

42 IAC 1-5-1 Gifts

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

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

The OFBCI Executive Director was involved in a number of businesses and held volunteer positions with various organizations prior to joining the agency and sought advice on the propriety of continuing to hold those positions. SEC found the Executive Director would not have a conflict of interest to the extent none of the organizations had a financial interest in any matters before the agency; however, he should continue to be mindful of IC 4-2-6-9 in the event any such matters might arise in the future. Furthermore, SEC found there was no problem with the Executive Director's name appearing on websites soliciting donations for various organizations so long as donations were not being solicited from persons having a business relationship with OFBCI.

June 2013
No. 13-I-24

The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to I.C. 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 Ethics Officer for the Office of the Governor. Another state employee is the Executive Director of the Office of Faith-Based and Community Initiatives ("OFBCI"). Prior to becoming the Executive Director of the OFBCI on January 14, 2013, the state employee was involved in a number of businesses and held a number of volunteer positions in various organizations. The OFBCI works to ensure that the faith-based institutions of Indiana are provided equal access to state and federal resources and services. The OFBCI includes the Indiana Commission on Community Service and Volunteerism ("ICCSV"). The OFBCI, with assistance from the ICCSV, provides information, training, technical assistance and limited grant funding to both community-based and faith-based organizations seeking to make Indiana a better place to live for all citizens. As the Executive Director of the OFBCI, the state employee leads the agency in these efforts. Along with serving as the Executive Director of the OFBCI, the state employee is still involved in a number of businesses and holds a number of volunteer positions in various organizations.

The Executive Director currently serves on the following five boards outside of his official position at the OFBCI:

1. The People Helping People Network, Inc. ("PHP"), a registered 501(c)(3) not-for-profit charitable organization. The Executive Director is the Founder and CEO of PHP. Through PHP, the Executive Director hosts a weekly radio show to shine a spotlight on people and organizations that are doing good works in our community and around the world. Previously, PHP held annual dinners that awarded outstanding volunteers and organizations in the community. These proceeds went to PHP. Currently, PHP only solicits funds on its website www.phpnetwork.org.

The Executive Director's name appears on the website as the Founder and CEO. The Executive Director is a volunteer and donor with the organization. He does not receive compensation for his role in the organization, and the organization does not have any business relationship with the OFBCI or with the State of Indiana.

2. The Gateway Business Alliance, Inc., d/b/a Gateway Community Alliance ("GCA"), a registered 501(c)(3) not-for-profit charitable organization. The Executive Director is the Founder and President of GCA. GCA hosts an annual "Miracle Mile Parade" on Saturday during the Labor Day weekend to support community, economic and social development. While holding his position as Executive Director of the OFBCI, the state employee will not perform fundraising for GCA or the Miracle Mile Parade directly. Both GCA and Miracle Mile Parade solicit funds online at www.GatewayCommunityAlliance.org and www.MiracleMileParade.com respectively. The Executive Director is listed as the President of GCA and Chairman of the Miracle Mile Parade. He is a volunteer and a donor to GCA. He does not receive compensation for his role in the organization, and the organization does not have a business relationship with the OFBCI or with the State of Indiana.
3. Indianapolis Metropolitan Police Motorcycle Drill Team, Inc. ("Drill Team"), a registered 501(c)(3) not-for-profit charitable organization. The Executive Director has been co-president since 1995. The goal of the Drill Team is to promote Law Enforcement as Goodwill Ambassadors by supporting community events. The website for the Drill Team (www.MotorcycleDrillTeam.org) includes a letter requesting contributions to the organization. The letter is signed by the Executive Director as the Co-President of the Drill Team. The Executive Director is a volunteer and donor with the Drill Team. He does not receive compensation for his role in the organization, and the Drill Team does not have any business relationship with the OFBCI or with the State of Indiana.
4. Indiana War Memorials Foundation, a registered not-for-profit organization not affiliated with any government entity. The Executive Director is a volunteer board member. The organization works to support veterans and maintain war memorials in the honor of veterans. The Executive Director is not involved directly in fundraising for the organization. The organization's website (www.indianawarmemorials.org/about.htm) has a link for individuals to donate to the Foundation directly. He is a volunteer and donor. He does not receive compensation for his role in the organization.
5. The Lincoln Roundtable, Inc. is a private Sub-S corporation that provides education and leadership opportunities to individuals in the community. This group encourages others to actively participate in the democratic process. The Executive Director is the Founder and President of the Lincoln Roundtable. He does not receive compensation for his role in the organization.

The Executive Director is also involved in the following six businesses:

1. Associated Materials, Inc. d/b/a Cardwell Do-It Best Home Center – a Central Indiana retail establishment with Hardware, Lawn & Garden Supplies, Roofing, Paint, Lumber, Plywood, Building Materials and a complete Tool Rental Center. The Executive Director serves as President and CEO of Cardwell Do-it Best Home Center.
2. Cardwell Real Estate, Inc., d/b/a Cardwell, REALTORS – a full service residential and commercial real estate brokerage. The Executive Director serves as President and Principal Broker.
3. Huddleston Professional Centre, Inc. – a professional office complex. The Executive Director serves as Vice President and Managing Broker.
4. Madison Capital, LLC – a holding company comprised of retail and commercial investment properties. The Executive Director serves as President and Managing Member.
5. J.C. Madison, LLC – a holding company comprised of residential investment properties. The Executive Director serves as President and Managing Member.
6. J.M. Holdings, LLC – a holding company comprised of industrial investment properties. The Executive Director serves as President and Managing Member.

These businesses do not bid on or participate in any state projects. Furthermore, none of these businesses lobby any state agencies, including the OFBCI.

According to the Ethics Officer for the Governor's office, none of the Executive Director's outside activities as described above violates any OFBCI rule or regulation and none of the organizations he is involved with will apply for grant funding through the OFCBI or the ICCSV, which falls under the OFBCI. Furthermore, The Ethics Officer believes his outside activity does not present a conflict of interest that would be inherently incompatible with his duties as the Executive Director of the OFBCI. The Executive Director does not intend to directly solicit donations through fundraising from anyone who has a business relationship with the OFBCI.

The Executive Director sought an informal advisory opinion from the Office of Inspector General on February 8, 2013, regarding the propriety of the Executive Director engaging in such outside activities pursuant to the Code. The Ethics Officer has approved the Executive Director's outside professional activities as described above; however, in an abundance of caution, the Ethics Officer is now seeking a formal advisory opinion on the matter on behalf of the Office of the Governor in her capacity as the agency's Ethics Officer.

ISSUES

1. Is the Executive Director's participation in any of the described outside professional activities prohibited under the Code?

2. Would a conflict of interest arise for the Executive Director under I.C. 4-2-6-9 if he participates in any decision or vote in which he or any of the organizations with which he is involved has a financial interest in the outcome of the matter?
3. Is it permissible under the Code for the Executive Director's name to be on fundraising solicitation letters or websites for the outside organizations with which he is involved?

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 1-5-1

Gifts; travel expenses; waivers

Sec. 1. (a) A state employee or special state appointee, or the spouse or unemancipated child of a state employee or special state appointee, shall not knowingly solicit, accept, or receive any:

- (1) gift;
- (2) favor;
- (3) service;
- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

from a person who has a business relationship with the employee's or special state appointee's agency or is seeking to influence an action by the employee or special state appointee in his or her official capacity.

(b) The following shall not be subject to this rule:

- (1) Gifts, favors, services, entertainment, food, drink, travel expenses, or registration fees from public agencies or public institutions.
- (2) Food or drink consumed at a public meeting to which at least twenty-five (25) individuals are invited. A meeting will be considered public if:
 - (A) the event is a reception or other gathering for public officials that is not arranged to solicit government procurement of goods or services;
 - (B) the employee is giving a speech or participating in a presentation in the employee's official capacity; or
 - (C) the meeting has a formal educational program that the employee is attending to assist him or her in performing official duties.
- (3) Mementos or souvenirs of nominal value.
- (4) Food or drink consumed by an employee during negotiations or other activities related to an Indiana economic development corporation economic development project.
- (5) Gifts, favors, services, entertainment, food, or drinks from relatives, or a person with whom the employee or special state appointee has an ongoing social relationship, so long as:
 - (A) the gifts or other items of value are not deducted as a business expense; and
 - (B) the gift giver is not seeking to influence an action by an employee or special state appointee in that person's official capacity.

- (6) Political contributions subject to I.C. 3-9-2 that are reported in accordance with applicable law.
- (7) Nominal refreshments offered to a state employee or a special state appointee conducting official state business while the employee or special state appointee is at a workplace of a person who:
- (A) has a business relationship; or
 - (B) seeks to influence official action;
- with the employee's or special state appointee's agency.
- (8) Discount and other promotional programs approved and made available to state employees and special state appointees through the state personnel department or the Indiana department of administration.
- (c) An employee's or special state appointee's state officer or appointing authority may waive application of subsection (a) of this rule in individual cases when consistent with the public interest. The waiver shall:
- (1) be in writing; and
 - (2) identify the following:
 - (A) The employee or special state appointee.
 - (B) The nature and value of the gift.
 - (C) The donor of the gift.
 - (D) Why acceptance of the gift is consistent with the public interest.
- (d) Written waivers must be filed with the commission within thirty (30) days of receipt of the gift. The commission may review the written waivers. An appointing authority or state officer may designate authority to the agency's ethics officer to waive application of this rule on behalf of the appointing authority or state officer. The designation shall be in writing and filed with the commission.
- (e) If a person wishes to reimburse the state for any part or all of the expenses incurred by the state for appearances of a state officer, employee, or special state appointee or their official representatives on behalf of the state, the person shall remit to the treasurer of state any such amounts. The treasurer of the state shall quietus the funds into the general fund.

ANALYSIS

A. Outside employment

An outside employment or professional activity opportunity creates a conflict of interest under I.C. 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. Subsections 2) and 3) apply to uncompensated professional activities as well as compensated outside employment positions.

In this case the Ethics Officer, in her capacity as such for the Office of the Governor, has approved all of the Executive Director's outside employment and professional activities. Based on the information provided to the Commission and the Ethics Officer regarding these activities, the Executive Director's outside activities do not appear to present any conflicts of interest under the rule on outside employment.

B. Conflict of interests

A further conflict of interest may arise for a state employee under I.C. 4-2-6-9 if he knowingly participates in a decision or vote in which certain persons have a financial interest in the outcome of the matter, including the employee himself as well as a business organization in which he serves as an officer, a director, a trustee, a partner or an employee. "Financial interest" is defined in I.C. 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 term also includes an interest arising from employment or prospective employment for which negotiations have begun; however, it does not include an interest that is not greater than the interest of the general public or any employee.

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.

In this case, the Ethics Officer does not identify any circumstances in which a potential conflict of interest may arise for the Executive Director in his capacity as such of the OFBCI as a result of his outside employment and professional activities. However, the Executive Director must continue to ensure compliance with this rule and seek a formal advisory opinion from the Commission regarding a screening procedure or a determination regarding the substantiality of the interest should he identify a potential conflict of interest.

C. Gifts

Including the Executive Director's name on fundraising letters or websites for the outside organizations in which he is involved could implicate 42 IAC 1-5-1, the state ethics rule that pertains to gifts. This rule prohibits a state employee from knowingly soliciting or accepting donations from any person who has a business relationship with their agency or any person who is seeking to influence an action by the employee in his official capacity. A "person" is defined in I.C. 4-2-6-1(a)(13) as any individual proprietorship, partnership, unincorporated association, trust, business trust, group, limited liability company, or corporation, whether or not operated for profit, or a governmental agency or political subdivision. "Business relationship" is defined in I.C. 4-2-6-1(a)(5) as "dealings of a

person with an agency seeking, obtaining, establishing, maintaining, or implementing: (i) a pecuniary interest in a contract or purchase with the agency; or (ii) a license or permit requiring the exercise of judgment or discretion by the agency.” The term also includes the relationship a lobbyist, even if unregistered, has with an agency. Furthermore, this rule applies even if the donations are going directly to the organization and not to the employee himself.

The Executive Director would be prohibited, under the gifts rule, from using his name on fundraising letters and/or websites of the organizations he is associated with for the purpose of soliciting or accepting donations from any person who has a business relationship with the OFBCI.

CONCLUSION

The Commission finds that the Executive Director’s participation in the professional activities described herein is not prohibited by the Code. Moreover, the Commission finds that a conflict of interest would arise for the Executive Director under I.C. 4-2-6-9 if he participates in any decision or vote in which he or any of the organizations with which he is involved has a financial interest in the outcome of the matter. The Executive Director must continue to ensure compliance with this rule and seek a formal advisory from the Commission regarding a screening procedure or a determination regarding the substantiality of the interest should he identify a potential conflict of interest. Finally, the Commission finds that the Executive Director’s name on fundraising solicitation letters or websites for the outside organizations with which he is involved would not be prohibited by the gifts rule so long as it does not involve a person who has a business relationship with the OFBCI.