

STATE BOARD OF ACCOUNTS
302 West Washington Street
Room E418
INDIANAPOLIS, INDIANA 46204-2769

SPECIAL INVESTIGATION REPORT
OF

SANITARY DISTRICT
CITY OF MUNCIE
DELAWARE COUNTY, INDIANA

May 3, 2019 to September 13, 2019



FILED
11/21/2019

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STATE OF INDIANA
AN EQUAL OPPORTUNITY EMPLOYER

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TO: THE OFFICIALS OF THE CITY OF MUNCIE, DELAWARE COUNTY, INDIANA

This is a special investigation report for the Sanitary District of the City of Muncie (City), for the period May 3, 2019 to September 13, 2019, and is in addition to any other report for the City as required under Indiana Code 5-11-1. All reports pertaining to the City may be found at www.in.gov/sboa/.

We performed procedures to determine compliance with applicable Indiana laws and uniform compliance guidelines established by the Indiana State Board of Accounts and were limited to records associated with payroll transactions and related records. The Results and Comments contained herein describe the identified reportable instances of noncompliance found as a result of these procedures. Our tests were not designed to identify all instances of noncompliance; therefore, noncompliance may exist that is unidentified.

The Official Response to the Results and Comments, incorporated within this report, was not verified for accuracy.

Paul D. Joyce
Paul D. Joyce, CPA
State Examiner

September 19, 2019

SANITARY DISTRICT
CITY OF MUNCIE
RESULTS AND COMMENTS

GOVERNMENT EMPLOYEE HOLDING OFFICE

The same comment also appeared in prior Report B52636.

The Muncie Sanitary District (MSD) was created by ordinance in 1968 and is considered to be a department of the City of Muncie.

Indiana Code 36-9-25-3(a) states in part: "A department of public sanitation is established as an executive department of the municipality. . . ."

The City of Muncie Common Council (Common Council) has an elected member, Douglas Marshall (Marshall), who also works for the MSD as a sanitary engineer. Indiana Code 3-5-9-7, effective July 1, 2015, permits government employees who also held elective office as of January 1, 2013, to continue holding elected office until the term of the elected office expires.

Common Council member Marshall's term of office affected by Indiana Code 3-5-9-7 expired as of December 31, 2015. Marshall was re-elected to the Common Council in November 2015 and began a new term of office on January 1, 2016. Marshall, who was employed with the MSD during the previous term of office, has continued employment with the MSD from January 1, 2016, to the date of this report and has not complied with the requirements of Indiana Code 3-5-9-5. As a result, Marshall is deemed to have resigned his employment with the MSD on January 1, 2016. Any compensation paid to Marshall subsequent to May 2, 2019, (date of prior Report B52636) related to employment with the MSD may be the personal responsibility of Common Council member Marshall.

From May 3, 2019 through September 13, 2019, Marshall received compensation of \$22,557.60 as an employee of the MSD.

Indiana Code 3-5-9-1 states:

"As used in this chapter, 'elected office' refers only to the following:

SANITARY DISTRICT
CITY OF MUNCIE
RESULTS AND COMMENTS
(Continued)

- (1) The executive or a member of the executive body of a unit.
- (2) A member of the legislative body or fiscal body of a unit."

Indiana Code 3-5-9-2 states: "As used in this chapter, 'government employee' refers to an employee of a unit. The term does not include an individual who holds only an elected office."

Indiana Code 3-5-9-5 states: "Except as provided in section 7 of this chapter, an individual is considered to have resigned as a government employee when the individual assumes an elected office of the unit that employs the individual."

We requested that Marshall reimburse MSD in the amount of \$22,557.60, and any additional compensation received after September 13, 2019, for compensation received based on noncompliance with statutory prohibitions. (See Summary of Charges, page 6)

SPECIAL INVESTIGATION COSTS

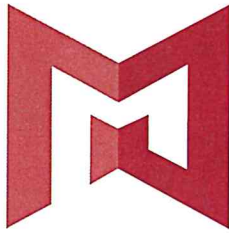
The State of Indiana incurred costs in the amount of \$2,755 due to the special investigation of the Muncie Sanitary District.

Audit costs incurred because of poor records, nonexistent records, or any other inadequate book-keeping practices, or because of theft or a shortage may be the personal obligation of the responsible official or employee. (Accounting and Uniform Compliance Guidelines Manual for Cities and Towns, Chapter 1)

We requested that Marshall reimburse the State of Indiana for special investigation costs in the amount of \$2,755. (See Summary of Charges, page 6)

SANITARY DISTRICT
CITY OF MUNCIE
EXIT CONFERENCE

The contents of this report were discussed on September 19, 2019, with Kevin Nemyer, City Controller; Dennis Tyler, Mayor; William Smith, President of the Sanitary District Board; and Linda Gregory, Common Council member.



McKINNEY & MALAPIT LAW

October 2, 2019

Indiana State Board of Accounts
202 W. Washington Street, Room E 418
Indianapolis, IN 46204-2765

VIA EMAIL: ldavid@sboa.in.gov

Re: OFFICIAL RESPONSE TO SPECIAL INVESTIGATION REPORT
Entity: Muncie Sanitary District
Period Examined: May 3, 2019 – September 13, 2019

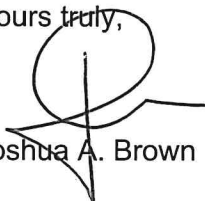
To Whom It May Concern:

Please be aware that McKinney & Malapit Law represents Muncie Sanitary District ("MSD") and assisted MSD in drafting this formal response to the Indiana State Board of Accounts' ("SBOA") position that IC 3-5-9-5 operates to terminate Mr. Doug Marshall's ("Mr. Marshall") employment with MSD.

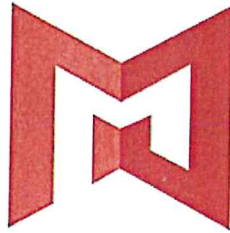
MSD has previously responded to SBOA's position in letters dated March 28, 2019 and April 4, 2019. A copy of each is attached as **Exhibit A** and **Exhibit B**, respectively.

MSD does not believe that any additional response is necessary and in lieu of simply reiterating the arguments made in the prior letters, directs SBOA to their prior responses and respectfully requests SBOA reconsider its position after reviewing the referenced law and the attached responses.

Yours truly,



Joshua A. Brown



McKINNEY & MALAPIT LAW

March 28, 2019

Indiana State Board of Accounts
202 W. Washington Street, Room E 418
Indianapolis, IN 46204-2765

VIA: Idavid@sboa.in.gov

**Re: OFFICIAL RESPONSE, Muncie Sanitary District,
Period Examined: January 1, 2016 – December 31, 2018
Date of Conference: March 18, 2019**

To Whom It May Concern:

Please be aware that McKinney & Malapit Law represents Muncie Sanitary District ("MSD") and assisted MSD in drafting this formal response to the Indiana State Board of Accounts' ("SBOA") position that I.C. 3-5-9-5 operates to terminate Mr. Doug Marshall's ("Mr. Marshall") employment with MSD.

I.C. 3-5-9-5 provides that "an individual is considered to have resigned as a government employee when the individual assumes an elected office of the unit that employs the individual." The term "unit" is defined in I.C. 3-5-9-3, which provides that it means "a county, city, town, or township."

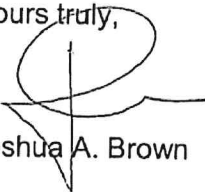
MSD concedes that Mr. Marshall is an employee of MSD and that he is a member of the Muncie City Council, but it is MSD's position that I.C. 3-5-9-3 serves only to terminate the employment of Mr. Marshall if he were an employee of the City of Muncie.¹ This position is based upon the plain and ordinary language of I.C. 3-5-9-3 and I.C. 3-5-9-5, read in concert. Applying these statutes to the facts at issue would provide that: Mr. Marshall is considered to have resigned

¹ I.C. 3-5-9-5 specifically uses the term "considered to have resigned" instead of "terminate employment", but for the purposes of this letter, MSD uses the terms interchangeably for ease of language.

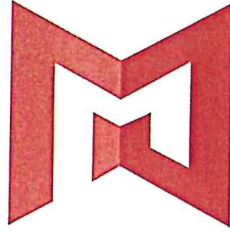
as an employee if he is a councilperson of a "county, city, town, or township" that employs him. He is not.

Mr. Marshall is an employee of MSD, and MSD is a separate governmental unit from the City of Muncie, for purposes of I.C. 3-5-9-3 and I.C. 3-5-9-5. The language of I.C. 3-5-9-3's limited definition of "unit" makes that clear. MSD is "under the control of a board of sanitary commissioners ..." ² not the Muncie City Council. As a result, MSD disagrees with SBOA's position in this matter and submits this formal response for SBOA's review and consideration.

Thank you for your review and consideration.

Yours truly,

Joshua A. Brown

² I.C. 36-9-25-3(b).



McKINNEY & MALAPIT LAW

April 4, 2019

Indiana State Board of Accounts
202 W. Washington Street, Room E 418
Indianapolis, IN 46204-2765

VIA: l david@sboa.in.gov

***Re: SUPPLEMENTAL OFFICIAL RESPONSE, Muncie Sanitary District,
Period Examined: January 1, 2016 – December 31, 2018
Date of Conference: March 18, 2019***

To Whom It May Concern:

Please be aware that McKinney & Malapit Law represents Muncie Sanitary District (“MSD”) and assisted MSD in drafting this supplemental formal response to the Indiana State Board of Accounts’ (“SBOA”) position that I.C. 3-5-9-5 operates to terminate Mr. Doug Marshall’s (“Mr. Marshall”) employment with MSD.

Separate Entities

In addition to our response previously submitted on March 28, 2019, MSD also states that the SBOA has previously treated MSD and the City of Muncie as separate entities in other matters. During the 1980s the SBOA found that the Mayor of Muncie was not permitted to borrow money from MSD because these entities were separate. MSD requests that the SBOA continue to treat MSD and the City of Muncie as separate entities in this matter.

Prior Authority/Opinions

On March 9, 2016, Mr. Daniel Shackle, Chief Counsel and Mr. Kevin McDowell, Deputy Attorney General, prepared an analysis of a similar issue concerning an employee of Gary Sanitary District (“GSD”) who also served as a councilperson for the Gary Common Council (“GCC”). In that case, Mr. Shackle and Mr. McDowell, on behalf of the Attorney General of the State of Indiana, found that GSD was not a “unit” for purposes of I.C. 3-5-9, and therefore that

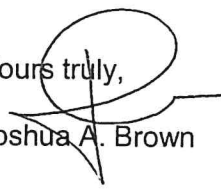
statute did not serve to terminate the employment of the councilperson with GSD. When making this determination, Mr. Shackle and Mr. McDowell found that the GCC did not have authority to determine employment and compensation decisions, and as such the councilperson has not "assume[d] an elected office of the unit that employs the individual[.]" Similarly, in the case at hand, Muncie City Council ("MCC") does not have the authority to determine employment or compensation decisions for MSD and therefore, I.C. 3-5-9 does not serve to terminate Mr. Marshall's employment with MSD.

Possible Conflict of Interest

A conflict of interest arises when two positions are "inherently inconsistent and repugnant" to one another.¹ This is not the case before us. Mr. Marshall has abstained from any votes that concerned MSD business while serving as a councilperson on MCC. MCC has no authority over the non-tax-funded budget of MSD. The only portion of MSD's budget that MCC reviews is that portion which is funded by tax dollars. The division that employs Mr. Marshall, Sewer Maintenance/Engineering, is not included within the budget that is reviewed by MCC. MCC, when reviewing the tax-funded budget, does not have authority to impact the budget of specific departments, the salaries of employees, or any other specific line items within that portion of the budget. This limited role of MCC and the continued abstention by Mr. Marshall of votes on MSD business resolves any potential concern that SBOA would have regarding a conflict of interest by Mr. Marshall serving on the MCC when also continuing as an employee of MSD.

MSD respectfully requests SBOA reconsider its position after consideration of the relevant law and MSD's official response and supplementary official response. Thank you for your review and consideration.

Yours truly,


Joshua A. Brown

¹ See Gregory Zoeller, Dual Office Analysis: Can the Legislature Carve Out Exceptions, 37 Ind. L. Rev. 733, 763 (2004) (citing Metcalf v. Goff, 9 A. 226, 227 (R.I. 1887)).

INDIANA STATE BOARD OF ACCOUNTS COMMENT ON THE OFFICIAL RESPONSE

To provide clarity and perspective, the Indiana State Board of Accounts (SBOA) is commenting on the Official Response to the Result and Comment (RC) entitled *GOVERNMENT EMPLOYEE HOLDING OFFICE*. An Official Response and a Supplemental Official Response (SOR) to this RC were submitted by McKinney & Malapit Law, representing the Muncie Sanitary District (MSD).

The SOR states, in part:

"On March 9, 2016, Mr. Daniel Shackle, Chief Counsel and Mr. Kevin McDowell, Deputy Attorney General, prepared an analysis of a similar issue concerning an employee of Gary Sanitary District ("GSD") who also served as a councilperson for the Gary Common Council ("GCC"). In that case, Mr. Shackle and Mr. McDowell, on behalf of the Attorney General of the State of Indiana, found that GSD was not a "unit" for purposes of I.C. 3-5-9, and therefore that statute did not serve to terminate the employment of the councilperson with GSD. When making this determination, Mr. Shackle and Mr. McDowell found that the GCC did not have authority to determine employment and compensation decisions, and as such the councilperson has not "assume[d] an elected office of the unit that employs the individual[.]" Similarly, in the case at hand, Muncie City Council ("MCC") does not have the authority to determine employment or compensation decisions for MSD and therefore, I.C. 3-5-9 does not serve to terminate Mr. Marshall's employment with MSD."

SBOA Comment:

The SOR refers to an analysis prepared by the Attorney General of the State of Indiana (AG) dated March 9, 2016, in a similar issue concerning an employee of the Gary Sanitary District (GSD) who was also a member of the Gary Common Council (GCC). Subsequent to the March 9, 2016 analysis, the AG prepared an additional analysis dated July 15, 2016, which concluded

"The GCC member has been both a "government employee" and an elected official. The GCC and the GSD are both part of a "unit," to wit: the City of Gary. The GCC member, by virtue of her elected office, can affect her compensation as a "government employee" through exercise of her "elected office," a situation that the legislation in question seeks to prevent."

The July 15, 2016, AG analysis continued by stating the GCC councilperson's "positions are now incompatible under Ind. Code Chapter 3-5-9".

Continuing with the similar issue at the GSD, a Declaratory Judgment Compliant was filed in Lake County Superior Court (Cause No. 45D01-1611-PL-124). The GCC member requested that the Court declare the GCC member does not violate Indiana Code 3-5-9-5 by working for the GSD and serving on the GCC. The Court's Order, filed June 25, 2018, states in part:

"These statutes are clear and unambiguous. All of their words and phrases, when taken in their plain, ordinary, and usual sense, mean: The Gary Sanitary District performs its statutory functions as a department of the City of Gary, so Brown's employment, as defined by I.C. 3-5-9-2, is with the City of Gary. . . .

The relief requested by the member of the GCC that the Court declare she does not violate I.C. 3-5-9-5 was denied."

SANITARY DISTRICT
 CITY OF MUNCIE
 SUMMARY OF CHARGES
 (Due to Malfeasance, Misfeasance, or Nonfeasance)

	Charges	Credits	Balance Due
Douglas Marshall, Common Council member:			
Government Employee Holding Office, pages 3 and 4	\$ 22,557.60	\$ -	\$ 22,557.60
Special Investigation Costs, page 4	2,755.00	-	2,755.00
Totals	\$ 25,312.60	\$ -	\$ 25,312.60

This report was forwarded to the Office of the Indiana Attorney General.

AFFIDAVIT

STATE OF INDIANA)
Allen)
COUNTY)

I, Stephen R. Poor, Field Examiner, being duly sworn on my oath, state that the foregoing report based on the official records of the City of Muncie, Delaware County, Indiana, for the period from May 3, 2019 to September 13, 2019, is true and correct to the best of my knowledge and belief.

Stephen R. Poor
Field Examiner
Stephen R. Poor

Subscribed and sworn to before me this 9th day of October, 2019

Maria Angeles Salinas
Notary Public



MARIA ANGELES SALINAS, Notary Public
Allen County, State of Indiana
Commission Number NP0722266
My Commission Expires September 25, 2027

My Commission Expires
County of Residence: _____