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The Ethics Officer for the Indiana Department of Health (IDOH) sought advice on behalf of the new IDOH Chief Medical Officer regarding outside employment/professional activities while employed by IDOH. The Commission finds that the employment/professional activities would not be contrary to the Code of Ethics.

October 12, 2023
2023-FAO-010

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, an agency Ethics Officer, and the state employee whose outside professional activities serve as the basis for this request.

BACKGROUND

The Ethics Officer for the Indiana Department of Health (IDOH) requested the Commission's advisory opinion on behalf of the Chief Medical Officer (CMO) for IDOH. Specifically, the Ethics Officer requested this opinion from the Commission to ensure that the CMO's continued outside employment/professional activity as a Travel Medical Physician providing Direct Patient Care and his international volunteer work is acceptable under the Code while he is employed at IDOH.

The CMO is scheduled to begin his position as CMO at IDOH on November 6, 2023. He will join state employment after having served as Medical Director of Employee Health and Travel Medicine at Franciscan Health and the Franciscan Physician Network. The CMO would like to continue outside employment with Franciscan Health after starting his role at IDOH, serving as a Travel Medical Physician in Direct Patient Care. The CMO also proposed to continue participating in international volunteer work.

In his role with IDOH, the CMO will report to Indiana's State Health Commissioner. In this clinical executive position, he will provide medical guidance, support and advocacy of agency initiatives to the IDOH Commissioner, executive team and divisions within the agency. The CMO role will not include any contract administration or rulemaking duties.

Franciscan Health will pay for The CMO's medical malpractice insurance for his patient care activities. He will pay for his own medical licensing fees and certifications. In his proposed outside employment at Franciscan Health, he will not serve in a supervisory or leadership role; rather, the CMO will serve as an intermittent/as-needed employee provider for Franciscan Health and Franciscan Physician Network. The CMO plans to work one shift per week. Franciscan Health will pay the CMO an hourly wage for his services, and his rate will not be dependent on patient billing.

Franciscan Health is affiliated with the Franciscan Health Foundation, with whom IDOH maintains seven active contracts. The Ethics Officer provided that these contracts are maintained and administered at the division level within IDOH. In his role, the CMO will not be involved in the negotiation of or serve as a signatory for these contracts.

The Ethics Officer further provided that the CMO's compensation from Franciscan Health will not be derived from any contracts with IDOH; his hourly wage will be paid from general patient revenue.

In his role, the CMO will not be in a position to make decisions regarding specific providers, and any direction he would provide regarding protocols, policies or procedures that might impact external stakeholders would apply to all clinical specialists, hospital administrators and any other providers uniformly. The Ethics Officer provided that if the CMO were to be in a position where he could be involved in a matter that would uniquely impact Franciscan Health, Franciscan Physician Network, Franciscan Health Foundation or their related entities, IDOH would implement a screen to prevent his involvement in such decisions.

The CMO has historically participated in medical mission trips one to two times per year and would like to continue doing so during his state employment. During these trips, the CMO partners with international health organizations or universities to see patients in a clinical setting and pays his own expenses. The CMO understands that if he were to be offered any gifts, lodging, travel expenses or food and drink during his volunteer work he would need to communicate with IDOH's ethics officer to ensure the Code's gifts rule would permit his acceptance.

The CMO understands and agrees that he may not use State time to conduct his proposed outside work for Franciscan Health or his volunteer medical mission trips.

The Ethics Officer provided that IDOH does not believe that Dr. Crowder's proposed outside employment activities would be incompatible with his role as IDOH CMO. The Ethics Officer explained that such outside activities will help the CMO maintain and build upon his professional skills such that it will support his ability to perform his duties as IDOH CMO.

The Ethics Officer requested Commission's opinion regarding the application of any of the rules in the Code to the CMO's proposed outside employment with Franciscan Health and his volunteer medical mission work.

ISSUE

What ethics issues, if any, arise for the CMO given his role with IDOH and his proposed simultaneous outside position with Franciscan Health and volunteer medical mission work?

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.

42 IAC 1-5-1 Gifts; travel expenses; waivers

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 3-9-2; IC 4-2-6

Sec. 1. (a) A state employee or special state appointee, or the spouse or unemancipated child of a state employee or special state appointee, shall not knowingly solicit, accept, or receive any:

- (1) gift;
- (2) favor;
- (3) service;
- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

from a person who has a business relationship with the employee's or special state appointee's agency or is seeking to influence an action by the employee or special state appointee in his or her official capacity.

(b) The following shall not be subject to this rule:

- (1) Gifts, favors, services, entertainment, food, drink, travel expenses, or registration fees from public agencies or public institutions.
- (2) Food or drink consumed at a public meeting to which at least twenty-five (25) individuals are invited. A meeting will be considered public if:
 - (A) the event is a reception or other gathering for public officials that is not arranged to solicit government procurement of goods or services;
 - (B) the employee is giving a speech or participating in a presentation in the employee's official capacity; or
 - (C) the meeting has a formal educational program that the employee is attending to assist him or her in performing official duties.
- (3) Mementos or souvenirs of nominal value.
- (4) Food or drink consumed by an employee during negotiations or other activities related to an Indiana economic development corporation economic development project.
- (5) Gifts, favors, services, entertainment, food, or drinks from relatives, or a person with whom the employee or special state appointee has an ongoing social relationship, so long as:
 - (A) the gifts or other items of value are not deducted as a business expense; and
 - (B) the gift giver is not seeking to influence an action by an employee or special state appointee in that person's official capacity.
- (6) Political contributions subject to IC 3-9-2 that are reported in accordance with applicable law.

(7) Nominal refreshments offered to a state employee or a special state appointee conducting official state business while the employee or special state appointee is at a workplace of a person who:

- (A) has a business relationship; or
 - (B) seeks to influence official action;
- with the employee's or special state appointee's agency.

(8) Discount and other promotional programs approved and made available to state employees and special state appointees through the state personnel department or the Indiana department of administration.

(c) An employee's or special state appointee's state officer or appointing authority may waive application of subsection (a) of this rule in individual cases when consistent with the public interest. The waiver shall:

- (1) be in writing; and
- (2) identify the following:
 - (A) The employee or special state appointee.
 - (B) The nature and value of the gift.
 - (C) The donor of the gift.
 - (D) Why acceptance of the gift is consistent with the public interest.

(d) Written waivers must be filed with the commission within thirty (30) days of receipt of the gift. The commission may review the written waivers. An appointing authority or state officer may designate authority to the agency's ethics officer to waive application of this rule on behalf of the appointing authority or state officer. The designation shall be in writing and filed with the commission.

(e) If a person wishes to reimburse the state for any part or all of the expenses incurred by the state for appearances of a state officer, employee, or special state appointee or their official representatives on behalf of the state, the person shall remit to the treasurer of state any such amounts. The treasurer of the state shall quietus the funds into the general fund.

42 IAC 1-5-2 - Donor restrictions

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-7-3

Sec. 2. A person who has a business relationship with an employee's or a special state appointee's agency shall not provide any:

- (1) gifts;
- (2) favors;
- (3) services;
- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

to such employee or special state appointee if the employee or special state appointee would not be permitted to accept the gift, favor, service, entertainment, food, drink, travel expenses, or registration fees under this rule.

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, Gifts and Benefitting from and Divulging Confidential Information. The application of each provision to the CMO's proposed outside activities 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 provided by the Ethics Officer, IDOH does not believe that the CMO's employment at Franciscan Health is incompatible with his role as CMO such that it would create a conflict under this provision. The CMO will not serve in a supervisory or leadership role with Franciscan Health. Instead, he will be providing patient care in the travel medicine clinic. As to his proposed continuation of his volunteer work on medical missions, the CMO will not be compensated.

Nothing in the information presented suggests that the CMO would use or attempt to use his state position for any unwarranted privileges or exemptions.

The CMO confirmed that he understands that he is prohibited from disclosing confidential information that he may have access to by virtue of his state employment in any of his outside positions.

Based on the information provided to the Commission, the Commission finds that the CMO's outside activities will not violate 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 the CMO from participating in any decision or vote,

or matter relating to that decision or vote, if he or a business organization which employs him has a financial interest in the matter.

Per IC 4-2-6-1(a)(11), the term “financial interest” does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify his or her Ethics Officer and Appointing Authority and seek an advisory opinion from the Commission or file a written disclosure statement.

Accordingly, the CMO would have a potential conflict of interests if he is in a position to participate in decisions or votes, or matters related to such decisions or votes, in which he or Franciscan Health would have a financial interest in the outcome.

In his role, the CMO will not be in a position to negotiate or administer any contracts that IDOH maintains with the Franciscan Health Foundation. Further, he will not be in a position to make decisions regarding specific providers, and any direction he would provide regarding protocols, policies or procedures that might impact external stakeholders would apply to all clinical specialists, hospital administrators and any other providers uniformly. The Ethics Officer provides that if the CMO were to be in a position where he could be involved in a matter that would uniquely impact Franciscan Health, Franciscan Physician Network, Franciscan Health Foundation or their related entities, IDOH would implement a screen to prevent his involvement in such decisions.

The Commission finds that neither the CMO nor IDOH have identified a potential conflict of interests for the CMO at this time. The Commission confirmed with the Ethics Officer that if such a potential conflict of interests is identified, IDOH will include the screen implemented by the Ethics Officer as part of a disclosure filed with the Commission.

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. 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.

Franciscan Health is affiliated with the Franciscan Health Foundation, with whom IDOH maintains seven active contracts. Ms. Elam provides that these contracts are maintained and administered at the division level within IDOH. In his role, the CMO will not be involved in the negotiation of or serve as a signatory for these contracts.

The CMO’s compensation from Franciscan Health will not be derived from any contracts with IDOH; Franciscan Health will pay his hourly wage from general patient revenue. The Commission has found that compensation that an employee receives

from his or her outside employer that comes from general Medicaid funds does not implicate this rule. As such, the CMO is not prohibited from receiving compensation from Franciscan Health derived from general patient revenue, even if some of that general patient revenue may be sourced from state Medicaid payments for eligible patients.

So long as Franciscan Health does not compensate the CMO from funds derived from a state contract, the CMO will not have a financial interest in a state contract that would create a conflict of interests under the Code.

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 prohibits the CMO from accepting any compensation from any employment, transaction or investment that 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 Franciscan Health. 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 new position at IDOH, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including Franciscan Health, 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 the 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.

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

F. Gifts and Donor Restrictions

The gifts rule (42 IAC 1-5-1) prohibits state employees from knowingly soliciting or accepting any gift, favor, service, entertainment, food, drink, travel expenses or registration fees from a person who has a business relationship with the state employee’s agency or is seeking to influence an action by the state employee in his or her official capacity.

A "business relationship" is defined as "[d]ealings of a person with an agency seeking, obtaining, establishing, maintaining, or implementing: (i) a pecuniary interest in a contract or purchase with the agency; or (ii) a license or permit requiring the exercise of judgment or discretion by the agency." It also includes the relationship a lobbyist has with an agency and the relationship an unregistered lobbyist has with an agency.

The donor restrictions rule (42 IAC 1-5-2) mirrors the gifts rule and prohibits those with a business relationship with a state employee's or special state appointee's agency from offering a gift in that same circumstance.

The general prohibition on gifts is subject to the eight exceptions outlined in subsection (b) of 42 IAC 1-5-1 or its application in certain circumstances may be waived by the agency's appointing authority as provided for in subsections (c) and (d).

The Ethics Officer provides that the CMO pays his own expenses for the volunteer medical mission trips that he plans to continue during his state employment. During these trips, the CMO partners with international health organizations or universities to see patients in a clinical setting. The Ethics Officer provides that if the CMO were to be offered any gifts, lodging, travel expenses or food and drink during his volunteer work, he is aware that he would need to communicate with IDOH's ethics officer to ensure the Code's gifts rule would permit his acceptance.

The Commission advises that the CMO work in advance to make the Ethics Officer aware of any health organization or university he may receive assistance or reimbursement from as part of his volunteer activities, in order to identify any entities that maintain a business relationship with IDOH such that the gifts rule would be invoked.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the CMO's proposed outside position with Franciscan Health and continued involvement in volunteer medical mission activities outside of his role at IDOH are not prohibited under the Code.

Respectfully Submitted,

Sean Gorman
State Ethics Director