

IC 4-2-6-1 Definitions

Although a prior executive order (98-23) recognized the Governor's Public Building Foundation, Inc., no successor to Governor O'Bannon has issued an EO renewing this recognition. SEC concluded that since no EO or statute authorizes the Foundation, its members are not considered "special state appointees" as the term is defined for purposes of the Code of Ethics.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to I.C. 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

The Governor's Public Building Foundation, Inc. ("Foundation") is a 501(c)(3) that is distinct from the Governor's Residence Commission. The Foundation filed Articles of Incorporation with the Indiana Secretary of State in December of 1997. Under these Articles of Incorporation, the purposes of the Foundation include "raising and distributing funds for the operation and use of buildings belonging to the State of Indiana, such as the Governor's Residence."

In May of 1998, the Foundation received a letter from the Internal Revenue Service with the determination that the Foundation would be exempt from federal income tax as a 501(c)(3) organization. Governor O'Bannon then issued Executive Order 98-23 ("EO 98-23") in July of 1998, recognizing the Foundation out of a need for the establishment of an Indiana not-for-profit corporation to cooperate with public and private entities to maintain the Governor's Residence and other buildings maintained by the State of Indiana. EO 98-23 also referenced the Articles of Incorporation filed in 1997.

The Foundation's Articles of Incorporation name the three initial members of the Foundation's Board of Directors and refer to the Bylaws of the Corporation for how future members will be selected. The Bylaws of the Corporation provide that the Governor may remove any director at any time with or without cause. They also provide that the Governor will appoint new members to the Foundation when vacancies occur. The Bylaws allow the Foundation's Board of Directors to amend them anytime. EO 98-23 provided that the Governor will appoint the Foundation's members. Both EO 98-23 and the Foundation's Articles of Incorporation provide that the Foundation will continue perpetually. However, EO 98-23 has not been renewed by any of Governor O'Bannon's successors in office.

ISSUE

Are members of the Foundation's Board of Directors considered special state appointees and therefore subject to the application of the Code?

RELEVANT LAW

I.C. 4-2-6-1

(a)(18) "Special state appointee" means a person who is: (A) not a state officer or employee; and (B) elected or appointed to an authority, a board, a commission, a committee, a council, a task force, or other body designated by any name that: (i) is authorized by statute or executive order; and (ii) functions in a policy or an advisory role in the executive (including the administrative) department of state government, including a separate body corporate and politic.

ANALYSIS

I.C. 4-2-6-1(a)(18) defines "special state appointee" as a person who is "not a state officer or employee" and is "elected or appointed to... a commission... that is authorized by statute or executive order; and functions in a policy or an advisory role in the executive (including the administrative) department of state government...." In this case, the Foundation is not authorized by statute. It was authorized by EO 98-23 at one time; however the EO has not been renewed since Governor O'Bannon's Administration. According to I.C. 4-1-7.1-3, an agency created by executive order expires no later than the date the officer who created it leaves office. I.C. 4-1-7.1-1 defines agency to include "any agency, authority, board... or other similar unit created or established by ... executive order of an officer of the state...." The Foundation appears to fall within the definition of the term "agency." Although the Foundation still exists under its Articles of Incorporation, it appears that it is no longer authorized by an executive order.

Under EO 98-23, the Governor was responsible for appointing the Board of Directors to the Foundation. Although the Governor still appoints the members of the Foundation pursuant to the Foundation's current Bylaws, the Board of Directors may amend the bylaws at anytime. Because EO 98-23 has expired and because the Foundation has the ability to change how future Directors are named by changing its bylaws, it does not appear that the Foundation's Board of Directors are special state appointees and accordingly, the Code would not apply to them.

CONCLUSION

The Commission finds that the members of the Foundation's Board of Directors are not special state appointees and are therefore not subject to application of the Code.