

42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)

The Building Law Compliance Officer of the Indiana Department of Homeland Security also owned a small architecture firm that he wished to continue to operate during the course of his state employment. In his capacity with IDHS, the Officer is statutorily responsible for issuing written interpretations of building and fire safety law, and this authority cannot be delegated. Because work performed by the Officer for the firm could ultimately be part of a dispute in which the parties request such a written interpretation, the SEC found that a conflict of interest would arise for the Officer to hold outside employment with the firm.

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

BACKGROUND

A state employee is the Building Law Compliance Officer (“Compliance Officer”) in the Division of Fire and Building Law Compliance (“Division”) of the Indiana Department of Homeland Security (“IDHS”). The Compliance Officer has been employed in this position since November 14, 2011. The Compliance Officer is supervised by the Indiana State Fire Marshal who in turn reports to the Executive Director of the IDHS. The Compliance Officer has a number of statutorily assigned duties and also supervises four sections in the Division: the Plan Review Section, the Building and Fire Code Inspection/Enforcement Section, the Elevator and Amusement Ride Section, and the Boiler and Pressure Vessel Section.

Under I.C. 10-19-7-4(c), the Compliance Officer is charged with administering the building laws. In addition, under I.C. 22-15-2-6(b) and I.C. 22-13-5, the Compliance Officer may issue a written interpretation of any building law¹ or fire safety law² upon the written request from a person that has a dispute with a county or municipality regarding the interpretation of a building law or fire safety law. The written interpretation is binding upon both the person requesting the interpretation and the county or municipality with whom the person had the dispute unless the written interpretation is overruled in a proceeding conducted pursuant to the Administrative Order and Procedures Act. The IDHS has historically taken the position that the authority to issue such written interpretation resides solely with the Compliance Officer and cannot be delegated to anyone else.

Under I.C. 10-19-7-3, the State Fire Marshal is prohibited from exercising any powers or performing any duties specifically assigned to the Compliance Officer.

In addition to his state employment, the Compliance Officer has a personal small business, an architect’s firm. The Firm is involved with several community development type projects,

¹ The term “building law” is very broadly defined under I.C. 22-12-1-3 and includes equipment laws (laws governing elevators, amusement rides, and boilers and pressure vessels) as well as laws governing industrialized buildings, mobile structures and laws governing the construction, addition, or alteration of any part of a Class 1 or Class 2 structure.

² The term “fire safety law” is also broadly defined under I.C. 22-12-1-13 to mean any building law, equipment law, or other law safeguarding life or property from the hazards of fire or explosion.

strategic planning projects, and residential construction projects. These are small projects of short duration and are not submitted to plan review by the Division. These projects would require the Compliance Officer to work up to 10 hours/week time commitment. He does not have other employees working for the Firm, but he may hire consulting services for some projects. He identifies the following 7 different projects that he has worked on, is currently working on, or would like to work on in the future:

- A church project located on the south side of Indianapolis - The Firm developed design specifications for the replacement of built in copper gutters and reroofing. This was a design bid build project. The scope of the project did not require submission to the Division. The contract was signed on July 28, 2010 and the projected completion date of the project is February 10, 2012.
- A private residence located in Indianapolis – The project consists of replacing the exterior siding and additional exterior and interior remodeling of the home. The bidding process is 95% complete and construction is anticipated to begin in the spring of 2012. This is a residential remodel project and will not be submitted to the Division. The contract was signed August 1, 2010 and the project is anticipated to be completed late summer 2012.
- A community feedback, City of Indianapolis (“City”) - The project consisted of a contract between the Firm and the City to develop and facilitate a community input session to gain feedback from the neighborhood regarding what they would like to see in the development of the community. The Compliance Officer was responsible for organizing community meetings and facilitating the meetings to gather feedback. He organized the feedback and shared it with the community. His Firm would not be considered for the design project. The contract for this project was signed on July 15, 2010 and the project was completed on September 1, 2010.
- Fire Station Project – This project involved a contract between the Firm and the City to meet with the Indianapolis Fire Department and gather information to determine the existing use of space of Fire Station #7. The Compliance Officer studied the information gathered and developed a proposed space program for the new station. A second part of the project required the Firm to determine the strengths and weaknesses of possible sites and to help determine the best site for a new station. The Firm would not be considered for the design project. The contract was signed on September 28, 2010 and it was completed on October 30, 2010.
- Food Pantry Project – The Firm was contracted by a Methodist Church to meet with the pantry committee to learn how they help families get food on a weekly basis. The Compliance Officer will use the information gathered to develop a plan for growth and expansion of the food pantry. This project would not be submitted to the Division. The scope of the Compliance Officer’s work is complete at the end of the strategic plan. The contract was signed November 1, 2010 and the project would be completed on February 14, 2012.
- Indiana Landmarks - The Firm would be hired by Indiana Landmarks to develop the strategic plan for the development of the historic structure into a Community Center. The scope of work would be only for the strategic plan and would consist

of various duties such as assessing interior and exterior building systems, creation of potential layouts based on the established building programs, and developing potential project budgets for each layout. No contract has been signed yet, but the duration of the project would be about 3 months.

- Hunting Lodge Project – The Firm would be hired by the Porter County Historical Commission to develop the strategic plan for the restoration of the historic hunting lodge located on the Kankakee River. The scope of work would be only for the strategic plan and would consist of various duties such as assessing interior and exterior building systems, creating potential layouts based on the established building programs, and developing potential project budgets for each layout. No contract has been signed yet, but the duration of the project would be about 5 months.

ISSUE

Is the outside professional employment that the Compliance Officer wants to pursue with the Firm prohibited by the Code of Ethics?

RELEVANT LAW

IC 4-2-6-5.5 (42 I.A.C. 1-5-5)

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).

ANALYSIS

The Compliance Officer's outside employment would create a conflict of interest according to IC 4-2-6-5.5 if his employment would trigger subsections (1), (2), and/or (3) of the statute. The Compliance Officer's outside employment triggers subsection (1) of the statute. The restriction

in subsection IC 4-2-6-5.5(a)(1) prohibits a state employee from accepting 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 his official duties that his ability to perform those duties would be materially impaired. In this case, the Compliance Officer's Firm has been and would like to continue being involved with various projects involving community development, strategic planning, and residential construction. While the projects he has been, is, or would like to be involved with may not necessarily be submitted to the Division for approval in a design release³, such projects may be subject to licensing and regulation requirements managed and monitored by the sections of the Division that the Compliance Officer supervises. Moreover, conflicts related to such projects could ultimately end up before him for resolution in his capacity as the Building Law Compliance Officer.

Specifically, two of the projects the Firm was involved with, the Community Feedback Project and the Fire Station Project, were completed before the Compliance Officer was employed by the IDHS. Accordingly, these projects would not present any immediate potential conflicts of interest for the Compliance Officer. However, these projects are the type that the Compliance Officer would like to work on in the future. These types of projects appear to be incompatible with the Compliance Officer's responsibilities as the Building Law Compliance Officer and could potentially require his recusal from matters so central or critical to the performance of his official duties that his ability to perform those duties would be materially impaired. While these types of projects do not require a design release for the stage of the project for which the Compliance Officer would be hired, a design release would be required for that development if the development of that site did occur. By statute the Building Law Compliance Office is responsible for the issuance of design releases although the staff of the Plan Review Section, which reports to the Building Law Compliance Officer, implements the plan review process. If the building is owned by the City, it may be subject to inspections by the Building and Fire Code Inspection/Enforcement Section ("Section") of the Division although it is unlikely that the Section would conduct such inspections since the buildings are also subject to permitting and inspections by the City. The City does apply for and obtain design releases for construction projects it undertakes. Nevertheless, the Elevator and Amusement Ride Section, under the State Building Law Compliance Officer, has issued the City several permits governing the elevators owned and operate by the City. These elevators would be subject to inspection by the Elevator and Amusement Ride Section of IDHS. Similarly, the Boiler and Pressure Vessel Section under the Compliance Officer's office has issued the City a few permits for the boilers and pressure vessels owned and operated by the City. These boilers and pressure vessels would be subject to inspection by the Boiler and Pressure Vessel Section.

Perhaps the most problematic aspect of the Compliance Officer's outside employment involves the fact that the Building Law Compliance Officer is responsible for issuing written interpretations of any building law or fire safety law upon written request from a person that has

³ A design release is, in essence, a permit which must be obtained for many types of construction projects before construction can commence. Construction must comply with the terms of the design release and applicable building laws. By statute, the Building Law Compliance Office is responsible for the issuance of design releases although the staff of the Plan Review Section, which reports to the Building Compliance Officer, does implement this plan review process.

a dispute with a county or municipality regarding the interpretation of a building law or fire safety law. Even if a screening procedure could be implemented so that the Building Law Compliance Officer did not participate in any agency decisions regarding the City's construction projects governed by design releases and any agency decision regarding the City's elevators and boilers and pressure vessels, it would not be possible to screen him from writing interpretation of building laws. If a person constructing a building in the City gets into a dispute with the City regarding the interpretation of a building law or fire safety law, that person could request a written interpretation of those laws from the Building Law Compliance Officer. However, if the Compliance Officer was serving as a contractor to the City at that time, he would not be able to fulfill his obligations as the Building Law Compliance Officer because he could be reviewing work that he was associated with as a representative of his Firm.

A similar situation could arise for the Compliance Officer in the Church Project, the Food Pantry Project, the Indiana Landmarks, the Private Residence Project, and the Hunting Lodge Project. Moreover, regarding the Private Residence Project, a one-family residence is a Class 1 structure and as such is not subject to inspection or regulation by any of the IDHS sections reporting to the State Building Law Compliance Officer. However, the project must still comply with the State building laws applicable to one-family residences and the project is subject to inspection by the City. If the City did get into a dispute with the homeowner regarding the scope or applicability of building laws or fire safety laws applicable to this project, the City, IDHS, and the Compliance Officer would be placed in untenable positions. Specifically, as the architect hired by the homeowner for this project, the homeowner would rely upon the Compliance Officer and his expertise to design a project which complied with any applicable building and/or fire safety law. The homeowner could request a written interpretation from the Building Law Compliance Officer to resolve the dispute. The Compliance Officer could not serve in both roles.

CONCLUSION

Based on the foregoing analysis, the Commission finds that a conflict of interest pursuant to I.C. 4-2-6-5.5 would arise for the Compliance Officer in his proposed outside employment opportunities with his Firm.