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OFFICIAL OPINION 2002-1

Tim McClure, Director
State Ethics Commission
402 West Washington Street, Room W189
Indianapolis, Indiana 46204

RE: Authority of State Ethics Commission to Enforce Executive Orders

Dear Mr. McClure:

This letter responds to the request of the former director, David Maidenberg, for an answer to the following question:

Does the State Ethics Commission have the authority to enforce an executive order establishing standards of conduct for the Indiana Utility Regulatory Commission?

It is our opinion that the State Ethics Commission does have the authority to enforce an executive order establishing standards of conduct for the Indiana Utility Regulatory Commission.

ANALYSIS

The Commission is established in, and granted authority by, Indiana Code Chapter 4-2-6. The Commission's authority to investigate and take action concerning ethics violations is found in Indiana Code Chapter 4-2-6-4 which provides a procedure by which the Commission may initiate investigations itself or receive complaints that ultimately can lead to action being taken. In language that is repeated elsewhere in the statute regarding the Commission's powers, Indiana Code Section 4-2-6-4(b)(2)(E) and (F) allow the Commission to take various actions when it determines that a respondent has violated "this chapter, a rule adopted under this chapter, or any other statute or rule establishing standards of official conduct of state officers, employees, or special state appointees."

In 1993 Governor Bayh issued an executive order entitled Code of Ethics for the Indiana Utility Regulatory Commission which addresses the conduct of the members of the Commission and certain employees of the Commission. Section 1 of the executive order states that:

An independent and honorable Commission is indispensable to the proper performance of its statutory duties. Commissioners should establish, maintain, and enforce high standards of conduct so that the integrity and independence of the Commission may be preserved. **The provisions of this code should be construed and applied to further that objective without any limitation upon the State Ethics Commission in the exercise of its powers.**

(emphasis added). Therefore, it is clear that the intent was that the Code of Ethics for the Indiana Utility Regulatory Commission was intended to supplement other requirements enforced by the State Ethics Commission.

There still remains the question of whether this Code of Ethics falls within the scope of “any other statute or rule establishing standards of official conduct of state officers, employees, or special state employees” and thus falls within the State Ethics Commission jurisdiction. The question becomes whether this Code of Ethics is either a statute or a rule. Executive orders are issued by the governor and statutes are enacted by the General Assembly. An executive order is clearly not a statute.

The Indiana Court of Appeals discussed the nature of executive orders in a recent opinion stating that:

In general an executive order is a command or direction issued by the “President of the United States or the chief executive officer of a State that has the force of law and that is promulgated in accordance with applicable law.” 43 U.S.C. § 14616 (defining an executive order in the context of public health and welfare). An executive order must fall within the authority granted to the Governor by the constitution or statutory provision. 81A C.J.S. § *States* 130 (1977). . . . Executive power is the “power to execute the laws, to carry them into effect as distinguished from the power to make the laws and the power to judge them.” *Tucker v. State*, 218 Ind. 614,670, 35 N.E. 2d 270, 291 (1941). By express legislation the Governor has the responsibility of ensuring the efficient operation of the executive branch of government. Ind. Code § 4-3-6-3 provides in part that the Governor shall re-examine from time to time the organization of all agencies of State government and determine what changes are necessary to accomplish various purposes including “to promote the better execution of laws, the more effective management of the executive and administrative branch of the government and of its agencies and functions, and expeditious administration of the public business.”

Nass v. State ex. rel. Unity Team, Local 9212 International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), 718 N.E.2d 757, 763 (Ind. App. 1999), transfer denied, *Nass v. Unity Team*, 735 N.E.2d 224 (Ind. 2000).

However, the inquiry remains whether an executive order is a rule. Rules and rulemaking are generally governed by Indiana Code Chapter 4-22-2. Several pertinent definitions are found in Indiana Code Section 4-22-2-3 as follows:

(a) **"Agency" means any officer, board, commission, department, division, bureau, committee, or other governmental entity exercising any of the executive (including the administrative) powers of state government.** The term does not include the judicial or legislative departments of state government or a political subdivision as defined in IC 36-1-2-13.

(b) "Rule" means the whole or any part of an agency statement of general applicability that:

(1) has or is designed to have the effect of law; and

(2) implements, interprets, or prescribes:

(A) law or policy; or

(B) the organization, procedure, or practice requirements of an agency.

(c) "Rulemaking action" means the process of formulating or adopting a rule....

(emphasis added).

Indiana Code Section 4-22-2-13 addresses the scope of Indiana Code Chapter 4-22-2 and states the following as pertinent to the current question.

(c) This chapter does not apply to a rulemaking action that results in any of the following rules:

(1) A resolution or directive of any agency that relates solely to internal policy, internal agency organization, or internal procedure and does not have the effect of law

(2) A restriction or traffic control determination of a purely local nature that:

(A) is ordered by the commissioner of the Indiana department of transportation;

(B) is adopted under IC 9-20-1-3(d), IC 9-21-4-7, or IC 9-20-7; and

(C) applies only to one (1) or more particularly described intersections, highway portions, bridge causeways, or viaduct areas.

(3) A rule adopted by the secretary of state under IC 26-1-9.1-526.

(4) **An executive order or proclamation issued by the governor.**

(emphasis added).

Although rules probably are more typically thought of as provisions adopted by various state agencies after having gone through the rulemaking process under Indiana Code Chapter 4-22-2, it is clear from the above quoted provisions that the General Assembly considers an executive order a rule. With that said, it would be an “other rule establishing standards of official conduct” as contemplated by the State Ethics Commission statute and therefore within the enforcement authority of the State Ethics Commission.

CONCLUSION

For the foregoing reasons, it is our opinion that the State Ethics Commission does have the authority to enforce an executive order establishing standards of conduct for the Indiana Utility Regulatory Commission.

We hope this response has adequately answered your question. If you need more assistance concerning this matter, please call me at (317) 232-6303.

Sincerely,

Stephen Carter
Attorney General

James F. Schmidt
Deputy Attorney General