

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

SUPPLEMENTAL COMPLIANCE REPORT
OF

MUNCIE SANITARY DISTRICT
CITY OF MUNCIE
DELAWARE COUNTY, INDIANA

January 1, 2019 to December 31, 2019



FILED
02/23/2021

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SCHEDULE OF OFFICIALS

<u>Office</u>	<u>Official</u>	<u>Term</u>
City Controller	Kevin Nemyer	01-01-19 to 12-31-19
	Trent Conway	01-01-20 to 11-30-20
	Craig Wright	12-01-20 to 12-31-20
Mayor	Dennis Tyler	01-01-19 to 12-31-19
	Dan Ridenour	01-01-20 to 12-31-20
President of the Common Council	Douglas Marshall	01-01-19 to 12-31-19
	Brad Polk	01-01-20 to 12-31-20
President of the Board of Public Works and Safety	John Quirk	01-01-19 to 03-05-19
	Roger Overbey	03-06-19 to 12-31-19
	Linda Gregory	01-01-20 to 12-31-20
President of the Sanitary District Board	William Smith	01-01-19 to 08-25-20
	Stephen Brand	08-26-20 to 12-31-20



STATE OF INDIANA
AN EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF ACCOUNTS
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INDIANAPOLIS, INDIANA 46204-2769

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

This report is supplemental to our audit report of the Muncie Sanitary District (District), City of Muncie (City), for the period from January 1, 2019 to December 31, 2019. It has been provided as a separate report so that the reader may easily identify any Audit Results and Comments that pertain to the District. It should be read in conjunction with our Financial Statement Audit Report of the City, which provides our opinions on the City's financial statement. This report may be found at www.in.gov/sboa/.

As authorized under Indiana Code 5-11-1, we performed procedures to determine compliance with applicable Indiana laws and uniform compliance guidelines established by the Indiana State Board of Accounts. The Audit Result and Comment contained herein describes the identified reportable instance 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.

Any Official Response to the Audit Result and Comment, incorporated within this report, was not verified for accuracy.

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

December 10, 2020

MUNCIE SANITARY DISTRICT
CITY OF MUNCIE
AUDIT RESULT AND COMMENT

GOVERNMENT EMPLOYEE HOLDING OFFICE

The same comment also appeared in prior Reports B52636 and B53804.

This issue was investigated by the Indiana State Board of Accounts' Special Investigation Division through September 13, 2019. Their findings are reported in Report B53804.

Condition and Context

The Muncie Sanitary District (MSD) was created by ordinance in 1968 and is considered to be a department of the City of Muncie per Indiana Code 36-9-25-3(a) as cited below.

The City of Muncie Common Council (Common Council) had 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.

The 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, through the end of the audit period, and had not complied with the requirements of Indiana Code 3-5-9-5. As a result, Marshall was deemed to have resigned his employment with the MSD on January 1, 2016. Any compensation paid to Marshall subsequent to May 2, 2019, the date of prior Report B52636, related to employment with the MSD may be the personal responsibility of Common Council member Marshall.

For the period of May 3, 2019 through December 31, 2019, Marshall received total compensation from the MSD in the amount of \$43,027.77. Marshall was requested to reimburse the MSD \$22,557.60 for compensation received from the MSD in the special investigation Report B53804 referenced above. The remaining balance of \$20,470.17 may also be the personal responsibility of Common Council member Marshall.

Common Council member Marshall's term of office ended as of December 31, 2019, but Marshall remains an employee of the MSD.

Criteria

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

MUNCIE SANITARY DISTRICT
CITY OF MUNCIE
AUDIT RESULT AND COMMENT
(Continued)

Indiana Code 3-5-9-1 states:

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

- (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."

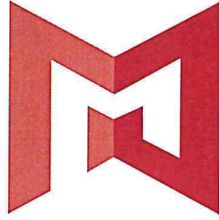
Indiana Code 3-5-9-5 states: "Except as provided in section 7 of this chapter, an individual is considered to have resigned as a government employee when the individual assumes an elected office of the unit that employs the individual."

Indiana Code 3-5-9-7 states:

"(a) Notwithstanding sections 4 and 5 of this chapter, a government employee who assumes or holds an elected office on January 1, 2013, may continue to hold the elected office and be employed as a government employee until the term of the elected office that the government employee is serving on January 1, 2013, expires.

(b) After the expiration of the term of the elected office that the government employee referred to in subsection (a) is serving on January 1, 2013, the government employee is subject to section 5 of this chapter with respect to assuming or holding an elected office and being employed by the unit that employs the government employee."

We requested that Marshall reimburse the MSD in the amount of \$20,470.17, for additional compensation received after the September 13, 2019, issuance of special investigation Report B53804 based on noncompliance with statutory prohibitions. (See Summary of Charges, page 14)



McKINNEY & MALAPIT LAW

December 16, 2020

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 SBOA Audit
Entity: Muncie Sanitary District
Period Examined: May 3, 2019 – December 31, 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, April 4, 2019, and October 2, 2019. A copy of each is attached as **Exhibit A**, **Exhibit B**, and **Exhibit C** respectively.

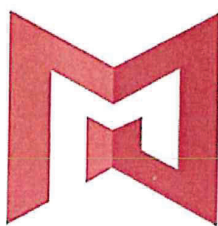
MSD does not believe that any additional response is necessary and in lieu of simply reiterating the arguments made in the prior letters, directs SBOA to their prior responses and respectfully requests SBOA reconsider its position after reviewing the referenced law and the attached responses. MSD would further note that they have not requested reimbursement from Mr. Marshall and has no intention of doing so. Additionally, it should be noted that this matter is now the subject of litigation initiated by the Indiana Attorney General.

Yours truly,

Mark R. McKinney

MUNCIE OFFICE | 765-896-8964 | 201 NORTH HIGH STREET | MUNCIE, IN 47305
INDIANAPOLIS OFFICE: | 317-793-2020 | 10475 CROSSPOINT BOULEVARD, SUITE 250 | INDIANAPOLIS, IN 46256

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McKINNEY & MALAPIT LAW

March 28, 2019

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

VIA: ldavid@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.

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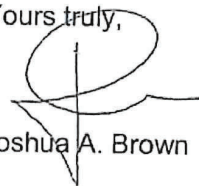
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as an employee if he is a councilperson of a "county, city, town, or township" that employs him. He is not.

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.

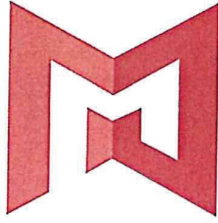
Thank you for your review and consideration.

Yours truly,

A handwritten signature in black ink, appearing to be "Joshua A. Brown", written over a horizontal line.

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: ldavid@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

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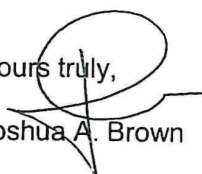
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statute did not serve to terminate the employment of the councilperson with GSD. When making this determination, Mr. Shackle and Mr. McDowell found that the GCC did not have authority to determine employment and compensation decisions, and as such 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.

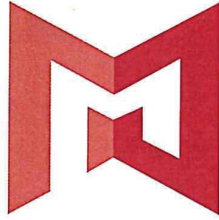
Possible Conflict of Interest

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)).



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

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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 Complaint 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."

MUNCIE SANITARY DISTRICT
CITY OF MUNCIE
EXIT CONFERENCE

The contents of this report were discussed on December 10, 2020, with Craig Wright, City Controller; Dan Ridenour, Mayor; Aaron Clark, Common Council member; Anitra Davis, Common Council member; Troy Ingram, Common Council member; Richard Ivy, Common Council member; Jeff Robinson, Common Council member; John Barlow, Muncie Sanitary District (MSD) Administrator; Deana Cox, MSD Financial & Billing Manager; Stephen Brand, President of the Sanitary District Board; Tonya Brothers-Bridge, MSD Board member; Joseph Evans, MSD Board member; Bill Smith, MSD Board member; Brian Stephens-Hotopp, MSD Board member; and Mark McKinney, MSD Attorney.

MUNCIE 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 4 and 5	\$ 20,470.17	\$ -	\$ 20,470.17

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

AFFIDAVIT

STATE OF INDIANA)
Dearborn COUNTY)

I, Joshua Bresser, Field Examiner, being duly sworn on my oath, state that the foregoing report based on the official records of the Muncie Sanitary District, City of Muncie, Delaware County, Indiana, for the period from January 1, 2019 to December 31, 2019, is true and correct to the best of my knowledge and belief.


Field Examiner

Subscribed and sworn to before me this 22nd day of February, 2021


Notary Public

My Commission Expires: 06-21-2024
County of Residence: Ohio County IN

