

IC 4-2-6-1(a), Definitions

ISM was found to be a private, nonprofit, government related corporation and thereby an agency as defined in the Code of Ethics. Therefore, ISM's employees would be employees as defined by the Code of Ethics and subject to the Code of Ethics in its entirety.

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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).

BACKGROUND

The Deputy Director and Chief Counsel for the Indiana Department of Natural Resources ("DNR") requested a formal advisory opinion from the Commission on behalf of the Division of State Museums and Historic Sites ("Division") in December 2007 to address various ethical issues that arise due the interaction between the Indiana State Museum ("ISM") and the Indiana State Museum Foundation, Inc. ("Foundation").

In advisory opinion number 07-I-16, the Commission found that the current structure that DNR and the Foundation have in place for the operation of the Division and the ISM subjects state employees and/or Foundation employees to violations of the Code of Ethics. Specifically, the Commission found that state and/or Foundation employees were subject to violations of the following ethics rules:

1. 42 IAC 1-5-1 – Gifts; Travel Expenses; Waivers
2. 42 IAC 1-5-8 – Additional Compensation
3. 42 IAC 1-5-9 – Conflicts of Interest; Decisions and Voting
4. 42 IAC 1-5-12 – Use of State Property
5. 42 IAC 1-5-13 – Ghost Employment

The Commission identified the 2006 contractual Agreement between DNR and the Foundation ("2006 Agreement") to be the primary cause of the ethical issues. DNR indicated that the agency would attempt to resolve the ethical issues identified by the Commission by seeking a legislative amendment to IC 14-20.

The Deputy Director reported DNR's proposed legislative amendments to the Commission in January 2008. To address the ethical issues, DNR proposed to add a new statutory section to give the agency authority to delegate, by contract, the management of the ISM or historic sites property. More specifically, to address conflict of interest issues, DNR proposed to strike language in IC 1-20-1-8(a)(2)(b) and IC 1-20-1-8(a)(2)(c) which required that three separate individuals serve as division director, head of the section of museums, and head of the section of historic sites.

In addition, DNR requested further clarification from the Commission regarding the application the Code of Ethics to Foundation employees.

ISSUES

Is the Foundation an agency for purposes of the Code of Ethics?

RELEVANT LAW

IC 4-2-6-1

Definitions

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

(2) "Agency" means an authority, a board, a branch, a bureau, a commission, a committee, a council, a department, a division, an office, a service, or other instrumentality of the executive, including the administrative, department of state government. The term includes a body corporate and politic set up as an instrumentality of the state and a private, nonprofit, government related corporation. The term does not include any of the following:

- (A) The judicial department of state government.
- (B) The legislative department of state government.
- (C) A state educational institution.
- (D) A political subdivision.

(8) "Employee" means an individual, other than a state officer, who is employed by an agency on a full-time, a part-time, a temporary, an intermittent, or an hourly basis. The term includes an individual who contracts with an agency for personal services.

ANALYSIS

Proposed Legislative Amendments

The Commission acknowledges DNR's awareness of the ethical issues that arise for state and/or Foundation employees under the mixed management structure established by the 2006 Agreement between DNR and the Foundation. The Commission further recognizes the initial efforts that DNR has made thus far to address the ethical issues. Such efforts suggest that progress has been made.

The Commission, however, is of the opinion that the proposed legislative amendments presented by DNR do not address all of the specific ethical issues that may arise for state and/or Foundation employees. Instead, if adopted by the legislature, the proposed amendments to IC 14-20 would statutorily authorize DNR to implement the agency's proposed management structure of the ISM. Accordingly, DNR is advised and directed to ensure that the management structure that is implemented for the ISM pursuant to legislative amendments be compliant with the Code of Ethics.

The Commission further encourages DNR to continue working to make further progress to ensure full compliance with the Code of Ethics.

Application of the Code of Ethics to the Foundation

The Code of Ethics applies to state officers, employees, and special state appointees. For purposes of the Code of Ethics, the term “employee” is defined in 42 IAC 1-3-8 (IC 4-2-6-1(a)(8)) as an individual, other than a state officer, who is employed by an agency on a full-time, part-time, a temporary, an intermittent, or an hourly basis. The term “agency” is defined broadly in 42 IAC 1-3-2 (IC 4-2-6-1(a)(2)) to include “a private, nonprofit, government related corporation.” In this case, the Foundation is a not-for-profit corporation that is registered as such in the State of Indiana and whose sole purpose is to participate in the operation of the ISM.

CONCLUSION(S)

The Commission finds that the Foundation is an agency as defined in IC 4-2-6-1 for purposes of the Code of Ethics. The Commission further finds that as an agency, employees of the Foundation are subject to the Code of Ethics in its entirety.