

42 IAC 1-5-1 Gifts; travel expenses; waivers
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 Bicentennial Commission and IDOA sought advice to determine whether members of the Bicentennial Commission were special state appointees for purposes of the Code and whether Bicentennial Commission staff's duties were impacted by the Code. SEC found that members of the Bicentennial Commission are not special state appointees because the Commission they were appointed to does not function in a policy or advisory role in the executive department of state government. SEC further found that the employees of the Bicentennial Commission are subject to the Code and that the application of the Code would not adversely impact the Bicentennial Commission staff's unique duties.

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No. 14-I-7

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

The Indiana 2016 Bicentennial Commission ("Bicentennial Commission") was statutorily created by the enactment of I.C. 4-23-33, P.L. 198-2013 effective July 1, 2013, retroactively effective as of December 1, 2011. The Bicentennial Commission will statutorily expire June 30, 2017.

The duties of the Bicentennial Commission are specifically enumerated in I.C. 4-23-33-5 and include: 1) planning and developing activities appropriate to commemorate Indiana's statehood, 2) encouraging private organizations and local governments to organize and participate in activities that highlight the bicentennial and, 3) coordinating and promoting bicentennial activities throughout Indiana.

The Bicentennial Commission consists of fifteen (15) members, appointed by and serving at the pleasure of the Governor. The Bicentennial Commission members represent a cross-section of esteemed and accomplished Indiana leaders and visionaries who have graciously volunteered their time and effort to assist the Bicentennial Commission to pursue and accomplish the enumerated plan and vision. The Bicentennial Commission is chaired by a former Lt. Governor and a former Congressman. On February 21, 2013, the Bicentennial Commission asked First Lady Karen Pence to serve as the official Bicentennial Ambassador and she currently serves in that role.

All Bicentennial Commission members serve strictly as volunteers and receive no payment or consideration from the State for their service. Additionally, the members and the staff perform non-traditional State functions to achieve the legislative intent of the Bicentennial Commission.

The Indiana Department of Administration ("IDOA") received State funding totaling \$484,950 for the bi-annual 2014-2015 budget, which funds are allocated to the bicentennial efforts. Of

that funding \$309,486 is dedicated to salaries, and associated administrative and operating costs and expenses. The Bicentennial Commission has no authority or oversight over the State funding dedicated to the staff. Additional funding for Bicentennial Commission events and programs must be secured through private funding, gifts, grants, sales, and promotions. It is foreseeable that additional State funds may be requested to execute approved capital projects of the Bicentennial Commission.

Currently there are two (2) employees serving to conduct the affairs of the Bicentennial Commission. To facilitate proper oversight, payment, etc. of the employees they were placed within the IDOA staffing table and appear as IDOA employees for convenience, payroll and functional purposes. The Bicentennial Commission employees are not physically housed within IDOA, and have no operational reporting duties or responsibilities with respect to IDOA's statutory and traditional functions. Rather they serve to accommodate and accomplish the goals of the Bicentennial Commission.

A myriad of programs and initiatives have arisen and will continue to develop in conjunction with the 2016 Bicentennial Celebration. To facilitate those activities and ensure a lasting tribute and recognition of our State, the Bicentennial Commission and IDOA wish to ensure proper conduct by all persons associated with these tasks and to eliminate and avoid any potential appearance of impropriety.

ISSUE

- 1) Are members of the Bicentennial Commission special state appointees under the Code?
- 2) In what ways, if any, does the Code impact the activities of the Bicentennial Commission staff in the execution of their duties as state employees?

RELEVANT LAW

I.C. 4-2-6-1

(18) "Special state appointee" means a person who is: (A) not a state officer or employee; and (B) elected or appointed to an authority, a board, a commission, a committee, a council, a task force, or other body designated by any name that: (i) is authorized by statute or executive order; and (ii) functions in a policy or an advisory role in the executive (including the administrative) department of state government, including a separate body corporate and politic

42 I.A.C. 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 IC 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.

I.C. 4-2-6-9 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 I.A.C. 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 I.A.C. 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. Bicentennial Commission Members

I.C. 4-2-6-1(a)(18) defines “special state appointee” as a person who is “not a state officer or employee” and is “elected or appointed to ...a commission...that is authorized by statute or executive order; and functions in a policy or advisory role in the executive (including the administrative) department of state government...” In this case, it is undisputed that the Bicentennial Commission members are not state officers or employees. They are appointed to a commission that is authorized by statute. The only question that is unresolved in determining whether the Bicentennial Commission members are special state appointees is whether the Commission itself “functions in a policy or advisory role in the executive department of state government.” The duties of the Bicentennial Commission are specifically enumerated in I.C. 4-23-33-5 and include: 1) planning and developing activities appropriate to commemorate Indiana’s statehood, 2) encouraging private organizations and local governments to organize and participate in activities that highlight the bicentennial and, 3) coordinating and promoting bicentennial activities throughout Indiana. Given the limited and unique nature of the statutory duties of the Bicentennial Commission, it does not appear that this particular Commission “functions in a policy or advisory role in the executive department of state government.” Accordingly, the Bicentennial Commission members do not meet the statutory definition of the term “special state appointee.” They are therefore not subject to the Code.

B. Bicentennial Commission Employees

The employees selected by the Bicentennial Commission and assigned to IDOA are state employees. As such, they are subject to the Code. Given the Bicentennial Commission’s unique statutory mandate, the application of the relevant rules in the Code to the Bicentennial Commission’s staff is analyzed below.

1. Gifts

The gifts rule states in part that a state employee shall not knowingly solicit, accept, or receive any gift, favor, service, entertainment, food, drink, travel expenses, or registration fees from:

1. a person who has a business relationship with the employee’s agency; or
2. a person who is seeking to influence an action by the employee in his or her official capacity.

For the gifts rule to apply, the “person,” defined in I.C. 4-2-6-1(a)(13), from whom the donations are being solicited must either have a “business relationship” with the employee’s agency or must be seeking to influence an action by the employee in his or her official capacity. “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.

In this case, the Commission must determine whether the state employees supporting the Bicentennial Commission would be prohibited from soliciting donations from any person who has a business relationship with the Bicentennial Commission and/or the IDOA. Specifically, since they are employees of the IDOA, a strict application of the gifts rule would prohibit those staff members from soliciting or accepting any gift from someone who had a business relationship with the IDOA. While that interpretation may appear to be expansive, such interpretation would not be detrimental to the day-to-day activities of the state employees supporting the Bicentennial Commission. More specifically, the gifts rule applies to the staff members themselves. It does not apply to the Bicentennial Commission. Accordingly, while the state employees would be prohibited from soliciting or accepting any gift for themselves from someone who had a business relationship with the IDOA, they would not be prohibited from doing so on behalf of the Bicentennial Commission.

2. Conflicts of Interest

As state employees, the staff members of the Bicentennial Commissioner are subject to the Code including the conflicts of interest provision set forth in I.C. 4-2-6-9. I.C. 4-2-6-9(a)(1) prohibits the state employees from participating in any decision or vote if they have a financial interest in the outcome of the matter. While it does not appear that a conflict of interest would arise for these state employees, given the unique staffing arrangements, IDOA has nevertheless chosen to adopt specific screening measures to apply in specific situations or projects of the Bicentennial Commission that might require IDOA’s input/approval. See attachment A.

3. Use of State Property

The use of state property rule provides that a state employee shall not make use of state materials, funds, property, personnel, facilities, or equipment for any purpose other than official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation. Since the Bicentennial Commission is statutorily authorized, use of state property by the Bicentennial Commission staff in their efforts to further the mission of the Bicentennial Commission, such as fundraising, would not violate this rule.

4. Ghost Employment

The ghost employment rule provides that a state employee shall not 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. Since the Bicentennial Commission is statutorily authorized, the Bicentennial Commission’s staff’s engagement in various efforts during working hours to further the mission of the Bicentennial Commission, such as fundraising, would not violate this rule.

CONCLUSION

The Commission finds that members of the Bicentennial Commission are not special state appointees because the Commission they were appointed to does not function in a policy or advisory role in the executive department of state government. The Commission further finds that the employees of the Bicentennial Commission are subject to the Code. Subject to the foregoing analysis, the Commission finds that the application of the Code would not adversely impact the Bicentennial Commission staff's unique duties.