INSPECTOR GENERAL REPORT

2009-09-0191

September 7, 2010

OFFICIAL MISCONDUCT STATUTE

Summary

A recommendation to amend the criminal official misconduct statute to clarify whether its application is limited to conduct that (1) constitutes another criminal offense and (2) is committed while in the course of official duties.

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Inspector General David O. Thomas reports as follows:

This report involves a recommendation to the Indiana Legislature for it to consider amending the Official Misconduct statute in IC 35-44-1-2(1) and (2).[1]

[1] IC 35-44-1-2: Official misconduct
Sec. 2. A public servant who:
(1) knowingly or intentionally performs an act that the public servant is forbidden by law to perform;
(2) performs an act the public servant is not authorized by law to perform, with intent to obtain any property for himself or herself;
(3) knowingly or intentionally solicits, accepts, or agrees to accept from an appointee or employee any property other than what the public servant is authorized by law to accept as a condition of continued employment;
(4) knowingly or intentionally acquires or divests himself or herself of a pecuniary interest in any property, transaction, or enterprise or aids another person to do so based on information obtained by virtue of the public servant's office that official action that has not been made public is contemplated;
(5) knowingly or intentionally fails to deliver public records and property in the public servant's custody to the public servant's successor in office when that successor qualifies; or
(6) knowingly or intentionally violates IC 36-6-4-17(b);

The reason for this recommendation is to clarify the statutory language so that, if endorsed by the Indiana Legislature, the public, the Office of Inspector General (OIG) and Prosecuting Attorneys will be on notice and have clarity with regard to what constitutes this offense.

The issues addressed below are not purely academic questions. Instead, these issues have arisen in both the OIG's advisory (IC 4-2-7-3(8)) and investigatory (IC 4-2-7-3(3)) functions. Accordingly, the OIG seeks Legislative guidance to better advise and investigate.

The OIG is charged to "recommend policies and carry out other activities designed to deter, detect, and eradicate fraud, waste, abuse, mismanagement and misconduct in state government." IC 4-2-7-3(2). The OIG is also authorized to "recommend legislation to the governor and general assembly to strengthen public integrity laws, including the code of ethics." IC 4-2-7-3(9).

With this limited jurisdiction in mind, the OIG respectfully makes the following findings and recommendation for consideration by the Indiana General Assembly.

I

Findings

A

The statutory language for the class D felony crime of official misconduct in IC 35-44-1-2(1) currently reflects three elements of proof: a (1) public servant

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commits official misconduct, a Class D felony [emphasis added].

(as defined in IC 35-41-1-24[2]) who (2) knowingly or intentionally, (3) performs an act that the public servant is prohibited by law to perform.

Similar to this third element of proof in subsection (1), subsection (2) requires this same proof.

B

Regarding the third element, an act "not authorized by law" in its literal interpretation could be interpreted to include just that: any law. As an extreme, but possible example of a literal interpretation of the current offense, a judge, legislator or executive branch employee (as a public servant under IC 35-41-1-24) caught speeding on his or her way to the grocery store on the weekend could be guilty of this class D felony criminal offense.[3] The infraction offense of speeding (law violation) would be committed by a government employee (public servant).

More plausibly, a non-criminal but illegal act, such as a violation of a statutory procedure related to a person's official government work that is not otherwise a crime, might also qualify under a literal interpretation of this criminal offense.

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[2] IC 35-41-1-24: "Public servant" defined
Sec. 24. "Public servant" means a person who:
(1) is authorized to perform an official function on behalf of, and is paid by, a governmental entity;
(2) is elected or appointed to office to discharge a public duty for a governmental entity; or
(3) with or without compensation, is appointed in writing by a public official to act in an advisory capacity to a governmental entity concerning a contract or purchase to be made by the entity.
The term does not include a person appointed by the governor to an honorary advisory or honorary military position.
As added by P.L.311-1983, SEC.25. Amended by P.L.13-1987, SEC.15.

Although these literal interpretations may seem absurd or extreme, the current use of the word "law" rather than "offense" could be interpreted as a deliberate intent by the Legislature to make this offense more expansive than the judicial opinions addressed herein. This is because the word "offense" is specifically defined in IC 35-41-1-19 as a crime and not an infraction. Had the legislature intended to limit the application of official misconduct to conduct that is a crime, it could have used the word "offense" rather than "law."

C

It is a well-settled rule of judicial interpretation that statutes are to be interpreted with regard to the plain and ordinary meaning of their words. *Cox v. Worker's Comp. Bd.*, 675 N.E.2d 1053, 1057 (Ind.1996). The primary goal in statutory construction is to determine, give effect to, and implement the intent of the legislature. *Collier v. Collier,* 702 N.E.2d 351 (Ind.1998).

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D

On this issue of the prohibited conduct, the Indiana Supreme Court has stated in relevant part:

> Although the language of Ind. Code § 35-44-1-2(1) is broad and general, the heart of the issue in an official misconduct charge is explicit: whether the act was done by a public official in the course of his official duties. *See Daugherty v. State,* 466 N.E.2d 46 (Ind.Ct.App.1984) (Judge Ratliff concurring). There must be a connection between the charge and the duties of the office. A charge for misconduct must rest upon criminal behavior that is related to the performance of official duties. *See e.g. State v. Schultz,* 71 N.J. 590, 367 A.2d 423 (1976) (forgeries of endorsements on checks received in payment of traffic fines which forgeries were done by clerk receiving the checks). Needless to say, if the misconduct bears no relation to the official duties, there is no official misconduct. *Id. See e.g.*

> *Kauffman v. Glassboro*, 181 N.J.Super. 273, 437 A.2d 1040*1040 334 (Ct.App.Div.1981) (burglary by a police officer held unrelated to official duties).

State v. Dugan, 793 N.E.2d 1034, 1039 (Ind.2003).

As recently as 2008, the Indiana Court of Appeals in *Heinzman v. State*, 895 N.E.2d 716, 724 (Ind. Ct. App. 2008) reversed several convictions for official misconduct involving a Department of Child Services caseworker who molested a child because he was no longer working in his official capacity at the time of the offense. The court determined that "[a] charge for official misconduct must rest on criminal behavior related to the performance of official duties; if the misconduct bears no relation to the official duties, there is no official misconduct."

II

Recommendation

If these judicial interpretations accurately reflect the intent of the Indiana Legislature regarding the official misconduct statute, the OIG respectfully recommends a clarification of the statutory language to reflect this intent. Such an amendment could be made as follows:

> IC 35-44-1-2: Official misconduct
>
> Sec. 2. A public servant[4] who:
> (1) knowingly or intentionally performs **in the course of official duties an offense as defined in IC 35-41-1-19** ~~an act that the public servant is forbidden by law to perform;~~
> (2) **knowingly or intentionally performs in the course of official**

[4] A "public servant" is currently defined in IC 35-41-1-24.

duties an offense as defined in IC 35-41-1-19 ~~performs an act the public servant is not authorized by law to perform~~, with intent to obtain any property for himself or herself;

(3) knowingly or intentionally solicits, accepts, or agrees to accept from an appointee or employee any property other than what the public servant is authorized by law to accept as a condition of continued employment;

(4) knowingly or intentionally acquires or divests himself or herself of a pecuniary interest in any property, transaction, or enterprise or aids another person to do so based on information obtained by virtue of the public servant's office that official action that has not been made public is contemplated;

(5) knowingly or intentionally fails to deliver public records and property in the public servant's custody to the public servant's successor in office when that successor qualifies; or

(6) knowingly or intentionally violates IC 36-6-4-17(b);

commits official misconduct, a Class D felony [emphasis added].

In essence, if the proposed language reflects the intent of the legislature, the official misconduct statute would operate as either a penalty enhancing statute or alternatively as a discretionary charging tool by prosecuting attorneys, because a separate criminal offense would always be available.[5]

It may be argued that a "public servant" is never off-duty, thereby justifying a definition of "in the course of official duties." But such an interpretation would defeat a legislative change, if made.

The proposed amendments would continue to promote the original legislative intent in enacting the law, which is to hold public servants to a higher standard of conduct. The following example illustrates how the legislative changes to the statue might apply: if a prosecuting attorney could prove a public servant was guilty of public intoxication (IC 7.1-5-1-3) *while in the course of his*

[5] RICO patterns of official misconduct remain a predicate offense for the charging of "corrupt business influence", yet an additional penalty enhancement to a class C felony. IC 35-45-6-1 and 35-45-6-2.

official work duties, the potential penalties with the alternative or dual charging of official misconduct would increase from:

Class B misdemeanor:[6] 0-180 days in jail, fine up to $1000

to a:

Class D felony:[7] 180 days–3 years incarceration, fine up to $10,000

Conclusion

For the above reasons, the OIG respectfully recommends a consideration by the Indiana Legislature to amend subsections (1) and (2) of the official misconduct statute to clarify its application. This recommendation is respectfully made in an attempt to strengthen this public integrity law pursuant to the legislative directive given to the OIG in IC 4-2-7-3(9). The OIG remains committed to providing additional information or research upon request.

Dated this 7th day of September, 2010.

David O. Thomas, Inspector General

[6] IC 35-50-3-3.
[7] IC 35-50-2-7.