

42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)

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

42 IAC 1-5-12 Use of state property

42 IAC 1-5-13 Ghost employment

The IDHS Ethics Officer sought advice on behalf of a special state appointee on the Indiana Emergency Response Commission to determine whether the special state appointee could continue his outside employment as the Director of the Allen County Office of Homeland Security and his service as a member of the Allen County LEPC. SEC determined that neither his service on the Allen County LEPC or as Director of the Allen County Office of Homeland Security would create a conflict under IC 4-2-6-5.5. SEC found that a potential conflict of interest could arise for the special state appointee under IC 4-2-6-9 if he participates in decisions and/or votes regarding his outside employers in which he would have a personal financial interest, but that such a conflict of interest would not arise if he participates in decisions or votes regarding matters in which only his outside employers would have a financial interest in as they are government entities and not business organizations for purposes of IC 4-2-6-9(a)(3). SEC further determined that a screen to remove the special state appointee from matters in which he would have a personal financial interest would be satisfactory to prevent a conflict of interest from arising for him under IC 4-2-6-9.

March 2015

No. 15-I-7

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 the Ethics Officer for the Indiana Department of Homeland Security (“IDHS”). He requests an advisory opinion from the Commission on behalf of a special state appointee serving as a Commissioner on the Indiana Emergency Response Commission (“IERC”). The IERC has duties as set forth in IC 13-25-1-6.

In addition to serving as a Commissioner on the IERC, the special state appointee is a member of the Allen County Local Emergency Management Committee (a Local Emergency Planning Committee, (“LEPC”)), and was recently named Chairman. The special state appointee also works full-time as the Director of the Allen County Office of Homeland Security. In this position, he is an employee of the Allen County government.

The IERC could potentially vote on matters that may provide a financial interest at least indirectly to the Allen County LEPC or to Allen County as a whole. One example of this would be a decision to award grant funding directly to Allen County or to the LEPC as a sub-grantee. Moreover, the Allen County LEPC may participate in similar votes.

Based on these circumstances, the IDHS identified a couple of issues for the Commission to consider. The first and primary question is whether IC 4-2-6-9 applies to the Commissioner’s circumstances at all, as IC 4-2-6-9(a)(3) provides that a special state appointee is prohibited from participating in decisions or votes if he has knowledge that “[a] *business organization* in which the . . . special state appointee . . . is serving as an officer, a director, a trustee, a partner, or an

employee” has a financial interest in the outcome of the matter (emphasis added). Therefore, the first question the IDHS presents is whether the Allen County LEPC and/or the Allen County Office of Homeland Security constitute a “business organization” for purposes of the Code. If they do not constitute business organizations for purposes of the Code, the IDHS also asks for a determination as to whether either entity is considered a state agency, noting that particular IDHS employees are mandatory members of boards and commissions.

If the Commission determines that either the Allen County LEPC and/or the Allen County Department of Homeland Security is a business organization for purposes of the Code, the IDHS Ethics Officer drafted two proposed screening agreements for the Commission’s review. The first agreement concerns IERC decisions which may benefit the Allen County LEPC and/or the Allen County Office of Homeland Security. This agreement provides that the special state appointee will be screened from all IERC decisions and matters whose outcome might potentially involve, to its benefit or detriment, the financial interests of the Allen County LEPC or the Allen County Office of Homeland Security. When any matter whose outcome might potentially involve the financial interests of the Allen County LEPC or the Allen County Office of Homeland Security is presented to the IERC, the special state appointee is to abstain from participating in any discussions, decisions, or votes with respect to that matter. The reason for his abstention will also be recorded into the minutes of the IERC meeting. While this agreement requires the special state appointee to fully abstain from the IERC process when the matter may impact the Allen County LEPC or the Allen County Office of Homeland Security, the agreement does not delegate any particular authority to another person because the special state appointee does not have signing or contract authority for the IERC.

The second proposed screening agreement concerns Allen County LEPC decisions which may benefit the Allen County Office of Homeland Security. This agreement provides that the special state appointee will be screened from all Allen County LEPC decisions and matters whose outcome might potentially involve, to its benefit or detriment, the financial interests of the Allen County Office of Homeland Security. When any such matter is presented to the Allen County LEPC, the special state appointee is to fully abstain from participating in any discussions, decisions, or votes with respect to that matter. If the matter would ordinarily require the special state appointee’s signature as Chairman of the Allen County LEPC, that authority is delegated to an unnamed person. The person is unnamed at this time because the LEPC may have to pass a resolution granting this authority.

ISSUES

1. Do the Allen County LEPC and/or Allen County Department of Homeland Security constitute “business organizations” for purposes of IC 4-2-6-9(a)(3)?
2. If the Allen County LEPC and/or Allen County Department of Homeland Security constitute a “business organization” would a conflict of interest arise for the special state appointee under IC 4-2-6-9 if he participates in decisions or votes in his IERC capacity that either entity would have a financial interest in? If so, are the screening agreements proposed by the IDHS appropriate to prevent a conflict of interest from occurring?

3. What other ethics issues arise, if any, for the special state appointee given his positions as an IERC Commissioner, a member of the Allen County LEPC, and his full-time employment at the Allen County Office of Homeland Security?

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 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.

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

IC 4-2-6-5.5 if it results in the special state appointee: 1) receiving compensation of substantial value when the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the special state appointee'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.

Based on the information provided by the IDHS Ethics Officer and the special state appointee, it does not appear that the special state appointee's service as a member of the Allen County LEPC or his outside employment with the Allen County Department of Homeland Security would create a conflict under this provision. Specifically, the Commissioner's responsibilities as an LEPC member and as the Director of the Allen County Office of Homeland Security would not be inherently incompatible with his responsibilities as a special state appointee on the IERC or require his recusal from matters that are critical to the performance of his state duties. Moreover, nothing presented suggests that his service as a member of the Allen County LEPC or as the Director of the Allen County Office of Homeland Security would require the special state appointee to disclose confidential information that he may have access to by virtue of his state position. Similarly, nothing presented suggests that he would use or attempt to use his state position for any unwarranted privileges or exemptions.

B. Conflict of Interest

IC 4-2-6-9(a)(1) prohibits the special state appointee from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the special state appointee from participating in any decision or vote if a *business organization* which employs him has a financial interest in the matter. In this case, the special state appointee is employed by the Allen County LEPC and the Allen County Department of Homeland Security. Whether a potential conflict of interest under this provision would arise for the special state appointee if he participates in decisions or votes pursuant to his service on the IERC in which either of these two employers would have a financial interest depends upon whether these entities constitute a business organization. The term business organization is not currently defined in the Code.

As noted in opinion 06-I-13, the Office of the Attorney General ("OAG") has previously determined that an LEPC is a state entity. While the question regarding the status of the Allen County Department of Homeland Security as a State agency is outside the scope of this Commission and more appropriately addressed by the OAG, it is worth noting that the Allen County Department of Homeland Security appears to be part of or at least associated with a local unit of government. As such, this entity would not constitute a state "agency" for purposes of the Code. *See* IC 4-2-6-1(a)(2)(d).

Based on the information provided, the Commission finds that the Allen County LEPC and the Allen County Department of Homeland Security are government entities and that, as such, these two government entities are not "business organizations" for purposes of IC 4-2-6-9(a)(3). Therefore, the special state appointee would not be prohibited from participating in decisions or votes in matters before the IERC in which the Allen County LEPC and/or the Allen County Department of Homeland Security would have a financial interest in.

However, a potential conflict of interest could still arise for the special state appointee if he participates in decisions or votes involving either one of his outside employers if he personally has a financial interest in the outcome of the matter. *See* IC 4-2-6-9(a)(1). It appears that the special state appointee's responsibilities as an IERC Commissioner may require him to participate in a decision or vote that would provide funding to either of his employers that would be used to pay his salary.

IC 4-2-6-9(b) provides that an employee 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. IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter.

In this case, the IDHS proposed two screening procedures to address the special state appointee's potential conflict of interest. While the second proposal does not need to be considered, the first proposal concerns IERC decisions which may benefit the Allen County LEPC and the Allen County Office of Homeland Security. This agreement provides that the special state appointee will be screened from all IERC decisions and matters whose outcome might potentially involve, to its benefit or detriment, the financial interests of the Allen County LEPC or the Allen County Office of Homeland Security. When any matter whose outcome might potentially involve the financial interests of the Allen County LEPC or the Allen County Office of Homeland Security is presented to the IERC, the special state appointee is to abstain from participating in any discussions, decisions, or votes with respect to that matter. The reason for his abstention will also be recorded into the minutes of the IERC meeting.

Because it was determined that the Allen County LEPC and the Allen County Office of Homeland Security are not business organizations for purposes of IC 4-2-6-9(a)(3), the Commission finds that the proposed screening procedures prohibiting the special state appointee's participation as a Commissioner of the IERC in decisions or votes on matters in which the Allen County LEPC or Allen County Office of Homeland Security may have a financial interest should be revised to require the special state appointee's recusal from matters before the IERC in which he has a personal financial interest. So long as the proposed screen is implemented with these changes, it would be appropriate to prevent a conflict of interest from arising for the special state appointee under IC 4-2-6-9.

C. Confidential information

The special state appointee 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 special state appointee 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, a governmental agency, and a political subdivision. 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 special state appointee is exposed to or has access to such confidential information in his position as a Commissioner on the IERC, he would be prohibited not only from divulging that information but from ever using it to benefit anyone, including himself or an employer, in any manner.

D. Use of State Property and Ghost Employment

42 IAC 1-5-12 prohibits the special state appointee 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 special state appointee 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 special state appointee observes these provisions he would not violate these laws.

CONCLUSION

The Commission finds that a potential conflict of interest could arise for the special state appointee if he participates in decisions and/or votes regarding his outside employers in which he would have a personal financial interest. The Commission further finds that the screening mechanism proposed by the IDHS is appropriate so long as it is revised to prohibit the special state appointee from participating in decisions or votes in which he has a personal financial interest. On the other hand, the Commission finds that a potential conflict of interest does not arise under IC 4-2-6-9 for decisions or votes regarding matters in which only his outside employers would have a financial interest in as they are government entities and not business organizations.

Subject to the foregoing analysis and the implementation of the recommended screening procedures, the special state appointee's outside employment with the Allen County LEPC and the Allen County Office of Homeland Security would not be contrary to the Code.