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The Chief Medical Officer for the Indiana Family Social Services Administration sought advice regarding outside employment to work as a mental health consultant with a medical practice group. The Commission finds that his prospective outside employment position would not create a conflict of interests under the Code of Ethics.

November 12, 2020
2020-FAO-011

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 Family and Social Services Administration (FSSA) is requesting an advisory opinion on behalf of the Superintendent and Chief Medical Officer of the NeuroDiagnostic Institute (NDI) and Chief Medical Officer of the Indiana State Psychiatric Hospital Network (“CMO”).

The Ethics Officer is requesting an opinion from the Commission addressing whether it would be a conflict of interests for the CMO to obtain outside employment with Meridian Health Services (Meridian). In this outside employment with Meridian, CMO would see patients for four to six hours a week. This position would commence on January 1, 2021.

CMO’s role with the State of Indiana began in 2016 as FSSA’s Chief Medical Officer, primarily focused on design, construction and activation of the NDI with a secondary focus on State Psychiatric Hospital Network integration as chair of the medical directors committee. He is also the executive sponsor of the Cerner electronic medical record project for the State psychiatric hospitals. In July of 2019, CMO’s primary role expanded to Superintendent and Chief Medical Officer of NDI.

The scope of administrative responsibilities associated with these positions have and continue to preclude the CMO from attending directly to patients at the state psychiatric hospitals. His schedule of meetings associated with NDI operations, network operations and electronic medical records does not allow enough time for him to attend to patients.

In 2016 ([16-I-6](#)), the Commission granted the CMO permission to pursue a small number of

consulting hours with Aspire Indiana (Aspire) in their Anderson office. His role there has been to provide psychiatric diagnostic evaluations and medication management consultation. These services are limited to one afternoon per week for four to six hours with no ongoing responsibility in between these afternoon sessions. Issues that cannot wait until his scheduled hours are handled by other clinicians at Aspire. The CMO makes up his 37.5 hours work-week requirement by working longer hours the remaining four days of the week. Additionally, the CMO asserts that he is always available by phone for emergency issues at NDI, even while consulting.

CMO's arrangement with Aspire will terminate mid-December. As such, he is interested in pursuing a new opportunity with Meridian. The scope of his work with Meridian would be similar to what he is doing now with Aspire, with no ongoing responsibility between consulting sessions that would interfere with his primary state employment. Meridian, like Aspire, would provide malpractice coverage for his work. The location(s) of the consulting would be Anderson, Indianapolis or some combination of the two to be determined.

Meridian provides a full range of mental health services to adults, children and adolescents, including behavioral and addiction treatment programs. CMO will be paid on an hourly basis and will not serve in a supervisory or leadership role. He will not charge patients nor will he bill insurance. Rather, Meridian will bill insurance and Medicaid.

Meridian has several state contracts, including contracts with different FSSA divisions. The Ethics Officer has provided that, to the best of her and CMO's knowledge, no part of CMO's salary from Meridian would be derived from any of their state contracts.

The CMO's position within FSSA does not impact any contractual or financial responsibilities between FSSA and Meridian. Furthermore, his responsibilities do not include the ability to make decisions that directly impact Meridian or its patients. This opportunity essentially continues the work he has been doing since 2016 at different locations with a different entity. This consulting will allow him to continue to maintain clinical proficiency while making a small contribution to addressing the psychiatric shortage among underserved populations in Indiana.

ISSUE

1. Would CMO's outside employment opportunity with Meridian create any conflict of interests for him under the Code?
2. What other ethics issues, if any, arise for CMO given his position at FSSA and his prospective simultaneous outside position with Meridian?

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.

IC 35-44.1-1-4

Conflict of interest

Sec. 4. (a) The following definitions apply throughout this section:

(1) "Dependent" means any of the following:

(A) The spouse of a public servant.

(B) A child, stepchild, or adoptee (as defined in IC 31-9-2-2) of a public servant who is:

(i) unemancipated; and

(ii) less than eighteen (18) years of age.

(C) An individual more than one-half (1/2) of whose support is provided during a year by the public servant.

(2) "Governmental entity served by the public servant" means the immediate governmental entity being served by a public servant.

(3) "Pecuniary interest" means an interest in a contract or purchase if the contract or purchase will result or is intended to result in an ascertainable increase in the income or net worth of:

(A) the public servant; or

(B) a dependent of the public servant who:

(i) is under the direct or indirect administrative control of the public servant; or

(ii) receives a contract or purchase order that is reviewed, approved, or directly or indirectly administered by the public servant.

(b) A public servant who knowingly or intentionally:

(1) has a pecuniary interest in; or

(2) derives a profit from;

a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Level 6 felony.

(c) It is not an offense under this section if any of the following apply:

(1) The public servant or the public servant's dependent receives compensation through salary or an employment contract for:

(A) services provided as a public servant; or

(B) expenses incurred by the public servant as provided by law.

(2) The public servant's interest in the contract or purchase and all other contracts and purchases made by the governmental entity during the twelve (12) months before the date of the contract or purchase was two hundred fifty dollars (\$250) or less.

(3) The contract or purchase involves utility services from a utility whose rate structure is regulated by the state or federal government.

(4) The public servant:

(A) acts in only an advisory capacity for a state supported college or university; and

(B) does not have authority to act on behalf of the college or university in a matter involving a contract or purchase.

(5) A public servant under the jurisdiction of the state ethics commission (as provided in IC 4-2-6-2.5) obtains from the state ethics commission, following full and truthful disclosure, written approval that the public servant will not or does not have a conflict of

interest in connection with the contract or purchase under IC 4-2-6 and this section. The approval required under this subdivision must be:

(A) granted to the public servant before action is taken in connection with the contract or purchase by the governmental entity served; or

(B) sought by the public servant as soon as possible after the contract is executed or the purchase is made and the public servant becomes aware of the facts that give rise to a question of conflict of interest.

(6) A public servant makes a disclosure that meets the requirements of subsection (d) or (e) and is:

(A) not a member or on the staff of the governing body empowered to contract or purchase on behalf of the governmental entity, and functions and performs duties for the governmental entity unrelated to the contract or purchase;

(B) appointed by an elected public servant;

(C) employed by the governing body of a school corporation and the contract or purchase involves the employment of a dependent or the payment of fees to a dependent;

(D) elected; or

(E) a member of, or a person appointed by, the board of trustees of a state supported college or university.

(7) The public servant is a member of the governing board of, or is a physician employed or contracted by, a hospital organized or operated under IC 16-22-1 through IC 16-22-5 or IC 16-23-1.

(d) A disclosure must:

(1) be in writing;

(2) describe the contract or purchase to be made by the governmental entity;

(3) describe the pecuniary interest that the public servant has in the contract or purchase;

(4) be affirmed under penalty of perjury;

(5) be submitted to the governmental entity and be accepted by the governmental entity in a public meeting of the governmental entity before final action on the contract or purchase;

(6) be filed within fifteen (15) days after final action on the contract or purchase with:

(A) the state board of accounts; and

(B) if the governmental entity is a governmental entity other than the state or a state supported college or university, the clerk of the circuit court in the county where the governmental entity takes final action on the contract or purchase; and

(7) contain, if the public servant is appointed, the written approval of the elected public servant (if any) or the board of trustees of a state supported college or university (if any) that appointed the public servant.

(e) This subsection applies only to a person who is a member of, or a person appointed by, the board of trustees of a state supported college or university. A person to whom this subsection applies complies with the disclosure requirements of this chapter with respect to the person's pecuniary interest in a particular type of contract or purchase which is made on a regular basis from a particular vendor if the individual files with the state board of accounts and the board of trustees a statement of pecuniary interest in that particular type of contract or purchase made with that particular vendor. The statement required by this subsection must be made on an annual basis.

ANALYSIS

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Use of State Property, Ghost Employment and Benefitting from and Divulging Confidential Information. The application of each provision to the CMO is analyzed below.

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 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 ethics officer regarding outside employment opportunities since 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 opportunity.

Based on the information and opinion provided by the Ethics Officer, the Commission finds that CMO's employment at Meridian would not create a conflict under this provision. Specifically, Dr. CMO's responsibilities with Meridian would not be inherently incompatible with his FSSA responsibilities nor would they require his recusal from matters that are critical to the performance of his state duties.

At Meridian, CMO would not be serving in a leadership or supervisory role. His role at Meridian would be limited to seeing patients for four to six hours a week, and he would be paid on an hourly basis. The Commission confirmed that CMO would not be required to disclose confidential information to which he may have access by virtue of his state employment in his outside position with Meridian.

Further, nothing in the information presented suggests that CMO would use or attempt to use his state position to secure any unwarranted privileges or exemptions. The CMO must continue to ensure he does not use or attempt to use his official FSSA position to secure any unwarranted privileges or exemptions.

The Commission finds that the CMO's outside employment with Meridian would not create a conflict of interests for him under 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 he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits CMO from participating in any decisions or votes, or matters related to such decisions or votes, in which Meridian would have a financial interest in the outcome.

According to the information provided by the Ethics Officer, CMO is not in a position at FSSA to impact any contractual or financial responsibilities between FSSA and Meridian. Furthermore, his responsibilities at FSSA do not include the ability to make decisions that directly impact Meridian or its patients. Although Meridian does have contracts with FSSA and other state agencies, CMO is not involved in these contracts and does not participate in any decisions related to these contracts.

The Commission finds that the CMO does not have an identified potential conflict of interests at this time; however, if a potential conflict of interests is identified in the future, CMO must meet the disclosure and notification requirements in IC 4-2-6-9(b).

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 Commission has interpreted this rule to apply when a state employee derives compensation from a contract between the State 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 FSSA, as well as other state agencies, have active contracts with Meridian. Based on the information provided, CMO would not have contracting authority for any state agencies, including FSSA, that may contract with Meridian, but he would have a financial interest in Meridian's contracts if any part of his salary from Meridian would be paid from funding received through state contracts. According to the Ethics Officer, the CMO would be paid on an hourly basis and, to the best of her and CMO's knowledge, his salary would not be derived from state contract funds.

So long as his salary would not be derived from state contract funds, the CMO would not have a financial interest in these contracts, and the Commission finds that CMO would not have a conflict of interests under this rule.

Also, so long as Meridian is not compensating CMO with any funds from a state contract, the criminal conflict of interests statute (IC 35-44.1-1-4) is not implicated. To ensure CMO complies with both IC 4-2-6-10.5 and the criminal conflict of interests statute, the Commission recommends that CMO's employment contract with Meridian include a provision stating that his salary will not be derived from any state contracts.

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 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, such as Meridian. 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 his position with FSSA, he is prohibited not only from divulging that information but from ever using it to benefit any person, including Meridian, in any manner.

E. Use of state property and Ghost employment

42 IAC 1-5-12 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 that has been approved by the Commission. Likewise, 42 IAC 1-5-13 prohibits 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.

The Commission confirmed that CMO understands that he may not use state time to work at his outside position. The CMO confirmed that he will be able to meet the 37.5-hour state work week requirement despite seeing patients a few hours per week.

To the extent that CMO observes these provisions regarding his outside employment activities, his outside position would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, CMO’s outside employment with Meridian would not create a conflict of interests for him under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
Ethics Director

