



**OFFICE OF EXECUTIVE INSPECTOR GENERAL
FOR THE AGENCIES OF THE ILLINOIS GOVERNOR**

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Via Electronic and US Mail

April 5, 2012

Chad Fornoff
Executive Director
Executive Ethics Commission
401 South Spring Street
513 William Stratton Building
Springfield, IL 62706

**Re: OEIG Written Comments to Notice of Proposed Amendments:
Ill. Admin. Code, tit. 2, Section 1620**

Dear Executive Director Fornoff:

On February 24, 2012, the Executive Ethics Commission's (EEC) notice of proposed amendments to the Illinois Administrative Code provisions found in Title 2, Section 1620 were published in the Illinois Register. In the publication, the EEC proposes numerous amendments relating to the initiation of executive inspector general investigations, EEC decisions, the revolving door prohibitions, and actions for removing and disciplining various procurement officers.

In light of the fact that the proposed amendments relating to actions for removing and disciplining various procurement officers do not directly involve the duties and responsibilities of the Office of Executive Inspector General for the Agencies of the Illinois Governor (OEIG), our Office will not comment on those proposed amendments. However, we do take the opportunity to respond to the proposed amendments relating to the following rules:

- Case Initiation Form – Contents (Section 1620.320) and Opening an Investigation File (Section 1620.330);
- Decision of the Commission (Section 1620.530); and
- Revolving Door Prohibition (Section 1620.610).

For each of the above proposed amendments we will set forth: the OEIG's understanding of the statutory authority under the State Officials and Employees Ethics Act (Ethics Act) permitting the EEC to propose the amendments; how the proposed amendments relate, if at all, to any existing rules; and, the OEIG's comments with regard to the proposed amendments.

I. Case Initiation Form – Contents, *Proposed Amendments to Section 1620.320* and Opening an Investigation File, *Proposed Amendments to Section 1620.330*

A. The EEC’s Statutory Authority to Promulgate these Proposed Amendments

The promulgation of any rules must arise from the express language of the Ethics Act or from a reasonable implication of that express language in order to achieve the objectives for which the EEC was created. *See, e.g., Schalz v. McHenry County Sheriff’s Dept. Merit Comm’n*, 497 N.E.2d 731, 733 (Ill. 1986) (stating that “[a]ny power or authority claimed by an administrative agency must find its source within the provisions of the statute by which the agency was created”) (internal citations omitted); *Vuagniaux v. Dept of Prof’l Regulation*, 802 N.E.2d 1156, 1165 (Ill. 2004) (discussing that only powers possessed by an administrative agency are those granted to it by the legislature, and any action taken by the administrative agency must be authorized by statute). Moreover, any proposed administrative rule that conflicts with the Ethics Act is invalid. *See, e.g., Illinois Dept of Revenue v. Illinois Civil Service Comm’n*, 827 N.E.2d 960, 972 (Ill. App. Ct. 2005) (holding that the agency’s amendments to the Administrative Code were void because they conflicted with the language of the Personnel Code); *Illinois RSA No. 3, Inc. v. Dept of Central Mgmt. Servs.*, 809 N.E.2d 137, 140 (Ill. App. Ct. 2004).

According to Section 20-15 of the Ethics Act, the EEC was explicitly provided with the authority to “promulgate rules governing the performance of its duties and the exercise of its powers and governing the investigations of the Executive Inspectors General.” Based upon this authority, the EEC has proposed amendments that revise Sections 1620.320 and 1620.330. The OEIG believes the two proposed amendments arise from the express language of the Ethics Act because they involve “governing the investigations of Executive Inspectors General.”

B. The EEC’s Proposed Amendments and Relationship to Existing Rules

i. Amendments to Section 1620.320

Effective July 1, 2008, the EEC promulgated rules codified in Section 1620.320 involving so-called “case initiation forms.” The 2008 rules required executive inspectors general to create a case initiation form that set out certain information. In subsection (c) of 1620.320, the EEC required the case initiation form to include: the name, address, and telephone number of the complainant.

In its proposed amendments, the EEC seeks to amend subsection (c) by adding the words, “unless filed anonymously” after the requirement that case initiation forms include the name, address, and telephone number of the complainant. No other amendments are proposed with regard to this rule.

ii. Amendments to Section 1620.330

Effective July 1, 2008, the EEC also promulgated rules codified in Section 1620.330 regarding the opening of investigation files by executive inspectors general. The 2008 rules stated that executive inspectors general could initiate or open their own investigation only “upon information received and not upon his or her own prerogative.”

In the proposed amendments, the EEC seeks to amend this section by deleting the words “upon information received and not upon his or her own prerogative.” No other amendments are proposed with regard to this rule.

C. The OEIG’s Comments Regarding the EEC’s Proposed Amendments

In 2009, the Ethics Act was amended by allowing individuals to file anonymous complaints and allowing executive inspectors general to self-initiate or open their own investigations. These amendments repealed *sub silentio* the portions of the two above-mentioned rules requiring case initiation forms to include the name, address, and telephone number of complaints even in cases where the complaint was submitted anonymously and also repealed the prohibition against executive inspectors general being able to self-initiate their own investigations.

In light of the statutory amendments to the Ethics Act, since 2009 the OEIG has been accepting anonymous complaints and has been self-initiating investigations. Thus, the OEIG does not object to the proposed amendments and supports amending Section 1620.320 and Section 1620.330 so that these two rules no longer conflict with the Ethics Act.

II. Decision of the Commission, *Proposed Amendments to Section 1620.530*

A. The EEC’s Statutory Authority to Promulgate these Proposed Amendments

Section 20-55 of the Ethics Act provides that the EEC “shall promulgate rules for the decision and recommendation process.” Based upon this authority, the EEC proposes to amend Section 1620.530. The OEIG believes these proposed amendments arise from the express language of the Ethics Act because the amendments involve the EEC’s promulgation of EEC “rules for the decision and recommendation process.”

B. The EEC’s Proposed Amendments and Relationship to Existing Rules

The proposed amendments would add two new subsections (subsections b and c) to the current Section 1620.530, which relates to EEC decisions. Proposed subsection (b) creates a non-exclusive list of thirteen “mitigating and aggravating factors” that the EEC *may* consider when imposing a fine on a respondent after a finding of liability. Proposed subsection (c) states:

The decision shall include a description of the alleged misconduct, the decision of the Commission, including any fines levied and any recommendation of discipline and the reasoning for that decision.

(Italics in original.) No other amendments are proposed with regard to this rule.

C. The OEIG's Comments Regarding the EEC's Proposed Amendments

The OEIG agrees that the EEC should fully describe the reasoning for any fines and discipline it imposes including mitigating and aggravating factors it may consider in arriving at its decision. The OEIG suggests, however, that the factor cited in new subsection (b)(9), namely "involvement of others" be revised to include the phrase, "especially other State employees." In other words, the OEIG suggests that subsection (b)(9) state: "involvement of others, especially other State employees." The OEIG is making this suggestion because we believe that a scheme that involves the misconduct of other State employees is an aggravating factor, given the broader impact this sort of misconduct may on State government. Otherwise, the OEIG does not object to the proposed amendments and fully supports adding the two new subsections.

III. Revolving Door Prohibitions:

- *Proposed New Subsection (c)(5) of Section 1620.610*
- *Proposed Amendment to Subsection (c)(6) of Section 1620.610*
- *Proposed New Subsection (g) of Section 1620.610*
- *Proposed New Subsection (h) of Section 1620.610*

A. The EEC's Statutory Authority to Promulgate these Proposed Amendments

As noted above, the EEC may only promulgate rules that arise from the express language of the Ethics Act (or from a reasonable implication of that express language). *Abatron, Inc. v. Dep't of Labor*, 515 N.E.2d 1336, 1339 (Ill. App. Ct. 1987) (stating that "a basic rule of statutory construction is that the expression of one thing or one mode of action in an enactment excludes all others"). As such, "[a]n administrative agency cannot extend its statutory authority by enacting administrative rules." *Schalz*, 497 N.E.2d at 733; *see also Illinois Bell Telephone Co., v. Illinois Commerce Comm'n*, 561 N.E.2d 426 (Ill. App. Ct. 1990). Indeed Illinois courts have struck down an agency's rules that extend beyond its authority. *See, e.g., Schalz*, 497 N.E.2d at 734 (holding that the agency, which was statutorily granted with the authority to impose discipline, did not have the authority to promulgate rules regarding the types of conduct that would result in discipline); *Illinois RSA No. 3, Inc.*, 809 N.E.2d 137, at 140 (holding that the agency's rule contradicted the statutory language); *Kilquist v. Brown*, 561 N.E.2d 234, 237 (Ill. App. Ct. 1990) (holding that the commission's regulation exceeded its authority).

As the OEIG understands, the EEC's role with regard to the Ethics Act's revolving door provisions is limited. The EEC's role includes adjudicating appeals filed by either an aggrieved employee or the Attorney General relating to an executive inspector general's revolving door determination, *see* 5 ILCS 430/5-45(g), or adjudicating cases involving alleged substantive violations of revolving door prohibitions filed by the Attorney General pursuant to Section 20-50. However, neither Section 5-45, which relates to the revolving door prohibitions, nor any other provision in the Ethics Act, provides the EEC with the specific authority to promulgate

rules governing the means in which a revolving door matter is investigated.¹ In any event, because the EEC possesses the general authority to “promulgate rules governing the performance of its duties and the exercise of its powers and governing the investigations of the Executive Inspectors General,” to the extent the EEC is seeking to promulgate (or amend) rules governing the performance of *its* duties or governing investigations *of executive inspectors general* (in relation to revolving door prohibitions) we believe the EEC does have such authority.

On the other hand, the OEIG nevertheless believes that the EEC’s promulgation of administrative rules that seek to govern parties other than itself or executive inspectors general is not within its statutory authority to promulgate. Moreover, as mentioned above, the EEC does not have authority to promulgate rules that conflict with the Ethics Act, do not arise from the express language of the Ethics Act, or are not the result of a reasonable implication of same. Thus, the OEIG must object to and cannot support any proposed EEC rule that seeks to govern parties over whom the EEC has not been given specific rule-making authority.

B. The EEC’s Proposed Amendments and Relationship to Existing Rules

In its proposed Revolving Door Prohibition amendments, the EEC proposes various amendments presently codified in Section 1620.610. Specifically, the EEC proposes adding a new subsection (c)(5), seeks to amend the current subsection (c)(5) which would be new subsection (c)(6), and seeks to create two new subsections, subsections (g) and (h). Below is a summary of the EEC’s proposed amendments.

i. New Subsection (c)(5) to Section 1620.610

This amendment would create a new subsection (c)(5). It applies to State employees who are required to seek a determination with the OEIG prior to accepting non-State employment, but who are intending to become self-employed. New subsection (c)(5) states:

in the case of self-employment, the employee’s initial submission shall include a list of known clients with which the employee or his/her business intends to contract. The employee must update this list when he/she or his/her company contracts with a new client and submit the names of each additional client to both the former employee’s Ethics Officer and the appropriate Inspector General. A 5-45(f) review is only required for the initial submission.

No other amendments are proposed with regard to this rule.

ii. Amendment to Subsection (c)(5) or new Subsection (c)(6) of Section 1620.610

Under what would be new subsection (c)(6) of Section 1620.610, employees subject to the revolving door determinations must provide the appropriate executive inspector general with a statement from the agency’s Ethics Officer detailing certain involvement the employee has had in making contracting or licensing or regulatory decisions with the prospective non-State

¹ In fact, in Section 20-20 of the Ethics Act, executive inspectors general are given the “discretion to determine the appropriate means of investigation as permitted by law.”

employer. The proposed EEC amendment would amend the existing rules by adding a sentence at the end of subsection (c)(6) that would state:

The statement from the ethics officer must be submitted to the appropriate Executive Inspector General within five (5) calendar days after receiving notification from the employee.

No other amendments are proposed with regard to this rule.

iii. New Subsections (g) and (h) to Section 1620.610

The proposed EEC amendments would also create new subsections (g) and (h). Specifically, new subsection (g) would read as follows:

Any State employee in a position subject to the policies required by subsection 5-45(c) or a determination of Section 5-45(d) of the Act, who is offered non-State employment during State employment or within a period of one year immediately after termination of State employment, but fails to provide the required notice set forth in subsection (c) above, shall be subject to a fine pursuant to section 5 ILCS 430/50-5(e).

(Italics in original.) No other amendments are proposed with regard to this rule. New subsection (h) would require certain Section 5-45(h) list employees to file a notice with the appropriate executive inspector general prior to accepting non-State employment. The proposed notice is similar to the requirements presently in place for employees and officers subject to Section 5-45(c) and (d) of the Ethics Act. No other amendments are proposed with respect to this rule.

C. The OEIG's Comments Regarding the EEC's Proposed Amendments

i. Comments with Regard to New Subsection (c)(5) to Section 1620.610

As the OEIG understands this proposed rule, new subsection (c)(5), it would require a class of employees, namely those who are seeking to be self-employed to:

- submit a list of known clients; and,
- update the client list whenever he/she or his/her company “contracts” with a new client.

However, according to the language in the new subsection, a Section 5-45(f) determination by an executive inspector general would only take place upon the initial submission, and not when the employee subsequently updates the list. As set forth below, the OEIG does not support the proposed amendments to Section 1620.610(c)(5) for a number of reasons.

a) The Proposed Amendment Conflicts with the Ethics Act

The proposed amendment conflicts with the Ethics Act. The rule would require a self-employed former employee to update the OEIG and Ethics Officer only *after* the former State employee or his or her company contracts with a new client. At that point, the former employee will have already potentially violated the law by entering into a contract with the client. Because this would directly conflict with the statutory language of Section 5-45(f), which requires a determination on non-State employment “*prior* to accepting such non-State employment” 5 ILCS 430/5-45(f) (emphasis supplied), the OEIG objects to this amendment.

b) The Proposed Amendment Exceeds the EEC’s Authority

As noted above, the OEIG believes that the EEC’s promulgation of administrative rules imposing requirements governing third parties is not within its statutory authority. In the proposed amendment to new subsection (c)(5) of Section 1620.610, the EEC seeks to impose certain requirements on third parties, namely it requires self-employed former State employees to provide certain information or presumably be subject to a fine. While the OEIG does not dispute that the EEC has the right to and in fact has drafted numerous administrative rules governing its conduct and executive inspectors general,² the OEIG must respectfully object to any EEC proposed amendment which seeks to govern the conduct of third parties, as does new subsection (c)(5).

The OEIG’s objection is made with the realization and is cognizant that the EEC has already enacted administrative rules governing third parties (employees subject to the revolving door provisions). However, even though the OEIG may not have previously objected to such promulgation, we must respectfully object now because we believe the EEC lacks statutory authority to require employees to perform or not perform certain activities or potentially be subject to an administrative fine.

c) The Proposed Amendment Treats Certain State Employees Disparately

The OEIG also objects to the proposed amendment because it disparately treats a class of individuals—those who seek to be self-employed versus those who are non-self-employed—with no apparent rational basis. Section 5-45 requires all employees subject to subsections (c) and (d) to give notice to an executive inspector general prior to accepting employment for up to one year after separation from State employment, regardless of whether the employee intends to engage in self-employment or not. The proposed amendment treats self-employed individuals differently because this class of individuals now only has to submit to a Section 5-45(f) review once. Thus, this proposed amendment is inappropriate.

² For example, the EEC has promulgated numerous rules relating to EIGs, namely rules relating to: Conduct of Investigations; Case Initiation Form – Contents; and Opening an Investigation, among others.

d) The Proposed Amendment is Unnecessary and is Unclear

The OEIG also objects to the proposed amendment because we believe that the amendment is unnecessary, unclear and may confuse persons subject to the revolving door notification requirement. First, when a person subject to Section 5-45 (c) or (d) submits notice to the OEIG, we require persons intending to engage in self-employment to provide our office with information on their potential clients.³ Thus there is no need for this requirement to be codified in an administrative rule. However, and just as importantly, the proposed rule may confuse former State employees as to their obligations under the statute, since, as noted above, the statute requires certain former State employees (non-self-employed individuals) to seek a determination from an executive inspector general pursuant to Section 5-45(f) each time they seek a new job during the one-year period after they leave State employment but would only require other former State employees (self-employed individuals) to submit a list of clients and undergo a determination once. This distinction is confusing, unnecessary and unclear and may unfortunately result in the inadvertent violation of the Ethics Act, which the OEIG would prefer to avoid.

For the foregoing reasons, the OEIG objects to this proposed new subsection and does not support proposed Section 1620.610(c)(5).

ii. Comments with Regard to Amendment to Subsection (c)(6) of Section 1620.610

As the OEIG understands it, this proposed rule would create a 5-day deadline for Ethics Officers to submit the form required to process a State employees' revolving door determination. The OEIG does not support the proposed amendments to new subsection (c)(6) because, again, we believe the EEC lacks statutory authority to promulgate administrative rules that impose requirements governing third parties.

In its proposed amendments, the EEC is seeking to govern the conduct of State Ethics Officers, individuals over whom the OEIG does not believe the EEC has such authority. The OEIG appreciates that individuals seeking a revolving door determination have a genuine interest in the expeditious completion of the revolving door determination process, and usually seek to make certain Ethics Officers timely submit the appropriate form (OEIG's RD 102) to the OEIG. And while an administrative rule requiring an Ethics Officer to submit a form within a 5-day period would no doubt inure to the benefit of the departing employee, the OEIG does not believe the EEC has the authority to require such 5-day submission from a third party. Although it is the duty of every officer or employee under the jurisdiction of an executive inspector general to cooperate in an investigation (Section 20-70), the cooperation only extends to executive inspectors general and the Attorney General. Moreover, under its general authority to determine the appropriate means of investigation (Section 20-20(1)), the OEIG generally follows up with Ethics Officers regarding said form so that the OEIG may timely complete its Section 5-45(f) obligatory revolving door determination. For the foregoing reasons, the OEIG respectfully objects to this proposed amendment.

³ The OEIG generally seeks this information based upon the Ethics Act's grant of authority to executive inspectors general to determine the appropriate means of investigation and has required the information under State employees' obligation to cooperate with executive inspectors general and the Attorney General. *See* 5 ILCS 430/20-70.

iii. Comments with Regard to New Subsection (g) of Section 1620.610

As the OEIG understands it, this proposed rule would mandate the EEC to impose an administrative fine of up to \$5,000 against a State employee who fails to comply with the revolving door *notice* requirements. Although it is somewhat unclear as to why the EEC would impose a mandatory fine (*shall* be subject to a fine) on individuals who fail to provide the required notice set forth in subsection (c), the OEIG must object to this proposed amendment for a couple of reasons.

First, it is unclear the effect this proposed rule will have or how it will be applied in relation to the existing statutory provisions or penalties contained in the Ethics Act. For example, the Ethics Act already provides that “[a]n ethics commission may levy an administrative fine for a violation of Section 5-45 of this Act of up to 3 times the total annual compensation that would be obtained in violation of 5-45.” Moreover, under 5 ILCS 430/50-5(e), an administrative fine may be levied by the EEC for any violation of the Ethics Act, which presumably would include the notice provisions of an employee’s revolving door obligations. Thus, specific administrative penalties already exist for violations of the revolving door provisions in Section 5-45. In addition, a more general administrative penalty already exists for violations of the Ethics Act, such as the revolving door provisions.

Second, the language used in the proposed rule, which states that employees “shall” be subject to a fine, appears to suggest that a State employee who files a revolving door notice late or not at all will *automatically* be subject to an administrative fine by the EEC. The OEIG does not believe that an automatic fine is consistent with the statutory scheme for prosecution of the Ethics Act violations and we do not believe such an automatic fine would comport with the dictates of due process. Under the terms of the Ethics Act, any violation of the Ethics Act, including a violation of the revolving door notice provisions, are generally investigated by an executive inspector general, and thereafter presented to the Attorney General’s Office for the reasonable cause determination. Only after the Attorney General makes its reasonable cause determination may the Attorney General file an administrative proceeding, which includes an opportunity for the subject to contest the charges and be heard.

In short, the proposed amendment appears to eliminate the checks and balances set forth in the Ethics Act and would strip individuals of the Ethics Act’s built-in due process safeguards. Therefore, the OEIG opposes the proposed new subsection (g) to Section 1620.610.

iv. Comments with Regard to New Subsection (h) of Section 1620.610

As the OEIG understands it, this proposed rule would create a notice requirement for high-ranking State employees and officials subject to subsection 5-45(h) prior to their acceptance of non-State employment. The Ethics Act currently provides that *only* employees and officers subject to subsections 5-45(c) and (d) are required to provide a revolving door notice to the appropriate executive inspector general and in fact specifically excludes subsection (h) employees from the notice requirement. Specifically, the Ethics Act states:

Any State employee in a position subject to the policies required by subsection (c) or to a determination under subsection (d), *but who does not fall within the prohibition of subsection (h) below*, who is offered non-State employment during State employment . . . shall, prior to accepting such non-State employment, notify the appropriate Inspector General.

5 ILCS 430/5-45(f) (emphasis supplied). The OEIG does not support the proposed amendment for a number of reasons.

a) The Proposed Amendment Conflicts with the Ethics Act

The proposed amendment directly conflicts with the Ethics Act. In this proposed rule, the EEC seeks to impose new duties and obligations on so-called “(h) list” employees, who are not otherwise statutorily required to provide *any* notice to executive inspectors general about post-State employment under the existing revolving door provisions in the Ethics Act. Given the absence of any express statutory authority to make such a rule and given that the proposed rule imposes these new duties and obligations upon persons who are expressly not under any statutory duty or obligation, the OEIG objects to this amendment and cannot support it.

b) The Proposed Amendment Exceeds the EEC’s Authority

As noted above, the OEIG believes that the promulgation of administrative rules that seek to impose requirements governing third parties is not within the EEC’s statutory authority. Consistent with the Ethics Act, the OEIG does not currently conduct any determinations for employees and officers subject to subsection 5-45(h). Moreover, if a notice provision for subsection 5-45(h) employees and officers is required by the Administrative Code as proposed, (h) list employees may be confused as to the effect of their notice requirement and their obligations under the Ethics Act.

Therefore, the OEIG opposes the proposed new Subsection (h) to Section 1620.610.

IV. Conclusion

In summary, the OEIG supports the EEC’s proposed amendments to the *Case Initiation Form – Contents* (Section 1620.320), the proposed amendments to the *Opening an Investigation File* (Section 1620.330) and the proposed amendments relating to the *Decision of the Commission* (Section 1620.530).

However, in regards to the proposed amendments to the *Revolving Door Prohibitions* (Section 1620.610), for the reasons set forth above, the OEIG cannot support any of the proposed amendments and respectfully objects to each proposed amendment.

We appreciate the opportunity to offer these comments. If you would like to discuss these comments or anything else, please feel free to contact me at (312) 814-1932.

Sincerely,

Ricardo Meza
Executive Inspector General

By:



Cole S. Kain
Chief of Staff and General Counsel

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