

42 IAC 1-5-6 Conflict of economic interests (IC 4-2-6-9)

IC 4-2-6-1 Definitions

A state employee serving on the Air Pollution Control Board was also employed by an energy company which owned and operated coal-fired power plants in the state. SEC found that the definition of "financial interest" would not encompass rules adopted by administrative agencies; therefore, it would not be a conflict of interest for the employee to vote on the adoption of a rule by the Board that would ultimately affect the energy company for which he also worked.

July 12, 2007

No. 07-I-7

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

Pursuant to IC 13-17-2-2, the state employee was appointed to serve in the Local Government position on the Air Pollution Control Board (Board) earlier this year. As part of his regular, non-state employment, the Commissioner also serves as the Economic Development Coordinator for an energy company, which owns and operates coal-fired power plants in Indiana.

The Board is governed by IC 13-17-2 and is charged with adopting rules concerning air quality and regulation for the Indiana Department of Environmental Management (IDEM). The Board Member stated that the Board consists of various members, each of which are specifically appointed due to the knowledge, experience, or education that qualifies that individual to represent various components and entities that have a stake in the regulation of air quality. The Board Member stated that the statutory language that governs the Board creates a situation where members of the Board have an interest in the outcome of rulemakings.

The Board will vote on the adoption of a rule that will impose a significant reduction in mercury air emissions from coal-fired power plants in Indiana. The mercury reduction rule will achieve approximately a 70% reduction in mercury emissions by 2018. The Board Member stated that this is the minimum level of reduction required by the United States Environmental Protection Agency (EPA). He explains that even if the Board does not adopt the rule, the emission reductions will apply to Indiana because the EPA will mandate the reductions in the absence of action by the state. When it considers the rule, the Board may take one of several actions:

- Preliminarily adopt the rule as presented with a 70% reduction by 2018.
- Amend the rule to be more stringent either by increasing the reduction percentage or requiring an earlier compliance date or both.
- Decide not to preliminarily adopt any rule or hold the rule for future consideration; however, the federal requirements would still apply to Indiana plants.
- Amend the rule to make it less stringent than the federally-mandated reductions; however, the federal requirements would still apply to Indiana plants.

The Board Member seeks clarification from the Commission regarding the votes and decisions that he may participate in as a Board member given that those decisions may affect his non-state employer.

ISSUES

1. Does the Board Member's participation in a vote regarding the adoption of a rule that will impose a significant reduction in air emissions from coal-fired power plants in Indiana would present a conflict of interest under IC 4-2-6-9?
2. Does IC 4-2-6-9 prohibit the Board Member from participating in future decisions or votes made by the Board that may affect his non-state employer?

RELEVANT LAW

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.

IC 4-2-6-1

Definitions

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

- (10) "Financial interest" means an interest:
 - (A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or
 - (B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation. The term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

ANALYSIS

The Board's enabling statute specifically requires that the Board be composed of specific individuals. See IC 13-2-2. However, the enabling statute also requires that the majority of the Board members do not derive any significant part of their income from persons subject to permits or enforcement orders under the federal Clean Air Act (42 U.S.C. 7401 et seq.), as amended by the Clean Air Act Amendments of 1990. IC 13-17-2-4(2).

In this case, the Board Member would be prohibited from participating in the Board's vote regarding the adoption of a mercury emission rule if either he or his employer, the energy company, has a financial interest in the outcome of the matter. For purposes of ethics, the term "financial interest" is defined as an interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person, or an interest involving property or services. See IC 4-2-6-1(a)(10)(A) and IC 4-2-6-1(a)(10)(B). The definition does not include an interest in an administrative rule that agency adopts. While the decision that the Board takes regarding the adoption of a mercury emissions rule may ultimately affect the Board Member's employer, the Board's vote to adopt an administrative rule is not an action that is enumerated in the statutory definition of the term "financial interest."

A conflict would arise for the Board Member if he participates in any future vote in which he or his non-state employer has a financial interest, as defined in IC 4-2-6-1(a)(10), in the outcome of such matter. If the Board Member identified a potential conflict of interest, he shall notify his 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 may then, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the Board Member from involvement in the matter; or 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 Board Member.

CONCLUSION

Subject to the foregoing analysis, the Board Member's participation in the vote regarding the adoption of the mercury emission rule would not constitute a conflict of interest for purposes of IC 4-2-6-9. However, the Board Member's participation in future decisions or votes of the Board must be made in accordance to the foregoing analysis.