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An INDOT Highway Technician sought advice on whether his continued service as a township trustee presented any conflicts of interest under the Code of Ethics. SEC determined there was no inherent conflict under the Code in the Technician holding both positions as long as he observed the relevant ethics rules related to Political activity, Conflicts of interest, confidential information, Use of state property and Ghost employment. However, the SEC advised the Technician it had no authority to render opinions regarding the federal Hatch Act or the Indiana Constitution's prohibition against dual office holding.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to I.C. 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is employed as a Highway Technician 1 with the Indiana Department of Transportation ("INDOT") and also serves as the Township Trustee for Lagro Township in Wabash County. In addition to his regular duties with INDOT, the Highway Technician also plows snow, seals cracks, picks up trash from the roads and performs other functions as assigned by the agency during the winter months. The Highway Technician does not have any involvement in the funding or sources of funding of the INDOT projects to which he is assigned. His normal work hours are 7:00 a.m. to 3:30 p.m. and he receives no compensation for his work other than his paycheck from INDOT.

Regarding his work as a Trustee, the Highway Technician is the chief executive officer of the Township which is responsible for providing firefighting and emergency services, township assistance, cemetery maintenance, weed control, and authority over partition fence disputes. The Highway Technician also performs the normal administrative and accounting functions of the governmental unit in this capacity. His work as Trustee is only part-time due to Lagro Township's size. Specifically, he maintains office hours from 6:00 p.m. to 9:00 p.m. two days per week and performs other functions on an as-needed basis when he is not on duty with INDOT.

INDOT has raised concerns regarding the prohibitions against holding more than one "lucrative office," engaging in political activity, the use of state property for purposes other than official state business, ghost employment, gift restrictions, and the application of the federal Hatch Act.

ISSUE

Is the Highway Technician prohibited from serving in both his position at INDOT and as the Lagro Township Trustee?

RELEVANT LAW

42 IAC 1-5-4 Political activity

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 3-9-2; IC 4-2-6-1

Sec. 4. (a) A state employee or special state appointee shall not engage in political activity including solicitation of political contributions from:

(1) another employee or special state appointee; or

(2) any other person;

when on duty or acting in an official capacity.

(b) This section does not prohibit a state employee or special state appointee from engaging in such activity when not on duty.

(c) A state employee or special state appointee shall not solicit political contributions at any time from:

(1) persons whom the employee or special state appointee knows to have a business relationship with the employee's or the special state appointee's agency; or

(2) state employees or special state appointees directly supervised by the employee or the special state appointee.

(d) The appointing authority of an agency and all employees or special state appointees with purchasing or procurement authority on behalf of the state shall not solicit political contributions on behalf of any candidate for public office, unless that individual is a candidate for public office himself or herself.

42 IAC 1-5-5 Outside employment

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-5.5; IC 4-2-7

Sec. 5. Outside employment restrictions are set forth in IC 4-2-6-5.5.

I.C. 4-2-6-5.5

Conflict of interest; advisory opinion by commission

Sec. 5.5. (a) A current state officer, employee, or special state appointee shall not knowingly:

(1) accept other employment involving compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of public office or require the individual's recusal from matters so central or critical to the performance of the individual's official duties that the individual's ability to perform those duties would be materially impaired;

(2) accept employment or engage in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment; or

(3) use or attempt to use the individual's official position to secure unwarranted privileges or exemptions that are:

(A) of substantial value; and

(B) not properly available to similarly situated individuals outside state government.

(b) A written advisory opinion issued by the commission or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

42 IAC 1-5-6 Conflicts of interest; decisions and voting

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 6. Decision and voting restrictions are set forth in IC 4-2-6-9.

I.C. 4-2-6-9

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

42 IAC 1-5-12 Use of state property

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation.

42 IAC 1-5-13 Ghost employment

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

42 IAC 1-5-10 Benefiting from confidential information

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 IAC 1-5-11 Divulging confidential information

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

I.C. 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

ANALYSIS

The Highway Technician's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Political Activity, Conflicts of Interest, Use of State Property, Ghost Employment and Benefitting from and Divulging Confidential information. The application of each provision to the Highway Technician is analyzed below. The Commission does not have jurisdiction to interpret or address concerns regarding the dual office holding prohibition or the federal Hatch Act.

A. Political Activity

The political activity rule prohibits the Highway Technician from engaging in political activity, including the solicitation of political contributions from anyone, when he is on duty or while acting in an official capacity for the State. This rule also prohibits the Highway Technician from

soliciting political contributions at any time, whether on duty or not, from persons with whom INDOT has a business relationship or from state employees or special state appointees he directly supervises. If he has purchasing or procurement authority on behalf of the State, the Highway Technician is also restricted from soliciting political contributions on behalf of any candidate for public office unless he is a candidate for public office himself. So long as the Highway Technician adheres to the above restrictions, continuing to serve as Township Trustee would not appear to be prohibited by the political activity rule.

B. Outside Employment/Professional Activity

I.C. 4-2-6-5.5 prohibits the Highway Technician from 1) accepting other employment involving compensation of substantial value if those responsibilities are inherently incompatible with his responsibilities in his state employment or would require his recusal from matters so central or critical to the performance of his duties with the State that his ability to perform them would be materially impaired; 2) accepting employment or engaging in business or professional activity that would require him to disclose confidential information that was gained in the course of his employment with the State; and 3) using or attempting to use his position with the State to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government. In this case, INDOT's ethics officer has indicated that the Highway Technician's continued service as a Township Trustee would not create a conflict of interest given his specific duties with the agency.

C. Conflicts of Interest

I.C. 4-2-6-9(a) prohibits a state employee from participating in any decision or vote if he has knowledge that various persons may have a "financial interest" in the outcome of the matter, including himself. The term financial interest as defined in I.C. 4-2-6-1(a)(11) includes an interest involving property or services. However, the term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

Based on the information and testimony provided by the Highway Technician, it does not appear that he would be required to participate in decisions or votes in his employment at INDOT that would relate to or affect him or his role as Township Trustee. So long as no such decisions or votes come before the Highway Technician in his position at INDOT, he would not be in violation of this rule. In the event he would be required to participate in any such matters during the course of his state employment, he should follow the procedure set forth in subsection (b) and disclose the conflict to the Commissioner of INDOT and request an appropriate screen from the Commission.

D. Use of State Property

The use of state property rule prohibits a state employee from using state property for purposes other than official state business. The Highway Technician has not provided information that would suggest that he would use state property to fulfill his Township Trustee duties. To the extent that the Highway Technician refrains from using state property for duties related to his role as Township Trustee, he would not be in violation of this rule.

E. Ghost Employment

The ghost employment rule prohibits a state employee from engaging in or directing others to engage in work other than the performance of official duties during working hours absent a written policy allowing it. In this case, the Highway Technician indicates that he maintains hours for his Township Trustee duties separate from his state hours. To the extent that the Highway Technician refrains from engaging or directing other to engage in work other than official state duties, he would not be in violation of this rule

F. Gifts

The gifts rule prohibits the Highway Technician from accepting gifts from persons who have a business relationship with INDOT or from someone who is trying to influence him in his official capacity. The Highway Technician indicates that there is a minimal chance that he would deal with the same vendors at INDOT as in his role as Township Trustee. Moreover, he indicates that he does not accept gifts from vendors who deal with Lagro Township. So long as the Highway Technician does not accept gifts from persons who have a business relationship with INDOT or who are seeking to influence him in his official capacity at any time, he would not be in violation of this rule.

G. Confidential Information

42 IAC 1-5-10 and 42 IAC 1-5-11 prohibit a state employee from benefitting from or divulging confidential information. The Highway Technician indicates that his duties as Township Trustee do not require him to benefit from or divulge confidential information. To the extent that the Highway Technician complies with these restrictions, he would not be in violation of these rules.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Highway Technician is not prohibited by the Code from serving in both his position at INDOT and as the Lagro Township Trustee.