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The Ethics Officer for the Indiana State Police (ISP) sought advice on behalf of an ISP Training Division Officer regarding outside employment/professional activities while employed by ISP. The Commission finds that the employment/professional activities would not be contrary to the Code of Ethics.

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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, 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 State Police (ISP) is requesting an advisory opinion on behalf of an ISP Lieutenant (Lieutenant), a member of ISP's Training Division. Specifically, the Ethics Officer is requesting an opinion from the Commission to ensure that the Lieutenant's proposed outside employment as a public safety salesperson for Shearwater Research, Inc. (Shearwater) is acceptable under the Code while he is employed at ISP.

The Lieutenant is currently employed part-time at Shearwater as a consultant/trainer in public safety diving. ISP previously approved the Lieutenant's off-duty outside employment with Shearwater. Shearwater has approached the Lieutenant with an offer to assume additional duties as a public safety salesperson, in addition to his consultant/trainer role.

The Lieutenant is a certified divemaster and past commander of ISP's dive team. In his current ISP Training Division role, he is no longer involved with ISP's dive team and is not involved in any procurement of equipment or supplies for ISP's dive team.

Shearwater is not a registered vendor for the State of Indiana; therefore, no direct sales to a state agency, including ISP can occur. ISP does not use Shearwater equipment or services. The Lieutenant will not be marketing Shearwater products and services to ISP or any other state agency. Should a state agency choose to procure Shearwater products, these products are commercially available through other vendors who the Lieutenant would not represent in his proposed additional duties at Shearwater as a public safety salesperson. The Lieutenant maintains an understanding with Shearwater that he will not be involved in any marketing or

sales to ISP on behalf of Shearwater.

ISSUE

What ethics issues, if any, arise for the Lieutenant given his role at ISP and his proposed new duties as a salesperson in his off-duty position with Shearwater?

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

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 Lieutenant's proposed outside activities as a salesperson for Shearwater 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. ISP has previously approved the Lieutenant's off-duty outside employment at Shearwater for his work as a consultant/trainer in public safety diving.

Shearwater is not a registered vendor for the State of Indiana, and therefore no direct sales to an executive branch agency can occur. Further, the Lieutenant is not involved with ISP's dive team and is not involved in any procurement of equipment or supplies for ISP's dive team.

The Lieutenant understands that he is prohibited from disclosing confidential information that he may have access to by virtue of his ISP role to Shearwater, its clients or anybody

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

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Lieutenant 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 Lieutenant from participating in any decision or vote, or matter relating to that decision or vote, if he or a business organization such as Shearwater, who 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 in writing and seek an advisory opinion from the Commission or file a written disclosure statement.

Accordingly, the Lieutenant 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 Shearwater would have a financial interest in the outcome.

In his role at ISP’s Training Division, the Lieutenant is not in a position to be involved in any procurement of equipment or supplies for ISP’s diving team. The Lieutenant’s current position and his proposed additional duties at Shearwater do not involve any dealings with ISP or other State of Indiana agencies. The Commission finds that the Lieutenant has not identified a potential conflict of interests at this time.

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.

The Ethics Officer provides that Shearwater is not registered as a vendor for the State of Indiana. ISP does not utilize Shearwater for products or services. The Ethics Officer states that nothing would prevent ISP or another state agency from seeking to do business with Shearwater in the future.

So long as Shearwater is not compensating the Lieutenant from funds derived from a state contract or grant, the Lieutenant would not have a financial interest in a state contract that would create a conflict of interests under the Code.

D. Confidential information

The Lieutenant 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 Lieutenant 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 Shearwater. 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 Lieutenant is exposed to or has access to such confidential information in his ISP role, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including Shearwater or its clients, in any manner.

E. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the Lieutenant 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 Lieutenant 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 Lieutenant observes these provisions regarding his outside employment at Shearwater, his proposed new role as a salesperson would not violate these ethics laws.

CONCLUSION

The Commission finds that based on the information provided by the Lieutenant and by the ISP’s ethics officer, the Lieutenant’s current outside employment activity and proposed additional role as a public safety salesperson at Shearwater complies with the requirements of the Code of Ethics. The Commission advises the Lieutenant to ensure that no compensation he receives from Shearwater be derived from State of Indiana funds should Shearwater receive such funding. The Commission further finds that no potential conflict of interests has been identified for the Lieutenant; however, the Commission advises that the Lieutenant should file a conflict of interests disclosure statement pursuant to IC 4-2-6-9, which identifies a screen to be implemented by ISP, in the event that ISP becomes involved in matters involving Shearwater.

Respectfully Submitted,

Sean Gorman
State Ethics Director