

42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)
42 IAC 1-5-6 (IC 4-2-6-9)
42 IAC 1-5-7(IC 4-2-6-10.5)

An IDHS employee sought advice on whether his outside employment as an adjunct instructor and consultant would violate the Code of Ethics. SEC reviewed each of the conflict of interest provisions in the Code and found the employee's outside employment would not create a conflict of interest under IC 4-2-6-5.5 or IC 4-2-6-9. SEC did conclude, however, that the employee would have a financial interest in a contract made by a state agency in situations where the salary from any of his outside employment were to be tied to a contract with a state agency, and he would need to abide by the requirements set forth in IC 4-2-6-10.5(b) to avoid violating the rule.

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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).

BACKGROUND

A state employee is employed by the Indiana Department of Homeland Security ("IDHS") and currently serves as a Chemical, Biological, Radiological, Nuclear Event Specialist with the Field Services Division of IDHS. The Specialists' job duties consist of providing on-scene technical assistance to emergency response entities when dealing with hazardous materials ("Hazmat") related emergencies and disasters. In addition, the Specialist conducts inspections of explosive magazines. The Specialist also provides Hazmat related training to local emergency responders.

In addition to his employment with the state, the Specialist works outside of the agency as an adjunct instructor for a community college on a periodic basis and on a contract basis with two private companies as an instructor and/or consultant. The Specialist contracts with the two private companies to provide Hazmat related trainings to private companies, hospitals and local emergency responders who work for public safety agencies.

In 1992, the Specialist obtained a written opinion from the Director of the Commission regarding his outside employment as an adjunct instructor for the community college. In that opinion, the Commission Director opined that the Specialist could act as an adjunct instructor if the teaching and preparation was done on non-state time and without the use of state equipment, materials or personnel.

With respect to funding, IDHS provides a significant amount of funding to local units of government, through grant agreements (contracts), for the training of local emergency responders. In addition, local emergency planning committees (which are state agencies operating under IDHS's umbrella) also enter into contracts with private training providers for the provision of training to local emergency responders.

ISSUE

- (1) Does the Specialist's outside employment with the community college create a conflict of interest under the Code of Ethics?
- (2) Does the Specialist's outside employment with the two private companies create a conflict of interest under the Code of Ethics?

RELEVANT LAW

IC 4-2-6-5.5

Conflict of interest; advisory opinion by inspector general

Sec. 5.5. (a) A current state officer, employee, or special state appointee shall not knowingly:

(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; or

(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 or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

IC 4-2-6-9

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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)(2) shall be filed with the appointing authority.

IC 4-2-6-10.5

Prohibition against financial interest in contract; exceptions

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:

(1) a state officer, an employee, or a special state appointee who does not participate in or have official responsibility for any of the activities of the contracting agency, if:

(A) the contract is made after public notice or, where applicable, through competitive bidding;

(B) the state officer, employee, or special state appointee files with the commission a statement making full disclosure of all related financial interests in the contract;

(C) the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee; and

(D) in the case of a contract for professional services, the appointing authority of the contracting agency makes and files a written certification with the commission 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; or

(2) a state officer, an employee, or a special state appointee who, acting in good faith, learns of an actual or prospective violation of the prohibition in subsection (a), if, not later than thirty (30) days after learning of the actual or prospective violation, the state officer, employee, or special state appointee:

(A) makes a full written disclosure of any financial interests to the contracting agency and the commission; and

(B) terminates or disposes of the financial interest.

IC 4-2-6-1

Definitions

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise: (10) "Financial interest" means an interest:

(A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or

(B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation. 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.

ANALYSIS

As a state employee, the Specialist is subject to the Code of Ethics including the conflicts of interest provisions set forth in IC 4-2-6-5.5, IC 4-2-6-9, and IC 4-2-6-10.5. The application of each conflict of interest provision to the Specialist's outside employment with the community college and the two private companies is analyzed below.

A. IC 4-2-6-5.5, Conflict of Interest, Outside Employment

In relevant part, IC 4-2-6-5.5 provides that a current state employee may not 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. In this case, the Commission finds no evidence to suggest that the Specialist's outside employment would involve compensation of substantial value or that his outside employment with any of his three outside employers would require him to recuse himself from matters so central or critical to the performance of his official duties at IDHS.

IC 4-2-6-5.5 would also prohibit the Specialist from accepting employment that would require him to disclose confidential information that was gained in the course of state employment. The Commission finds no evidence to suggest that the Specialist would be required to disclose confidential information in his outside employment ventures.

Finally, there is nothing to suggest that the Specialist would use or attempt to use his position with IDHS to secure unwarranted privileges or exemption in his outside employment.

B. IC 4-2-6-9, Conflicts of Interest, Decisions and Voting

In relevant part, IC 4-2-6-9(a)(3) provides that a state employee may not participate in any decision or vote if the state employee has knowledge that a business organization in which the individual is employed by has a financial interest in the outcome of the matter. While it does not appear that a conflict of

interest would arise for the Specialist under this rule given his state duties, he should be cautious to ensure compliance with this rule in the event that a decision or vote involving any one of his employers should arise during the course of his employment with IDHS.

C. IC 4-2-6-10.5, Prohibition against financial interest in contract; exceptions

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.

The first step in the analysis is to determine whether the Specialist would have a financial interest in contracts that his outside employers may have with a state agency. To make this determination, the definition of the term financial interest must be examined.

In relevant part, 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.

While it is evident that the Specialist would not be contracting directly with a state agency, the Commission finds that he could be performing work for his outside employers on contracts funded by a state agency. It is the opinion of the Commission that the Specialist would have an interest in such contract if his salary is contingent on any of the employer’s contracts with a state agency.

Having determined that the Specialist would have a financial interest in contracts between his outside employers and a state agency, the analysis then turns to whether the Specialist has “official responsibilities” for the contracting agency. In this case, it would appear that the contracts the Specialist would have a financial interest in would primarily be made by IDHS. Having determined that the Specialist does not have contracting duties for IDHS, the Commission finds that the prohibition set forth in IC 4-2-6-10.5 would not apply to the Specialist when the salary for his outside employment is funded by a state contract so long as he ensures compliance with the criteria set forth in IC 4-2-6-10.5 (b)(1)(A)-(D). With respect to the IC 4-2-6-10.5(b)(1)(A), the Commission recommends that IDHS take appropriate action when awarding contracts/grants to ensure that individuals such as the Specialist can be in compliance with this subsection of the rule.

CONCLUSION

Based on the foregoing analysis, the Commission finds that the Specialist's outside employment with the community college, and the two private companies would not create a conflict of interest under IC 4-2-6-5.5 or IC 4-2-6-9.

The Commission further finds that for purposes of IC 4-2-6-10.5, the Specialist would have a financial interest in a contract made by a state agency in situations where salary from any of his outside employment is tied to a contract with a state agency. However, this prohibition will not apply if the Specialist does not have contracting duties for the agency awarding the contract and is in full compliance with the requirements sets forth in IC 4-2-6-10.5 (b)(1)(A)-(D).