

42 IAC 1-5-7 Conflicts of interest; contracts (IC 4-2-6-10.5)

IC 4-2-6-7 State officers and employees; excess compensation for sale or lease; advisory body member exception

The DNR EO sought advice regarding the agency's intent to purchase a flood easement on property that the agency regularly flooded but also happened to be owned by a DNR employee. SEC found that the purchase would be pursuant to a contract; however, the DNR employee did not have official contracting responsibilities with the agency. As a result, the DNR and its employee would not be prohibited under the Code of Ethics from entering into the easement as long as they observed the requirements in IC 4-2-6-10.5(b)(1).

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No. 10-I-9

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 DNR, the Chief Legal Counsel requests an advisory opinion regarding the agency's intent to purchase a flood easement on property owned by a DNR employee (Employee).

The Employee, who is employed by DNR as a conservation officer, owns a parcel of property in Steuben County. DNR would like to secure an easement on a portion of the Employee's property for the purpose of maintaining water levels on adjacent DNR property to increase waterfowl hunting opportunities and waterfowl production and to manage vegetation. DNR currently floods the Employee's property when the water level is high. A flood easement would resolve the ongoing problem by paying the Employee just compensation for backing water onto his property.

The Employee has owned the property since at least 1994. He does not work in the Division of Land Acquisition (which handles property transactions) or the Division of Fish & Wildlife (which manages the adjacent state property) and has no oversight over either of these divisions. He also does not have any responsibilities regarding review, approval, or management of any contracts entered into by DNR.

DNR's Division of Land Acquisition undertakes a variety of property transactions, ranging from outright land purchases to acquisition of easements. DNR's Division of Land Acquisition has a standardized process for acquiring an interest in property. The rate of compensation for an acquisition is determined by appraisal of fair market value.

ISSUE

- (1) Would the Code of Ethics prohibit DNR from purchasing an easement from the Employee for his property?

- (2) Would the Code of Ethics prohibit the Employee from accepting compensation from DNR for an easement on his property?

RELEVANT LAW

IC 4-2-6-7

State officers and employees; excess compensation for sale or lease; advisory body member exception

Sec. 7. (a) This section does not apply to a special state appointee who serves only as a member of an advisory body.

(b) A state officer, employee, or special state appointee may not receive compensation:

(1) for the sale or lease of any property or service which substantially exceeds that which the state officer, employee, or special state appointee would charge in the ordinary course of business; and

(2) from any person whom the state officer, employee, or special state appointee knows or, in the exercise of reasonable care and diligence should know, has a business relationship with the agency in which the state officer, employee, or special state appointee holds a position.

IC 4-2-6-10.5 (42 IAC 1-5-7)

Prohibition against financial interest in contract; exceptions

Sec. 10.5. (a) Subject to subsection (b), a state officer, an employee, or a special state appointee may not knowingly have a financial interest in a contract made by an agency.

(b) The prohibition in subsection (a) does not apply to:

(1) a state officer, an employee, or a special state appointee who does not participate in or have official responsibility for any of the activities of the contracting agency, if:

(A) the contract is made after public notice or, where applicable, through competitive bidding;

(B) the state officer, employee, or special state appointee files with the commission a statement making full disclosure of all related financial interests in the contract;

(C) the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee; and

(D) in the case of a contract for professional services, the appointing authority of the contracting agency makes and files a written certification with the commission that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee; or

(2) a state officer, an employee, or a special state appointee who, acting in good faith, learns of an actual or prospective violation of the prohibition in subsection (a), if, not later than thirty (30) days after learning of the actual or prospective violation, the state officer, employee, or special state appointee:

(A) makes a full written disclosure of any financial interests to the contracting agency and the commission; and

(B) terminates or disposes of the financial interest.

ANALYSIS

The question in this case involves DNR's intended purchase of an easement from a state employee. Accordingly, the appropriateness of this transaction according to the Code of Ethics must be analyzed from the perspective of the agency who is acquiring the easement, and the perspective of the Employee who would be granting the easement.

While none of the rules in the Code of Ethics would prohibit DNR from purchasing an easement on the Employee's property, IC 4-2-6-7 and IC 4-2-6-10.5 govern the Employee's acceptance of compensation from his employing agency for the easement. Accordingly, the Commission analyzes the application of these laws to the Employee below.

A. Excess Compensation for Sale or Lease

IC 4-2-6-7 prohibits the Employee from accepting compensation for the sale or lease of any property or service which substantially exceeds that which he would charge in the ordinary course of business from any person whom he knows has a business relationship with the agency he works for. The Commission finds that the prohibition would not apply in this case. Specifically, the Employee would be selling the easement and DNR would purchase the easement pursuant to the agency's established purchasing process. Furthermore, the rate of compensation would be determined by appraisal of fair market value. In addition, the Employee would be selling the easement to DNR itself, not a person who has a business relationship with the agency.

B. Conflicts of Interest; Contracts

In terms of conflicts of interest, IC 4-2-6-10.5 provides that a state employee may not knowingly have a financial interest in a contract made by an agency. This prohibition, however, does not apply to an employee that does not participate in or have official responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met. The term "official responsibility" has been interpreted by the Commission as contracting responsibilities.

Because the Commission found that the acquisition of an easement by DNR from the Employee involves a contract, further analysis regarding the application of this rule to the Employee is warranted. Since the Employee does not have contracting duties, the prohibition against having a financial interest in a contract would not apply to the Employee provided he can ensure compliance with the criteria set forth in IC 4-2-6-10.5(b)(1)(A)-(D). These requirements include 1) ensuring that the contract is made after public notice or, where applicable, through competitive bidding; 2) filing with the Commission a statement making full disclosure of all related financial interests in the contract; 3) ensuring that the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee; and 4) in the case of a contract for professional services, the appointing authority of the contracting agency must make and file a written certification with the Commission that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee.

The Commission finds that the Code of Ethics does not prohibit DNR from purchasing an easement from the Employee. The Commission further finds that subject to the foregoing analysis and the Employee's compliance with the statutory criteria set forth in IC 4-2-6-10.5(b)(1)(B)-(D), the Employee would not be prohibited from accepting compensation from DNR for an easement on his property.