

IC 4-2-6-8 Financial disclosure; filing false statement; penalty

SEC concluded that since no individual members of the PERF board of trustees were permitted to transact business on behalf of the fund, none of them could properly be characterized as having final purchasing authority for purposes of IC 4-2-6-8(a)(6).

ADVISORY OPINION

November 9, 2006
No. 06-I-25

The Indiana State Ethics Commission (Commission) issues the following advisory opinion concerning Indiana Code 4-2-6. Any opinion rendered by the Commission, until amended or revoked, is binding on the Commission in any subsequent allegations concerning the person who requested the opinion and who acted in good faith in accordance with the advice rendered, unless material facts were omitted or misstated by the person in the request for the opinion or testimony before the Commission.

BACKGROUND

On November 3, 2006, the Commission received a joint request for an advisory opinion from the respective General Counsels for the Indiana State Teachers' Retirement Fund (TRF), the Indiana Public Employees' Retirement Fund (PERF), and the Indiana Finance Authority (IFA) regarding the application of IC 4-2-6-8(a)(6) to the board members of each entity. The request for an opinion noted that IC 4-2-6-8(a)(6) requires any agency employee, special state appointee, former agency employee, or former special state appointee with "final purchasing authority" to file a written financial disclosure statement with the Inspector General. The term "final purchasing authority" has not yet been defined by statute, administrative rule, or written advisory opinion. The General Counsels indicated their belief that whether their respective board members would be required to file a financial disclosure statement in accordance with IC 4-2-6-8(a)(6) hinged on the definition of the term "final purchasing authority" and whether their respective board members would be considered to have such authority in the performance of their duties as special state appointees with the entities in question.

While the General Counsels collectively asked for a written advisory opinion as to the application of IC 4-2-6-8 to their respective boards, the Commission notes that each entity must be analyzed separately given that each entity has different statutory authority. Accordingly, the Commission issues separate written advisory opinions to each entity. The analysis in this opinion relates specifically to PERF.

ISSUE

Are members of PERF's board of trustees required to file financial disclosure statements in accordance with IC 4-2-6-8?

RELEVANT LAW

IC 4-2-6-8

Financial disclosure; filing false statement; penalty

Sec. 8. (a) The following persons shall file a written financial disclosure statement:

- (1) The governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney general, and state superintendent of public instruction.
- (2) Any candidate for one (1) of the offices in subdivision (1) who is not the holder of one (1) of those offices.
- (3) Any person who is the appointing authority of an agency.
- (4) The director of each division of the department of administration.
- (5) Any purchasing agent within the procurement division of the department of administration.
- (6) Any agency employee, special state appointee, former agency employee, or former special state appointee with final purchasing authority.

- (7) An employee required to do so by rule adopted by the inspector general.
- (b) The statement shall be filed with the inspector general as follows:
- (1) Not later than February 1 of every year, in the case of the state officers and employees enumerated in subsection (a).
- (2) If the individual has not previously filed under subdivision (1) during the present calendar year and is filing as a candidate for a state office listed in subsection (a)(1), before filing a declaration of candidacy under IC 3-8-2 or IC 3-8-4-11, petition of nomination under IC 3-8-6, or declaration of intent to be a write-in candidate under IC 3-8-2-2.5, or before a certificate of nomination is filed under IC 3-8-7-8, in the case of a candidate for one (1) of the state offices (unless the statement has already been filed when required under IC 3-8-4-11).
- (3) Not later than sixty (60) days after employment or taking office, unless the previous employment or office required the filing of a statement under this section.
- (4) Not later than thirty (30) days after leaving employment or office, unless the subsequent employment or office requires the filing of a statement under this section.
- The statement must be made under affirmation.
- (c) The statement shall set forth the following information for the preceding calendar year or, in the case of a state officer or employee who leaves office or employment, the period since a previous statement was filed:
- (1) The name and address of any person known:
- (A) to have a business relationship with the agency of the state officer or employee or the office sought by the candidate; and
- (B) from whom the state officer, candidate, or the employee, or that individual's spouse or unemancipated children received a gift or gifts having a total fair market value in excess of one hundred dollars (\$100).
- (2) The location of all real property in which the state officer, candidate, or the employee or that individual's spouse or unemancipated children has an equitable or legal interest either amounting to five thousand dollars (\$5,000) or more or comprising ten percent (10%) of the state officer's, candidate's, or the employee's net worth or the net worth of that individual's spouse or unemancipated children. An individual's primary personal residence need not be listed, unless it also serves as income property.
- (3) The names and the nature of the business of the employers of the state officer, candidate, or the employee and that individual's spouse.
- (4) The following information about any sole proprietorship owned or professional practice operated by the state officer, candidate, or the employee or that individual's spouse:
- (A) The name of the sole proprietorship or professional practice.
- (B) The nature of the business.
- (C) Whether any clients are known to have had a business relationship with the agency of the state officer or employee or the office sought by the candidate.
- (D) The name of any client or customer from whom the state officer, candidate, employee, or that individual's spouse received more than thirty-three percent (33%) of the state officer's, candidate's, employee's, or that individual's spouse's nonstate income in a year.
- (5) The name of any partnership of which the state officer, candidate, or the employee or that individual's spouse is a member and the nature of the partnership's business.
- (6) The name of any corporation (other than a church) of which the state officer, candidate, or the employee or that individual's spouse is an officer or a director and the nature of the corporation's business.
- (7) The name of any corporation in which the state officer, candidate, or the employee or that individual's spouse or unemancipated children own stock or stock options having a fair market value in excess of ten thousand dollars (\$10,000). However, if the stock is held in a blind trust, the name of the administrator of the trust must be disclosed on the statement instead of the name of the corporation. A time or demand deposit in a financial institution or insurance policy need not be listed.
- (8) The name and address of the most recent former employer.
- (9) Additional information that the person making the disclosure chooses to include. Any such state officer, candidate, or employee may file an amended statement upon discovery of additional information required to be reported.
- (d) A person who:
- (1) fails to file a statement required by rule or this section in a timely manner; or

(2) files a deficient statement; upon a majority vote of the commission, is subject to a civil penalty at a rate of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

(e) A person who intentionally or knowingly files a false statement commits a Class A infraction.

(Formerly: Acts 1974, P.L.4, SEC.2.) As amended by P.L.12-1983, SEC.5; P.L.13-1987, SEC.9; P.L.9-1990, SEC.7; P.L.3-1993, SEC.237; P.L.44-2001, SEC.3; P.L.14-2004, SEC.180; P.L.222-2005, SEC.6; P.L.89-2006, SEC.9.

ANALYSIS

As a threshold matter, the Commission finds that it has jurisdiction over the six (6) individuals who comprise PERF's board of trustees. The Commission renders this advisory opinion by virtue of its authority under IC 4-2-6-4(b)(1)(A). This analysis is limited to the factual representations made to the Commission by Andrea Unzicker, General Counsel of PERF, and the Commission's understanding of the PERF's statutory authority set forth in IC 5-10.3.

The Commission notes that PERF's board is composed of six (6) trustees. See IC 5-10.3-3-1. The board of trustees appoints a director, subject to approval of the Governor. See IC 5-10.3-3-7. The statutory duties of the director are set forth in IC 5-10.3-3-9. Ms. Unzicker represents to the Commission that PERF's procurement policies provide that the Executive Director shall have full and complete authority to enter into contracts. Ms. Unzicker also represents that PERF's board of trustees is responsible for approving investment contracts, but that no individual board member can expend money or sign a contract on behalf of PERF. According to IC 5-10.3-3-6, four (4) trustees constitute a quorum for the transaction of business. Various duties and powers of the board of trustees are set forth in IC 5-10.3-3-7 and IC 5-10.3-3-8 respectively. The board's powers specifically include the expenditure of money, including income from the fund's investments, for effectuating the fund's purposes. See IC 5-10.3-3-7(12).

With regard to the application of IC 4-2-6-8 in this case, the Commission finds that members of PERF's board of trustees are not subject to IC 4-2-6-8(a)(6). Specifically, the filing requirement set forth in IC 4-2-6-8(a)(6) appears to be intended to apply to an individual employee or special state appointee, current or former, who has or had individual discretion to exert final purchasing authority. Given that no individual board member may transact business on behalf of the fund, but rather, a quorum vote is required for the transaction of business, it appears that the no individual board member may properly be characterized as having final purchasing authority for purposes of IC 4-2-6-8(a)(6).

The Commission notes that members of PERF's board of trustees are subject to state ethics laws prohibiting various conflicts of interest that are set forth in IC 4-2-6. To the extent that any individual board member would have a potential conflict of interest as contemplated by IC 4-2-6-9, any other state ethics statute, or PERF's enabling statute, such member has a mandatory duty to disclose the potential conflict of interest for review.

Conclusion

Subject to the foregoing analysis, members of PERF's board of trustees are not required to file financial disclosure statements under IC 4-2-6-8(a)(6); however, this advisory opinion does not relieve any individual board member of any filing requirement the respective board member may have under another provision of IC 4-2-6-8(a). Members of PERF's board of trustees must ensure compliance with this advisory opinion and all state ethics laws and rules.

Respectfully submitted,

Laura L. Forest, Director