

42 IAC 1-5-6 Conflicts of Interests (IC 4-2-6-9)

A special state appointee serving on the Natural Resources Commission sought advice on if the plan documented in their filed disclosure implements sufficient procedures to screen from possible conflict of interests. The Commission finds that the screen established under the written disclosure statement filed is sufficient to address any potential conflict of interests.

September 14, 2023
2023-FAO-007

The Indiana State Ethics Commission (Commission) issues the following advisory opinion (FAO) concerning the State Code of Ethics (Code) pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor, a special state appointee.

BACKGROUND

A Commissioner (Commissioner), a special state appointee, appointed by the Governor of Indiana to serve on the Natural Resources Commission (NRC), is seeking advice. The NRC serves as the ultimate authority for the Indiana Department of Natural Resources (DNR).

Pursuant to IC 4-21.5-3 and 312 IAC 3-1, an administrative law judge (ALJ) employed by the NRC conducts evidentiary hearings and issues non-final orders in matters before the NRC. Parties to such hearings may object to the non-final order issued by the ALJ, invoking a process whereby parties' objections are set for discussion at a public meeting conducted by the NRC's Administrative Orders and Procedures Act (AOPA) Committee (Committee). The Committee is comprised of three NRC Commissioners, one of which is currently the Commissioner.

Upon review of materials for an AOPA Committee meeting set for August 9, 2023 the Commissioner discovered that an attorney employed by the law firm (Firm) at which the Commissioner is a partner had entered an appearance in a case before the AOPA Committee. The Commissioner ceased his review of the case materials and notified the AOPA Committee, the NRC and the NRC's Ethics Officer. The Commissioner recused himself from participating in the August 9, 2023, AOPA Committee meeting.

On August 10, 2023, the Commissioner filed a disclosure statement with the Commission outlining the potential conflict of interests. The disclosure statement describes the implementation of a screen established by the Ethics Officer. In further accordance with the requirements of a disclosure statement outlined in IC 4-2-6-9 (b)(2), The Commissioner and the Ethics Officer signed the disclosure statement and provided it to the NRC's appointing authority.

Pursuant to the screening plan documented in the disclosure statement, the Commissioner will require all attorneys at the Firm to report any potential conflicts that could arise as it pertains to his role as a special state appointee. The Commissioner will notify the NRC's Hearings Division staff by email of any matters involving the Firm's attorneys that could potentially

come before the AOPA Committee. Upon the scheduling of a hearing before the AOPA Committee, NRC's Hearings Division will notify the AOPA Committee of any potential conflicts, and the Commissioner will recuse himself from participating in any matters before the AOPA Committee involving cases in which a conflict has been identified.

The Commissioner is seeking the Commission's FAO regarding the sufficiency of his disclosure statement and screening plan under the Code.

ISSUES

Does the plan documented in the Commissioner's disclosure statement implement sufficient procedures to screen the Commissioner from a conflict of interests under the Code?

RELEVANT LAW

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter relating to that 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 member, 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 ethics officer in writing and do either of the following:

- (1) 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:
 - (A) 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
 - (B) 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.
- (2) File a written disclosure statement with the commission that:
 - (A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

(ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed not later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) 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)(1)(B) shall be filed with the appointing authority.

ANALYSIS

The Commissioner's request for a FAO invokes consideration of the provisions of the Code pertaining to conflicts of interests in decisions and votes. The application of this provision to the Commissioner's circumstances is analyzed below.

Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Commissioner from participating in any decision or vote, or matter relating to that decision or vote, if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the Commissioner from participating in any decision or vote, or matter relating to that decision or vote, if a business organization in which he serves as an officer, director, member, trustee, partner or employee has a financial interest in the matter.

IC 4-2-6-9(b) requires that a special state appointee who identifies a potential conflict of interests notify his or her Ethics Officer and Appointing Authority in writing and either seek an advisory opinion from the Commission or file a written disclosure statement with the Commission.

In this case, the Commissioner has both notified the NRC's ethics officer and appointing authority and has filed a written disclosure statement.

The Commission does not address whether a potential conflict of interests exists under this rule such that it would require the Commissioner's disclosure, recusal and screen from AOPA Committee matters in which parties are represented by attorneys from the Commissioner's Firm.

The Commission finds that the screen established under the written disclosure statement filed by the Commissioner is sufficient to address any potential conflict of interests between the Commissioner's Firm and the Commissioner's role as a special state appointee, should such

potential conflicts arise. The Commission further commends the Commissioner for his actions in identifying a potential concern under the Code and for taking immediate steps to address any appearance of impropriety in the performance of his duties on the AOPA Committee.

The Commission suggests that, in addition to recusing himself from participation in AOPA Committee hearings involving parties represented by attorneys employed at the Commissioner's Firm, the Commissioner may consider physically removing himself from attendance at such a hearing if practicable.

The Commission notes that, irrespective of the applicability of the Code and measures that the Code may require, as a licensed attorney in the State of Indiana, the Commissioner remains subject to the requirements outlined in the Indiana Rules of Professional Conduct. The Commission advises the Commissioner that the Indiana Supreme Court Disciplinary Commission offers ethics opinions to active attorneys in good standing regarding the Indiana Rules of Professional Conduct.

CONCLUSION

The Commission finds that the screen established under the written disclosure statement filed by the Commissioner is sufficient to address any potential conflict of interests between the Commissioner's Firm and the Commissioner's role as a special state appointee in matters before the NRC's AOPA Committee, should such potential conflicts arise.

Respectfully Submitted,

Sean Gorman
State Ethics Director