

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

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

An EMS District Manager for the Indiana Department of Homeland Security sought advice regarding outside employment for creating and operating an ambulance transport company. The Commission is unable to approve the outside employment opportunity as it would create a conflict of interests under the Code of Ethics.

December 10, 2020
2020-FAO-015

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 Deputy General Counsel and Ethics Officer (“Ethics Officer”) for the Indiana Department of Homeland Security (IDHS) is requesting an advisory opinion on behalf of a IDHS EMS District Manager (“District Manager”) addressing outside employment and conflicts of interests.

The District Manager’s role with the State of Indiana began in June 2017. He serves as an EMS District Manager within the State Fire Marshal’s Office. In this role, the District Manager is responsible for oversight of ambulance services, the EMS training center and EMS Supervising Hospital certifications for Districts 1, 2 and 4. His oversight of ambulance services includes routine ambulance compliance inspections, investigations into complaints and reports of violations and renewal of provider certifications, which is done every two years. Due to the lack of ambulance transport services and delays in transports in Districts 1, 2 and 4, he provides hospitals with a point of contact for ambulance services if the hospitals are unable to find a service to transport patients.

The District Manager also serves as a part-time Advanced Emergency Medical Technician (AEMT) for Pulaski County EMS, which is located in District 2. In addition to working part-time as an AEMT, the District Manager also teaches EMR, EMT and AEMT classes for the Pulaski County EMS Training Center and CPR for Pulaski Memorial Hospital. IDHS implemented a screen in July 2017 allowing the District Manager to engage in these activities (The District Manager filed the disclosure form, which includes a description of the screen, with the OIG).

The District Manager proposes creating and operating an ambulance transport company with his brother. The transport company would focus on interfacility and skilled nursing facility transports. The proposed business would operate in the Districts that the District Manager manages.

The District Manager understands and agrees to comply with the ghost employment, use of state property and confidentiality provisions of the Code. He also understands that he is not to use his IDHS position to secure unwarranted privileges or exemptions that are of substantial value and

not properly made available to similarly situated individuals outside state government. Further, IDHS is prepared to implement a screen to ensure that he is not involved in any decisions, votes, or other matters in which his ambulance transport company would have a financial interest.

ISSUE

- 1) Would the District Manager's prospective outside employment with his ambulance transport service create any conflicts of interests for him under the Code?
- 2) What other ethics issues, if any, arise for the District Manager given his position as an EMS District Manager and his prospective, simultaneous employment with his ambulance transport business?

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.

ANALYSIS

A. Outside employment

An outside employment or professional activity 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.

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).

The Commission finds that it is unable to provide a statement that the District Manager's outside employment opportunity in forming and operating an ambulance transport service company would not violate subsection (a)(1) or (a)(2). The Commission has concerns about conflicts of interests under this rule and under IC 4-2-6-9 (See Section B below). The Commission finds that in order to avoid a conflict of interests under IC 4-2-6-9, the District Manager would likely have to recuse himself from matters that are central and/or critical to the performance of his official duties (including his duties related to routine ambulance compliance inspections, investigations into complaints and reports of violations and renewal of provider certifications for ambulance transport services within the Districts he oversees) such that his ability to perform them may be materially impaired.

Accordingly, the Commission does not approve the District Manager's outside employment with his prospective ambulance transport business.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the District Manager 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 District Manager from participating in any decision or vote, or matter relating to that decision or vote, if he or a business organization for which he serves as a partner or employee has a financial interest in the matter. The definition of "financial interest" in IC 4-2-6-1(a)(11) includes, in part, "an interest arising from employment".

The District Manager serves as an IDHS EMS District Manager and would like to operate an outside ambulance transport service, a business organization in which he would presumably be a partner, director, member and/or employee. As an EMS District Manager, the District Manager's responsibilities include oversight of ambulance service for Districts 1,2 and 4. He also provides hospitals with a point of contact for ambulance services if the hospitals are unable to find a service to transport patients.

The Commission finds that decisions the District Manager would have to make in his IDHS capacity could have a financial impact on his outside business, as his proposed business would provide ambulance transport services within the Districts he manages. This presents a potential conflict of interests under IC 4-2-6-9(a).

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify his Ethics Officer and Appointing Authority and seek an advisory opinion from the Commission or file a written disclosure statement with the OIG.

Both options require the implementation of a screen that would ensure the employee does not participate in the matters that would create a conflict of interests.

It is unclear if the District Manager has notified the IDHS appointing authority, but the Ethics Officer and the District Manager have requested this formal advisory opinion, and the Ethics Officer has indicated that IDHS is prepared to implement a screen to prevent the District Manager from participating in any decisions, votes or other matters in which his ambulance transport company would have a financial interest.

IDHS is prepared to implement a screen to ensure that the District Manager is not involved in any decisions, votes or other matters in which his ambulance transport company would have a financial interest; however, the Commission finds that it would not be possible to screen the District Manager from *all* decisions/votes in which he or his business would have a financial interest in the outcome of the matter, as the proposed screening procedures would not prevent a conflict of interest from arising for the District Manager under IC 4-2-6-9.

The District Manager's responsibilities include oversight of the ambulance services operating in the Districts he manages as an EMS District Manager. Even if IDHS were able to screen him from participating in the certifications/inspections of his own ambulance service, he would still be required to make such decisions that could affect competing ambulance services in his Districts. Consequently, if he operates his proposed ambulance transport company in the Districts he manages, this would create a potential conflict of interests under this rule because his company would have a financial interest in the outcome of most, if not all, decisions he would make concerning oversight and compliance regulation related to other ambulance services within his Districts.

Accordingly, the Commission finds that IDHS would be unable to adequately screen the District Manager from participation in all matters in which his proposed company would have a financial interest. As a result, he cannot operate his proposed business in his assigned Districts while he is a state employee and avoid violation of this rule.

CONCLUSION

The Commission is unable to approve the District Manager's outside employment opportunity. Operating an ambulance service in the Districts in which he is assigned oversight of ambulance services would create conflicts of interests for him under both IC 4-2-6-5.5 and IC 4-2-6-9. The Commission did not address other rules under the Code as a result of this finding.

Respectfully Submitted,

Jennifer Cooper
Ethics Director