



INVESTIGATIVE REPORT

Lori Torres, Inspector General

OFFICE: INDIANA DEPARTMENT OF NATURAL RESOURCES (DNR)
TITLE: DNR ADDITIONAL COMPENSATION, OUTSIDE EMPLOYMENT AND
CONFLICT OF INTERESTS
CASE ID: 2018-02-0036
DATE: April 24, 2019

*Inspector General Chief Legal Counsel, Tiffany Mulligan, after an investigation by
Inspector General Special Agent Mark Mitchell, reports as follows:*

The Indiana General Assembly charged the Office of Inspector General (OIG) with addressing fraud, waste, abuse and wrongdoing in the executive branch of state government. IC 4-2-7-2(b). The OIG also investigates criminal activity and ethics violations by state workers. IC 4-2-7-3. The OIG may recommend polices and carry out other activities designed to deter, detect and eradicate fraud, waste, abuse, mismanagement and misconduct in state government. IC 4-2-7-3(2).

Complaint

On February 1, 2018, the OIG received a complaint alleging that a Department of Natural Resources (DNR) District Forester (the Employee) had been charging commission fees for the sale of timber by classified forest owners since 2011. The individual who submitted the complaint (the Reporting Party) indicated that she had copies of cancelled checks for fees paid to the Employee for a timber sale. The Reporting Party also claimed that she had additional checks

written to the Employee through his family's private business. The complaint alleged that the Employee was charging fees for tasks that were part of his DNR District Forester role.

Investigation

OIG Special Agent Mark Mitchell conducted an investigation into this complaint. As part of the investigation, Special Agent Mitchell interviewed the Reporting Party, the Employee and the property owners who allegedly wrote checks to the Employee for his work on their property. Special Agent Mitchell also reviewed numerous documents, including cancelled checks, contracts, bank statements and DNR policies.

Background

Special Agent Mitchell first interviewed the Reporting Party. The Reporting Party explained that her complaint involved a specific parcel of land. The land transferred to three property owners (the Property Owners) after the previous owner passed away. The Reporting Party stated that she heard that the Employee recommended to the Property Owners that they sell the property and he told them not to get the property appraised. She claimed that the Employee helped the Property Owners sell timber from their land in 2011 and 2012 and that the Property Owners provided him a commission for this service. The Reporting Party stated that the Property Owners now wished to sell the property and that the Employee referred potential buyers to the Property Owners.

Special Agent Mitchell learned that the Employee worked for DNR for decades and recently retired from DNR. During his employment with DNR, he served as a District Forester and was responsible for a district, which included the property at issue. In his role as a District Forester, the Employee worked with private landowners to assist them in the management of their forests, which might be developed for hunting, recreation or timber production. He informed landowners about government programs that might assist landowners in meeting their

goals. He also conducted inspections if land was placed into the classified forest and wildlands program.

In an interview with Special Agent Mitchell, the Employee stated that if a landowner was interested in selling timber from his or her land, the Employee would advise the landowner if the timber was ready to be cut as part of his role as a DNR District Forester. He stated that it was within the landowner's discretion on whether to cut and sell the timber. The Employee explained that landowners usually hire a private forester to mark the trees and put the trees up for auction or sealed bid.¹ The Employee stated that District Foresters are not permitted to mark trees as part of their DNR duties and have not been permitted to do so for approximately the last fifteen years; prior to the current policy, marking trees was part of the duties of a DNR District Forester.

One of the Employee's supervisors (the Supervisor) confirmed that DNR's Division of Forestry had not provided timber marking services for over fifteen years. He explained that as the number of classified forests grew, the District Foresters no longer had time to provide certain services, including posting signs, marking trees, assessing board footage and value of trees and helping forest owners with the sale of trees. As a result, DNR District Foresters stopped providing this services about fifteen years ago.

Special Agent Mitchell obtained a copy of a recent job description for a DNR District Forester position, and it listed marking, marketing and harvesting of timber among the position's job duties. Special Agent Mitchell also obtained a copy of the draft Cooperative Forest Management (CFM) section from DNR's Operations Manual, which indicates that part of a District Forester's job is to mark timber on private land for harvesting.

¹ Marking trees is a process where a forester would select the mature and damaged trees, place a mark on them, measure the board volume on them and work up a timber sale notice for the landowner. The landowner then can send the notice out to several timber buyers for bids, and the timber buyers can submit a sealed bid to the landowner. The landowner has the discretion to accept or reject any bids received.

The Employee's Outside Employment

Special Agent Mitchell learned that the Employee provided services to the Property Owners as a private forester. Special Agent Mitchell obtained a copy of a letter that the Employee submitted to the Property Owners in 2005, thanking the Property Owners for wanting to hire him as a forestry management consultant. In the letter, the Employee proposes that the Property Owners hire him to do the following: conduct an inventory of their trees at a cost of \$700; post classified forest signs at corners and property lines and repaint the boundary lines for a cost of \$100; and perform follow up inspections and reports once every other two to three years at a cost of \$150 per inspection and report. The letter also reads "the timber will be ready to market in 5 to 8 years, the standard commission most foresters charge for marking and selling the mature trees is 10% but I feel a charge of 8% is more reasonable." One of the Property Owners signed the proposal letter, noting her agreement with the terms of the letter.

Special Agent Mitchell learned that the Employee conducted the boundary markings and sign postings in 2006. He completed forest inspections in 2006 and 2009. He completed the tree marking and harvesting in 2011 and 2012. The Employee admitted that he provided these services and he received payments as listed in his agreement with the Property Owners. The Employee received total payment from the Property Owners of approximately \$7,500.

The Employee stated that he has known the Property Owners for thirty-five years and he advised both the current Property Owners and the previous property owner as a DNR District Forester. He said he built a close relationship with them over the years. He said that he referred them to other private foresters who could do the work, but the Property Owners were more comfortable with him doing it. He stated that he now knows this was wrong and that he would be willing to make restitution to the Property Owners.

Special Agent Mitchell obtained a copy of a timber sale contract between the Property Owners and a private company from 2011. The contract provides that the private company will purchase timber from the Property Owners for \$82,034. Special Agent Mitchell also obtained copies of cancelled checks that one of the Property Owners wrote to the Employee. The checks totaled \$2,187.58, which is one-third of eight percent of the contract for the sale of the timber. Special Agent Mitchell confirmed with the Employee and two of the three Property Owners that all three Property Owners paid the Employee equal amounts; therefore, the Employee's payment for services involving sale of the timber was consistent with the Employee's agreement with the Property Owners.

Special Agent Mitchell interviewed two of the three Property Owners who hired the Employee for private forestry work. They both confirmed that they knew the Employee for many years and began their association with the Employee through his role as a DNR District Forester for the property. They said that they sought out the Employee to do the private forestry work, and he did not approach them about doing the work. They believed the Employee performed work for them above and beyond his responsibilities as a DNR District Forester. The Property Owners also confirmed that the Employee tried to direct them towards a private forestry consultant to perform the work, but they rejected his recommendation because they wanted him to do the work.

Special Agent Mitchell asked one of the Property Owners if the Employee should return the fees the Property Owners paid to him. She said she would not feel good about accepting the money back because he earned the money. Another one of the Property Owners said they would have had to pay someone else to do the work if they had not paid him. Both of the Property Owners stated that they support the Employee and do not believe he did anything wrong. They said he has always been above board with them.

The Employee told Special Agent Mitchell that he has not done any similar private forester work for anyone else either inside or outside his district. Special Agent Mitchell subpoenaed the Employee's bank records. He cross checked the names from checks deposited from the Employee's accounts to the list of classified forest owners that the Employee managed as a DNR District Forester. Special Agent Mitchell found no checks deposited into the Employee's checking or savings account from any certified forest property owners who owned property that the Employee managed as a DNR District Forester.

Potential Sale of the Property

Special Agent Mitchell confirmed that the Property Owners were in the process of selling the property. The Property Owners who Special Agent Mitchell interviewed said that they told the Employee they were interested in selling the property, and the Employee had referred them to a potential buyer. Both of the Property Owners said the Employee never suggested they not have the property appraised. They said they did not know if the Employee had any specific relationship or association with the potential buyers.

The Employee admitted that he had referred a couple of individuals to the Property Owners when they told him that they were interested in selling the property. He denied telling the Property Owners not to have the property appraised, and he stated that he would never have said that. He believed that one individual he referred to the Property Owners was interested in purchasing the property, but he did not know if the sale had taken place or the status of a potential sale. He said he knew the potential buyers because they were private foresters.

Use of State Time and Resources

The Reporting Party submitted a similar complaint to the Supervisor at DNR. The Supervisor reviewed the matter and found that the Employee provided the services noted in the Reporting Party's complaint; however, he found that the Employee did not use state time or

resources for this work. In an interview with Special Agent Mitchell, the Employee stated that he used vacation and weekends to perform the private forestry work for the Property Owners. Special Agent Mitchell found no evidence to suggest that the Employee used state time or state property for the private forestry work he conducted for the Property Owners.

State Ethics Commission Opinions and DNR Policies

Special Agent Mitchell found that the State Ethics Commission (Commission) has issued four Formal Advisory Opinions (FAOs) involving DNR foresters in recent years.² In [FAO No. 13-I-41](#), a DNR Property Forester asked for approval to moonlight as a private sector forester on private land within Indiana. DNR provided several conditions, such as getting written approval from the State Forester, under which DNR would support a DNR Property Forester's outside employment on private land. The SEC found that property owners are not prohibited from engaging in outside employment as private sector foresters on private land so long as "DNR implements the proposed guidelines, increases the reporting requirement to a quarterly basis, and screens property foresters from confidential information."

Special Agent Mitchell also found that DNR has a policy on outside employment activities. The Commission approved DNR's policy in 1995, and DNR's Chief Legal Counsel approved the policy in 2006 and approved an amended policy in 2008. DNR's outside employment policy reads "The following are examples of activities that are not allowed as a self-employed consultant: 1) timber theft appraisals, 2) timber marking and 3) timber selling." The policy requires employees interested in offering consultant services to inform the State Forester or his designee prior to offering the services "[b]ecause of the high potential for conflicts of

² The SEC issued the following FAOs regarding DNR foresters: [No. 11-I-14](#); [No. 12-I-17](#); [13-I-41](#); [14-1-13](#); and [14-I-13A](#).

interest”. When asked about the policy, the Employee stated that he may have received it, but he doesn’t recall receiving it.

Special Agent Mitchell found that the draft Cooperative Forest Management section from DNR’s Operations Manual also includes a section on moonlighting, which requires a DNR employee to get clearance from the State Forester and where needed from the State Ethics Commission (Commission) for all forestry work. The Employee stated that he did not notify the State Forester or his agency ethics officer regarding his outside employment. He also did not seek a Formal Advisory Opinion from the Commission.

Conclusion

During the course of his investigation, Special Agent Mitchell found no evidence that the Employee engaged in criminal activity. Special Agent Mitchell found limited evidence implicating the Indiana Code of Ethics (Code), which is found in IC 4-2-6 and 42 IAC 1.

First, Special Agent Mitchell’s investigation revealed insufficient evidence to support a violation of IC 4-2-6-9, the Code’s conflict of economic interests rule, and IC 4-2-6-5.5, the Code’s outside employment rule. The Employee’s work for the Property Owners took place prior to 2015. Prior to 2015, the Code defined “employer” to exclude “a customer or client of a self-employed individual in a sole proprietorship or a professional practice.”³ As a result, the Property Owners likely would not have been considered the Employee’s employers for purposes of the Code when he completed private forestry work for them. Although the Employee violated DNR’s outside employment policy by not notifying others of his outside employment, he likely did not violate the Code’s conflict of economic interests or outside employment rules as

³ The General Assembly removed this language from the definition of employer in 2015. IC 4-2-6-1(a)(10) now defines “employer” as “any person from whom a state officer or employee or the officer’s or employee’s spouse received compensation.

interpreted prior to 2015 because the Property Owners were not his “employers” at the time of his outside work.

Second, Special Agent Mitchell’s investigation revealed insufficient evidence to support a violation of 42 IAC 1-5-8, the Code’s Additional Compensation rule, because the work the Employee performed for the Property Owners does not appear to be part of the Employee’s official duties as a DNR District Forester. Although some DNR documents still list tree marking as part of the District Forester’s job duties, both the Supervisor and the Employee stated that the District Foresters have not been allowed to perform this service as part of their official duties for at least the last fifteen years.

Finally, Special Agent Mitchell’s investigation revealed no evidence to support a violation of IC 4-2-6-17, the Code’s misuse of state property rule, or 42 IAC 1-5-13, the Code’s ghost employment rule.

The OIG declines to file a complaint with the Commission in this case due to the challenges listed above, along with the age of the actions that gave rise to this complaint and because the Employee is no longer a state employee. As a result, the OIG is closing this case for insufficient cause.

Recommendations

Although the OIG is declining to file a complaint with the Commission in this case, the OIG makes several recommendations to DNR that may help prevent conflicts of interests and the appearance of conflicts of interests in the future. First, the OIG encourages DNR to clarify its policies on outside employment, specifically regarding outside forester work, to ensure employees understand how to comply with the Code of Ethics and DNR rules. DNR also should update any additional documents, such as manuals and job descriptions, to ensure they reflect current policy and practice. Second, DNR should ensure that all employees affected by DNR’s

policy on outside employment have a copy of the most recent version of the policy. Third, DNR should file any of its current policies, including those on outside employment, with the Commission pursuant to 42 IAC 1-6-1. Finally, due to the history of forestry questions coming before the Commission, DNR should consider bringing any revised policies before the Commission to ensure that they fully comply with the Code of Ethics.

Dated: April 24, 2019

APPROVED BY:

A handwritten signature in black ink that reads "Lori Torres". The signature is written in a cursive style with a long horizontal stroke at the end.

Lori Torres, Inspector General