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An FSSA employee sought advice regarding whether he was prohibited from working as a Chief Medical Officer for FSSA while simultaneously continuing to work at Eskenazi Health, IU School of Medicine, and Roudebush VA Medical Center. SEC determined that the employee's outside employment would not create a conflicts of interests for him so long as he did not participate in any decisions or votes at FSSA that would effect Eskenazi Health, IU School of Medicine, or their related entities; the employee did not have any financial interests in any state contracts through his outside employment; the employee did not divulge from confidential information; the employee did not benefit from or allow his outside employers to benefit from confidential information; the employee did not use nor direct others to use state property for non-state business or engage in the performance of non-state duties during state working hours unless expressly permitted to do so.

August 9, 2018
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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

The Ethics Officer for the Indiana Family and Social Services Administration (FSSA) is requesting an advisory opinion on behalf of the employee, the new Chief Medical Officer for FSSA. Specifically, the ethics officer is requesting an opinion from the Commission addressing whether it would be a conflict of interests for the employee to continue his outside employment with Eskenazi Health, hold his appointment at the Indiana University School of Medicine while on temporary leave, and retain privileges at the Roudebush VA Medical Center while employed as the Chief Medical Officer for FSSA.

The employee will join FSSA after serving as the Medical Director of the Indiana Poison Center, Division Chief Medical Toxicology, and holding numerous roles at Indiana University School of Medicine, including Faculty President. The employee is scheduled to commence working at FSSA on August 6, 2018. He has agreed not to work any shifts at Eskenazi Health after his start date at FSSA until he receives a formal advisory opinion from the State Ethics Commission indicating that it would not be a conflict of interests for him to continue his outside employment activities.

The Chief Medical Officer position is a clinical executive position that reports to the Secretary of FSSA. The Chief Medical Officer's primary role is to provide leadership to the medical directors in each FSSA Division and the Office of Social Determinants of Health. As the Chief Medical Officer, the employee will provide medical oversight, expertise and leadership to projects and operations within the Agency, including policy advising and program planning. His duties will not include any contract administration or rulemaking.

The employee would like to continue to work a few evenings a month in the emergency department at Eskenazi Health while employed as the Chief Medical Officer of FSSA. He does not anticipate working more than three evenings a month on average. The employee believes that it is important for him to continue working in the emergency room to maintain his skills through patient contact because it will aid him in his performance as Chief Medical Officer. Eskenazi Health partners with the Indiana University School of Medicine and serves as the public hospital division of the Health & Hospital Corporation of Marion County. Eskenazi Health's programs have received national recognition. Eskenazi is a safety-net hospital, meaning that it provides health care and other related services to the uninsured, Medicaid-recipients, and other vulnerable populations regardless of ability to pay. It is also the home of the first adult level trauma center in Indiana, the region's only adult burn center, and Indiana's first community mental health center. As a physician in the Eskenazi Health emergency room, the employee will see firsthand the barriers to receiving medical care faced by the indigent, geriatric and pediatric patients he encounters.

The employee will pay for his own medical malpractice insurance, licensing fees and certifications. Furthermore, he will not serve in a supervisory or leadership role with Eskenazi Health or Indiana University Health Physicians (IU Health Physicians). Rather, he will serve as an independent contractor to Eskenazi Health through IU Health Physicians. He will not charge patients nor will he bill insurance. He will be paid by IU Health Physicians on an hourly basis.

Eskenazi Health and IU Health Physicians are Indiana Medicaid Providers. Each has an Indiana Medicaid Provider Agreement with FSSA and both receive Medicaid reimbursements. Eskenazi Health does not have a direct contract with FSSA; however, its community mental health center is certified by FSSA's Division of Mental Health and Addiction. Additionally, IU Health Physicians is affiliated with Indiana University Health (IU Health), and FSSA's various divisions have six active contracts with IU Health, Indiana University and related entities. The contracts are at the division level in FSSA. The division directors are the owners of the contracts. The employee, as Chief Medical Officer, would not be in a position to negotiate or sign these contracts. Per the employee, to avoid a potential conflict under IC 35-44.1-1-4, IU Health Physicians will not use funds from these contracts with FSSA to pay him; however, his fees may be paid from general Medicaid funds.

The Ethics Officer provides that the employee has no leadership role with IU Health Physicians or IU Health, that he is taking a leave of absence from the medical school, and that he would only be staffing the emergency room a few times a month; she asserts that all of these measures should ensure that there is not even an appearance that he is deriving a profit from or has a pecuniary interest in any of the IU Health contracts with the State.

The employee would not be in a position to make decisions regarding Medicaid providers or community mental health centers, and any direction he would provide regarding protocols, policies

or procedures that might impact external stakeholders would apply to all clinical specialists, hospital administrators, and any other providers uniformly. Therefore, it is unlikely the employee would make a decision that would have a unique impact on Eskenazi Health, IU Health Physicians, IU Health, or their related entities. If the situation presented itself, FSSA would screen the employee from participating in any such decision by having the Secretary delegate full authority to another employee to handle such matters independently.

In addition to working as an independent contractor to Eskenazi Health, the employee is in the process of applying for privileges to work in the emergency room at the Roudebush VA Medical Center and would like to retain said privileges if awarded. He does not believe at this time that he will seek work there; however, he wants to obtain privileges in case an opportunity would arise in the future.

The employee would also like to maintain his appointment at the Indiana University School of Medicine while employed by FSSA. The employee recently completed his term as Faculty President. He plans to take an approved temporary leave of absence from the medical school that will permit him to retain his title and the full rights of a faculty member. During his temporary leave of absence, the employee will not receive any benefits or salary; however, he will be required to continue to abide by the professional standards of the medical school to remain a faculty member in good standing. He will also be required to renew his leave of absence annually.

The employee understands and agrees that he may not use state time to work at Eskenazi Health, the medical school or Roudebush VA Medical Center. Additionally, he is confident that he will meet the 37.5 hour work-week requirement despite seeing patients a few evenings a month.

Based on the information presented, the Ethics Officer does not believe that the employee's outside employment activities would be incompatible with his duties as Chief Medical Officer. Rather, she believes that the employee's outside employment activities will help maintain and build upon his professional skills such that he may better be able to meet the essential functions of his position as Chief Medical Officer. This would include identifying opportunities to collaborate and develop clinical integration initiatives with other stakeholders in the State to achieve effective and affordable outcomes, as well as participating as a spokesperson to the public and health care professionals.

ISSUE

What ethics issues, if any, arise for the employee given his position as Chief Medical Officer for FSSA and his simultaneous outside positions with Eskenazi Health, IU School of Medicine, and Roudebush VA Medical Center?

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

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Use of State Property, Ghost Employment, and Benefiting from and Divulging Confidential Information. The application of each provision to the employee is analyzed below.

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 and opinion provided, the Commission finds that the employee's employment at Eskenazi Health would not create a conflict under this provision. Specifically, the employee would not serve in a supervisory or leadership role with the hospital; he would be an independent contractor and will be paid on an hourly basis. According to the Ethics Officer, the employee's responsibilities in treating patients during a few evenings per month in the emergency department at Eskenazi Health would not conflict with his responsibilities as the Chief Medical Officer for FSSA and would not require him to recuse himself from matters that are critical to the performance of his duties at FSSA.

His other outside employment/professional activities would not provide the employee with compensation of a substantial value. The employee is taking a leave of absence from his position with IU School of Medicine and will not receive any benefits or salary during this time. The employee is in the process of applying for privileges to work at the Roudebush VA Medical Center and would like to retain such privileges if awarded. However, he does not have any current plans to seek paid employment at this facility.

The Ethics Officer confirmed that the employee would not be required to disclose confidential information that he may have access to by virtue of his state employment in any of his outside positions. Further, nothing in the information presented suggests that the employee would use or attempt to use his state position for any unwarranted privileges or exemptions. The employee held all of these outside positions prior to becoming the Chief Medical Officer for FSSA.

Accordingly, the Commission finds that the employee's outside employment positions would not violate IC 4-2-6-5.5.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the employee 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 employee 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 employee will be serving as the Chief Medical Officer for FSSA and will also be working a few shifts per month in the emergency department at Eskenazi Health. The employee will serve as an independent contractor to Eskenazi Health through IU Health Physicians, which is affiliated with IU Health.

Accordingly, the employee 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, Eskenazi Health, IU Health Physicians or IU Health would have a financial interest in the outcome.

Eskenazi Health does not have any direct contracts with FSSA; however, its community mental health center is certified by FSSA's Division of Mental Health and Addiction. Additionally, FSSA's various divisions have six active contracts with IU Health and related entities. The Ethics Officer provides that these contracts are at the division level in FSSA and that the division directors are the owners of the contracts.

According to the information provided by the Ethics Officer, the employee, as Chief Medical Officer, would not be in a position to negotiate or sign these contracts. Further, the employee would not be in a position to make decisions regarding Medicaid providers or community mental health centers, and any direction he would provide regarding protocols, policies or procedures that might impact external stakeholders would apply to all clinical specialists, hospital administrators, and any other providers uniformly. Therefore, it is unlikely the employee, or even FSSA, would make a decision that would have a unique impact on Eskenazi Health, IU Health Physicians, IU Health, or their related entities.

The Commission finds that the employee does not have an identified potential conflict of interests at this time. However, if a potential conflict of interests is identified in the future the Ethics Officer must ensure that the employee meets the disclosure and notification requirements in IC 4-2-6-9(b). The Ethics Officer has provided that if any conflicts arise for the employee, FSSA will ensure that he is screened from participating in the matters and the Secretary would delegate full authority to another employee to handle such matters independently.

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 contracting responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

The Ethics Officer provides Eskenazi Health does not have any direct contracts with FSSA; however, FSSA's various divisions have six active contracts with IU Health and related entities.

The Ethics Officer provides that in order to avoid any conflicts under IC 35-44.1-1-4 (the criminal conflict of interests statute), IU Health Physicians will not use funds from these

contracts with FSSA to pay the employee. She notes that his fees may be paid from Medicaid funds.

Accordingly, the Commission finds that the employee would not have a financial interest in a state contract through any of his outside employment positions.

D. Confidential information

The employee 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 employee 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 IU Health. 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 employee is exposed to or has access to such confidential information in his position as Chief Medical Officer of FSSA, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including any of his outside employers, in any manner.

E. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the employee 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 that has been approved by the Commission. Likewise, 42 IAC 1-5-13 prohibits the employee 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 employee observes these provisions regarding his outside employment/professional activities, his outside positions would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the employee’s outside employment positions would not create a conflict of interests under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
State Ethics Director