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DNR Property foresters requested approval to engage in outside employment as private sector foresters on private woodlands within the State. The DNR proposed guidelines under which the foresters could work with private landowners and avoid potential conflicts of interest. The DNR further proposed that property foresters wishing to work on private lands must request and receive approval in writing from the State Forester on an annual basis and present an activity report to the State Forester for each calendar year during which they requested permission to work. The SEC found the arrangement proposed by the foresters and DNR was sufficient to avoid any potential conflicts of interest and, to the extent that the DNR implements the proposed guidelines, increases the reporting requirement to a quarterly basis, and screens property foresters from confidential information, that property foresters were not prohibited from engaging in outside employment as private sector foresters on private woodlands within the State.

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The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee serves as the Ethics Officer for the Department of Natural Resources (“DNR”). Property foresters, who work within the Property Section of the DNR Division of Forestry (“Division”), have requested approval to moonlight as private sector foresters on private woodlands within the State of Indiana (“State”). There is the potential for a conflict of interest to arise if a property forester employed by the Division works in the private sector forestry business. The Ethics Officer has identified the potential issues below and outlines how the Division proposes to handle such matters.

As part of their normal duties, property foresters interact with private sector timber buyers, adjacent private woodland owners, and district foresters who have oversight of the Classified Forest and Wildlands Program (“Program”). The district forester’s oversight includes, but is not limited to, the approval of federal or state cost share dollars, adherence to best management practices, and compliance with the laws and rules that govern the Program.

If given the opportunity to moonlight, property foresters would be in direct competition with private sector forestry consulting groups. The Division estimates that 85% of private landowners do not seek professional forestry advice prior to conducting forest management activities, which indicates a large untapped market. As a result, the Division believes it is appropriate to allow property foresters to work with private landowners under the following circumstances:

- 1) Property foresters wishing to work on private lands must request and receive approval in writing from the State Forester on an annual basis. They must also present an activity report to the State Forester for each calendar year during which they requested permission to work.
- 2) The property forester must be able to demonstrate that the job was acquired separately from, and without the benefit of, their state employment.
- 3) Prior to performing work for a private landowner, the property forester must explain in a writing to the landowner the following:
 - a. The property forester is working as a private forester and the work performed is not part of the property forester's state duties.
 - b. Any disputes that arise as a result of the quantity or quality of work performed will not be settled by the Division.
 - c. A copy of the writing must be provided to the State Forester.
- 4) If the work is performed on land enrolled in the Program, a current management plan approved by the landowner and the district forester must be on file. If a current plan is not on file, the district forester will prepare one. The Assistant State Forester for CFM will review and approve all management plans prepared for tracts being serviced by property foresters. The property forester must follow the plan as written.
- 5) When timber is marked and sold, the sale will be reviewed and approved by a district forester from outside the district where the timber is marked or by the Assistant State Forester for CFM.
- 6) All private work must be done on non-state time. Any inquiries and phone calls about private sector activity that occur during the employees work day must be postponed until the employee is off duty.
- 7) No state resources may be used on any private sector forest management activities. This includes but is not limited to: computers, data recorders, vehicles, e-mail, telephones, or other forestry tools and supplies.
- 8) Property foresters can sell no more than 750,000 bd. ft. or equivalent in a calendar year.
- 9) Property foresters can work no more than thirty calendar days in a year on private land forestry activity.
- 10) Property foresters may not advertise in the IFWOA Directory of Professional Foresters.

Activities that would be allowed by property foresters on private woodlands include timber marking and marketing, timber stand improvement work (TSI), tree planting, timber tax consultation, estate planning, and timber appraisal work. Timber appraisal work for timber theft or similar situations would not be allowed.

ISSUE

Does the Code prohibit the DNR property foresters from engaging in outside employment as private sector foresters on private woodlands within the State?

RELEVANT LAW

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

Conflict of interest; advisory opinion by commission

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).

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.

42 I.A.C. 1-5-10

Benefiting from confidential information

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 I.A.C. 1-5-11

Divulging confidential information

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

IC 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

42 IAC 1-5-12 Use of state property

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation.

42 IAC 1-5-13 Ghost employment

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

ANALYSIS

A. Outside employment

An outside employment or professional activity opportunity creates a conflict of interest under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value when the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of his official duties that his ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use his official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

The Commission generally defers to an agency's appointing authority or ethics officer regarding outside employment opportunities since it views them as being in the best position to determine whether an employee's proposed outside employment opportunity would violate any of the aforementioned provisions of IC 4-2-6-5.5 given the employee's state duties. The Ethics Officer has expressed his opinion that the DNR property forester's efforts to moonlight as private sector foresters on private woodlands would be appropriate and would not violate any of the provisions of IC 4-2-6-5.5 under the specific circumstances outlined above. Specifically, in addition to abiding to the aforementioned guidelines, the DNR proposes that property foresters wishing to work on private lands must request and receive approval in writing from the State Forester on an annual basis and present an activity report to the State Forester for each calendar year during which they requested permission to work. It is the opinion of the Commission that the annual reporting component proposed by the DNR be increased to quarterly reports. Property foresters would be required to present an activity report to the State Forester for each quarter of the calendar year during which they requested permission to work. The Commission is satisfied that the guidelines, along with the increased reporting requirement, set forth by the DNR for property foresters who wish to engage in private forestry work would ensure that none of the conflict of interest provisions set forth in IC 4-2-6-5.5 would be violated.

B. Conflict of interests

A separate conflict of interest may arise for a state employee under IC 4-2-6-9 if he or she knowingly participates in a decision or vote in which certain persons have a financial interest in the outcome of the matter, including the employee him or herself as well as a business organization in which they serve as an employee. "Financial interest" is defined in IC 4-2-6-1(a)(11) 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.

The property foresters would be prohibited under this rule from participating in any decision or vote at DNR in which he or she would have a financial interest. To the extent that the property foresters would be in a position to review the work they performed as private sector foresters, a conflict of interest would arise. More specifically, a conflict would arise if they would have a financial interest in whether their work as private foresters would be approved if subject to review by the Division.

An employee who identifies such a potential conflict of interest is required to notify his appointing authority and seek an advisory opinion from the Commission to determine whether a) procedures should be implemented to screen the employee from involvement in the matter, or b) the interest is not so substantial that the Commission considers it likely to affect the integrity of the services the state expects from the employee.

It appears that the property foresters have taken steps to both notify their appointing authority and to seek an advisory opinion from the Commission. Furthermore, the DNR proposes to implement a detailed screening procedure to ensure that the property foresters do not participate in decisions or votes in which they would have a financial interest in.

C. Confidential information

The property foresters are prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from, or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the property foresters from accepting any compensation from any employment, transaction, or investment which is entered into or made as a result of material information of a confidential nature. The term “person” is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation, such as the Company. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

It is possible that property foresters could be exposed to or have access to confidential information in the course of their employment with the DNR. So long as the property foresters neither divulge nor benefit from confidential information that could be used in their moonlighting activities, the proposed outside employment would not violate these rules.

D. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the property foresters from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation. Likewise, 42 IAC 1-5-13 prohibits the property foresters from engaging in, or directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

To the extent that the property foresters adhere to this restriction, their proposed outside employment would not violate either of these rules.

CONCLUSION

To the extent that the DNR implements the proposed guidelines, increases the reporting requirement to a quarterly basis, and screens property foresters from confidential information, the Commission finds that property foresters are not prohibited from engaging in outside employment as private sector foresters on private woodlands within the State.