



INVESTIGATIVE REPORT

Lori Torres, Inspector General

OFFICE: INDIANA INSPECTOR GENERAL
TITLE: RECOMMENDATIONS FOR SPECIAL STATE APPOINTEES
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The Inspector General's Chief Legal Counsel, Tiffany Mulligan, after several investigations by special agents with the Inspector General, reports as follows:

The Indiana Office of Inspector General (OIG) investigates potential criminal activity and Code of Ethics violations within the executive branch of state government. Ind. Code § 4-2-7-3. The OIG is statutorily charged with recommending policies to deter, detect, and eradicate fraud, waste, abuse, mismanagement, and misconduct in state government. Ind. Code § 4-2-7-3 (2). It also is charged with providing advice to agencies on developing, implementing, and enforcing policies and procedures to reduce the risk of fraudulent or wrongful acts within agencies. Ind. Code § 4-2-7-3 (8).

This report provides recommendations to address findings from several investigations that the OIG conducted involving special state appointees. More specifically, this report outlines cases that lacked sufficient cause for an ethics complaint but raised at least the appearance of a conflict of interests. It then incorporates what the OIG learned in these cases to make recommendations to help agencies reduce actual or perceived conflicts of interests involving the board and commission members that they oversee. Along with posting this report on the OIG's website, the OIG is

distributing the recommendations in this report to the ethics officers for all state executive branch agencies.

Special State Appointees and Conflict of Interests Rules

Within the executive branch of state government, there are nearly 200 boards and commissions that are authorized by state statute or executive order. These boards and commissions are made up of a variety of individuals, including individuals employed in full-time positions with the State and individuals employed full-time in the private sector, in nonprofit organizations or with local units of government. In many cases, state statute specifically defines the makeup of these bodies and requires that certain slots on the boards include individuals with specific backgrounds or expertise. This expertise is often critical in allowing members to make informed decisions based on their own knowledge and expertise or the knowledge and expertise of their colleagues in a particular industry; however, their outside employment and financial interests often present unique challenges for special state appointees to comply with the Code of Ethics (Code), most specifically with the Code's rules on conflict of interests.

The Code is found in Ind. Code 4-2-6 and 42 IAC 1. It defines "special state appointee" to mean "a person who is: (A) not a state officer or employee; and (B) elected or appointed to . . . a body designated by any name¹ that: (i) is authorized by statute or executive order; and (ii) functions in a policy or an advisory role in the executive (including administrative) department of state government, including a separate body corporate and politic." Ind. Code § 4-2-6-1(a)(18). This broad definition covers many, if not most, of the members of the nearly 200 boards within the executive branch of state government.

¹ The definition of special state appointee includes anyone "elected or appointed to an authority, a board, a commission, a committee, a council, a task force, or other body designated by any name . . ." Ind. Code § 4-2-6-1(a)(18). For simplicity, this report hereafter uses the term "board" to refer to all of these types of bodies, regardless of their titles.

All of the provisions in the Code apply to special state appointees, and many of these provisions may be foreign for special state appointees who work full-time in the private sector. For example, a special state appointee might be accustomed to accepting gifts from clients or customers of their private business, but a special state appointee cannot accept a gift from someone who has a business relationship with the board on which they serve. *See 42 IAC 1-5-1*. Although several provisions in the Code present challenges to special state appointees that might look different than those faced by state employees or officers, the complaints received by the OIG and the OIG's investigative findings reveal that the Code's conflict of interests provisions present some of the most common and challenging issues for special state appointees. The Code has three main conflict of interests rules that apply to special state appointees as outlined below².

Ind. Code § 4-2-6-9

Conflict of Interests; Decisions and Voting

Ind. Code § 4-2-6-9 prohibits a special state appointee from participating in a decision or vote, or a matter related to that decision or vote, if he or she knows that he or she or a business organization for which he or she works has a financial interest in the outcome of the decision or vote. The statute also requires the special state appointee to notify his or her appointing authority and ethics officer in writing if he or she identifies a potential conflict of interests. The special state appointee must also either seek an advisory opinion from the State Ethics Commission (Commission) or file a written disclosure with the Commission. If the special state appointee seeks an advisory opinion from the Commission, the Commission can either screen the special state

² Indiana's Criminal Code also contains a conflict of interests provision that applies to public servants. Ind. Code § 35-44.1-1-4 prohibits a public servant from knowingly or intentionally having a pecuniary interest in or deriving a profit from a contract or purchase connected with an action by the governmental entity served by the public servant. Although the OIG reviews complaints and investigates cases for criminal conflicts of interests, this report is limited to provisions outlined in the Code of Ethics.

appointee, like they would a state employee, from participating in the decision or vote, or the Commission can make a written determination that the interest is not so substantial that it will likely affect the integrity of the services that the State expects from the special state appointee. If the special state appointee files a written disclosure with the Commission, it must meet certain requirements, including detailing the conflict of interests and describing and affirming the implementation of a screen that is established by the ethics officer.

For example, under this rule, a special state appointee cannot vote on the award of a contract or grant on or for which the special state appointee's outside employer bid or applied. Even if the special state appointee recuses herself from such a vote, she must take the notification and disclosure steps outlined in the statute. Furthermore, the special state appointee cannot make recommendations or participate in board discussion on the vote. Instead she should remove herself from the room during such discussions.

Ind. Code § 4-2-6-10.5

Conflict of Interests; Contracts

Ind. Code § 4-2-6-10.5 prohibits a special state appointee from knowingly having a financial interest in any state contract. The prohibition does not apply to a special state appointee who does not participate in or have contracting responsibilities for the contracting agency so long as he or she files a written disclosure with the OIG before he or she executes the contract with the state agency. The statute requires the written disclosure to meet several requirements, including a statement making full disclosure of all financial interests in a contract and an affirmation that the contract was made after public notice and through competitive bidding if applicable.

For example, under this rule, a special state appointee cannot own a business that has a contract with another state agency, unless the special state appointee is not involved in contracting

for the agency awarding the contract and if the special state appointee files a disclosure with the OIG. Also, a special state appointee cannot have part of his salary come directly from a state contract or grant unless he meets the requirements of the rule.

Ind. Code §4-2-6-11.5

Lobbyists Prohibited from Serving on Executive Branch Boards

Ind. Code § 4-2-6-11.5 prohibits a lobbyist from serving as a special state appointee, unless he or she serves on an advisory body. Ind. Code § 4-2-7-1, which applies to this provision³, defines “lobbyist” to mean an individual who seeks to influence decision making of an executive branch agency and who is registered with the Indiana Department of Administration as an executive branch lobbyist. Ind. Code § 4-2-6-1(a)(1) defines “advisory body” to mean a “. . . body designated by any name of the executive department that is authorized only to make nonbinding recommendations.” Therefore, the statute provides that a special state appointee may not serve as an executive branch lobbyist unless they serve on a body that is only authorized to make nonbinding recommendations.

OIG Investigations Involving Special State Appointees

As noted above, the OIG has found that the Code’s conflict of interests provisions present the most common and sometimes the most challenging issues for special state appointees under the Code. The OIG has received and investigated several complaints involving special state appointees that allege some sort of conflict of interests. Below is a description of four of these cases where the OIG found insufficient cause to file a complaint⁴, but the OIG made several

³ Ind. Code § 4-2-6-1(b) provides that all of the definitions in Ind. Code 4-2-7 apply throughout Ind. Code 4-2-6.

⁴ To review an IG Report involving a case where the Inspector General filed a complaint against a state special appointee for violation of a conflict of interests provision, see: http://in.gov/ig/files/2015-10-0173%20IPLA%20Board%20of%20Pharmacy%20COI_WEB.pdf.

findings that led to the recommendations in this report. Each of these cases involve a different executive branch agency.

Case 1

Beginning in 2013, the OIG investigated an anonymous complaint regarding a special state appointee that sits on a board (the Board) that is staffed by an executive branch agency. In general, the complaint alleged that outside of the special state appointee's membership on the Board, the Board member worked for a non-profit organization and owned and operated a consulting firm with his/her spouse. The complaint alleged that the non-profit organization received government funds administered by the Board and that the consulting firm provided services to several other entities that received funding from the Board.

The OIG's investigation confirmed that the Board member was a special state appointee under Ind. Code § 4-2-6-1(a)(18) because of his/her service on the Board; therefore, the Code applied to the Board member. The OIG also confirmed that the non-profit organization that the Board member served on received several grant awards from the Board and that the Board member was the President of a consulting firm, which the Board member owned and operated with his/her spouse.

The OIG did not find evidence that the Board member participated in any decisions or votes while on the Board involving the non-profit organization for whom the Board member worked, the Board member's and spouse's private consulting firm or clients of the private consulting firm. The OIG reviewed Board meeting minutes; however, the Board meeting minutes generally provided only a summary of the discussion at the meeting with very little detail. The meeting minutes did not specify when the Board member voted and when the Board member refrained from voting. The minutes also varied from meeting to meeting and did not appear to

follow a particular format. The OIG also reviewed the Board's meeting memorandum, recordings, and email correspondence to and from Board members; however, this review found no evidence that the Board member participated in any decisions or votes in which any of the outside organizations he/she was involved with had a financial interest.

Although the OIG found no evidence that the Board member participated in any decision or vote involving his/her nonprofit organization or the consulting firm, the OIG found no evidence that the Board member notified the agency's appointing authority about a potential conflict of interests or sought a formal advisory opinion from the Commission pursuant to Ind. Code § 4-2-6-9⁵. Because the nonprofit organization received funding from the Board, the Board member likely had a potential conflict of interests and should have followed the disclosure requirements in Ind. Code § 4-2-6-9.

The OIG reviewed documentation of past grant awards administered by the state agency to the nonprofit organization where the Board member worked and found no evidence that the Board member's salary with the nonprofit organization was dependent on the grants or that the grants increased his/her salary. As a result, the OIG was unable to determine if the Board member knowingly had a financial interest in a grant made by a state agency; therefore, the OIG had insufficient cause to support a violation of Ind. Code § 4-2-6-10.5.

The OIG also looked at the Board member's consulting firm. The OIG found that the consulting firm did not have a contract with the State of Indiana. After reviewing various records from the consulting firm, the OIG found that the consulting firm performed work for one entity that applied for funds from the Board. The OIG found no evidence that the Board member was

⁵ In 2015 the General Assembly amended Ind. Code § 4-2-6-9 to provide individuals the option of filing a written disclosure statement with the State Ethics Commission (Commission) instead of seeking a formal advisory opinion from the Commission. This option was not available when the OIG received the ICJI complaint referenced in this report.

directly involved in this work; instead the Board member's spouse was listed as the contractor and principal consultant on all of related documents. Also, the OIG did not find evidence that the entity who contracted with the consulting firm used state funding to pay the consulting firm for the work. As a result, the OIG found no evidence that the consulting firm had a financial interest in a state contract.

In summary, the OIG found no evidence that the Board member violated a Code of Ethics provision, except for the Board member's failure to disclose a potential conflict of interests to the agency's appointing authority and to seek a formal advisory opinion from the Commission under Ind. Code § 4-2-6-9. The OIG determined that based on the facts discovered during the investigation, there was insufficient cause to bring a complaint before the Commission in this matter.

Case 2

Beginning in 2015, the OIG investigated a complaint involving three members of a board (the Board) that is staffed by an executive branch agency. The complaint alleged that multiple members of the Board had financial interests in contracts with state agencies in violation of Ind. Code § 4-2-6-10.5.

The OIG's investigation confirmed that the three Board members were special state appointees under Ind. Code § 4-2-6-1(a)(18) because of their service on the Board; therefore, the Code applied to them. The OIG also confirmed that each of the Board members had completed ethics training and found that the Inspector General and Ethics Director for the OIG trained them all in person in 2014.

The OIG's investigation found that each of the three Board members had two or more contracts with one or more state executive branch agencies that had not been disclosed in

accordance with Ind. Code § 4-2-6-10.5. (None of the Board members had contracts with the agency that staffed the Board.) The OIG obtained copies of these contracts. After a review of contracts, the OIG determined that the Board members entered into these agreements prior to the 2015 change in the law and, because it was unclear when the conflict of interests was identified⁶, the OIG gave them an opportunity to comply with the statutory filing requirement. The OIG received all of the required disclosure statements. Because the Board members came into compliance with the filing requirements, the OIG closed this case.

Case 3

Beginning in 2017, the OIG investigated a complaint involving a special state appointee who served on a board (the Board) that was staffed by yet a different executive branch agency. The complaint alleged that the Board member worked as a lobbyist while serving on the Board and failed to disclose his work as a lobbyist.

The OIG's investigation confirmed that the Board member was a special state appointee under Ind. Code § 4-2-6-1(a)(18) because of his/her service on the Board; therefore, the Code applied to the Board member. The OIG also confirmed that the Board member served as an officer for a private organization that has received grant funding from the agency in the past. The OIG found that the Board member had been a registered executive branch lobbyist with the Indiana Department of Administration for several years, but the Board member had not been registered as an executive branch lobbyist since 2012.

⁶Prior to 2015, Ind. Code § 4-2-6-10.5 provided an exception to the rule if the employee made a full written disclosure of any actual or prospective violation of the rule and terminated the financial interest within thirty days of learning of the actual or prospective violation of the rule. In 2015, the General Assembly amended this statute and removed the exception. The amended statute now requires a written disclosure statement to be filed with the OIG prior to the special state appointee executing the contract with the agency.

During the investigation, the OIG reviewed several documents, including the Indiana Department of Administration's executive branch lobbying records, grant documents, and federal and state law. The OIG learned that the Board votes to approve the agency's applications for certain federal grants to the State; however, it does not vote on which specific private or nonprofit entities receive the funding from the grant. The OIG also learned that the Board is required by federal law to review the State's plans for the grant and to provide recommendations to the State for modifications of the plans. Federal law requires the State to submit recommendations from the Board to the federal government along with its grant application regardless of whether the State made the recommended modifications from the Board. Nothing in federal law or the grant documents that the OIG reviewed indicates that the Board makes binding recommendations or decisions.

The OIG's investigation found that the Board member may have engaged in legislative lobbying but was not registered as an executive branch lobbyist while serving as a special state appointee. Furthermore, even if he/she had engaged in executive branch lobbying, the Board appears to be an advisory body because it appears to be authorized only to make nonbinding recommendations. As a result, the OIG's investigation revealed no evidence that the Board member violated Ind. Code § 4-2-6-11.5.

The OIG also found no evidence that the Board member participated in any decision or vote, or matter related to a decision or vote, in which his/her outside employers had a financial interest. Although his/her employer received grant funding from the agency, the Board on which the member sits as a special state appointee did not review or vote on funding for specific providers, such as his/her outside employer. Instead the Board only voted on very general

information included in the agency's grant application to the federal government. Therefore, the OIG found no evidence that the Board member violated Ind. Code § 4-2-6-9.

The OIG's investigation revealed no evidence that the board member violated any provision of the Code; therefore, the OIG closed the investigation for insufficient cause.

Case 4

In 2017, the OIG received an inquiry from another executive branch agency regarding a special state appointee that served on a board (the Board) that the agency staffs. According to the inquiry, the Board member solicited donations for an organization with which the Board member is affiliated from other Board members and from the Board itself.

Based on the information provided, the Board member was a special state appointee under Ind. Code § 4-2-6-1(a)(18) because of service on the Board; therefore, the Code applied to the Board member. The OIG provided the agency head with an overview of the rules in the Code that might apply to this situation, including two conflict of interests rules: Ind. Code § 4-2-6-9 and Ind. Code § 4-2-6-10.5.

The OIG concluded that Ind. Code § 4-2-6-9 would be implicated if the Board member is an officer, director, member, trustee, partner, or employee of the organization that is seeking funding from the Board. Furthermore, the OIG strongly advised the agency to not allow Board members to bring matters before the Board that involve outside organizations in which they are involved. The OIG advised that this will help avoid any potential conflict of interests or even the appearance of impropriety, regardless of whether the Board members intend to vote on the matter themselves. The OIG also advised that if the Board members are aware that the Board on which they serve is making decisions or voting on matters that involve an outside organization in

which they are involved, they should seek an informal advisory opinion from the OIG or discuss the matter with the agency's Ethics Officer.

The OIG further concluded that Ind. Code § 4-2-6-10.5 would be implicated if the Board member had a financial interest in a contract, such as a grant agreement between the Board and a business organization in which the Board member may be invested. The OIG noted, however, that the Board member could have a financial interest in a grant agreement if the Board does not have contracting responsibility for the agency that is entering into a grant agreement and if he/she files a conflict of interests – contracts disclosure statement with the OIG. The OIG advised that Board members should seek an informal advisory opinion from the OIG if they know a state entity will award a grant or other agreement to organizations in which they are involved.

The OIG did not complete an investigation in this matter but instead referred the matter to the agency with the above advice. The OIG also suggested that the use the overview of the rules to develop a policy to address future solicitations by members of boards that the agency oversees.

Recommendations

Based upon these investigations from a wide variety of executive branch agencies and other OIG activities, the OIG makes the following recommendations to state executive branch agencies that oversee or staff boards that include special state appointees. The goal of these recommendations is to help agencies reduce the instances of actual or perceived conflicts of interests and protect special state appointees from taking actions that may lead to potential complaints or investigations under the Code.

Recommendation 1

The OIG recommends all state executive branch agencies educate and advise special state appointees on the Code. Under 42 IAC § 1-4-1, all special state appointees must be properly trained in the Code within six weeks of their appointment date and at least every two years thereafter. The OIG has created an online ethics training that helps agencies and special state appointees meet this requirement. The OIG works very closely with agency ethics officers to track training compliance and ensure all special state appointees have taken the online ethics training. The OIG encourages ethics officers to continue working with the OIG on this effort and to provide the OIG with updated rosters of their board members so that the OIG can ensure all special state appointees complete the ethics training in a timely manner.

Along with ensuring special state appointees take the online ethics training, the OIG recommends agency ethics officers take additional steps to ensure all special state appointees under their purview understand the Code's rules and how they might apply to their specific situations. These steps might include: providing in-person training on the Code where special state appointees can meet their ethics officer and ask questions; distributing additional materials to special state appointees on some of the Code's most common rules, such as the brochure the OIG prepared on high risk areas for boards members⁷ or other materials the ethics officer might create specific to their agency boards; making themselves available to special state appointees for questions on the Code; and advising special state appointees on when they should request an informal or formal advisory opinion from the OIG.

⁷ This brochure can be found at: <http://in.gov/ig/files/Boards%20and%20Commissions.pdf>

Recommendation 2

The OIG recommends all state executive branch agencies proactively identify actual or perceived conflicts of interests that their special state appointees might face. This might involve asking special state appointees to fill out a survey identifying their outside employment or other financial interests when they first join the board, when the information they originally submitted changes, and on an annual basis thereafter. The survey also could ask board members to affirm that they do not currently serve as an executive branch lobbyist. Agency efforts to proactively identify conflicts of interests also could involve implementing a policy or providing guidance to a particular board on what might constitute a conflict of interests for that board.

The OIG recognizes that special state appointees are often, if not always, vetted for conflicts of interests when they are first appointed to a board. Although this is an important first step in reducing the instances of actual or perceived conflicts of interests, taking the additional step of having the agency ask for this information might ensure agency ethics officers have access to the information and allow agency ethics officers to counsel special state appointees on their specific situation. For example, if the agency ethics officer knows of a potential conflict of interests under Ind. Code §§ 4-2-6-9 or 10.5, the agency ethics officer can advise the special state appointee to take any necessary steps, such as notifying their appointing authority or agency ethics officer, setting up a screen or filing a disclosure. Requiring board members to provide updates on their outside employment and financial interests allows the agency to maintain current information and continue to monitor boards for potential conflicts.

Recommendation 3

The OIG recommends all executive branch boards provide consistent records of any decisions or votes and recusals. Many board meetings must comply with Indiana's Public

Meetings (Open Door) Law found in Ind. Code 5-14-1.5. This statute requires the board to keep a memorandum of the meeting that includes certain details of the meeting, including “a record of all votes taken by individual members if there is a roll call.” Ind. Code § 5-14-1.5-4 (b)(4).

Although where applicable this can provide evidence that a board member recused himself or herself from a particular vote, it does not provide evidence of whether the board member recused themselves of all matters, including discussions, involving the vote. Furthermore, several OIG investigations found that boards often take action without a roll call, such as through unanimous consent. In these cases, boards may not keep a record of a board member recusing himself or herself when he or she has a conflict of interests.

By maintaining consistent records on who participates in decisions, votes, or discussions on a specific matter and who recuses themselves from these matters, boards can increase public confidence in their decisions. Specifically, records of recusals will help ensure the public that board members are not violating the Code’s conflict of interests provisions and the board’s decisions are not influenced by a member’s potential conflict of interests.

Dated: October 2, 2017

APPROVED BY:

A handwritten signature in black ink that reads "Lori Torres". The signature is written in a cursive, flowing style.

Lori Torres, Inspector General