

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

IURC sought guidance regarding members of its Indiana Underground Plant Protection Advisory Committee to determine whether members would have a potential conflict of interests under IC 4-2-6-9 if they participate in penalty recommendations in cases involving their employers; and, if so, how the members should fulfill the disclosure and screening requirements of IC 4-2-6-9(b) if cases involving their employers come before the Advisory Committee on a frequent basis. SEC determined that an Advisory Committee member would have a potential conflict of interests under IC 4-2-6-9 if he or she were to participate in penalty recommendations, a process that involves a decision or vote, in cases in which his or her employer would have a financial interest. SEC further found that mere abstention from the recommendations in these cases would not satisfy the disclosure and screening requirements provided in IC 4-2-6-9(b); however, due to the high number of potential conflicts, the SEC determined that Advisory Committee members may file a Conflict of Interest – Decisions and Votes disclosure form with the OIG on an annual basis, rather than every time a conflict arises due to their employment with companies involved in cases before the Advisory Committee but must still file a separate disclosure form for any additional potential conflicts that are not related to the employer issues detailed on the annual disclosure.

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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). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is the Ethics Officer for the Indiana Utility Regulatory Commission (IURC). The Ethics Officer is requesting an Advisory Opinion on behalf of the Assistant General Counsel for the IURC, who also serves as the legal advisor to the Indiana Underground Plant Protection Advisory Committee (Advisory Committee).

The Advisory Committee was established under IC 8-1-26-23 as part of the Damages to Underground Facilities Act. Members of the Advisory Committee are appointed by the Governor. These special state appointees are from various sectors of the excavation-operator community. IC 8-1-26-23(b) requires certain representatives to be included on the board; specifically, one member must represent the association (Indiana 811), one member must represent investor owned gas utilities, one member must represent operators of pipeline facilities or pipelines, one member must represent municipal gas utilities, two members must represent commercial excavators, and one member must represent providers of facility locate marking services.

Accordingly, most members of the Advisory Committee work for an excavating or operating company. They are middle to upper management; none are owners or officers. Generally, the Advisory Committee’s role is to act in an advisory capacity and make penalty recommendations to the IURC in matters in which the IURC’s Pipeline Safety Division (Division) has found a violation of the Damage to Underground Facilities Act, IC 8-1-26. The Advisory Committee does not determine violations; they only recommend penalties. The IURC, under IC 8-1-26-23(k), has final authority to vote on whether to uphold or reverse the finding of

violation and approve or disapprove the recommendation of penalty. In most cases, the parties are the excavator and the operator.

The specific process initiates when an excavator hits a gas line. The operator (gas company) submits information about the damage to the Division. The Division investigates the matter and drafts an Investigation Summary Report. The Division forwards the report and case file to the Advisory Committee. At the Advisory Committee's monthly meeting, the members review the files and recommend penalties, which are tracked via a spreadsheet, meeting minutes, and written Recommendation Forms. In recommending a penalty, "[t]he affirmative vote of a majority of members appointed under subsection (b) is required to take action." IC 8-1-26-23(f). After notice and opportunity for a public hearing are complete, the IURC reviews the recommendation forms and the Investigation Summary Reports for each case. At its weekly conference, the IURC then upholds or reverses the finding of a violation by the Division and approves or disapproves each recommendation of the Advisory Committee.

Most Advisory Committee members' companies have the potential to be a respondent in a case and therefore face civil penalties. The Damage to Underground Facilities Act looks at excavation violations caused by excavators and operators; therefore, all Advisory Committee members who represent these groups work for a company that could be affected. Facility locate marking services providers would not be parties to a case. However, they likely have an agreement with the gas operator in a case to pay any civil penalties that are the result of the providers' failed locates.

Under IC 4-2-6-9(a), a special state appointee, such as an Advisory Committee member, cannot participate in any decision or vote, or matter related to such decision or vote, if the member has knowledge that he or she, or a business where he or she is employed, has a financial interest in the outcome of the matter. The Advisory Committee members have sought to comply with IC 4-2-6-9(a) by abstaining from a case in which the company they work for is involved. From the inception of the Advisory Committee, any member who works for a company involved in a case, or has a personal relationship with a company that is involved in a case, has abstained from involvement in the penalty recommendation process so that the member avoids any conflict of interests. While the Advisory Committee's by-laws do allow a member to speak on the issue, in practice, the member abstains from discussion, collaboration, and agreeing on a recommendation. Because several members work for companies heavily involved in excavation matters, there are frequent abstentions.

At most monthly meetings, the Advisory Committee reviews about 140 cases. This number varies based on the number of damage violations found by the Division and the workload of the Advisory Committee. The Advisory Committee has provided a list of abstentions in the past year in cases that the IURC has reviewed and approved as part of the request materials. Of 1,448 cases reviewed by the Advisory Committee in one year, at least one member abstained in 56% of the cases.

The Advisory Committee seeks clarification regarding whether the recommended penalty process constitutes a decision or vote for purposes of IC 4-2-6-9(a) and if the identification of an ongoing potential conflict of interests requires the member to follow the requirements in IC 4-2-

6-9(b) and notify his or her appointing authority and ethics officer and seek an advisory opinion from the Commission or file a disclosure form.

Due to the large number of cases the Advisory Committee reviews each month, the IURC is concerned that requiring a member to complete a conflict of interests disclosure form for every instance in which their employer may be involved in a case before the Advisory Committee would be burdensome on both the individual and the Office of Inspector General in having to file and post all of these disclosures on their website.

The IURC proposes that, if an ongoing potential conflict of interest exists for an Advisory Committee member, due to the frequency at which their employer is involved in cases before the Advisory Committee, the Advisory Committee member instead file one disclosure form per meeting or one disclosure form per year, informing the Commission that matters involving their employer may come before the Advisory Committee through the cases in which they are recommending penalties, and that they will be screened from any involvement in that case so as not to participate in the decision or vote, or any matter related to such decision or vote, in a case in which their employer is involved.

ISSUE

1. Would a conflict of interests under IC 4-2-6-9 arise for an Advisory Committee member if their employer would have a financial interest in the outcome of a matter before the Advisory Committee?
2. If so, does mere abstention or recusal from the matter fulfill the disclosure and screening requirements of IC 4-2-6-9(b)?
3. What process should an Advisory Committee member follow when potential conflicts of interests are identified in order to meet the statutory requirements set forth in IC 4-2-6-9(b), given that numerous conflicts of interests may arise for a single Advisory Committee member during any given meeting?

RELEVANT LAW

IC 4-2-6-1 Definitions

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

...

(10) "Financial interest" means an interest:

(A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or

(B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the

corporation. The term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

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Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 6. Decision and voting restrictions are set forth in IC 4-2-6-9.

IC 4-2-6-9

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.

ANALYSIS

The Advisory Committee's enabling statute requires that it be composed of specific individuals appointed by the Governor. *See* IC 8-1-26-23. The seven appointed members of the Advisory Committee are considered special state appointees for purposes of the Code. A "special state appointee" is a person who is not a state officer or employee and is elected or appointed to a board, a commission, a committee, council. . . that is authorized by statute. . . and functions in a policy or advisory role in the executive department of state government, including a separate body corporate and politic." *See* IC 4-2-6-1(a)(18).

IC 4-2-6-9 prohibits a special state appointee from participating in any decision or vote, or matter relating to that decision or vote, if the special state appointee has knowledge that various persons may have a "financial interest" in the outcome of the matter, including the special state appointee or a business organization in which the special state appointee is serving as an officer, director, a member, a trustee, a partner, or an employee. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest involving property, services, or a transaction between an agency and any person. However, the term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

In this case, a conflict of interests would arise for the Advisory Committee members if they were to participate in a decision or vote, or matter relating to such decision or vote, in which the member, or more likely, a business organization in which the member is serving as an officer, a director, a member, a trustee, a partner, or an employee would have a financial interest in the outcome of the matter.

The Commission finds that the penalty recommendations are decisions or votes for purposes of IC 4-2-6-9(a). The Advisory Committee's duty is to recommend penalties with respect to persons that the Pipeline Safety Division has found to have committed a violation. Despite the recommendation not being the final decision on a penalty – as the IURC must approve or disapprove each recommendation – the Advisory Committee is tasked with making these recommendations. In recommending a penalty, "[t]he affirmative vote of a majority of members appointed under subsection (b) is required to take action." IC 8-1-26-23(f). Accordingly, the penalty recommendations are the outcome of a vote or decision by the Advisory Committee members.

The Commission further finds that an Advisory Committee member, or a business organization in which they or a business organization they are serving as an employee officer, a director, a member, a trustee, a partner, or an employee would have a financial interest in the outcome of the matter in which the Advisory Committee member is voting. As the IURC notes, most Advisory Committee members' companies have the potential to be a respondent in a case and therefore face civil penalties. The Damage to Underground Facilities Act

looks at excavation violations caused by excavators and operators; therefore, all Advisory Committee members who represent these groups work for a company that could be affected. Facility locate marking services providers would not be parties to a case. However, they likely have an agreement with the gas operator in a case to pay any civil penalties that are the result of the providers' failed locates.

Consequently, an Advisory Committee member whose employer is involved in a case before the Advisory Committee would have a potential conflict of interests under IC 4-2-6-9 if he or she were to participate in the penalty recommendation in that case.

The IURC provides that from the inception of the Advisory Committee, any member who works for a company involved in a case, or has a personal relationship with a company that is involved in a case, has abstained from involvement in the penalty recommendation process. In practice this means that the member abstains from discussion, collaboration, and agreeing on the recommendation. Because several members work for companies heavily involved in excavation matters, there are frequent abstentions.

However, the Commission points out that IC 4-2-6-9(b) requires that a special state appointee who identifies a potential conflict of interests shall notify the person's appointing authority and ethics officer in writing and either (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; or (2) file a written disclosure statement with the Commission that details the conflict of interests and describes and affirms the implementation of a screen established by the ethics officer. This law has always required that affirmative actions be taken by an individual to disclose and be screened from a potential conflict of interest that they have identified. Abstention or recusal is not enough to satisfy the disclosure and screening requirements in IC 4-2-6-9(b) and meet the law's overall transparency objectives.

The 2015 changes to the Conflict of Interest law set forth in IC 4-2-6-9 affords the Advisory Committee members flexibility in the way that they can ensure compliance with the statutory disclosure requirements set forth in the law when they identify a potential conflict of interests. Typically a conflict of interests form needs to be filed or an individual needs to seek a formal advisory opinion from the Commission every time a potential conflict of interests under IC 4-2-6-9(a) is identified.

Based on historical data provided by the IURC, Advisory Committee members would need to file disclosures for about 800 or more cases annually, or an average of more than 50 disclosures for one meeting, if they were required to file a form for every identified potential conflict of interests. Due to the unusually high number of cases reviewed each month, the statutory requirements for membership, and the subsequent potential conflict of interests that are identified by the Advisory Committee members on an ongoing basis, the Commission finds that Advisory Committee members can fulfill the disclosure and screening requirements under IC 4-2-6-9(b) by completing and filing a Conflict of Interest – Decisions and Votes disclosure form with the OIG on an annual basis. The form must adhere to all of the requirements in IC 4-2-6-9(b) including a description of the ongoing potential conflict of interests due to their employment with companies

that may be involved in the cases that come before the Advisory Committee for a penalty recommendation, a copy of the notification of the potential conflict of interests that was sent to the IURC's appointing authority, and a description of the screen that will be implemented and overseen by Ms. Roads as the IURC Ethics Officer. The screen should require the Advisory Committee members to continue to abstain from all participation in the recommendations for the cases involving their employers as they have done in the past.

Further, Advisory Committee members who identify any additional conflict of interests, not covered under their annual disclosure form, will need to file additional Conflict of Interest – Decisions and Votes disclosure forms with the OIG in accordance with IC 4-2-6-9.

CONCLUSION

The Commission finds that an Advisory Committee member would have a potential conflict of interests under IC 4-2-6-9 if he or she were to participate in the penalty recommendation in a case in which his or her employer would have a financial interest in the outcome. The Commission further finds that mere abstention from the recommendations in these cases would not satisfy the disclosure and screening requirements provided in IC 4-2-6-9(b); however, it is not necessary for an Advisory Committee member to seek a formal advisory opinion or file a conflict of interests disclosure form upon identification of every case he or she must be screened from involving his or her employer. Rather, due to the unusually high number of cases in which the members would have the same potential conflict of interests, the Advisory Committee members can file a Conflict of Interest – Decisions and Votes disclosure form with the OIG on an annual basis that details the ongoing potential conflict of interests, due to their employment with companies involved in cases before the Advisory Committee, and the screening mechanism implemented and overseen by the IURC to address the potential conflict of interests. Advisory Committee members are still required to file Conflict of Interest – Decisions and Votes disclosure forms every time they identify a potential conflict of interests under IC 4-2-6-9 that is not related to the employer issues detailed in their annual disclosure forms.