

42 IAC 1-5-1 Gifts; travel expenses; waivers
42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)
42 IAC 1-5-8 Additional compensation
42 IAC 1-5-12 Use of state property
42 IAC 1-5-13 Ghost employment

The mixed management agreement between the Division of State Museums and Historic Sites of the DNR and the ISM was found to subject state employees to a host of ethical issues which the DNR would be expected to remedy through a legislative amendment in conjunction with the state legislature.

December 13, 2007

No. 07-I-16

The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6(b)(1).

BACKGROUND

The Deputy Director and Chief Counsel for the Indiana Department of Natural Resources (“DNR”) requests a formal advisory opinion from the Commission on behalf of the Division of State Museums and Historic Sites (“Division”), a division of DNR, which addresses the interaction between the Indiana State Museum (“ISM”) and the Indiana State Museum Foundation, Inc. (“Foundation”). The Division was established as a section of DNR under IC 14-9-4-1 and developed under IC 14-20. Legislative appropriations from DNR make up the bulk of funds that are used to operate the ISM. In fiscal year 2005, state appropriations to the ISM were approximately \$7 million with an earned income of \$ 1 million. The Foundation is a not-for-profit corporation that is registered as such in the State of Indiana.

In 2002, the Division and the Foundation entered into an agreement in which the Division shifted various management duties of the operation of the ISM to the Foundation. The “Agreement for Operation of the Indiana State Museum” (“2002 Agreement”) created a mixed management structure for the operation of the ISM. The 2002 Agreement provided that the Foundation would be responsible for employing and paying the compensation and benefits of the Chief Executive Officer (CEO) of the ISM. The 2002 Agreement further provided that the CEO of the ISM would be selected jointly by the Division and the Foundation.

In 2006, the 2002 Agreement was renewed. According to the new Agreement (“2006 Agreement”), the Foundation is to continue to operate the ISM facility and Historic Sites throughout the state. A notable change that was incorporated into the new 2006 Agreement is that the Foundation is now required to employ and pay the compensation and benefits of the Division Director. The 2006 Agreement further requires that the Division Director serve as the CEO of both the ISM and Historic Sites. In 2007, a Division Director and CEO of the ISM and Historic Sites was appointed. The 2006 Agreement further requires that the Foundation perform various functions which include the following:

- Employ and compensate the ISM CEO and Vice President of Institutional Advancement.
- Jointly with the Department select or remove the Division Director.
- Conduct and pay for ISM marketing activities and temporary exhibits.
- Provide training and travel out of state for ISM staff.
- Operate membership and development programs.
- Operate gift shops for the ISM.

The 2006 Agreement requires that the Division:

- Collect and transfer to the Foundation administrative fees, exhibit fees, and donations collected into the state museum development fund.
- Permit the Foundation to operate a gift shop within the ISM and retain all net proceeds. Such proceeds are to be used exclusively for ISM projects.
- Permit the Foundation to sell memberships in the ISM and process these sales through the ISM ticketing system.
- Treat Foundation memberships as annual paid ISM admissions.
- Provide office space to the Foundation, including utilities, janitorial services, and technology maintenance (such as computers).

In 2006, the Inspector General (“IG”) issued an investigative report regarding the ISM. (IG Report 2005-10-0534). The IG report asserts a finding that ISM employees are vulnerable to violation of the State Code of Ethics due to the mixed management of the ISM and the Foundation. To remedy the vulnerability that state employees are subjected to, the IG made three separate recommendations, all of which require that the current operating structure between the ISM and the Foundation be amended or eliminated.

The Deputy Director and Chief Counsel requests an official advisory opinion from the Commission to address the various ethical concerns that surround the mixed management status of the ISM and the Foundation.

ISSUE

Does the current structure that DNR and the Foundation have in place for the operation of the Division and the ISM subject state employees and/or Foundation employees to violations of the Indiana Code of Ethics?

RELEVANT LAW

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

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

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

IC 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 1-5-8 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.

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

The 2006 Agreement between the Division and the Foundation imposes a mixed management structure that is unique in state government. Under the current operating circumstances, the Commission identifies that ethics issues arise for the Division Director/CEO of the ISM and Historic Sites, ISM employees, and the Foundation under the following ethics rules:

1. 42 IAC 1-5-1 – Gift rule
2. 42 IAC 1-5-8 – Additional Compensation
3. 42 IAC 1-5-9 – Conflicts of Interest; Decisions and Voting
4. 42 IAC 1-5-12 – Use of State Property
5. 42 IAC 1-5-13 – Ghost Employment

The mixed management arrangement that is currently in place raises concerns regarding the application of the Gift rule and Additional compensation rule to state employees as they fulfill their respective duties. This mixed management arrangement particularly raises concerns for state employees regarding ghost employment as they may be directed to engage in the performance of work for the Foundation. Also, the mixed structure generates questions regarding the appropriate use of state property, such as computers, facilities, and/or resources by both state employees and Foundation employees for Foundation work.

With respect to conflicts of interest, the structure dictated by the agreement subjects the Division Director/CEO of the ISM and Historic Sites to potential conflict of interests by requiring that a single individual fulfill distinct roles that may have competing interests.

CONCLUSIONS

The Commission finds that the current structure that DNR and the Foundation have in place for the operation of the Division and the ISM subjects state employees and/or Foundation employees to violations of the Indiana Code of Ethics. The Commission further finds that the mixed management structure that was implemented as a result of the 2006 Agreement is the source and cause of the ethical issues noted above.

It is the understanding of the Commission that DNR intends to engage the Legislature in 2008 to seek a legislative amendment that will resolve all ethics issues identified by the Commission. Accordingly, the Commission requests that the Deputy Director and Chief Counsel report DNR's legislative progress in January 2008.