

42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

42 IAC 1-5-12 Use of state property

42 IAC 1-5-13 Ghost employment

ISDH sought advice to determine whether the Commissioner of ISDH could maintain his outside employment as a staff anesthesiologist at a hospital and as an Assistant Professor of Clinical Anesthesia at a medical school. SEC determined that the Commissioner's employment at the hospital and medical school would not create a conflict under IC 4-2-6-5.5, because the statutory provision creating the position specifically contemplates and allows the ISDH Commissioner to engage in outside employment. SEC further determined that the ISDH's proposed screening mechanism for purposes of IC 4-2-6-9(b) is appropriate and should remain in place for the duration of the Commissioner's employment with the ISDH and his service with the hospital and medical school in order to avoid a conflict of interest.

November 2014

No. 14-I-25

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). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is the Ethics Officer for the Indiana State Department of Health ("ISDH"). She seeks an opinion from the Commission on behalf of the Commissioner of the ISDH. The Commissioner began his employment with the ISDH on October 22, 2014.

Prior to becoming the ISDH Commissioner, the state employee served as a staff anesthesiologist at Eskenazi Health ("Eskenazi"). He also served as the chair of the Pharmacy and Therapeutics Committee. In addition, he worked at the Indiana University ("IU") School of Medicine as an Assistant Professor of Clinical Anesthesia. The Commissioner plans to continue working in these roles in addition to his state employment. IC 16-19-4-4 indicates that the Commissioner may "in an individual capacity as a licensed physician and not in the official capacity as state health commissioner, engage in the practice of medicine if the practice of medicine does not interfere with the performance of the state health commissioner's duties as state health commissioner."

Eskenazi is owned and operated by Health and Hospital Corporation. The IU School of Medicine is an educational institution that has close ties to IU Health and the ISDH considers these two entities as one for conflicts purposes. The ISDH deals directly with Eskenazi and IU Health. Specifically, the ISDH has contracts and/or grants with the Health and Hospital Corporation and IU Health. The Commissioner has already been advised not to sign or negotiate any contracts involving Eskenazi, Health and Hospital Corporation or IU/IU School of Medicine/IU Health. He has also been advised to not be involved in any regulatory matters involving these entities.

To address any issues that may arise due to the Commissioner's affiliation with these entities and to comply with the conflict of interest laws, the ISDH has established the following procedures

to screen the Commissioner from all involvement with any contract or regulatory issues relating to Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health:

1. Any and all contracts involving Eskenazi, Health and Hospital Corporation and/or IU/IU School of Medicine/IU Health shall be assigned and/or negotiated by ISDH's Chief of Staff. If he is not available, the contract shall be assigned to one of the approved agency signatories.
2. Any and all regulatory matters involving Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health shall be handled by the Deputy State Health Commissioner, or ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
3. Any and all documents that require a licensed physician's signature, including isolation orders, quarantine orders, and any medical directives involving or related to Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health shall be signed by the Deputy State Health Commissioner, the ISDH's Chief Medical Consultant, or the ISDH's Medical Director.
4. While this screen should prevent the Commissioner from having access to any confidential information involving Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health, the Commissioner shall not benefit from or divulge such information.
5. Any other miscellaneous matters involving Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health shall be handled by the Deputy State Health Commissioner or ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
6. The Commissioner will contact the agency ethics officer if there are any changes in his appointment.

ISSUE

What ethics issues, if any, arise for the state employee given his position as the ISDH Commissioner and his simultaneous employment with Eskenazi and the IU School of Medicine?

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 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 (42 IAC 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.

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.

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.

42 IAC 1-5-12 Use of state property

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment 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.

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 interest 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.

The Commission generally defers to an agency's appointing authority or ethics officer regarding outside employment opportunities since it views them as being in the best position to determine whether a conflict of interest might exist between an employee's state duties and an outside employment opportunity. Based on the information provided by the ISDH, it does not appear that the Commissioners' outside employment positions would create a conflict under this provision. Specifically, the statutory provision creating the position specifically contemplates and allows the ISDH Commissioner to engage in outside employment.

B. Conflict of interests

IC 4-2-6-9 (a)(1) prohibits the Commissioner from participating in any 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 Commissioner from participating in any decision or vote if a business organization in which he is serving as an employee has a financial interest in the matter.

The state employee is the Commissioner for the ISDH. He is also employed by Eskenazi and the IU School of Medicine, an entity closely associated with IU Health. The ISDH has ties, including contractual ties, with these entities. To the extent that either of these entities would have a financial interest in an ISDH decision or vote, a conflict of interest would arise for the Commissioner if he participates in such decision or vote.

IC 4-2-6-9(b) provides that a state employee 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. In this case, the Commissioner, through his Ethics Officer requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to his appointing authority.

IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, the ISDH has established the following procedures to screen the Commissioner from all involvement with regulatory issues relating to Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health:

1. Any and all contracts involving Eskenazi, Health and Hospital Corporation and/or IU/IU School of Medicine/IU Health shall be assigned and/or negotiated by the ISDH's Chief of Staff. If he is not available, the contract shall be assigned to one of the approved agency signatories.
2. Any and all regulatory matters involving Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health shall be handled by the Deputy State Health Commissioner, or the ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
3. Any and all documents that require a licensed physician's signature, including isolation orders, quarantine orders, and any medical directives involving or related to Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health shall be signed by the Deputy State Health Commissioner, the ISDH's Chief Medical Consultant, or the ISDH's Medical Director.
4. While this screen should prevent the Commissioner from having access to any confidential information involving Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health, the Commissioner shall not benefit from or divulge such information.
5. Any other miscellaneous matters involving Eskenazi, Health and Hospital Corporation and IU/IU School of Medicine/IU Health shall be handled by the Deputy State Health Commissioner, or the ISDH's Chief of Staff. If either of these individuals is not available, an individual listed as an approved signatory designee of the agency will be consulted.
6. The Commissioner will contact the agency ethics officer if there are any changes in his appointment.

This screen should remain in place for the duration of the Commissioner's employment with the ISDH and his service with Eskenazi and IU School of Medicine.

C. Confidential information

The Commissioner 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 Commissioner 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 that the Commissioner is exposed to or has access to such confidential information in his position as ISDH Commissioner, he would be prohibited not only from divulging that information but from ever using it to benefit anyone in any manner.

D. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the Commissioner 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 Commissioner 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 Commissioner observes these provisions in his employment with Eskenazi and the IU School of Medicine, such outside professional activity would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis and the implementation of the screening procedures established by the ISDH, the Commissioner's continued employment with Eskenazi and the IU School of Medicine would not be contrary to the Code of Ethics.