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An employee for the Indiana Family Social Services Administration sought advice regarding outside employment to work in a voluntary capacity with the Indiana 211 Partnership. 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-012

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 current Director of Contact Center Services/Interim Director for Indiana 211 Partnership, Inc. (Employee)

On August 5, 2020, the Employee interviewed for the position of Deputy Director of the Indiana 211 program (IN211) with FSSA and accepted an offer for employment on August 14, 2020. She received confirmation that the position was approved on October 15, 2020. She verbally accepted the position on October 30, 2020. FSSA is now seeking a formal advisory opinion regarding whether the Employee may serve in a volunteer capacity with Indiana 211 Partnership, Inc. while remaining employed with FSSA.

Through legislation, effective July 1, 2020, FSSA assumed the operations of IN211. Indiana 211 Partnership, Inc. offers a free service that connects individuals with help and answers regarding resources available in their community. The legislation did not require that FSSA take over Indiana 211 Partnership, Inc., which is the 501(c)(3) entity that previously operated IN211. Instead, FSSA contracted with Indiana 211 Partnership, Inc. to allow Indiana 211 Partnership, Inc. to continue to operate IN211 from July 1, 2020 through December 31, 2020. FSSA is expected to take over operations of the Indiana 211 program on January 1, 2021.

Under the arrangement FSSA has with Indiana 211 Partnership, Inc., the Employee, as an employee of Indiana 211 Partnership, Inc., accesses its bank account and then invoices FSSA for expenses, which FSSA then pays to Indiana 211 Partnership, Inc. Indiana 211 Partnership, Inc. uses the funds that FSSA provides to pay various entities for services and materials for which Indiana 211 Partnership, Inc. has existing contracts. Effective January 1, 2021, these contracts are expected to become FSSA contracts and all the Indiana 211 Partnership, Inc.

employees will become FSSA employees.

The Employee plans to resign as an Indiana 211 Partnership, Inc. employee but would like to continue to serve as an officer for Indiana 211 Partnership, Inc. on a voluntary basis so that she can continue processing invoices for Indiana 211 Partnership, Inc. while it winds up its operations of the program. The Employee is not currently a voting member of the Indiana 211 Partnership, Inc. Board of Directors; rather she is the designee assigned to run operations, including the financials.

As background, the employee was with United Way of Allen County as the Director of 211 for eight years. They were one of the call centers with whom Indiana 211 contracted to provide services. In October 2019, she was offered a position as Director of Contact Center Services with Indiana 211 Partnership, Inc., which made her responsible for center operations at both the Indianapolis and the Fort Wayne call centers. When the Director of Indiana 211 Partnership, Inc. left in December of 2019, the employee became Co-Interim Director. In early July of 2020, she was designated as the sole Interim Director. She is currently the only person at an executive level within the organization. She believes it would be in everyone's best interest if she assisted Indiana 211 Partnership, Inc. on an ad-hoc basis until it is dissolved, likely by June 2021. Furthermore, she believes the legislation requires that Indiana 211 Partnership, Inc. have a designated director; therefore, she believes that her absence would be a hardship on the Indiana 211 Partnership, Inc. Board of Directors as it would have to employ a new director on a short-term basis. If it chose to pursue that option, she would still need to dedicate a significant amount of time to train that person.

As the Deputy Director for IN211, the Employee will report to the Executive Director of the 211 Division within FSSA. She will be responsible for working with the Executive Director to set up the infrastructure needed to operate IN211. She will assist in managing the day to day operations of the division, ensuring and improving performance, productivity and efficiency of operations. She will supervise key staff and assist the Executive Director in oversight of internal and external communication, special projects and improvement of the division's culture and public image. Additionally, she will assist with procurement activities and contract evaluations.

The Employee understands and agrees to comply with the ghost employment, use of state property and confidential information provisions of the Code. She also understands that she is not to use her FSSA position to secure unwarranted privileges or exemptions that are of substantial value and not properly made available to similarly situated individuals outside state government. Furthermore, the Employee's future supervisor is prepared to implement a screen to ensure that she is not involved in any decisions or votes or other matters in which Indiana 211 Partnership, Inc. would have a financial interest. The Employee strongly believes that holding both positions would be in the best interest of FSSA to ensure the smooth transition of the program to FSSA.

ISSUE

1. Would the Employee's outside professional activity opportunity as a volunteer officer with Indiana 211 Partnership, Inc. create any conflicts of interests for her under the Code?
2. What other ethics issues, if any, arise for the Employee given her new position at FSSA and her outside professional activity with Indiana 211 Partnership, Inc.?

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.

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

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 Employee is analyzed below.

A. Outside employment/professional activity

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 her official duties that her 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 her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

The Employee would not be compensated by the Indiana 211 Partnership, Inc. for her volunteer service; accordingly, subsection (1) of this rule does not apply. The Ethics Officer provides that the Employee understands she cannot disclose confidential information or use her state position to secure unwarranted privileges or exemption that are of substantial value and not properly made available to similarly situated

individuals outside state government.

The Commission confirmed that the Employee would not be required to disclose confidential information to which she may have access by virtue of her state employment in her outside position with Indiana 211 Partnership, Inc. So long as she ensures that she will not use or attempt to use her state position to secure any unwarranted privileges or exemptions, the Employee would not violate this rule.

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 she 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 related to that decision or vote, if she has knowledge that a business organization with whom she is serving as an officer, director, trustee, partner, member or employee has a financial interest in the outcome.

The Employee will not be a paid employee of Indiana 211 Partnership, Inc., but she will be serving the organization on a volunteer basis. Accordingly, this rule would be triggered if the Employee participates in any matter related to a decision or vote that could financially impact Indiana 211 Partnership, Inc.

According to the information provided by the Ethics Officer, the Employee's supervisor is prepared to implement a screen to ensure that the Employee is not involved in any decisions or votes or related matters in which Indiana 211 Partnership, Inc. would have a financial interest in the outcome.

The Ethics officer provides that FSSA and the Indiana 211 Partnership, Inc. are still two separate entities and FSSA does not operate the non-profit. FSSA has a contract with the non-profit that is set to expire in December 2020. FSSA pays invoices submitted by the non-profit according to the current contract terms but is otherwise not involved in the current wind down activities of the non-profit.

FSSA will screen the Employee from all decisions regarding and involvement in FSSA's contract with Indiana 211 Partnership, Inc. when she begins her employment with FSSA. This includes screening the Employee from any decisions or participation in the invoices submitted to FSSA by Indiana 211 Partnership, Inc.

The Ethics Officer further provides that the Employee's role at FSSA would not involve any participation in financial matters involving the non-profit. Once she commences employment at FSSA, the Employee's responsibilities will initially concern setting up the IN211 operations on the FSSA side, including setting up the required infrastructure needed for FSSA to be able to run the program and hiring and supervising FSSA staff; FSSA will have no need for the Employee to participate in any matters concerning the non-profit once she begins her new role at FSSA.

Accordingly, the Commission finds that the Employee would not have a potential conflict of interests under this rule once she begins her new role at FSSA, so long as her responsibilities do not include any participation in matters in which Indiana 211 Partnership, Inc. would have a financial interest.

C. 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, such as Indiana 211 Partnership, Inc. 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 her position with FSSA, she is prohibited not only from divulging that information but from ever using it to benefit any person, including Indiana 211 Partnership, Inc., in any manner.

D. Use of state property and Ghost employment

42 IAC 1-5-12 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 that has been approved by the Commission. 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.

The Commission expressed concern over the perceived possibility of overlap of her two positions and determined that the Employee must be extra mindful of these rules and take precautions to ensure that she is not working on Indiana 211 Partnership, Inc. activities during her FSSA working hours or using any state resources while completing her volunteer work for Indiana 211 Partnership, Inc.

The Commission determined that the Employee should keep an accurate and detailed record (e.g. a log) of the time she spends volunteering with Indiana 211 Partnership, Inc. to minimize any appearance that she may be completing this work on state time and to minimize or eliminate any confusion as to which role she is fulfilling at any given time.

To the extent that the Employee observes these provisions regarding her outside professional activities, her outside position would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Employee's outside volunteer activities with Indiana 211 Partnership, Inc. would not create a conflict of interests under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
Ethics Director