

#### **42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)**

The DNR EO sought advice on behalf of a member of the Historical Preservation Review Board who periodically serves as an archeological consultant for contractors hired to perform projects for INDOT. SEC found the Board member would have a financial interest in any decisions made or votes taken by the Board on INDOT projects for which he served as a consultant, resulting in a conflict of interest under IC 4-2-6-9. SEC determined further that no such conflict of interest would arise for the Board member to participate in decisions or votes involving INDOT projects on which he was not serving as a consultant.

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

#### **BACKGROUND**

A state employee is the Chief Legal Counsel and Ethics Officer for the Indiana Department of Natural Resources (DNR). As the Ethics Officer for the DNR, she requests an advisory opinion regarding a special state appointee.

The special state appointee serves on the Indiana Historical Preservation Review Board (Board). The Board is established by IC 14-21-1-20 to perform certain duties regarding state and federal historic preservation laws. The Board is made up of nine members who are each appointed by the DNR Director, with the concurrence of the Governor. The members of the Board must meet certain qualifications. The special state appointee was appointed to the Board on January 25, 2010 to fill the prehistoric and historic archeology position.

In addition to his service on the Board, the special state appointee performs consulting services as an archeologist, and periodically conducts archeological services for projects being undertaken by the Indiana Department of Transportation (INDOT). The special state appointee is not hired directly by INDOT, but by a contractor for INDOT. As a state agency using state and federal funding for projects, INDOT must obtain certain approvals from the Board. However, the Board has no role in making or reviewing contracting decisions made by INDOT or its contractors.

Since the special state appointee has been a member of the Board, he has not taken part in a decision regarding an INDOT (or any other) project for which he has been hired to perform consulting services. In fact, based upon the type of work that the special state appointee does and the kinds of projects that must go before the Board, it is unlikely that projects for which the special state appointee is hired as a consultant will require consideration by the Board.

#### **ISSUE**

Would a conflict of interest arise for the special state appointee under IC 4-2-6-9 if he participates in a decision or vote of the Board concerning INDOT projects on which he has been hired to perform archeological services? Would it arise if he participates in a decision or vote of the Board concerning INDOT projects on which he has not been hired to work?

## RELEVANT LAW

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

#### **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.

## ANALYSIS

IC 4-2-6-9 prohibits the special state appointee from participating in any decision or vote if he has knowledge that various persons have a "financial interest" in the outcome of the matter, including himself. Specifically, IC 4-2-6-9(a)(1) prevents the special state appointee from participating in any decision or vote in which he has a financial interest in the outcome of the matter.

In this case, the special state appointee would have a financial interest in a decision or vote the Board takes regarding any INDOT projects on which he has been hired to perform archeological services. Accordingly, the Commission finds that the special state appointee would be prohibited from participating in any decision or vote if such decision or vote involves a project he has been hired to work on. In such cases, the special state appointee must be screened from

participation in any decision or vote involving that project. The Commission further finds that a conflict would not arise if he participates in decisions or votes of the Board involving INDOT projects for which he has not been hired.

### **CONCLUSION**

The Commission finds that a conflict of interest would arise for the special state appointee under IC 4-2-6-9 if he participates in a decision or vote of the Board concerning INDOT projects on which he has been hired to perform archeological services. The Commission further finds that such conflict of interest would not arise for the special state appointee if he participates in a decision or vote of the Board concerning INDOT projects for which he has not been hired to work.