

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 1-5-7 Prohibition against financial interest in contract; exceptions (IC 4-2-6-10.5)
42 IAC 1-5-12 Use of state property
42 IAC 1-5-13 Ghost employment

FSSA sought advice to determine whether the CMO of the State's new Neuro-Diagnostic Institute could maintain his outside employment as a Psychiatrist with two mental health centers. SEC determined that the CMO's employment at the mental health centers would not create a conflict under IC 4-2-6-5.5.

Specifically, the information provided by the FSSA Ethics Officer indicated that the CMO's outside employment responsibilities would not be inherently incompatible with his FSSA responsibilities nor would they require his recusal from matters that are critical to the performance of his state employment duties.

SEC further determined that the CMO would not have a conflict of interests under IC 4-2-6-9 so long as he does not participate in decisions or votes, or matters related to such votes and decisions, in which either of his outside employers would have a financial interest in the outcome. In addition, the CMO would not have a conflict of interests in a contract with a state agency, because the mental health centers have indicated that none of the consulting fees they will pay to the CMO are derived from state contract funds.

March 2016
No. 16-I-6

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 Family and Social Services Administration ("FSSA"). The Ethics Officer is requesting an advisory opinion on behalf of a practicing psychiatrist. The Psychiatrist who will begin employment with the State as the Chief Medical Officer ("CMO") of the State's new Neuro-Diagnostic Institute and Advanced Treatment Center ("NDI") on March 14, 2016. To maintain his specialty certification and medical credentials, the Psychiatrist must maintain patient contact. The Psychiatrist would like to meet this requirement by seeing patients for five hours a week at Aspire Indiana Health, Inc. ("AIH") and/or Porter-Starke Services, Inc. ("Porter-Starke").

The NDI will be a rapid throughput neuro-diagnostic institute, which will modernize the State's mental health system. The NDI will serve as the hub for Indiana's other State Operated Facilities. In this new model, modern genetic and imaging techniques will drive accurate diagnosis and appropriate treatment regimens, which will maximize recovery and lead to stable community placements. Instead of one facility serving around 100 mental health patients a year, the NDI will serve around 1,500 patients a year, thus significantly expanding the access to mental health services. The NDI will also focus on dual diagnosis patients or those with substance use disorders, in an attempt to curb the State's drug abuse problem.

The Psychiatrist has been chosen by FSSA to serve as the Chief Medical Officer of the new NDI, because of his broad knowledge, clinical experience and commitment to serving individuals in need of behavioral health services. He is board certified in Psychiatry and Neurology, with over

thirty years of clinical experience working with the forensic population and the persistently mentally ill.

The Ethics Officer asserts that continuing to see patients in the community will not detract from his position with the State, but instead will allow the Psychiatrist to maintain important professional credentials and certifications as well as allow him to continue his personal and professional mission of providing behavioral health services to those in need.

The Psychiatrist proposes to maintain his medical credentials and specialty certification by consulting at AIH and/or Porter-Starke for a total of five hours a week, from 1 p.m. to 6 p.m. every Tuesday. The Psychiatrist will pay for his own medical malpractice insurance, licensing fees, and certifications.

AIH is a newly created primary health care clinic that is in the process of seeking certification as a Federally Qualified Health Center ("FQHC"). FQHCs serve an underserved area or population, offer a sliding fee scale, provide comprehensive services, and have an ongoing quality assurance program. In his consulting role with AIH, the Psychiatrist will not serve in a supervisory or leadership role. The Psychiatrist will serve as an independent contractor to AIH and will be paid by AIH on an hourly basis. The Psychiatrist will not charge patients nor will he bill insurance. AIH currently has no direct contracts with the State. AIH has indicated that none of the consulting fees paid by AIH to the Psychiatrist will be derived from state contract funds.

Porter-Starke is a Community Mental Health Center ("CMHC") serving Porter and Starke counties. CMHCs provide a full range of mental health services to adults, children and adolescents, including behavioral and addiction treatment programs. The Psychiatrist desires to provide tele-psychiatry services to patients at Porter-Starke. As is the case with AIH, the Psychiatrist will be paid on an hourly basis and will not serve in a supervisory or leadership role. The Psychiatrist will not charge patients nor will he bill insurance. As a CMHC, Porter-Starke has mental health provider agreements with the State. Porter-Starke has indicated that none of the consulting fees paid by Porter-Starke to the Psychiatrist will be derived from state funds.

The Psychiatrist understands that he may not use state time to work or carry out duties at AIH or Porter-Starke. He anticipates easily meeting the 37.5 hour work week, despite the separate five hours each week he will split between AIH and Porter-Starke. During the five-hour period, he will be available to the NDI remotely by phone and email.

The Psychiatrist, in his role as CMO of the NDI, will not have statutory or designated authority to make decisions impacting overall Medicaid or FSSA programs. Particularly, in his role at the NDI, he will not have the ability to make decisions that directly impact AIH or Porter-Starke or their patients.

According to the Ethics Officer, the Psychiatrist's outside employment as described above would not violate any agency rule or regulation. Moreover, the Ethics Officer asserts that the Psychiatrist's outside employment does not appear to present a conflict of interest or otherwise be incompatible with his official duties as CMO of the NDI.

ISSUE

What ethics issues, if any, arise for the Psychiatrist given his position as CMO of the NDI for FSSA and his simultaneous employment with AIH and Porter-Starke?

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 may not knowingly do any of the following:

(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.

(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 stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

IC 4-2-6-9 (42 IAC 1-5-6)

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.

IC 4-2-6-10.5 (42 IAC 1-5-7)

Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement

Sec. 10.5. (a) Subject to subsection (b), a state officer, an employee, or a special state appointee may not knowingly have a financial interest in a contract made by an agency.

(b) The prohibition in subsection (a) does not apply to a state officer, an employee, or a special state appointee who:

(1) does not participate in or have contracting responsibility for the contracting agency; and

(2) files a written statement with the inspector general before the state officer, employee, or special state appointee executes the contract with the state agency.

(c) A statement filed under subsection (b)(2) must include the following for each contract:

(1) An affirmation that the state officer, employee, or special state appointee does not participate in or have contracting responsibility for the contracting agency.

(2) An affirmation that the contract: (A) was made after public notice and, if applicable, through competitive bidding; or (B) was not subject to notice and bidding requirements and the basis for that conclusion.

(3) A statement making full disclosure of all related financial interests in the contract.

(4) A statement indicating that the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee.

(5) In the case of a contract for professional services, an affirmation by the appointing authority of the contracting agency that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee. A state officer, employee, or special state appointee may file an amended statement upon discovery of additional information required to be reported.

(d) A state officer, employee, or special state appointee who:

(1) fails to file a statement required by rule or this section; or

(2) files a deficient statement; before the contract start date is, upon a majority vote of the commission, subject to a civil penalty of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

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.

IC 4-2-6-17

Use of state property for other than official business; exceptions; Violations

Sec. 17. (a) Subject to IC 4-2-7-5, a state officer, an employee, or a special state appointee may not use state materials, funds, property, personnel, facilities, or equipment for purposes other than official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation that has been approved by the commission. The commission may withhold approval of a policy or rule that violates the intent of Indiana law or the code of ethics, even if Indiana law or the code of ethics does not explicitly prohibit that policy or rule.

(b) An individual who violates this section is subject to action under section 12 of this chapter.

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

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if 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.

Based on the information provided, the Commission finds that the Psychiatrist's outside employment with AIH and Porter-Starke would not create a conflict under this provision. Specifically, the Psychiatrist's responsibilities with AIH and Porter-Starke would not be inherently incompatible with his FSSA responsibilities nor would they require his recusal from matters that are critical to the performance of his state employment duties. Moreover, while he is an independent contractor of AIH and Porter-Starke, nothing presented would suggest that the Psychiatrist would be required to disclose confidential information that he may have access to by virtue of his state employment. Similarly, nothing presented suggests that he would use or attempt to use his state position for any unwarranted privileges or exemptions.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Psychiatrist from participating in any decision or vote, or matter relating to that 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 Psychiatrist from participating in any decision or vote, or matter relating to that decision or vote, if he or a business organization which employs him has a financial interest in the matter.

The Psychiatrist will be serving as CMO of the NDI for FSSA. He will also be employed as a consultant for AIH and Porter-Starke. Accordingly, the Psychiatrist would have a potential conflict of interests if he participates in decisions or votes, or matters related to such decisions or votes, in which he, AIH or Porter-Starke would have a financial interest in the outcome. The Ethics Officer advises that the Psychiatrist will not have statutory or designated authority to

make decisions impacting overall Medicaid or FSSA programs. Particularly, in his role at the NDI, he will not have the ability to make decisions that directly impact AIH or Porter-Starke or their patients.

So long as no such decisions or votes, or matters related to such decisions or votes, in which the Psychiatrist, AIH, or Porter-Starke would have a financial interest in the outcome come before him in his position at FSSA, the Psychiatrist would not be in violation of this rule. In the event he would otherwise participate in any such matters during the course of his state employment, he must follow the procedure set forth in IC 4-2-6-9 (b) to disclose the conflict.

C. Conflict of interests – contracts

Pursuant to IC 4-2-6-10.5, a state employee may not knowingly have a financial interest in a contract made by an agency. This prohibition however, does not apply to an employee that does not participate in or have official responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met. The term “official responsibility” has been interpreted by the Commission as contracting responsibilities.

Porter-Starke, as a CMHC, has mental health provider agreements with the State. The Ethics Officer provides that AIH does not have any direct contracts with the State. The term “financial interest” is defined as the interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person. 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.

Based on the information provided, the Psychiatrist would not have contracting authority for any state agencies that may contract with AIH or Porter-Starke, but he would have a financial interest in AIH’s or Porter-Starke’s contracts if any part of his salary from AIH and/or Porter-Starke would be paid from funding received through state contracts. According to the Ethics Officer, both AIH and Porter-Starke have indicated that none of the consulting fees they will pay to the Psychiatrist will be derived from state contract funds. Accordingly, because he would not have a financial interest in these contracts, the Commission finds that the Psychiatrist would not have a conflict of interests under this rule.

D. Confidential information

The Psychiatrist 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 Psychiatrist 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 and a corporation, such as AIH or Porter-Starke. 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 Psychiatrist is exposed to or has access to such confidential information in his position as CMO for FSSA, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including AIH and Porter-Starke, in any manner.

E. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the Psychiatrist 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 Psychiatrist 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 Psychiatrist observes these provisions regarding his employment with AIH and Porter-Starke, such outside professional activity would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Psychiatrist's intended outside employment activities with AIH and Porter-Starke would not create a conflict of interests under the Code of Ethics.