

## Executive Orders, Signing Statements, and Veto Messages, Part Two

The focus of this month's column will be on several issues relating to the use of the executive order by Indiana governors:

- Does a governor's executive order continue in effect when his term is over?
- Can the general assembly by passing a statute preempt an area – thereby invalidating an executive order on the same subject?

Indiana's governors have long issued executive orders as one mechanism to set executive branch policy. There is little case law in Indiana involving executive orders. In a 1999 Indiana Court of Appeals ruling<sup>1</sup>, the Court held that:

An executive order must fall within the authority granted to the Governor by the constitution or statutory provision. ... As with most other jurisdictions, in Indiana the executive power of the state is vested in the Governor. Ind. Const, art. 5, § 1. In turn, 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.”

### *Does a governor's executive order continue in effect when his term is over?*

On the federal level, executive orders clearly continue after a president's term is over. Phillip J. Cooper writes in *By Order of the President: The Use and Abuse of Executive Direct Action* that the “sheer volume” of executive orders dating back over many administrations is overwhelming.

It often comes as a surprise to people called upon to work with orders today that the current governing guidelines for the issuance of executive orders are themselves from an executive order issued by President Kennedy. Executive Order 11030 was first promulgated in 1962, though it has been amended by a number of later orders issued during the Johnson, Carter, and Reagan administrations.<sup>2</sup>

Cooper also writes:

The real need is to provide a codification of the materials that brings together all the related orders and updates them so that it is possible to have in one place all the current orders applicable in any given situation.<sup>3</sup>

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<sup>1</sup> *Nass v. State ex. rel. Unity Team*, 718 N.E.2d 757, 763 (Ind. App. 1999), transfer denied (citations omitted).

<sup>2</sup> Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action*, University of Kansas Press, 2002, p. 17.

<sup>3</sup> Cooper, p. 19-20.

That an Indiana governor's executive orders continue to be effective after the governor has left office may be implied from the practices of recent Indiana governors. Governor Daniels' executive orders issued shortly after he took office in January 2005 show the use of phrases such as "is hereby superseded," "continuing the office," "rescinded and declared null and void," "which continues in effect, is hereby amended to be consistent herewith." This language supports the continuation of executive orders after the term of office.<sup>4</sup>

### ***What is the impact of General Assembly action on Executive Orders?***

When Governor Daniels took office in January of 2005, he immediately put in place Executive Order 5-12, "establishing rules of conduct for state officers, employees, and special appointees."

The relevant statutory provision then in effect, IC 4-2-6-11<sup>5</sup>, prohibited a former state employee who had had responsibility for any of a list of twelve items, including a contract, an enforcement proceeding, or a public works project, and excluding a legislative matter or administrative policy or rule, from representing a person on that matter for a one-year period, unless the agency involved waived the prohibition as "not in the public interest."

Also in effect when Daniels took office was Executive Order 04-10, issued by Governor Kernan on April 27, 2004, which placed some limits on senior-level executive branch employees leaving state government for a year from attempting to influence their former agency on behalf of any other person – the "revolving door" prohibition.<sup>6</sup>

Governor Daniels' order expressly incorporates the terms of Governor Kernan's prior order.<sup>7</sup> Further, it specifically prohibits both legislative lobbying and executive branch lobbying by former state employees.<sup>8</sup>

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<sup>4</sup> In Virginia and Florida many executive orders include their own expiration dates. In Minnesota a statute provides that "all executive orders expire 90 days after the date that the governor who issued the orders vacates office." See: [http://www.governor.state.mn.us/tpaw\\_View\\_Article.asp?artid=496](http://www.governor.state.mn.us/tpaw_View_Article.asp?artid=496). (The Minnesota act may raise separation of powers issues.)

<sup>5</sup> Most recently amended in 1992.

<sup>6</sup> 27 IR 2937 (June 1, 2004).

<sup>7</sup> Paragraph 7 of Daniels' EO 5-12: "7. The revolving door prohibitions created by Executive Order 04-10, which continues in effect, shall continue to apply to any state officer, employee, or special state appointee who left state government prior to January 10, 2005, or to any individual who served as a state officer, employee or special state appointee prior to and after January 10, 2005 and who seeks and receives a waiver from the State Ethics Commission of the requirements of this Executive Order that are in addition to those imposed by Executive Order 04-10." EO 5-12 [28 IR 1902 (3/1/05)] is available at: [indianalawblog.com/documents/EO\\_5-12.pdf](http://indianalawblog.com/documents/EO_5-12.pdf)

<sup>8</sup> Paragraph 8 of Daniels' EO 5-12 begins: "8. No state officer, employee, or special state appointee who leaves state government after January 10, 2005 shall accept employment or receive compensation for one year: a. as a lobbyist engaged in lobbying the executive or legislative branches of state government in Indiana ..."

In short, Governor Daniels' Executive Order 5-12 was more stringent than the then-existing statute law set out in IC 4-2-6-11. Was the Governor free to impose stricter requirements on executive branch employees, or did the prior existence of the statute pre-empt the area?

The impact of legislative action on the effectiveness of Executive Orders has come up in at least two recent administrative rulings and one law suit filed this year.

**The first ruling.** The first State Ethics Commission Advisory Opinion at issue is 05-1-11, issued Sept. 8, 2005.<sup>9</sup> A state employee resigned effective February 25, 2005. The question, as framed by the State Ethics Commission, was: "Does the post-employment restriction in Executive Order 05-12 and subsequently IC 4-2-6-11 prohibit the former employee from working as a lobbyist in the Indiana General Assembly prior to February 25, 2006?"

The Opinion quotes EO 05-12, paragraph 8's language prohibiting a state employee, leaving state government after January 10, 2005, from receiving compensation as a lobbyist engaged in lobbying either the executive or legislative branches of state government for a year after leaving state employment.

The Opinion also quotes the amended IC 4-2-6-11, "effective May 11, 2005", which restricts a person who served as a state employee after January 10, 2005, from serving within a year, as a lobbyist "as defined in IC 4-2-7-1," a definition that includes only executive branch lobbyists.

The Opinion concludes:

On May 11, 2005, paragraph 8 of the Executive Order *ceased to control* the issue of post-employment restrictions. On that date, IC 4-2-6-11 became effective. This statute changes the limitation concerning lobbying. In IC 4-2-6-11, the prohibition against lobbying the General Assembly is lifted. Only executive branch lobbying is restricted.

Accordingly, there is no post-employment prohibition against the former employee lobbying the legislative branch of state government. [emphasis added]

Apparently then, in the opinion of the Ethics Commission, the General Assembly's 2005 amendment to IC 4-2-6-11 was enough to supersede the Governor's executive order and possibly foreclose him from future efforts to limit legislative branch lobbying by former executive branch employees.

**The second ruling.** The following year the State Ethics Commission issued a second ruling relating to the relationship of EO 05-12 and IC 4-2-6-11. Advisory Opinion 06-1-04 was issued Jan. 20, 2006.<sup>10</sup> A state employee resigned and

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<sup>9</sup> <http://www.in.gov/ethics/advis/05-I-11.html>

<sup>10</sup> <http://www.in.gov/ethics/advis/06-I-4.html>

sought a waiver of “post employment statutory restrictions.” The question, as framed by the State Ethics Commission, was: “Should the former state employee be granted a waiver of the post-employment statute so that she can accept [private] employment [within the one-year period following her resignation]?”

The Opinion’s conclusion begins: “Since the former state employee resigned her employment *prior to the effective date* of IC 4-2-6-11, the Commission looks to Executive Order 05-12 to determine whether or not a waiver of the post-employment restriction is supported by the facts of this case.”<sup>11</sup>

In the 2005 opinion, where the employee also resigned *before* the amendment to IC 4-2-6-11 took effect, the ruling was that the amended statute, not the executive order, applied. In this 2006 opinion, however, the decision is the reverse; without further explanation the Commission relied on the executive order rather than the statute.

The 2006 ruling also fails to recognize that not only Governor Daniels’ recent executive order, but also the earlier version of IC 4-2-6-11, were in effect when the employee resigned. The use of the phrase “prior the effective date of IC 4-2-6-11” implies a lack of recognition that IC 4-2-6-11 was not enacted as a new statutory provision in 2005, but was simply amended by the General Assembly in 2005.

**The law suit.** A law suit has been filed in Marion Superior Court in this case, *Vanetta Kumar v. Mitchell E. Daniels and The Indiana State Ethics Commission*. The suit claims that the earlier version of IC 4-2-6-11 “would not have prevented [plaintiff] from becoming employed by DLZ within a year of her departure from state government. ... The aforementioned statute prohibited a former state employee from representing or assisting an outside entity with a particular matter with which the former employee was involved as a state employee. The statute did not prohibit the former employee from working for the entity in some unrelated capacity. ... Executive Order No. 05-12 placed a greater restriction on an employee who left state government than the statute enacted by the Legislature in that it prevented an employee who has been involved with a particular matter with an outside entity from taking employment in any capacity with that entity for one year from her state government departure date.”

### ***Conclusion.***

These two advisory opinions and the pending lawsuit indicate that the legal implications of the interplay between executive orders and statute law have just begun to be explored in Indiana.<sup>12</sup>

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<sup>11</sup> Emphasis added.

<sup>12</sup> It may be notable that Governor Daniels issued EO 5-12 with no qualification with respect to future legislation and that the Governor has not subsequently acted to modify or rescind EO 5-12, despite the amendment of IC 4-2-6-11 and the ethics rulings. In general, Daniels’ orders indicate cognizance of both prior executive orders and the possibility of future legislative action. An example is EO 05-3 [28

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IR 1889 (3/1/05)] creating the office of inspector general, which specifies both that: “This Executive Order shall expire upon the enactment of legislation by the General Assembly to codify the measures described in this Executive Order.” and that former Governor Kernan’s “Executive Order 04-09 establishing the Office of Chief Investigator is hereby superseded.”