

**42 IAC 1-5-1 Gifts**  
**42 IAC 1-5-2 Donor restrictions**  
**42 IAC 1-5-8 Additional compensation**

The Ethics Officer for the Indiana Department of Natural Resources (DNR) sought advice as to whether the Code permits employees of the Indiana State Park Inns Authority to receive tips as part of their compensation for work performed in their official duties. The Commission finds that it is permissible under the Code for specified Authority employees to accept tips as part of their employment compensation package.

June 9, 2022  
2022-FAO-012

The Indiana State Ethics Commission (Commission) issues the following formal advisory opinion concerning the State Code of Ethics (Code) pursuant to IC 4-2-6-4(b)(1)(A)(ii). The following opinion is based exclusively on sworn testimony and documents presented by the requestor, who serves as the Indiana Department of Natural Resources' (DNR) Agency Ethics Officer.

**BACKGROUND**

The Ethics Officer and General Counsel for DNR (Ethics Officer) is requesting a formal advisory opinion from the Commission as to whether the Code permits employees of the Indiana State Park Inns Authority (Authority) to receive tips as part of their compensation for work performed in their official duties. The Ethics Officer is requesting this opinion on behalf of DNR and the Authority.

According to the Ethics Officer, Indiana State Park Inns were part of the first seven Indiana State Parks, which were developed in 1916. Currently there are seven state park inns and lodges operating nearly 700 hotel and cabin rooms, a golf course and a central reservation system. Plans are being developed for two more lodges at existing Indiana State Parks.

The operation and management of Indiana State Park Inns were originally handled by an individual appointed by the county chair. Eventually, this responsibility was brought under DNR, although the operating structure was not codified. Under this system, State Park Inn employees were not considered state employees.

During the 2022 legislative session, the Indiana General Assembly passed Senate Enrolled Act 186 (SEA 186) to modernize the operations at State Park Inns. SEA 186 created the Authority as a public body corporate and politic. Under SEA 186, which is effective July 1, 2022, the Authority's executive director and employees of the State Park Inns are not state employees, but they will be able to participate in state benefits and retirement options as state employees. Furthermore, SEA 186 specifically reads that the Authority's executive director and employees are under the jurisdiction of the Commission, and they are subject to ethics rules and requirements that apply to the executive branch of state government.

SEA 186 requires the Authority to establish a personnel system for Authority employees, including a pay scale and benefit package. The legislation also provides the Authority with the option of adopting its own personnel system separate from the State's personnel system.

Under the State Personnel Department's (SPD) pay plan rules, a state employee's salary is the total remuneration for the employee, and an employee is prohibited from accepting tips as part of their employment compensation. The Authority intends to adopt a separate personnel system that will allow tips to be included in an employee's remuneration for certain positions that customarily receive tips as part of overall compensation, such as service/wait staff and housekeeping. Authority employees in these positions would be considered "tipped employees" as defined by the U.S. Department of Labor (DOL).

The Ethics Officer provides that DNR is unaware of any other agency or body under the executive branch of state government that has employees in professions that traditionally include tips from guests as part of the employee's compensation. No other state agency utilizes state employees to serve as staff operating restaurants and inns.

Under the Fair Labor Standards Act, employers are permitted to take a tip credit for employees receiving tips toward the employer's minimum wage obligation, effectively permitting an employer to pay an hourly rate for tipped employees of at least \$2.13 per hour. If Authority employees are not permitted to accept tips under the Code, the Authority will be responsible for paying at least the federal minimum wage of \$7.25 per hour. The Ethics Officer notes that the Authority will compete with the private sector for retaining and hiring staff for roles that customarily receive tips; therefore, the inability to structure designated Authority employees' compensation to receive tips would negatively impact the fiscal viability of the Authority's operation of State Park Inns.

### **ISSUE**

Is it permissible under the Code for Authority employees to accept tips as part of their employment compensation package?

### **RELEVANT LAW**

#### **42 IAC 1-5-1 Gifts; travel expenses; waivers**

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

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

Sec. 1. (a) A state employee or special state appointee, or the spouse or unemancipated child of a state employee or special state appointee, shall not knowingly solicit, accept, or receive any:

- (1) gift;
- (2) favor;
- (3) service;
- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

from a person who has a business relationship with the employee's or special state appointee's agency or is seeking to influence an action by the employee or special state appointee in his or her official capacity.

- (b) The following shall not be subject to this rule:
- (1) Gifts, favors, services, entertainment, food, drink, travel expenses, or registration fees from public agencies or public institutions.
  - (2) Food or drink consumed at a public meeting to which at least twenty-five (25) individuals are invited. A meeting will be considered public if:
    - (A) the event is a reception or other gathering for public officials that is not arranged to solicit government procurement of goods or services;
    - (B) the employee is giving a speech or participating in a presentation in the employee's official capacity; or
    - (C) the meeting has a formal educational program that the employee is attending to assist him or her in performing official duties.
  - (3) Mementos or souvenirs of nominal value.
  - (4) Food or drink consumed by an employee during negotiations or other activities related to an Indiana economic development corporation economic development project.
  - (5) Gifts, favors, services, entertainment, food, or drinks from relatives, or a person with whom the employee or special state appointee has an ongoing social relationship, so long as:
    - (A) the gifts or other items of value are not deducted as a business expense; and
    - (B) the gift giver is not seeking to influence an action by an employee or special state appointee in that person's official capacity.
  - (6) Political contributions subject to IC 3-9-2 that are reported in accordance with applicable law.
  - (7) Nominal refreshments offered to a state employee or a special state appointee conducting official state business while the employee or special state appointee is at a workplace of a person who:
    - (A) has a business relationship; or
    - (B) seeks to influence official action;with the employee's or special state appointee's agency.
  - (8) Discount and other promotional programs approved and made available to state employees and special state appointees through the state personnel department or the Indiana department of administration.
- (c) An employee's or special state appointee's state officer or appointing authority may waive application of subsection (a) of this rule in individual cases when consistent with the public interest. The waiver shall:
- (1) be in writing; and
  - (2) identify the following:
    - (A) The employee or special state appointee.
    - (B) The nature and value of the gift.
    - (C) The donor of the gift.
    - (D) Why acceptance of the gift is consistent with the public interest.
- (d) Written waivers must be filed with the commission within thirty (30) days of receipt of the gift. The commission may review the written waivers. An appointing authority or state officer may designate authority to the agency's ethics officer to waive application of this rule on behalf

of the appointing authority or state officer. The designation shall be in writing and filed with the commission.

(e) If a person wishes to reimburse the state for any part or all of the expenses incurred by the state for appearances of a state officer, employee, or special state appointee or their official representatives on behalf of the state, the person shall remit to the treasurer of state any such amounts. The treasurer of the state shall quietus the funds into the general fund.

#### **42 IAC 1-5-2 Donor restrictions**

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

Affected: IC 4-2-7-3

Sec. 2. A person who has a business relationship with an employee's or a special state appointee's agency shall not provide any:

- (1) gifts;
- (2) favors;
- (3) services;
- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

to such employee or special state appointee if the employee or special state appointee would not be permitted to accept the gift, favor, service, entertainment, food, drink, travel expenses, or registration fees under this rule.

#### **42 IAC 1-5-8**

##### **Additional compensation**

Sec. 8. A state officer, employee, or special state appointee shall not solicit or accept compensation for the performance of official duties other than provided for by law.

### **ANALYSIS**

#### *A. Gifts and Donor Restrictions*

The Gift rule prohibits state employees from knowingly soliciting or accepting any gift, favor, service, entertainment, food, drink, travel expenses or registration fees from:

- 1) a person who has a business relationship with the employee's agency; or
- 2) a person who is seeking to influence an action by the employee in his or her official capacity.

The donor restrictions rule mirrors the Gift rule and prohibits those with a business relationship with a state employee's agency from offering a gift in that same circumstance.

In order for the Gift rule to apply, the "person," defined in IC 4-2-6-1(a)(13), from whom the gift is being accepted or solicited must either have a "business relationship" with the employee's agency or must be seeking to influence an action by the employee in his or her official capacity.

“Business relationship” is defined in IC 4-2-6-1(a)(5) to include the dealings of a person with an agency seeking, obtaining, establishing, maintaining, or implementing a pecuniary interest in a contract or purchase with the agency.

The Ethics Officer writes that the Authority intends to allow tips to be included in the remuneration of certain positions that customarily receive tips, such as service/wait staff and housekeeping. In most instances, it seems unlikely that individuals who are tipping Authority employees would have a business relationship with the Authority. Most visitors to the State Park Inns are not seeking, obtaining, establishing, maintaining or implementing a pecuniary interest in a contract or purchase with the Authority or license or permit with the Authority; instead, they are simply visiting the State Parks Inns for personal enjoyment. Nonetheless, it is possible that an individual visiting a State Park Inn may have a business relationship with the Authority.

The Code does not define the term “gift”, but it does, however, define “compensation” in IC 4-2-6-1(a)(7) as “any money, thing of value or financial benefit conferred on or received by any person in return for services rendered or for services to be rendered whether by that person or another”. Per Internal Revenue Service (IRS) guidance, all cash and non-cash tips received by an employee are income and subject to federal income taxes. Further, if an employee’s total tips in a calendar month exceed twenty dollars, the employee is required to report the tips to the employer and the employer is required to withhold Social Security, Medicare and federal income taxes from the employee’s income.

Based on the information provided, the Commission finds that tips to specified employees are compensation and not gifts; therefore, the Gift rule and donor restriction rule would not apply, and the specified Authority employees would be able to accept tips as part of their compensation for employment.

#### *B. Additional compensation*

The Additional compensation rule prohibits a state employee from soliciting or accepting compensation for the performance of official duties other than provided for by law.

"Compensation" is defined in IC 4-2-6-1(a)(7) as any money, thing of value or financial benefit conferred on or received by any person in return for services rendered or for services to be rendered whether by that person or another.

The Authority proposes to structure these employees’ compensation as tipped employees in compliance with IRS regulations providing for tips as income, as well as with the DOL regulations permitting an employer to count an employee’s tips toward meeting the employer’s federal minimum wage requirements. Based on this information, the Commission determines that tips received by specified Authority employees are part of the employee’s overall compensation as provided for by law. As such, tips received by specified Authority employees are not considered to be prohibited additional compensation under the Code.

## **CONCLUSION**

Based on the foregoing analysis, the Commission finds that it is permissible under the Code for specified Authority employees to accept tips as part of their employment compensation package.

Respectfully Submitted,

Sean Gorman  
Ethics Director