



INSPECTOR GENERAL REPORT

2009-04-0064

December 7, 2009

DWD

Indiana Inspector General David Thomas, after an investigation by Special Agents Bud Allcron and Chuck Coffin, reports as follows:

This investigation and report was instigated by two reports by the Employment and Training Administration of the United States Department of Labor (“DOL”) issued on December 17, 2008 and March 9, 2009 regarding the Indiana Department of Workforce Development (“DWD”).

The mission of DWD is to oversee employment programs and unemployment insurance systems, and to facilitate regional economic growth initiatives for Indiana. IC 22-4-18-1. DWD’s creation is addressed in state statute under IC 22-4 and 22-4.1.

DWD interacts with various federal agencies and programs, including DOL, the Workforce Investment Act (29 U.S.C. 2801 *et seq.*), and the Wagner-Peyser Act (29 U.S.C. 49 *et seq.*). *See:* IC 22-4-18-1, *supra*; IC 22-4-1-1; IC 22-4-21-1; and IC 22-4-21-4.

The State Workforce Innovation Council (“SWIC”), addressed in the DOL

reports, is an Indiana entity which falls under DWD's purview. Its purpose is to advise on the use of federal funds and resources and comply with the statutory duties in IC 22-4-18.1-3.

This Office of the Indiana Inspector General ("OIG") met with DOL auditors and investigators in Chicago on May 13, 2009 and discussed their reports and findings.

Based upon the two DOL reports and requests to this office to investigate further matters, the OIG initiated its own investigation. OIG Special Agents Bud Allcron and Chuck Coffin, and OIG Attorney Todd Shumaker, reviewed numerous documents and conducted multiple interviews, condensing the various issues into a single investigation which leads to this report.

I

JURISDICTION

The OIG is "responsible for addressing fraud, waste, abuse, and wrongdoing in agencies," I.C. 4-2-7-2(b), and is charged to "provide advice to an agency on developing, implementing, and enforcing policies and procedures to prevent or reduce the risk of fraudulent or wrongful acts within the agency." I.C. 4-2-7-3(8).

In this capacity and based upon our investigation, the OIG now makes its findings and recommendations.

II

FINDINGS AND RECOMMENDATIONS

These findings and recommendations are reported as presented to DWD on November 23, 2009 for accuracy and response. DWD has commenced implementing these recommendations, and these actions may be reviewed by the OIG at a later time.

Findings

A

Although DWD is in substantial compliance with regard to training its approximate 1,000 employees with the mandatory Code of Ethics training module, DWD is in non-compliance regarding ethics training with its special state appointees.

From the end of 2007 through the beginning of 2008, the OIG worked with DWD to identify the boards and commissions associated with the agency in preparation for the roll-out of the OIG's mandatory online ethics training. DWD, along with twenty-five (25) other state agencies, was scheduled to complete ethics training over a three-week period of time from the middle of March through early April of 2008. In March of 2008, the OIG provided DWD with computer login information to distribute to all special state appointees to access the OIG's online ethics training. Ethics training was to be completed by all DWD state employees and special state appointees in early April of 2008. As was the case with all state agencies during the roll-out of the online training program, DWD was required to oversee the completion of training by all state employees and special state

appointees under its purview during this period of time.

At the outset of this investigation in the Spring of 2009, the OIG revisited DWD's ethics training records and discovered that a majority of DWD's special state appointees had not completed ethics training a year after the end of the initial training period had tolled.

Ethics training is mandatory for all state employees and special state appointees, and agency leaders have the duty to train all persons within the agency. 42 IAC 1-4-1.

B

As the OIG investigation progressed, the OIG also found that the DWD ethics training records were maintained inaccurately. These records omit DWD special state appointees who must train, and also contain persons associated with DWD who may not be required to train (*i.e.* persons who are not DWD "employees" or "special state appointees").

Agency leaders have the duty not only to ensure its members are trained, but to also maintain these training records. 42 IAC 1-4-1(3).

C

DWD has issued a written policy and SWIC By-laws which are inconsistent with the Code of Ethics, and has not filed these documents with the State Ethics Commission ("SEC") as required by 42 IAC 1-6-1.

DWD instituted DWD Policy 2009-05 which requires agency employees to seek an opinion from DWD's legal department if they believe a conflict of interest might arise from a decision or vote in which they are to participate. The policy further details the procedures DWD will employ to comply with this requirement, but only if the transaction exceeds \$10,000.

The conflict of interest rule at 42 IAC 1-5-6 (I.C. 4-2-6-9) prohibits state employees and special state appointees from participating in a decision or vote in which a certain set of persons has a financial interest, irrespective of the dollar value of the transaction. Furthermore, any employee or appointee who identifies such a conflict is required under 42 IAC 1-5-6 (I.C. 4-2-6-9(b)) to seek an advisory opinion from the SEC.

42 IAC 1-6-1 allows an agency's appointing authority to adopt ethics policies on the condition that they are at least as strict as the Code of Ethics.¹ However, the procedures advanced in DWD Policy 2009-05 are less restrictive than the requirements set forth in 42 IAC 1-5-6 (I.C. 4-2-6-9) in that they: (A) do not apply to special state appointees, (B) appear to only apply to transactions in excess of \$10,000, and (C) do not obligate an employee or special state appointee to seek advice from the SEC upon identifying a potential conflict of interest.

Consequently, DWD's policy is not in compliance with the requirements in the

¹ 42 IAC 1-6-1 Other sources

An appointing authority of an agency or a state officer may adopt policies, rules, or regulations concerning the subject matter of this rule provided that the policies, rules, or regulations are at least as strict as this rule. All such policies, rules, or regulations shall be filed with the commission, but failure to file does not affect the validity of such policies, rules, or regulations as applied to the agency's or state officer's employees or special state appointees.

Code of Ethics, and may mislead DWD members with regard to compliance with the Code of Ethics.

C-2

In September of 2009, DWD revised the SWIC Bylaws to establish the procedure SWIC members are to follow to identify and address conflicts of interest. Similar to Policy 2009-05, the provisions set forth in Article XIII of the SWIC Bylaws are less restrictive than the requirements set forth in 42 IAC 1-5-6 (I.C. 4-2-6-9) and have the potential to expose SWIC members to ethics violations. Specifically, as special state appointees, SWIC members are obligated by 42 IAC 1-5-6 (I.C. 4-2-6-9(b)) to seek an advisory opinion from the SEC upon identifying a potential conflict of interest. However, Article XIII establishes a conflicting policy that assures SWIC members they can eliminate a conflict of interest by taking action without notifying the SEC, as required in the Code of Ethics. As a result, the amended SWIC bylaws likewise do not comply with the Code of Ethics.

C-3

Inasmuch as they are related to the Code of Ethics in 42 IAC, DWD Policies 2009-04 and 2009-05 and the SWIC Bylaws should have been and were not filed with the SEC in compliance with 42 IAC 1-6-1.

D

We also find statutory non-compliance with the hiring of a private law firm by DWD.

D-1

From July 24, 2007 through February 15, 2008, DWD made payments to a private law firm to perform legal services on its behalf without the consent of the Attorney General, contrary to I.C. 4-6-5-3.²

D-2

We are also unable to locate a written contract reflecting this hiring of the law firm. Contracts must be in writing, I.C. 4-13-2-14.2, and must be approved by the Department of Administration, Attorney General, and Budget Agency. I.C. 4-13-2-14.1 and 14.3.

E

SWIC is increasing its participation in contracting for regional service providers, thereby raising the vulnerability of SWIC members who may have contracts with the State of Indiana to potential ethics violations.

This matter was addressed in a recent Unemployment Insurance Oversight Committee meeting, conducted by the Indiana General Assembly in the Fall of 2009. Due to federal requirements, SWIC needs to become more involved in this competitive bidding. This is obviously a necessary action for DWD to take to ensure it is in compliance with federal regulations. However, empowering SWIC to contract on its own in the future, where it has not done so in the past, raises

² IC 4-6-5-3 Written consent; employment of attorneys or special general counsel

No agency, except as provided in this chapter, shall have any right to name, appoint, employ, or hire any attorney or special or general counsel to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney general.

potential conflict of interest concerns. First, in issuing contracts, SWIC members who have contracts with the State may be asked to participate in decisions or votes in which the set of persons identified in 42 IAC 1-5-6 (I.C. 4-2-6-9(a)(1)-(4)) has a financial interest. As a result, such members would be required prospectively to seek advice from the SEC pursuant to 42 IAC 1-5-6 (I.C. 4-2-6-9(b)) to alleviate the potential conflicts of interest. Second, in becoming a contracting body, SWIC's members with contracts with the State would be prohibited altogether by 42 IAC 1-5-7 (I.C. 4-2-6-10.5) from having a financial interest in any contract with SWIC and would potentially face criminal conflicts of interest in the event they have a financial interest in a contract entered into with SWIC. IC 35-44-1-3.

F

Compliance violations within DWD were also reflected in an August 25, 2009 SBOA audit report and presented to the OIG. These violations of the SBOA *Accounting & Uniform Compliance Guidelines Manual for State & Quasi Agencies* include DWD's failure to: (1) reconcile its ledgers to the total SDO advance, (2) turn over its SDO balance for several months, (3) cancel checks that have been outstanding in excess of two years, (4) record additions to or tag items in DWD's fixed asset inventory, (5) properly supervise and approve employee attendance reports, and (6) properly report unemployment benefits and report unemployment tax collections to the Auditor of State.

Recommendations:

Based upon the above findings, the OIG makes the following recommendations:

1

That DWD appoint an internal Compliance Officer (“CO”). The CO should report directly to the DWD Commissioner and be dedicated solely to bringing DWD into compliance with all criminal, ethics, contracting, and financial rules. These rules include but are not limited to the many federal acts applicable to DWD, I.C. 35, I.C. 22-4-34-4, I.C. 22-4 and 4.1 (enabling statutes), 42 IAC 1-5 (Code of Ethics), Budget Agency Financial Circulars, State Board of Accounts Manuals, and the various statutory and administrative requirements.

The OIG remains committed to providing further training to DWD and its Compliance Officer upon request and also to sharing further risk assessment areas.

2

That DWD immediately ensure that all employees and special state appointees become and remain trained in the mandatory ethics training module. This includes an internal review of all entities related to DWD to determine if they qualify as special state appointees and/or employees.

3

That DWD maintain its ethics training records to accurately reflect its

current employees and special state appointees and their statuses with regard to training.

4

That DWD also familiarize itself with the United States Hatch Act in 5 USC Section 1501, and its application to DWD, due to its receipt of federal monies.

5

That DWD review all employees and special state appointees to determine if its members are in compliance with regard to the conflict of interest ethics rules in 42 IAC 1-5-6 (IC 4-2-6-9) and 7 (IC 4-2-6-10.5) and I.C. 35-44-1-3.

6

That DWD adopt and circulate a written policy that if its members encounter circumstances that are a “potential” conflict of interest, that these members pursuant to 42 IAC 1-5-6 (I.C. 4-2-6-9(b)) seek guidance from the SEC and follow the disclosure procedures outlined therein.

7

That DWD examine its new federal compliance feature of having SWIC in addition to Regional Workforce Boards participate more fully in contracting. DWD should educate SWIC members that under subpart (a) of IC 4-2-6-10.5, a

SWIC member may never “knowingly have a financial interest in a contract made by an agency.” IC 4-2-6-10.5(a). Only if the SWIC member does “not participate in or have official responsibility for any of the activities of the contracting agency” may the member proceed to the four-part test in IC 4-2-6-10.5(b).

8

That DWD Policy 2009-05 be amended to: (A) apply to both employees and special state appointees, (B) not be restricted to transactions in excess of \$10,000, and (C) to obligate DWD members to seek advice from the SEC upon identifying a potential conflict of interest.

9

That SWIC Bylaws establishing procedures for SWIC members to follow when identifying conflicts of interest include the mandatory provision in 42 IAC 1-5-6 (I.C. 4-2-6-9(b)) which requires the seeking of an advisory opinion from the SEC upon identifying a potential conflict of interest.

10

That DWD file these documents addressed in recommendations eight (policies) and nine (by-laws) with the SEC pursuant to 42 IAC 1-6-1.

11

That DWD review all outstanding hiring of law firms without the approval

of the Attorney General and review whether the nature of the hiring conforms to the requirements of I.C. 4-6-5-3 (attorney general approval).

That DWD review whether its contracts are in writing and approved by the three-step approval process required by I.C. 4-13-2-14.1 and 14.3.

12

That DWD immediately come into compliance with the issues raised by the SBOA in its August 25, 2009 review report.

Dated this 7th day of December, 2009.



David O. Thomas, Inspector General