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A state employee who served as a Confined Feeding Operations (CFOs) Inspector was interested in selling crops and livestock to CFOs and/or individuals associated with CFOs. SEC found that the employee would have a potential conflict of interests under IC 4-2-6-9 if he were to sell to CFOs that he inspected as the CFOs would have a financial interest in any determinations he would make. Accordingly, SEC determined that he could avoid a conflict of interests under IC 4-2-6-9 if IDEM screens him from all participation in inspections of CFOs to which he sells his products.

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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 is a Confined Feeding Operation (CFO) Compliance Inspector with the Indiana Department of Environmental Management (IDEM). The employee is responsible for conducting field inspections and providing technical and regulatory guidance to staff, the section supervisor and external entities. His essential duties are to interpret laws, regulations and guidelines within an area of assignment and develop and coordinate programs and work plans for the CFO Compliance Section. When necessary, he develops and modifies existing state programs to adapt to changes in federal or state legislation-mandated policy. He also acts as the program expert for the CFO Compliance Section and conducts field inspections in an assigned geographical area and large dairy operations.

The employee asserts that he is not involved in any contracting for IDEM and that he does not make any regulatory or licensing decisions for IDEM. He provides that his IDEM position does not involve participating in any decisions regarding the sale of harvested or standing crops to CFOs nor does it involve his participation in any decisions regarding the sale of calves/cattle to individuals who own or are associated with CFOs.

In addition to working for IDEM, the employee owns and operates a small cattle operation and harvests hay for livestock consumption in an Indiana county. The employee is seeking a formal advisory opinion from the Commission to determine if it would be a conflict of interests for him to sell either a harvested standing crop of hay to a permitted CFO or sell calves or cattle to individuals who own or are associated with a permitted CFO.

ISSUE

What ethics issues, if any, arise for the employee given his position as CFO Compliance Inspector and his simultaneous outside interests in selling his crops and/or livestock to CFOs?

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 may not knowingly do any of the following:

(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.

(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 stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

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 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter relating to that 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 member, 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 ethics officer in writing and do either of the following:

(1) 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:

(A) 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

(B) 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.

(2) File a written disclosure statement with the commission that:

(A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

(ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed not later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) 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)(1)(B) shall be filed with the appointing authority.

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

Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement

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 a state officer, an employee, or a special state appointee who:

(1) does not participate in or have contracting responsibility for the contracting agency; and

(2) files a written statement with the inspector general before the state officer, employee, or special state appointee executes the contract with the state agency.

(c) A statement filed under subsection (b)(2) must include the following for each contract:

(1) An affirmation that the state officer, employee, or special state appointee does not participate in or have contracting responsibility for the contracting agency.

(2) An affirmation that the contract: (A) was made after public notice and, if applicable, through competitive bidding; or (B) was not subject to notice and bidding requirements and the basis for that conclusion.

(3) A statement making full disclosure of all related financial interests in the contract.

(4) A statement indicating 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.

(5) In the case of a contract for professional services, an affirmation by the appointing authority of the contracting agency 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. A state officer, employee, or special state appointee may file an amended statement upon discovery of additional information required to be reported.

(d) A state officer, employee, or special state appointee who:

(1) fails to file a statement required by rule or this section; or

(2) files a deficient statement; before the contract start date is, upon a majority vote of the commission, subject to a civil penalty of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

42 IAC 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 IAC 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.

IC 4-2-6-17

Use of state property for other than official business; exceptions; Violations

Sec. 17. (a) Subject to IC 4-2-7-5, a state officer, an employee, or a special state appointee may not use state materials, funds, property, personnel, facilities, or equipment for purposes other than official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation that has been approved by the commission. The commission may withhold approval of a policy or rule that violates the intent of Indiana law or the code of ethics, even if Indiana law or the code of ethics does not explicitly prohibit that policy or rule.

(b) An individual who violates this section is subject to action under section 12 of this chapter.

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

The employee's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Excess Compensation for Sale or Lease, Use of State Property, Ghost Employment and Benefitting from and Divulging Confidential Information. The application of each provision to the employee is analyzed below.

A. Outside employment

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if 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.

IDEM's Ethics Officer provides that the employee has an assigned region in which he is responsible for inspecting CFOs. His farming operation is not in this region, and he does not intend to sell his crops or livestock to CFOs within this region. The employee will also not be required to disclose any confidential information that he has access to as a state employee for his prospective business.

Based on the information provided, the Commission finds that The employee's outside commercial venture in selling crops and/or livestock is not inherently incompatible with his IDEM responsibilities nor would it require his recusal from matters central or critical to the performance of his official state duties that his ability to perform them would be materially impaired; however, he should not inspect the same CFOs to which he sells crops or livestock. The Commission advised the Ethics Officer to ensure that procedures are in place to screen the employee from inspecting any of the CFOs to which he has or will sell crops or livestock.

The employee must also ensure that he does not use his position at IDEM to secure any advantages for CFOs or anyone else that would not be available to similar individuals.

So long as he does not sell to CFOs that he inspects as part of his IDEM duties, the employee would not have a conflict of interests under this rule and his outside commercial venture would not violate IC 4-2-6-5.5.

B. Excess Compensation for Sale or Lease

IC 4-2-6-7 prohibits a state employee from accepting compensation for the sale or lease of any property or service that substantially exceeds that which he or she would charge in the ordinary course of business or from any person who has a business relationship with the agency in which the individual is employed.

Business relationship is defined, in part, as the dealing of a person with an agency seeking, obtaining, establishing, maintaining, or implementing a license or permit requiring the exercise of judgment or discretion by the agency. In this case, it appears that the CFOs to which the employee would like to sell crops and/or livestock have a business relationship with IDEM since they are permitted by IDEM.

The Commission finds that the employee would need to ensure that he does not sell any crops and/or livestock to a CFO at a price that substantially exceeds what he would charge in the ordinary course of business.

C. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits The employee from participating in any decision or vote, or matter relating to that decision or vote, if he has a financial interest in the outcome of the matter. Financial interest is defined to include 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.

This prohibition extends beyond merely the decision or vote on the matter to encompass any participation in that decision or vote. In addition, the rule requires a state employee who recognizes a potential conflict of interests to notify his agency's appointing authority and ethics officer in writing and either (1) seek a formal advisory opinion from the State Ethics Commission or (2) file a written disclosure form with the OIG.

The employee asserts that he does not participate in any decisions regarding the sale of crops and cattle/calves to CFOs or individuals associated with CFOs in the course of his official state business; however, he is involved in conducting inspections of CFOs and his findings could lead to fines or other penalties for the CFOs if they are found to be noncompliant with applicable regulations. If he were to participate in decisions, or matters related to such decisions, concerning CFOs to whom he may sell his livestock or crops, it is possible that he could have a financial interest in the outcome of such decisions.

Accordingly, the Commission finds that he has an identified potential conflict of interests and he must ensure he meets the remaining disclosure and notification requirements in IC 4-2-6-9(b). He has already requested a formal advisory opinion and disclosed the potential conflict to the Commission, but he must also notify IDEM's appointing authority of the potential conflict and work with his Ethics Officer to ensure he is screened from all participation in the matters in which he would have a financial interest.

D. Conflict of interests – contracts

Pursuant to IC 4-2-6-10.5, 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 contracting responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

The employee does not have contracting responsibility for IDEM. Further, the employee provides that none of the compensation he would receive from the sale of his crops or livestock to CFOs would be derived from any state contracts.

Accordingly, the Commission finds that he does not have a financial interest in a state contract at this time and this rule does not apply.

E. Confidential information

The employee is 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 employee 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 a CFO. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

To the extent the employee is exposed to or has access to such confidential information in his position with IDEM, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including any CFO, in any manner.

F. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the employee 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 that has been approved by the Commission. Likewise, 42 IAC 1-5-13 prohibits the employee 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.

The Commission confirmed that the employee would be conducting his commercial activity during non-working hours and that he would not use any state property to conduct his outside activities. To the extent that the employee observes these provisions, his outside activities would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the employee's outside commercial activities in selling crops and livestock to CFOs would not create a conflict of interests under the Code of Ethics so long as IDEM screens him from inspecting any CFOs to which he would sell his products.