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IC 35-44.1-1-4 Conflict of interest

The Ethics Officer for the Indiana Department of Correction (DOC) sought advice on behalf of a DOC Correctional Captain regarding whether her prospective outside employment/professional activities while employed by DOC is permissible under the Code of Ethics. The State Ethics Commission (Commission) finds that the employment/professional activities would not be contrary to the Code of Ethics so long as the employee files a Disclosure Statement with proper screening protocols with the Commission.

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The Indiana State Ethics Commission (Commission) issues the following formal advisory opinion concerning the State Code of Ethics (Code) pursuant to IC 4-2-6-4(b)(1)(A)(ii). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

The Chief of Staff and the Ethics Officer (Ethics Officer) for the Indiana Department of Correction (DOC) requests the Commission's formal advisory opinion on a DOC employee's proposed outside employment with Ivy Tech Community College (Ivy Tech) while maintaining her position at DOC.

The DOC Employee is a Correctional Captain (Captain) at DOC's Reception Diagnostic Center, a maximum-security intake facility for adult male state prison inmates. She has worked for DOC for thirty-one years. In her role as Correctional Captain, she supervises a staff of approximately forty correctional officers, sergeants and lieutenants. She does not have contracting authority and does not participate in any contracting processes in her DOC position.

The Captain is seeking to accept an outside employment opportunity with Ivy Tech. Pursuant to IC 21-22-2-2, Ivy Tech is a state educational institution. Ivy Tech currently maintains a contract with DOC to provide education services to individuals incarcerated in DOC facilities. According to the Ethics Officer and the Captain, her role at DOC does not involve working with Ivy Tech.

In her proposed outside role, the Captain would supervise students in a classroom as a substitute teacher and would proctor test sessions at DOC's Plainfield Correctional Facility. This position would be performed part-time outside of her DOC position work schedule and would be done at a different DOC facility than the DOC facility at which she serves as a Correctional Captain. The Captain does not have any financial interest in Ivy Tech beyond the hourly pay she would receive from her part-time work with Ivy Tech.

The Ethics Officer explains that one of the biggest challenges faced by DOC is attracting and retaining sufficiently qualified staff to meet the needs of Indiana's highest security prisons, several of which are currently operating with staffing vacancy rates exceeding thirty percent. DOC competes with other law enforcement entities and correctional service providers for a limited number of qualified applicants. Further, the distance of many of DOC's facilities from major metropolitan areas presents an additional challenge to meeting staffing needs.

The Ethics Officer explains that DOC would benefit greatly from the Captain's part-time work at Ivy Tech and her custody background would help to enable a safe and secure environment in which students can learn. For these reasons, DOC believes her outside employment would further DOC's mission to provide meaningful, effective opportunities for successful reentry. The Ethics Officer explains that DOC supports the Captain's request to engage in this outside employment with Ivy Tech not only because she is a valued employee that DOC desires to retain, but also because her outside employment would benefit DOC operations and administration of programming to those who DOC was established to serve.

ISSUE

Is it permissible under the Code for the Captain to work for Ivy Tech part-time while maintaining her position at DOC?

RELEVANT LAW

IC 4-2-6-5.5 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 4-2-6-6

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 4-2-6-9 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 State officers and employees; financial interest in contract made by agency; exceptions

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).

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 1-5-10 Benefiting from confidential information

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

Affected: IC 4-2-7

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

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

Affected: IC 4-2-7

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

42 IAC 1-5-13 Ghost employment

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

Affected: IC 4-2-7

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:

...

(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:

....

(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

A. Criminal Conflict of Interests

The criminal conflict of interests statute, which is found in IC 35-44.1-1-4, prohibits a public servant from knowingly or intentionally having a pecuniary interest in or deriving a profit from a contract or purchase connected with an action by the public servant's agency. The statute makes violation of this prohibition a Level 6 felony.

The criminal conflict of interests statute provides several exceptions to the prohibition. Under IC 35-44.1-1-4(c)(1), it is not an offense if "the public servant . . . receives compensation through salary or an employment contract for: (A) services provided as a public servant" Furthermore, under IC 35-44.1-1-4(c)(5), the Commission may provide an employee with "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. . . ." The statute provides that such approval must be either "(A) granted to the public servant before the 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."

The Commission approves the Captain's proposed outside employment with Ivy Tech, so long as she files a disclosure statement with the Commission. Pursuant to state statute, Ivy Tech is a statewide educational institution. Furthermore, the Commission finds that the Captain's outside employment with Ivy Tech is in the public interest because she will be providing a needed service to the population DOC serves. The Captain has no contracting authority at DOC, and she will not hold a management or decision-making role at Ivy Tech. For these reasons, the Commission finds that the Captain does not have a conflict of interests under the criminal conflict of interests statute, so long as she files a disclosure statement with the Commission.

B. Conflicts 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 any state agency. The Code defines "financial interest" to include an interest arising from employment. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between a state agency and a third party. The rule's exception provides that an employee may have a financial interest in a contract made by a state agency, so long as that employee (1) does not participate in or have official contracting responsibility for the contracting agency and (2) files a disclosure form with the Inspector General prior to the contract's execution between the agency and third party.

The Commission finds that the Captain's proposed outside employment with Ivy Tech is not a conflict of interests under IC 4-2-6-10.5, so long as she files a disclosure statement with the

Commission. The Commission cites the following factors in determining that the Captain's outside employment would not constitute a conflict of interests under this statute: Ivy Tech is a large, statewide educational institution; the Captain's outside employment with Ivy Tech serves the public interest because she will be providing a needed public service; the Captain does not participate in or have contracting responsibility for DOC; and she will not hold a management or decision-making role at Ivy Tech. For these reasons, the Commission finds that the Captain does not have a conflict of interests under IC 4-2-6-10.5, so long as she files a disclosure statement with the Commission.

C. 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 would 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 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, the Captain's employment at Ivy Tech would not create a conflict of interests under this provision. The Captain's employment will not be inherently incompatible with her responsibilities at DOC and would not require her to disclose confidential information gained in the course of her state employment. The Ethics Officer explains that DOC would benefit greatly from the Captain's part-time work at Ivy Tech and her custody background would help to enable a safe and secure environment in which students can learn. For these reasons, DOC believes her outside employment would further DOC's mission to provide meaningful, effective opportunities for successful reentry.

Accordingly, the Commission finds that the Captain's outside employment position at Ivy Tech would not create a conflict of interests for her under IC 4-2-6-5.5.

D. Conflicts of Interests Related to Decisions and Votes

IC 4-2-6-9 pertains to conflicts of interests in decisions and voting. This rule prohibits state employees from participating in any decision or vote, or matter related to that decision or vote, if the state employee has knowledge that various persons may have a financial interest in the outcome of the matter, including (1) the state employee him/herself; (2) an immediate family member; (3) a business organization in which the state employee is serving as an officer, director, member, trustee, partner or employee, or (4) an organization with whom the state employee is negotiating or has an arrangement concerning prospective employment.

The Code defines “financial interest” in IC 4-2-6-1(a)(11) to include “an interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or involving property or services.” The term 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.

The Ethics Officer explains that the Captain does not in any way participate in or have contracting responsibility for DOC. He also explains that her role at DOC does not involve working with Ivy Tech. Furthermore, the Captain will be working at a different DOC facility for Ivy Tech than the facility at which she serves as a DOC Correctional Captain.

The Commission finds that the Captain does not have an identified potential conflict of interests under IC 4-2-6-9. Nonetheless, the Commission finds that the Captain should submit a disclosure statement with the Commission and DOC should implement a screen to prohibit her from participating in any decisions or votes, or matters related to decisions or votes, in which Ivy Tech would have a financial interest.

E. Use of State Property and Ghost Employment

IC 4-2-6-17, the use of state property rule, prohibits a state officer, employee or special state appointee from using 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 the Commission has approved.

Likewise, 42 IAC 1-5-13, the ghost employment rule, prohibits a state officer, employee or special state appointee 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 Captain observes these provisions regarding her outside employment, her outside position would not violate these ethics laws.

F. Confidentiality

IC 4-2-6-6 prohibits a state employee from accepting any compensation from any employment, transaction or investment that was entered into or made as a result of material information of a confidential nature. Similarly, 42 IAC 1-5-10 and 42 IAC 1-5-11 prohibit a state employee from benefitting from, permitting another person to benefit from or divulging information of a confidential nature except as permitted by law.

To the extent that the Captain possesses information of a confidential nature by virtue of her position at DOC that could be used to benefit any person, including Ivy Tech, the Captain will need to ensure that she complies with these rules.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Captain's outside employment with Ivy Tech would not create a conflict of interests under the Code of Ethics or Criminal Code so long as she files a disclosure statement and DOC implements a screen that would prohibit her from participating in any matters in which Ivy Tech would have a unique financial interest.

Respectfully Submitted,

David Cook
Inspector General
For the State Ethics Director