July 28, 2014

Ms. Diane Lewis
Chairperson,
D.C. Health Benefits Exchange Board
Diane.Lewis@HBX.com

Dear Ms. Lewis:

This responds to your request for advice concerning whether you permissibly may serve as the Chair of the Campaign Committee for the election of another D.C. Health Benefits Exchange (“HBX”) Board Member, Khalid Pitts, to the D.C. Council. 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 serve as the Chair of the Campaign Committee for the election of another HBX Board Member and you permissibly may engage in associated campaign activities, including fundraising.

You state that you are Chairperson of the HBX Board, a quasi-government instrumentality created by the District to implement the insurance marketplace provisions of the Affordable Care Act.¹ HBX is governed by an Executive Board made up of seven voting members and four non-voting, *ex-officio* members.² 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).³ The Board has broad authority including all the powers necessary to carry out the functions authorized by the Affordable Care Act.⁴

You state that you would like to serve as the Chair of the Campaign Committee for the election of another HBX Board Member, Khalid Pitts, while remaining Chairperson of the HBX Board. Serving as Chair of the Campaign Committee would require you to engage in fundraising. You would like to know, if you served as Chair of the Campaign Committee, what limitations you would face regarding Campaign Committee fundraising

¹ D.C. Official Code § 31-3171.02.

² D.C. Official Code § 31-3171.05.

³ Id.

⁴ 42 USCS § 18031

and policy development, what limitations you would face in discussing the work of Mr. Pitts at HBX, what limitations you would face in discussing your own work at HBX, whether you would be limited in voting on board related matters, and whether you would face limitations with regard to the topics you can discuss or questions you can answer as Chair of the Campaign Committee.

The applicable provisions of the Code of Conduct that inform my decision are found in the Local Hatch Act⁵ and Chapter 18, Title 6B of the D.C. Municipal Regulations.⁶

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.⁷ 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 D.C. Official Code § 1-1171.02(a) states that, “an employee may take an active part in political management or in political campaigns...,” I do not find that you would be prohibited from serving as the Chair of the Campaign Committee for the election of another HBX Board Member.⁸ Additionally, because your status as an “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 D.C. Official Code § 1-1171.02(a)(2), completely would preclude you, a member of a 2(f) board, from fundraising for a District regulated campaign.⁹

Per your question regarding policy development for the Campaign Committee, I do not find that the Local Hatch Act would prevent you from taking an active role. As stated previously, D.C. Official Code § 1-1171.02(a) states that, “an employee may take an active part in political management or in political campaigns...” I interpret that provision to include policy development as a part of political management.

In sum, I find that the Local Hatch Act does not prohibit you from serving as the Chair of the Campaign Committee for the election of another HBX Board Member or fundraising for his campaign (a District-regulated campaign), but please keep in mind the following. 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.¹⁰ Should you use your official authority or influence as an HBX Board Member to further the campaign or to fundraise for the campaign, I would consider you an

⁵ “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”).

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

⁷ D.C. Official Code § 1-1171.01(3)(C).

⁸ D.C. Official Code § 1-1171.02(a).

⁹ D.C. Official Code § 1-1171.02(a)(2).

¹⁰ D.C. Official Code § 1-1171.02(a)(1).

“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 this election. This means that you cannot use your position with the Board to further this 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.

Per your question regarding what limitations you would face in discussing the work of Mr. Pitts with the HBX Board, the prohibitions you face also relate back to the use of your official authority or influence. Although you may speak truthfully about his position with the HBX Board, as to not make any material misrepresentations, if you actively promote the work that Mr. Pitts does for the HBX Board, I would view your active promotion as a misuse of your official authority or influence.

As to your 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 as Chair of the Campaign Committee, 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 the matters 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.¹¹ Essentially, we 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.¹² 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.¹³ 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

¹¹ D.C. Official Code § 1-1171.03.

¹² D.C. Official Code § 1-1171.02(a)(4).

¹³ D.C. Official Code § 1-1171.03(b).

receives compensation for the performance of such services ..., or a member of a District government board or commission, with or without compensation.¹⁴ 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.¹⁵ 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 this private campaign for an at-large Council seat would amount 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.¹⁶ Therefore, if serving as Chair of the Campaign Committee becomes so burdensome that it affects your ability to serve as an HBX Board Member, then you would be prohibited from serving as Chair of the Campaign Committee 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. For instance, DPM § 1807.1(b) prohibits you from using government time or resources for other than official business or government approved or sponsored activities.¹⁷ Therefore, you may not use any District resources available to you because of your position with the HBX Board for this 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.¹⁸ 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.¹⁹ 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.

Per your question regarding voting on HBX matters while serving as Chair of the Campaign Committee, I do not foresee a situation where your position as Chair of the Campaign Committee would outright preclude you from voting as you normally would. If a situation presents itself where you feel a conflict is created between your position as Chair of the Campaign Committee and your position as an HBX Board Member, I advise you to reach out to me for further guidance.

¹⁴ DPM § 1899.1.

¹⁵ DPM § 1800.3(g).

¹⁶ DPM § 1807.1(a).

¹⁷ DPM § 1807.1(b).

¹⁸ DPM § 1807.1(c).

¹⁹ DPM § 1807.1(f).

In conclusion, your proposed position as Chair of the Campaign Committee for a fellow HBX Board Member 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.

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.

Sincerely,



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

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