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An IVH Employee sought advice regarding an outside employment opportunity working as a CNA student supervisor with an entity with whom IVH plans to contract with. SEC determined that the employee would not violate ethics rules regarding outside employment with the new employer.

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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.

BACKGROUND

The Chief Counsel and Ethics Officer (Ethics Officer) for the Indiana Veterans' Home (IVH) is requesting a Formal Advisory Opinion on behalf of IVH employee (Employee) related to an outside employment opportunity with an IVH contractor.

The Employee works as a night shift nursing supervisor for IVH, and she works from 6:00 p.m. to 6:00 a.m. The Employee is interested in an outside employment position with Greater Lafayette Career Academy (GLCA). GLCA offers a Certified Nursing Assistant (CNA) course. GLCA plans to enter into a zero dollar contract with IVH that allows GLCA to offer clinical hours to its CNA students at IVH. By entering into this contract with GLCA, IVH hopes to recruit CNAs from GLCA's program once they receive their certification. GLCA employs its own instructors, and IVH lets GLCA use IVH's facility (space and equipment). The students complete clinical training at the IVH facility from 12:00 to 12:30 p.m., Monday through Friday.

The Employee would like to work for GLCA, supervising the CNA students as they complete their clinical training at IVH. The Employee would not be working as an IVH employee when working for GLCA at the IVH facility. The Employee does not participate in any matters as an IVH employee that would impact GLCA. She also does not have contracting authority for IVH.

The Ethics Officer is concerned that the Employee would likely be disclosing confidential information if she took the job with GLCA as she would have to share patient information that is confidential and protected under HIPAA. The Ethics Officer notes that any GLCA employee supervising the students would need and have access to relevant patient information.

The Ethics Officer requested an Informal Advisory Opinion from the Office of Inspector General (OIG) on December 16, 2019. The Informal Advisory Opinion issued to the Ethics Officer recommended that IVH request a Formal Advisory Opinion from the Commission regarding

whether the Employee's outside employment opportunity with GLCA would create any conflicts of interests for her under the Code.

ISSUES

- 1) Would the Employee's outside employment with GLCA create any conflicts of interests (under IC 4-2-6-5.5; IC 4-2-6-9; or IC 4-2-6-10.5) for her under the Code?
- 2) What other ethics issues, if any, arise for the Employee given her position as a nurse supervisor for IVH and her simultaneous employment supervising students for GLCA using IVH's facility?

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

A. Outside employment

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5(a) if it results in the employee: (1) receiving compensation of substantial value when 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 or her official duties that his or 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 his or her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

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).

The Commission generally defers to an agency's Ethics Officer regarding outside employment opportunities since it views him or her as being in the best 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 the Ethics Officer provided, IVH does not believe that the responsibilities of serving as a clinical supervisor for GLCA would be inherently incompatible with the Employee's IVH responsibilities or require her to recuse herself from any matters that are critical to her role as a late night nurse supervisor.

The Ethics Officer pointed out that the Employee would have to share confidential information, specifically IVH patient medical information, with the students she plans to supervise; however, any clinical supervisor GLCA hires for this role would have access to and would share the same confidential information with the students in this program. The Commission finds that subsection (2) would not prohibit the Employee from being able to work as a clinical supervisor for the students in the CNA program though GLCA in addition to her IVH role.

The Commission confirmed that the Employee understands that she must not use or attempt to use her IVH position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside of state employment.

Based on all of the information provided, the Commission finds that the Employee's outside employment opportunity as a clinical supervisor with GLCA would not violate IC 4-2-6-5.5.

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 relating to that decision or vote, if a business organization in which she is serving as an officer, a director, a member, a trustee, a partner or an employee has a financial interest in the matter.

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. . ."

A potential conflict of interests would arise for the Employee if she participates in any matter related to a decision/vote in which GLCA has a financial interest. This restriction goes beyond the actual decision/vote and prohibits her participation in any matter related to the decision/vote.

The Ethics Officer provides that the Employee's IVH position does not include participation in any matters in which GLCA would have a financial interest in the outcome. Accordingly, the Ethics Officer and the Employee have not identified a potential conflict of interests at this time.

The Commission finds that the Employee does not have an identified potential conflict of interests at this time. If the Employee's circumstances change and a potential conflict of interests is identified in the future, she must follow the disclosure requirements in IC 4-2-6-9(b), including notifying IVH's appointing authority and seeking an advisory opinion from or filing a written disclosure statement 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 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. This prohibition however does not apply to an employee that does not participate in or have contracting responsibility for the contracting agency, provided certain statutory criteria are met.

IVH plans to enter into a contract with GLCA, but it will be a zero dollar contract. Under this contract, IVH will provide its facilities for GLCA's CNA students to obtain clinical hours/experience in exchange for the opportunity to recruit these students to work for IVH as CNAs in the future.

The Commission finds that the Employee would likely have a financial interest in this contract, as her outside position with GLCA would not be possible without this agreement between IVH and GLCA.

The Ethics Officer provides that the Employee has no contracting authority for the agency. Accordingly, the exception to this rule would apply to the Employee as long as she complies with the disclosure requirements in IC 4-2-6-10.5(b) and (c). In order to do so, the Employee must file the Conflict of Interests-Contracts Ethics Disclosure form with the OIG *before* the contract is executed. The Ethics Officer provided that the contract is still in development and has not yet been executed.

Accordingly, the Commission finds that the Employee meets the requirements for the exception under this rule as long as she files a completed Conflict of Interests – Contract Ethics Disclosure form with the OIG prior to the execution of the contract between GLCA and IVH.

D. 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 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. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

In this case, it does not appear that the Employee is accepting compensation from GLCA because of any IVH confidential information. The Employee would likely need to share confidential information, in the form of medical records, with the students she is supervising. The Commission noted that any supervisor serving in this position with GLCA would need to share this information, and determined that this rule would not prohibit the Employee from sharing such information with her students.

E. Use of state property and Ghost employment

IC 4-2-6-17 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. 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 shifts the Employee would work for her IVH position and the GLCA position would be different; however, the Employee must still ensure that she is not working on any GLCA-related work during her normal IVH shifts.

In terms of the prohibition on the use of state property, the facility she would be working in (and all of the equipment, supplies, etc., that she and the students would use) is state property. The Commission determined that such use of state property is for official state business due to the contract between IVH and GLCA to have CNA students train at the facility.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the employee’s outside employment opportunity would not be contrary to the Code of Ethics.