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An IDHS employee sought advice regarding whether his current position as the State Medical Director would create conflicts of interest with his outside employment positions. SEC determined the employee's outside employment would not violate any ethics rules, so long as the employee followed the proposed screen for the duration of his tenure as State Medical Director; the employee did not benefit from or divulge confidential information; the employee did not use state property for purposes other than official business; and the employee did not engage in work outside of his official duties during IDHS work hours.

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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 for the Indiana Department of Homeland Security (IDHS) seeks an opinion from the Commission on behalf of a physician/employee (employee), the new State Medical Director for IDHS. The employee's official duties and responsibilities as State Emergency Medical Services (EMS) Medical Director are set forth in IC 10-19-7-5. The employee is the second person to be appointed to the position, succeeding the previous physician/employee.

The employee's position through IDHS is as an hourly State employee, but he has other outside employers. His schedule with IDHS fluctuates based upon his work schedule for these other employers.

The employee's current outside employment includes the following: the employee is the Medical Director for EMS at St. Vincent Health and their EMS affiliate organizations; Medical Director for HOPE Clinic of Cicero; and he practices emergency medicine at several St. Vincent Health facilities around central Indiana as an employee/owner with St. Vincent Emergency Physicians, Inc., which provides physician staffing for several local health care facilities. The employee is the founder, owner, and operator of EMSEducation.net, LLC, On-line EMS Education and Training. Additionally, the employee participates in the speaker's bureau for Boehringer Ingelheim and is a consultant on certain issues for Eli Lilly and Company.

IDHS's Division of Fire and Building Safety, to which the employee is assigned, and one of its affiliated commissions—the Indiana EMS Commission—regulate emergency medical technicians, paramedics, and providers of EMS (and their facilities), in accordance with IC 10-19-7-2 and IC 16-31-2-7.

The Medical Director does not have the authority to sign contracts on behalf of IDHS, and the full extent of the Medical Director's function within IDHS and involvement with the EMS

Commission has yet to be developed. However, IDHS recognizes that there is a strong possibility that a decision or vote concerning the certification, licensing, sanction, or funding of one of his outside employers or, more likely, an EMT/Paramedic/Provider working under that employer's direction, will come before him at the Division of Fire and Building Safety or EMS Commission and therefore present a conflict of interests for the Medical Director under IC 4-2-6-9.

IDHS has drafted a screening agreement to screen the Medical Director from any decision, discussion or vote by IDHS or the EMS Commission whose outcome might potentially involve, to their benefit or detriment, the financial interests of any of his outside employers (or employees, officers, or agents thereof).

Specifically, the screening agreement states that IDHS will screen the employee from all IDHS and Indiana EMS Commission decisions and matters whose outcome might potentially involve, to their benefit or detriment, the financial interests of: St. Vincent Health and their EMS affiliate organizations; HOPE Clinic of Cicero; St. Vincent Emergency Physicians, Inc.; EMSEducation.net, LLC; Boehringer Ingelheim; and/or Eli Lilly and Company, or any employees, officers, or agents thereof.

The agreement further contemplates that any decision making authority the Medical Director has related to such matters be retained by his supervisor, the State Fire Marshal. The Medical Director is currently operating under the terms of this draft screening agreement, which the Ethics Officer has submitted for the Commission's review. The Ethics Officer asserts that the IDHS otherwise endorses the Medical Director's outside employment and does not believe such employment is incompatible with the Medical Director's IDHS duties or is in violation of IC 4-2-6-5.5.

ISSUE

What ethics issues, if any, arise for the employee given his position as the State Medical Director and his simultaneous outside employment 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 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 Ethics Officer regarding outside employment opportunities since it views them as being in the best position to determine whether a conflict of interests might exist between an employee's state duties and an

outside employment opportunity. The Ethics Officer provides that IDHS supports the employee's outside employment, and he does not believe any of his activities for his outside employers would create a conflict of interests for him under IC 4-2-6-5.5.

Based on the information provided the Ethics Officer, the employee is responsible for providing guidance and oversight of IDHS' EMS. The employee is an hourly employee with IDHS and has several outside employers through which he provides EMS-related services ranging from serving as the Director for EMS at St. Vincent Health to consulting on certain issues for Eli Lilly and Company.

According to the proposed screening policy provided by the Ethics Officer, the employee would be screened from all IDHS and Indiana EMS Commission decisions and matters whose outcome might potentially involve, to their benefit or detriment, the financial interests of any of his outside employers, or any employees, officers, or agents thereof, would have a financial interest in the outcome.

These decisions and/or any related discussions would be referred to the employee's supervisor, the State Fire Marshal. The Ethics Officer provided that the screen is intended to ensure that the employee's outside employment activities do not conflict with his state duties. Further, while screened from some matters, IDHS believes that the employee would not be required to recuse himself from matters that are critical to the performance of his duties as the State Medical Director.

Moreover, the Ethics Officer confirmed that the employee would not be required to disclose confidential information to which he may have access by virtue of his position with IDHS. Similarly, nothing in the information presented suggests that he would use or attempt to use his state position for any unwarranted privileges or exemptions. The employee already was already engaged in his current outside positions prior to becoming the State Medical Director for IDHS.

Accordingly, the Commission finds that the employee's outside employment 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 employee 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 employee from participating in any decision or vote, or matter relating to that decision or vote, if a business organization in which he is serving as an employee has a financial interest in the matter.

The employee is the State Medical Director for IDHS. The employee is also the Medical Director for Emergency Medical Services at St. Vincent Health and their EMS affiliate organizations; Medical Director for HOPE Clinic of Cicero; and he practices emergency medicine at several St. Vincent Health facilities around central Indiana as an employee/owner with St. Vincent Emergency Physicians, Inc., which provides physician

staffing for several local health care facilities. The employee is the founder, owner, and operator of EMSEducation.net, LLC, On-line EMS Education and Training. Additionally, the employee participates in the speaker's bureau for Boehringer Ingelheim and is a consultant on certain issues for Eli Lilly and Company.

Accordingly, the employee would have a potential conflict of interests if he participates in decisions or votes, or matters related to such decisions or votes, in which he or any of the organizations listed above, or any employees, officers, or agents thereof, has a financial interest in the outcome of the matter. The employee has provided that it is possible, and in some cases, likely that a decision or vote concerning the certification, licensing, sanction, or funding of one of the employee's outside employers will come before him at the Division of Fire and Building Safety or EMS Commission.

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. In this case, the employee, through his Ethics Officer requested an advisory opinion from the Commission as provided in the rule.

IC 4-2-6-9(b)(1) further provides that when a potential conflict of interests 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 IDHS has established a screening agreement providing that the employee will be screened from all IDHS and Indiana EMS Commission decisions and matters whose outcome might potentially involve, to their benefit or detriment, the financial interests of: St. Vincent Health and their EMS affiliate organizations, HOPE Clinic of Cicero, St. Vincent Emergency Physicians, Inc., EMSEducation.net, LLC, Boehringer Ingelheim, and/or Eli Lilly and Company, or any employees, officers, or agents thereof.

The agreement further contemplates that any decision making authority the Medical Director has related to such matters be retained by his supervisor, the State Fire Marshal. The Medical Director is currently operating under the terms of this draft screening agreement, which the Ethics Officer has submitted for the Commission's review.

The Commission finds the IDHS screen to be satisfactory to prevent the employee from having a conflict of interests violation under IC 4-2-6-9. The screen should remain in place for the duration of his tenure as the State Medical Director.

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 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 Ethics Officer provides that the employee does not have authority to sign contracts on behalf of IDHS. The Ethics Officer further provides that the employee would not receive compensation from any IDHS contracts or grants for any of his current outside positions.

Accordingly, the Commission finds that the employee would not have a financial interest in a state contract through any of his current outside employers.

D. Confidential information

The employee 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 employee 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 employee is exposed to or has access to such confidential information in his position as the IDHS State Medical Director, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including his outside employers in any manner.

E. Use of state property and Ghost employment

IC 4-2-6-17 prohibits the employee 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 employee 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 employee observes these provisions his outside professional activity would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis and implementation of the screening procedures established by IDHS, the Commission finds that the employee’s outside employment would not be contrary to the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
Ethics Director