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An Out of State Auditor in the Indiana Department of Revenue sought advice regarding outside employment to work as a Tax Collector. The Commission finds that his prospective outside employment position would not create a conflict of interests under the Code of Ethics.

December 10, 2020
2020-FAO-016

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

An Out of State Auditor (“Auditor”) in the Indiana Department of Revenue (DOR). He is requesting an opinion from the Commission addressing whether it would be a conflict of interests for him to accept outside employment as a Tax Collector.

The Auditor is assigned to conduct audits of companies in the Northeast region of the United States. He is currently conducting audits in Massachusetts, New York, New Jersey and Pennsylvania. All of the companies that he is currently auditing have a distribution center, warehouse, retail store or other financial interest in Indiana.

In the Auditor’s position, he performs income tax audits and sales and use tax audits. There are audits that are specifically associated with income taxes, such as S-Corporations, partnerships and withholding taxes. Likewise, there are audits specifically associated with sales and use taxes, such as motor vehicle rental tax or food and beverage tax audits depending on the company being audited. He does not audit property taxes. The Auditor cannot enter into any contracts or modify any current contracts with the companies that he audits. Only upper management can enter into or modify contracts with the companies

When the Auditor is auditing a company, he works with the tax managers and staff members of the company who gather the documentation he requests. He also works with CEOs, CFOs and accounting professionals that represent the company. During his audit, he ensures that the company has filed the necessary returns that Indiana law requires, and if the company has not, he makes adjustments to ensure that the company is tax compliant. He explains to the company why all the adjustments have been made during the final conference of the audit. During the final conference, he also informs the company that it has the right to contest the audit.

The Auditor is interested in an outside employment opportunity as a Tax Collector in Langhorne Manor Borough, Pennsylvania (Borough), where he currently resides. This is an elected position that is held for four years. As Tax Collector, he will be responsible for sending property tax bills to the Borough's homeowners and for collecting the property taxes. The funds from the property taxes will be deposited into a checking account and then remitted to the Borough and the school board, Neshaminy School District. If a homeowner becomes delinquent in paying property taxes that are due, a lien will be sent out, but it will not be his responsibility to send out this lien. As Tax Collector, the Auditor will not have the authority to assess payees, determine the amount of taxes a payee owes or determine whether liens are appropriate measures. His position would be part-time and require a minimal time investment of two to three hours per week. He would perform these duties in the evening or on the weekends outside of his normal DOR working hours.

The only business in the Borough is that of Cairn University, and it does not have any kind of nexus to Indiana. Cairn University's main area of education is bible study, but it also offers programs in English, History, Liberal Arts and Psychology. The Auditor does not and has not conducted any audits of Cairn University in his position with DOR.

The Auditor consulted with the Ethics Officer for DOR about this outside employment opportunity, and she referred him to the Office of Inspector General (OIG) for an informal advisory opinion. The OIG issued an informal advisory opinion to the Auditor on December 1, 2020. The Auditor is now requesting a final determination from the Commission regarding whether he can accept this outside employment opportunity under the Code.

ISSUE

1. Would the Auditor's outside employment opportunity as a Tax Collector create any conflict of interests for him under the Code?
2. What other ethics issues, if any, arise for the Auditor given his position at DOR and his simultaneous outside position as a Tax Collector?

RELEVANT LAW

42 IAC 1-5-4 Political activity

Sec. 4. (a) A state employee or special state appointee shall not engage in political activity including solicitation of political contributions from:

- (1) another employee or special state appointee; or
- (2) any other person;

when on duty or acting in an official capacity.

(b) This section does not prohibit a state employee or special state appointee from engaging in such activity when not on duty.

(c) A state employee or special state appointee shall not solicit political contributions at any time from:

- (1) persons whom the employee or special state appointee knows to have a business relationship with the employee's or the special state appointee's agency; or

- (2) state employees or special state appointees directly supervised by the employee or the special state appointee.
- (d) The appointing authority of an agency and all employees or special state appointees with purchasing or procurement authority on behalf of the state shall not solicit political contributions on behalf of any candidate for public office, unless that individual is a candidate for public office himself or herself.

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.

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 Auditor's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Political Activity, Use of State Property, Ghost Employment and Benefitting from and Divulging Confidential Information. The application of each provision to the Auditor 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 provided, the Auditor's outside employment position as a Tax Collector would not create a conflict under this provision. The Auditor's role and responsibilities as a Tax Collector would be very different from his role as an Out of State Auditor with DOR, and it does not appear that the positions would overlap in any meaningful way.

Accordingly, the Commission finds that the Auditor's responsibilities as a Tax

Collector would not be inherently incompatible with his DOR responsibilities nor would they require his recusal from matters that are critical to the performance of his state duties.

In addition, the Commission confirmed that the Auditor would not be required to disclose confidential information to which he may have access by virtue of his state employment in his outside position as a Tax Collector.

Nothing in the information presented suggests that the Auditor would use or attempt to use his state position for any unwarranted privileges or exemptions. The Auditor must continue to ensure he does not use or attempt to use his official DOR position for any unwarranted privileges or exemptions.

The Commission finds that the Auditor's outside employment opportunity as a Tax Collector would create a conflict of interests for him under this rule.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Auditor 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 Auditor from participating in any decisions or votes, or matters related to such decisions or votes, in which the Borough would have a financial interest in the outcome.

Based on the information provided about his role at DOR, the Auditor would not be required to participate in any decision or vote, or matter relating to a decision or vote, for DOR in which the Borough would have a financial interest.

Accordingly, he does not have an identified potential conflict of interests at this time; however, if a potential conflict of interests is identified in the future, he must ensure that he meets all the disclosure and notification requirements in IC 4-2-6-9(b). Mere recusal from matters that could create a potential conflict of interests would not be enough to satisfy the requirements.

C. Political activity

Because the role of Tax Collector is an elected position, the Auditor will need to ensure he complies with the political activity rule, found in 42 IAC 1-5-4. This rule prohibits a state employee from engaging in political activity, including solicitation of political contributions from (a) other state employees or special state appointees; or (b) any other person when on duty or acting in his or her official capacity. When not on duty or acting in his official capacity, the Auditor can engage in political activity so long as he does not solicit political contributions from any state employees or special state appointees that he directly supervises or from a person who has a business relationship with DOR.

The Commission reminded the Auditor to be cautious of this rule and follow the guidance it provided in its opinion in [2018-FAO-0016](#). In this opinion the Commission advised a state employee that he could run for State Representative while serving as a state employee; however, the Commission cautioned him not to do any of the following: engage in political activity while on duty or acting in his official capacity, use his official state title on campaign materials, solicit campaign contributions from his direct reports or from anyone who has a business relationship with his state agency, use his official position to secure unwarranted privileges or exemptions of substantial value, participate in decisions or votes in which the legislature would have a financial interest, use state property for non-official work performance during work hours, and benefit from or divulge confidential information. The Commission also advised the employee to add a disclaimer to his campaign material and website regarding unsolicited political contributions.

In addition, the Commission advised the Auditor to maintain and provide a list of all political contributions he receives to DOR to ensure he does not solicit or accept campaign contributions from anyone who has a business relationship with DOR.

D. Confidential information

The Auditor 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 Auditor from accepting any compensation from any employment, transaction or investment that 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 governmental agency or political subdivision, such as the Borough. 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 Auditor is exposed to or has access to such confidential information in his position with DOR, he is prohibited not only from divulging that information but from ever using it to benefit any person, including his outside employer, in any manner.

E. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the Auditor 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 Auditor 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 Auditor observes these provisions regarding his outside employment activities, his outside position as a Tax Collector would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Auditor's outside employment as a Tax Collector would not create a conflict of interests for him under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
Ethics Director