

**42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)**  
**42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**  
**42 IAC 1-5-1 Gifts; travel expenses; waivers**

The IDHS Executive Director sought advice to determine whether he could sit on the board of directors for a not-for-profit organization under the Code of Ethics. SEC found that, so long as the Director complied with the restrictions in certain ethics rules and observed the screening process the SEC had established, there would be no ethics violation.

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No. 07-I-1

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning Indiana Code 4-2-6. Any opinion rendered by the Commission, until amended or revoked, is binding on the Commission in any subsequent allegations concerning the person who requested the opinion and who acted in good faith, unless material facts were omitted or misstated by the person in the request for the opinion or testimony before the Commission.

**BACKGROUND**

The Executive Director of the Indiana Department of Homeland Security (IDHS), requests an official advisory opinion regarding his intended service on the Board of Directors for a not-for-profit organization that is in the process of being created.

The Executive Director is an employee of a University in Indiana as well as a special state appointee. Pursuant to the Commission's Official Advisory Opinion No. 06-I-13, the Executive Director is currently being screened from all IDHS decisions that benefit the University.

The Executive Director has been invited to serve on the Board of Directors of the not-for-profit organization. This is currently the University's project, but the members who established the project are forming the not-for-profit corporation.

IDHS does not anticipate that it will have a business relationship with the not-for-profit corporation when it is established. However, the not-for-profit corporation has and will be seeking funding from and partnering with corporations that do have business relationships with IDHS through the regulatory activities of the Fire and Building Safety Division of IDHS. Specifically, the Fire and Building Safety Division of IDHS permits or licenses building construction, the installation and operation of elevators and the installation and operation of boilers and pressure vessels.

According to the not-for-profit, the organization currently has three major sponsors with one being the University. IDHS currently has a business relationship with the University, but the Executive Director is already being screened from decisions regarding the University. IDHS does not have a business relationship with the second major sponsor. However, the third major sponsor is part of a company, which does have a few facilities in Indiana that IDHS would regulate.

**ISSUE**

The issue is whether the Executive Director's service on the Board of Directors of the not-for-profit organization that is currently in the process of being created, would pose a conflict of interest under IC 4-2-6-9, or any other state ethics law or rule, with regard to his duties as Executive Director of IDHS. If so, what screening mechanism must be put in place to ensure compliance with the State's Ethics laws?

**RELEVANT LAW**

**IC 4-2-6-5.5**

Conflict of interest; advisory opinion by inspector general

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).

*As added by P.L.222-2005, SEC.5. Amended by P.L.89-2006, SEC.6.*

#### **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.

*(Formerly: Acts 1974, P.L.4, SEC.2.) As amended by P.L.9-1990, SEC.8; P.L.15-1992, SEC.5; P.L.22-1995, SEC.2; P.L.222-2005, SEC.7.*

#### **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. (*Office of the Inspector General; 42 IAC 1-5-1; filed Dec 7, 2005, 2:45 p.m.: 29 IR 1208*)

### ANALYSIS

The Executive Director's intended outside professional activity with the not-for-profit organization invokes consideration of IC 4-2-6-5.5, which deals with conflicts of interest that may arise as a result of a special

state appointee's outside professional activity. Specifically, IC 4-2-6-5.5(a)(2) would prohibit the Executive Director from engaging in professional activity that would require him to disclose confidential information that was gained in the course of state employment. Based on the facts that presented, the Commission finds that there is no evidence to indicate that the Executive Director's service on the not-for-profit organization's Board of Directors would require him to disclose confidential information that he may have gained during the course of his employment with IDHS. Further, the Executive Director's service on the Board would not be contrary to the IC 4-2-6-5.5 (a) (1) as he will not be compensated for his service. To the extent that the Executive Director was to receive any compensation for his professional activity with not-for-profit organization, the Executive Director shall disclose the nature of the compensation to the Commission to determine whether receipt of any such compensation would be a violation of IC 4-2-6-5.5(a)(1).

With regard to IC 4-2-6-9, the Commission finds that the Executive Director's service on the not-for-profit organization's Board of Directors would constitute a conflict of interest with respect to his duties as Executive Director of IDHS. Specifically, IC 4-2-6-9(a)(4) provides that a special state appointee may not participate in any decision or vote if such person has knowledge that a business organization in which the special state appointee is an officer, a director, a trustee, a partner, or an employee has a financial interest in the outcome of the matter.

In this case, the Executive Director would be serving as a director for the not-for-profit organization and would be prohibited from participating in any decision or vote if he had knowledge that the not-for-profit organization had a financial interest in the outcome of any given matter. Given that the not-for-profit organization intends to seek funding from and/or partner with corporations that are regulated by IDHS, the not-for-profit organization would have a financial interest in the outcome of matters pertaining to those companies. Accordingly, the Executive Director would be prohibited from participating in any decision or vote involving any such corporations.

IC 4-2-6-9(b)(1) generally states that the Commission shall, with the approval of the appointing authority, assign a particular matter that would create a conflict of interest to another person and implement all necessary procedures to screen the special state appointee seeking an advisory opinion from involvement in the matter. In this case, the Commission approves of the screening mechanism proposed by the IDHS in which the University faculty member leading the not-for-profit organization project would provide the IDHS Ethics Officer with a list of the corporations that the not-for-profit organization contacts for purposes of obtaining funds or support for the project on a weekly basis. Accordingly, the IDHS Ethics Officer, the General Counsel, and Director of the Support Services Division shall screen the Executive Director from participating in any decision or vote involving these corporations.

Finally, the Executive Director's service on the Board of Directors for the not-for-profit organization could potentially implicate 42 IAC 1-5-1, the state ethics rule that pertains to gifts. In this case, the facts presented indicate that the not-for-profit organization has and will be seeking funding from corporations that have a business relationship with IDHS. As a special state appointee, the Executive Director would be prohibited from soliciting any of the enumerated items set forth in the gift rule from a person that has a business relationship with IDHS or who may seek to influence him in his official capacity.

### **Conclusion**

Subject to the foregoing analysis, the Executive Director would be permitted to serve on the Board of Directors for the not-for-profit organization. In addition, the Executive Director must ensure continued compliance with this advisory opinion and the State Code of Ethics.