

42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)
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The Director of the DNR wanted to continue to serve on the Board of a nature conservancy and drafted an agency policy that would allow other DNR employees to serve on the boards of conservancy partners. SEC found no conflict of interest would arise under the outside employment rule; however, the Director would be prohibited under the rule on conflicts of interest; decisions and voting from participating in any decision or vote in which the Conservancy would have a financial interest. Consequently, the screen proposed by the Director in which the Deputy Director would make decisions regarding the Conservancy should be implemented. Finally, any issues arising under the rules on use of state property and ghost employment were resolved by the adoption of the Director's proposed policy on work with conservancy partners.

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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 was recently appointed Director of the Indiana Department of Natural Resources ("DNR"). The Director is a member of the board of trustees for the Indiana chapter of The Nature Conservancy ("TNC"). DNR and TNC have a very strong working relationship. Specifically, the two entities join forces to promote the conservation of land in Indiana on many projects. Some of these projects involve the purchase of titles or easements from TNC by DNR.

The Director would like to continue his service on TNC's board and address the appropriateness of his participation on it.

ISSUE

What rules in the Code would apply to the Director's continued service on the TNC board?

RELEVANT LAW

IC 4-2-6-5.5 (42 IAC 1-5-5)

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).

I.C. 4-2-6-9 (42 IAC 1-5-6)

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

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

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.

ANALYSIS

A. Outside employment

An outside professional activity opportunity creates a conflict of interest under I.C. 4-2-6-5.5 if it results in the state employee: 1) receiving compensation of substantial value when the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of his official duties that his ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use his official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government. Subsections 2) and 3) apply to uncompensated professional activities as well as compensated outside employment positions. In this case, nothing in the information provided to the Commission regarding the Director's activities with TNC would appear to present any conflicts of interest under the rule on outside employment.

B. Conflicts of Interest

I.C. 4-2-6-9 prohibits the Director 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 or a business organization in which he is serving as an officer, a director, a trustee, a partner, or an employee. In this case, the Director indicates that he serves on the board of trustees of TNC. The Director has indicated that the DNR often times purchases titles or easements from TNC. Consequently, a conflict of interest would arise for the Director if he participates in a vote or decision in which he or TNC has a financial interest. Accordingly, the Director would be prohibited from participating in any decision or vote involving those or any other matters in which he or TNC would have a financial interest.

I.C. 4-2-6-9(b) provides that a state employee 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. In this case, the Director requested an advisory opinion from the Commission as provided in the rule and so long as he discloses his potential conflict to his appointing authority, he would not be in violation of this provision of the rule.

I.C. 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular

matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, the Director proposes a screening mechanism where he would be shielded from participating in any decision that affects TNC, including the purchase of titles or easements. The Deputy Director of DNR will make the decisions and sign off on documents on behalf of DNR involving TNC. To the extent the Director's appointing authority approves the proposed screen, he would be in compliance with the rule.

C. Ghost Employment and Use of State Property

The ghost employment rule provides that a state employee 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. In this case, the Director's service on the TNC board does not appear to be part of his "official duties." Accordingly, absent the adoption of a general written agency policy, the Director would be prohibited from participating on the TNC board during working hours. The Director has submitted a policy that would allow DNR employees to participate, during working hours, on the boards of conservation partners including TNC. In light of the policy, it does not appear that the Director's service on the TNC board would violate the ghost employment rule.

The use of state property rule provides, generally, that a state employee shall not use state property 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. It does not appear that the Director's service on the TNC board would be considered "official state business." Accordingly, absent the adoption of a general written agency policy, the Director would be prohibited from using state property for TNC related purposes. The policy submitted by the Director specifically addresses the use of state property by DNR employees for boards of conservation partners including TNC.

CONCLUSION

The Commission finds that the Director's continued service on the TNC board does not present a conflict of interest under the rule on outside employment. However, with respect to I.C. 4-2-6-9, the Commission finds that a potential conflict of interest would arise if the Director participated in any vote or decision in which TNC would have a financial interest because of his service on the group's board. Accordingly, it is the opinion of the Commission that the Director be screened from decisions and/or votes involving TNC pursuant to the screening procedures described herein. Finally, the policy submitted by the Director outlines the agency's approved use of state property and time with respect to TNC and other conservation partners.