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A Sergeant with the ISP aviation section was interested in pursuing outside employment with the FBO at the Angola airport; however, the FBO sells fuel to ISP and will occasionally perform maintenance and service on ISP's planes. SEC found no conflict of interest would arise for the Sergeant to accept outside employment with the FBO since decisions regarding the upkeep of the plane would be made by his supervisor and fuel purchases would be closely monitored by the ISP fiscal division.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to I.C. 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee serves as Ethics Officer and Commander of the Office of Professional Standards for the Indiana State Police ("ISP"). Another state employee serves as a Sergeant and is also a pilot in the ISP aviation section and is interested in pursuing outside employment with Falcon Aviation ("Falcon") which runs the Fixed-base operator ("FBO") at the Angola airport. Since ISP purchases fuel from Falcon, the Sergeant sought an informal advisory opinion from the Office of Inspector General on February 19, 2013, regarding the propriety of engaging in such outside employment pursuant to the Code. The Commander is now seeking a formal advisory opinion on the matter on behalf of ISP in her capacity as the agency's Ethics Officer.

ISSUE

Whether the Sergeant is prohibited from seeking outside employment with Falcon in light of his position in the ISP aviation section?

RELEVANT LAW

42 I.A.C. 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 I.A.C. 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.

I.C. 4-2-6-5.5 (42 I.A.C. 1-5-5)

Conflict of interest; advisory opinion by commission

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).

I.C. 4-2-6-9 (42 I.A.C. 1-5-6)

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.

ANALYSIS

A. Confidential Information

The Sergeant is prohibited, under 42 I.A.C. 1-5-10, from benefitting from or permitting any other person to benefit from information of a confidential nature except as permitted or required by law. Similarly, 42 I.A.C. 1-5-11 prohibits the Sergeant from divulging information of a confidential nature except as permitted by law. The term “person” is defined in I.C. 4-2-6-1(a)(13) to encompass both an individual and a corporation, such as the Association. In addition, the definition of “information of a confidential nature” is set forth in I.C. 4-2-6-1(a)(12). While it would be a violation of 42 I.A.C. 1-5-10 for the Sergeant to permit Falcon or any other person to benefit from information of a confidential nature to which he has access, it would also be a violation under 42 I.A.C. 1-5-11 for him to even divulge any such information, regardless of whether it is used to that person’s benefit. In this case, it is unclear if the Sergeant has access to confidential information and whether this information could be used to Falcon’s benefit in any manner. To the extent that the Sergeant does not benefit or divulge information of a confidential nature, the Sergeant would not be in violation of either of these rules.

B. Outside employment

An outside employment or professional activity opportunity creates a conflict of interest under I.C. 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 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.

According to the Sergeant, Falcon is well aware of his commitment to ISP and his on-call status as a pilot in the department’s aviation section. As such, Falcon has agreed that any work the Sergeant performs will be subordinate to his official duties with the State. Furthermore, the Sergeant has indicated that the tasks in his employment with Falcon will not be in conflict with his position at ISP. The Commander also indicates that ISP does not see any conflicts arising under the rule on Outside employment in the Sergeant’s employment with Falcon.

C. Conflict of interests

A further conflict of interest may arise for a state employee under I.C. 4-2-6-9 if he knowingly participates in a decision or vote in which certain persons have a financial

interest in the outcome of the matter, including the employee himself as well as a business organization in which he serves as an employee. "Financial interest" is defined in I.C. 4-2-6-1(a)(11) as an interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person or an interest involving property or services. The term also includes an interest arising from employment or prospective employment for which negotiations have begun; however, it does not include an interest that is not greater than the interest of the general public or any employee.

An employee who identifies such a potential conflict of interest is required to notify his appointing authority and seek an advisory opinion from the Commission to determine whether a) procedures should be implemented to screen the employee from involvement in the matter or b) the interest is not so substantial that the Commission considers it likely to affect the integrity of the services the state expects from the employee.

The Sergeant identifies two circumstances in which a potential conflict of interest may arise for him in his service to ISP as a result of his outside employment with Falcon. Specifically, 1) ISP routinely purchases gas from Falcon as the airport FBO and 2) ISP may request that Falcon perform maintenance and repair on its planes.

Regarding the latter concern, the Sergeant has stated that he is not involved in any decisions related to airplane maintenance and repair and only notifies his supervisor if such work is needed. The supervisor is responsible for relaying such information to relevant personnel at ISP and determining where any necessary work on the planes should be performed. Regarding the former conflict, the Sergeant noted that he regularly requests that Falcon fuel up the ISP planes when he returns from a flight for both maintenance and preparation reasons. However, ISP's fiscal division closely monitors the department's fuel purchases along with any contracts it has with outside vendors.

CONCLUSION

Subject to the foregoing analysis, the Commission determines that the Sergeant's employment with Falcon would not violate the ethics rule on Outside employment. In addition, the Commission finds that although a potential conflict of interest would arise in the Sergeant's purchase of fuel from Falcon for the ISP planes, it is not so substantial that it would affect the integrity of the Sergeant's service to ISP to warrant a screening mechanism. As a result, to the extent the Sergeant has made the ISP Superintendent aware of the potential conflict of interest in purchasing fuel from Falcon, he is in compliance with I.C. 4-2-6-9.