

42 IAC 1-5-5 and 42 IAC 1-5-6 Conflicts of Interest (IC 4-2-6-5.5 and IC 4-2-6-9)

42 IAC 1-5-7 Prohibition against financial interest in contract (IC 4-2-6-10.5)

42 IAC 1-5-10 Benefiting from confidential information

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IC 4-2-6-6 Compensation resulting from confidential information

IC 4-2-6-17 Use of state property

42 IAC 1-5-13 Ghost employment

The Chief Medical Officer of the Indiana State Department of Health (ISDH) sought advice regarding several outside employment/professional activity opportunities. SEC determined that the employment/professional activity opportunities would not be contrary to the Code of Ethics.

February 13, 2020
2020-FAO-004

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 (Ethics Officer) for the Indiana State Department of Health (ISDH) seeks an opinion from the Commission on behalf of the new Chief Medical Officer (CMO) for ISDH.

The Chief Medical Officer position is a clinical executive position that reports to the State Health Commissioner. The Chief Medical Officer's primary role is to provide the Commissioner, executive team and divisions with medical guidance, support and advocacy of agency initiatives based on best medical practices. As the Chief Medical Officer, the CMO will provide medical oversight, expertise and leadership to projects and operations within ISDH, including policy advising and program planning. Her duties will not include any contract administration, rulemaking or regulatory or compliance role.

The CMO has previously served as an assistant professor of clinical emergency medicine at the Indiana University School of Medicine and practiced emergency medicine at Methodist Hospital in Indianapolis. She is board certified in both emergency medicine and hospice and palliative care medicine.

The CMO would like to maintain (1) her outside employment with Indiana University (IU) Health Physicians as a supplemental or contract physician working at Methodist Hospital; (2) her appointment as a volunteer assistant professor at IU School of Medicine; and (3) a non-voting position as a member of the Indiana American College of Emergency Medicine Physicians, while employed as the Chief Medical Officer for ISDH. Each of these outside activities is explained in more detail below.

1. IU Health Physicians

The CMO would like to continue to work one shift per week in the emergency department at Methodist Hospital. The CMO believes that it is important for her to continue working in the emergency room to maintain her skills through patient contact because it will aid her in her performance as Chief Medical Officer for ISDH.

The CMO's medical malpractice insurance will be paid by IU Health Physicians as that is their standard practice. The CMO will pay her own licensing fees and certifications. The CMO will not serve in a supervisory or leadership role with Methodist Hospital or IU Health Physicians. Rather, she will serve as an independent contractor to Methodist Hospital through IU Health Physicians. She will not charge patients nor will she bill insurance. She will be paid by IU Health Physicians on an hourly basis.

IU Health Physicians is affiliated with IU Health, and ISDH's various divisions have six active contracts with IU Health, IU and related entities. The contracts are at the division level in ISDH, and the division directors are the owners of these contracts. The CMO, as Chief Medical Officer, would not be in a position to negotiate or sign these contracts. According to the CMO, to avoid a potential conflict under IC 35-44.1-1-4, IU Health Physicians will not use funds from these ISDH contracts to pay her; her fees will be paid from general patient revenue. Given that the CMO has no leadership role with IU Health Physicians or IU Health and that she would only be staffing the emergency room once per week, this should ensure that there is not even an appearance that she is deriving a profit from or has a pecuniary interest in any of the IU Health contracts with the State.

Further, in her role at ISDH, the CMO would not be in a position to make regulatory, compliance or other decisions regarding specific providers. Any direction she 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 CMO would make a decision that would have a unique impact on Methodist Hospital, IU Health Physicians, IU Health or their related entities. If the situation presented itself, ISDH would screen the CMO from participating in any such decision by having the Commissioner delegate full authority to another employee to handle such matters independently.

2. IU School of Medicine

The CMO would also like to continue with her appointment at the IU School of Medicine as a volunteer faculty member while employed by ISDH. The CMO is an assistant professor of clinical emergency medicine and would not be compensated in this position or be required to participate in any of the other duties expected of assistant professors; however, she will be required to continue to abide by the professional standards of the medical school to remain a faculty member in good standing.

3. Indiana Chapter of the American College of Emergency Medicine Physicians

The CMO would like to hold a non-voting position as a member of the Indiana Chapter of the American College of Emergency Medicine Physicians (the Association) while employed as the Chief Medical Officer for ISDH. She formerly held a voting position with the Indiana Chapter

but relinquished it upon acceptance of state employment. The Association serves as the primary source for continuing medical education for emergency medical physicians across the State. The CMO will not participate in any of the Association's legislative or policy efforts. Her role as a non-voting member would be limited to hearing the issues that emergency medical physicians are encountering across the State and letting the other members know what the ISDH is currently working on at any given time.

The Ethics Officer is requesting a Formal Advisory Opinion from the Commission addressing whether the CMO would have any conflicts of interests under the Indiana Code of Ethics if she were to engage in all three of these outside employment/professional activities while serving as the Chief Medical Officer for ISDH.

The CMO understands and agrees that she may not use state time to work at Methodist Hospital or engage in any of her outside professional activities. Additionally, she is confident that she will meet the 37.5 hour work-week requirement while also working a clinical shift each week.

ISSUE

What ethics issues, if any, arise for the CMO given her position as Chief Medical Officer and her simultaneous outside employment/professional activity positions?

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 when 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 her official duties that her 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 her 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 generally defers to an agency's ethics officer regarding outside employment opportunities as these individuals are in a better position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment/professional activity opportunity. The Ethics Officer provides that ISDH supports the CMO's outside employment, and she does not believe any of the CMO's activities for her outside employers would create a conflict of interests for her under IC 4-2-6-5.5.

Based on the information provided, the Commission finds that the CMO's employment with Methodist Hospital/IU Physicians would not create a conflict of interests under this rule. Specifically, the CMO would work one shift per week in the emergency department at Methodist Hospital. The CMO will not serve in a supervisory or leadership role with Methodist Hospital or IU Health Physicians. She will serve as an independent contractor to Methodist Hospital through IU Health Physicians, and she will be paid by IU Health Physicians (through patient funds, not any state contract) on an hourly basis.

According to the Ethics Officer, the CMO's responsibilities in treating patients during the weekly shift would not conflict with her responsibilities as the Chief Medical Officer at ISDH nor require her to recuse herself from matters that are critical to the performance of her duties as Chief Medical Officer.

The CMO's other outside employment/professional activities would not provide her with compensation of substantial value, thus IC 4-2-6-5.5(a) does not apply.

The Commission confirmed that the CMO would not have to disclose confidential information to which she may have access by virtue of her state employment in her work for any of the entities. Similarly, nothing in the information presented suggests that she would use or attempt to use her state position for any unwarranted privileges or exemptions. The CMO was already employed in or held these outside positions prior to becoming the Chief Medical Officer for ISDH.

Accordingly, based on all of the information provided, the Commission finds that the CMO's outside employment/professional activities 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 CMO from participating in any decision or vote, or matter relating to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the CMO from participating in any decision or vote, or matter relating to that decision or vote, if a business organization in which she is serving as an officer, a director, a member, a trustee, a partner or an employee has a financial interest in the matter.

Accordingly, the CMO would have a potential conflict of interests if she participates in decisions or votes, or matters related to such decisions or votes, in which she or any of

the organizations listed above have a financial interest in the outcome of the matter. The Ethics Officer provides that the CMO, as Chief Medical Officer, would not be in a position to be involved in the six contracts in place between IU Health, IU and related entities. These contracts are owned by ISDH division directors, and the Chief Medical Officer does not negotiate, sign or administer such contracts.

The Ethics Officer provides that the CMO is not in a position to make decisions regarding specific providers, and any direction she would provide ISDH regarding protocols, policies or procedures that might affect clinical specialists, hospital administrators and other providers would apply to all such stakeholders uniformly. The Ethics Officer does not anticipate that the CMO would ever be in a position, as Chief Medical Officer, to participate in a decision or vote in which Methodist Hospital, IU Health Physicians, IU Health, IU School of Medicine or the Association would have a financial interest in the outcome.

The Ethics Officer provides that if the CMO ever was in a position to participate in decisions or votes, or matters related to such decisions and votes, in which any of her outside employers had a financial interest in the outcome, ISDH would screen the CMO from participating in any such matters. The ISDH Commissioner would delegate full authority to another ISDH employee to handle such matters independently.

The Commission finds that the CMO does not have a potential conflict of interests under this rule at this time. If this should change, and the CMO identifies a potential conflict of interests, mere recusal or the internal reassignment of duties is not enough to satisfy the statutory requirements under this rule. IC 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interests shall notify the person's appointing authority and seek an advisory opinion from the Commission or file a written disclosure statement with the OIG. Accordingly, if a potential conflict of interests arises for the CMO, she will need to ensure she meets the disclosure and notification requirements so as to avoid violating this rule.

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. The Code defines “financial interest” to include an interest arising from employment. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between a state agency and a third party. 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 that the CMO does not have authority to negotiate or sign contracts on behalf of ISDH. The Ethics Officer further provides that the CMO has confirmed that she would not receive compensation from any ISDH contracts or grants for any of her outside positions. She would be paid hourly by IU Health Physicians for

her weekly shift at Methodist Hospital, and she would be paid through patient funds, not any state contract. She will not be compensated for her other outside activities.

Accordingly, the Commission finds that the CMO would not have a financial interest in a state contract.

D. Confidential information

The CMO 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 CMO 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. 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 CMO is exposed to or has access to such confidential information in her position as the ISDH Chief Medical Officer, she would be prohibited not only from divulging that information but from ever using it to benefit any person, including her outside employers in any manner.

E. Use of state property and Ghost employment

IC 4-2-6-17 prohibits the CMO 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 CMO 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 CMO observes these provisions, her outside professional activities would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the CMO’s outside employment/professional activity opportunities would not be contrary to the Code of Ethics.