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An FSSA employee sought advice regarding whether her continued current part-time employment as a Referral Specialist with C2H, a member of the Indiana 2-1-1 Partnership, a nonprofit that contracts with state agencies for projects, would create any conflicts of interests for her under the Code of Ethics given her current position as a Program Director for the PATH Program. SEC determined that the employee's current simultaneous outside employment opportunity with C2H would not violate any ethics rules as long as the employee did not use state property for any purpose other than state business; and the employee did not engage in non-official work during work hours.

May 10, 2018
2018-FAO-0015

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 employee is a state employee with the Indiana Family and Social Services Administration (FSSA). The Ethics Officer serves as FSSA's Managing Attorney and Ethics Officer and has submitted a Formal Advisory Opinion request on behalf of the employee.

The employee joined the Division of Mental Health and Addiction (DMHA) within FSSA in November 2013. In February 2018, the employee was promoted to the position of Program Manager for Projects for Assistance in Transition from Homelessness (PATH). PATH is a federal grant program that allows funding to be distributed for homeless outreach teams at selected local, public, or not-for-profit organizations. These teams are responsible for outreach to individuals who have Serious Mental Illness and/or substance use disorder and who are chronically homeless or at imminent risk of becoming homeless.

Under the PATH program, DMHA contracts with the following 13 Community Mental Health Center ("CMHC") providers: Adult & Child, Aurora, Centerstone, Health & Hospital, Hamilton Center, LifeSpring, Meridian, MHA of Vigo County, Oaklawn, Park Center, Porter-Starke, Swanson and Wabash. Each CMHC has homeless outreach workers that go out into the community to engage, assess and enroll potential consumers into the PATH program. The CMHCs submit their claims monthly with deliverables. These deliverables are supportive documents provided by the CMHC as proof of services provided and salaries paid to PATH staff. The employee's duties include reviewing claims submissions for reimbursement services provided, responding to CMHC questions regarding PATH, providing education and conducting annual

quality assurance site visits. The employee's recommendations regarding the payment of claims are subject to two levels of review by DMHA Deputy Directors. Pursuant to the Health Insurance Portability and Accountability Act, the claims that the employee reviews do not include individual names of consumers.

The employee also works part-time (every other Friday, Saturday and Sunday) as an information and referral specialist (I&R Specialist) for C2H, a non-for-profit organization that provides consumers community resources to address their basic needs, including information regarding mental health and addiction treatment facilities, such as the CMHCs, licensed private mental health institutions and certified addiction services providers that the employee's team audits. C2H is a member of the Indiana 2-1-1 Partnership (IN211), an independent nonprofit organization that convenes all 2-1-1 centers in Indiana around various topics that impact the 2-1-1 system in Indiana. IN211 contracts with state agencies for state-wide projects. IN211 contracts for the following programs through three different divisions in FSSA: Supplemental Nutrition Assistance Program through the Division of Family Resources; the Adult Protective Services reporting hotline through the Division of Aging; and the Open Beds project through DMHA. IN211 also has a contract with the Indiana State Department of Health. C2H has a business relationship with IN211 wherein C2H is reimbursed for providing services related to the aforementioned contracts. The employee's compensation is not directly billed to any FSSA contract or other state contract to her knowledge. Rather the source of her compensation is C2H's general operating funds. The employee provides that per Marilyn Cummins, Accounting & Human Resources Manager for C2H, I&R Specialists are not paid directly from any state contract.

The employee's duties as an I&R Specialist at C2H include serving as the point of contact for individuals calling for information about available resources for their various needs. She uses a database at C2H to provide information about resources to callers. She does not have any input or control over which resources are included in the database. As an I&R Specialist she is required to provide only basic information to callers. Additionally, she generally adheres to a script and is subject to quality assurance review to ensure that she is adhering to C2H policies and procedures.

C2H places I&R Specialists in specific groups that allow them to have access to certain type of calls from individuals requesting assistance. The groups include: Crisis calls (i.e. suicide hotline), Open Beds, the Energy Assistance Program, and Vermont211. Open Beds is the only group the employee currently is not in. Although the employee has been briefed about the Open Beds project, she has not received any training through C2H. Therefore, she is not permitted to handle calls regarding inquiries about the Open Beds project at this time.

Open beds is a DMHA program used to help address the opioid crisis. It is another resource for anyone looking for treatment for an opioid addiction. The purpose of the program is to be able to see available beds at selected locations in real time. The program is administered by the DMHA addictions team. The employee is not a member of the DMHA addiction team. The PATH program is separate and distinct from Open Beds. Furthermore, the employee's duties at FSSA do not include any involvement with the Open Beds project.

There is the potential that in performing her duties as an I&R Specialist for C2H that the employee may receive a call requesting a resource that includes the CMHCs that she oversees for the PATH

program. In which instance, the employee would be required to provide the appropriate information to the individual. However, the employee has no discretion in selecting the resources that she provides to callers. Rather the information provided is based on the location of the caller. For example, when a caller requests resources, the employee gathers information including the zip code for the caller. She enters the information into the database and the database populates the available resources. The employee is required to provide the information populated by the database, unless the consumer requests a resource outside of their area.

FSSA believes that the employee's part-time employment with C2H does not conflict with her duties at FSSA. The Ethics Officer also provides that, in her role as the Program Director, the employee is not in a position to participate in any decisions or votes or other matters related to a decision or vote where C2H would have a financial interest.

Given that the employee's part-time employer C2H has a business relationship where it receives payments from a contractor with multiple contracts with the State, and the employee's position as an I&R Specialist may include providing services related to those contracts, the employee seeks a formal advisory opinion regarding whether she may continue her part-time employment without violating IC 4-2-6-10.5 and its prohibitions against an employee knowingly having a financial interest in a contract made by a state agency, unless the employee does not have contracting responsibilities and files a written disclosure. The employee also seeks a formal opinion on the applicability of IC 35-44.1-1-4, which prohibits certain public servants from having a pecuniary interest in or deriving a profit from a contract with the public servant's agency, to her circumstances.

ISSUES

- 1) Would the employee's continued, part-time outside employment with C2H create any conflicts of interests for her under the Code of Ethics?
- 2) What other ethics issues, if any, arise for the employee given her position as a Program Director and her simultaneous employment with C2H?

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.

IC 35-44.1-1-4

Conflict of interest

Sec. 4. (a) The following definitions apply throughout this section:

(1) "Dependent" means any of the following:

(A) The spouse of a public servant.

(B) A child, stepchild, or adoptee (as defined in IC 31-9-2-2) of a public servant who is:

- (i) unemancipated; and
- (ii) less than eighteen (18) years of age.

(C) An individual more than one-half (1/2) of whose support is provided during a year by the public servant.

(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:

(1) The public servant or the public servant's dependent receives compensation through salary or an employment contract for:

(A) services provided as a public servant; or

(B) expenses incurred by the public servant as provided by law.

(2) The public servant's interest in the contract or purchase and all other contracts and purchases made by the governmental entity during the twelve (12) months before the date of the contract or purchase was two hundred fifty dollars (\$250) or less.

(3) The contract or purchase involves utility services from a utility whose rate structure is regulated by the state or federal government.

(4) The public servant:

(A) acts in only an advisory capacity for a state supported college or university; and

(B) does not have authority to act on behalf of the college or university in a matter involving a contract or purchase.

(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

The Commission cannot provide advice regarding past conduct; therefore, it cannot advise whether the employee's outside employment with C2H was in compliance with the Code of Ethics prior to seeking this opinion. Accordingly, this opinion only addresses the employee's outside employment with C2H going forward.

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.

The Commission generally defers to an agency's Ethics Officer regarding outside employment opportunities since it views them 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.

FSSA's Ethics Officer provides that the employee's part-time employment as an I&R Specialist for C2H is not incompatible with her FSSA duties, nor does it require recusal from her official responsibilities. The PATH program she oversees is separate and distinct from the Open Beds program through DMHA, and she has no interaction or involvement with C2H or the IN211 in her position at FSSA. While there is a potential that the employee, while serving in her role as I&R Specialist for C2H, may receive a call regarding a resource that includes the CMHCs that she oversees for the PATH program, the employee has no discretion in selecting the resources that she provides to callers. Rather the information provided is based on the location of the caller; the caller's zip code is entered into the database and the database populates the available resources.

The Commission confirmed that the employee understands that she is prohibited from disclosing confidential information she gained from FSSA in her position with C2H and that she must not use or attempt 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.

Accordingly, the Commission finds that the employee's outside employment with C2H 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 employee has a financial interest in the matter. The definition of "financial interest" in IC 4-2-6-1(a)(11) includes, in part, "an interest arising from employment".

The employee currently works as a Program Director for the PATH program and is seeking to maintain her outside employment with C2H. Accordingly, she would be prohibited from participating in any decisions or votes, or matter relating to those decisions or votes, in which C2H would have a financial interest in the outcome.

The Ethics Officer provides that the employee is not in a position at FSSA to participate in any decisions or votes, or matters related to a decision or vote, in which C2H would have a financial interest in the outcome. Accordingly, the Commission finds that a potential conflict of interests does not currently exist for the employee.

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 her 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 official responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

The employee's part-time outside employer, C2H, has a business relationship with IN211 through which C2H is reimbursed for providing services related to the contracts that IN211 has with FSSA. However, the Ethics Officer provides that the employee's compensation is not directly billed to any FSSA contract or other state contract. The source of her compensation is C2H's general operating funds.

Accordingly, the Commission finds that the employee would not have a financial interest in a state contract through her position at C2H and would not be in violation of this rule.

D. Criminal conflict of interests statute

In the Formal Advisory Opinion request, the Ethics Officer also asked whether IC 35-44.1-1-4, which prohibits certain public servants from having a pecuniary interest in or deriving a profit from a contract with the public servant's agency, would apply to the employee's circumstances.

IC 35-44.1-1-4 is the criminal statute that prohibits any public servant from knowingly or intentionally having a pecuniary interest in or deriving a profit from a contract/purchase connected with an action by the agency served by the public servant. The statute contains certain exceptions in subsection (c). One of these exceptions applies to an individual who obtains written approval from the Commission that the individual will not or does not have

a conflict of interests in connection with a contract or purchase under IC 4-2-6 and IC 35-44.1-1-4.

The Commission confirmed with the Ethics Officer that the employee does not have a pecuniary interest in any contracts with the agency she serves (FSSA), as the salary she receives for her part-time employment at C2H is not derived from any FSSA or other state contracts.

Accordingly, this opinion serves as written approval from the Commission that the employee does not have a conflict of interests in connection with a contract or purchase under IC 4-2-6 and IC 35-44.1-1-4.

E. Confidential information

The employee is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from, or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the employee from accepting any compensation from any employment, transaction, or investment which is entered into or made as a result of material information of a confidential nature. The term “person” is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation. In addition, the definition of “information of a confidential nature” is set forth in IC 4-2-6-1(a)(12).

To the extent the employee is exposed to or has access to such confidential information in her position with FSSA, she would be prohibited not only from divulging that information but from ever using it to benefit any person, including her outside employer, in any manner.

F. 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.

To the extent that the employee observes these provisions in her employment with FSSA, such outside professional activity would not violate these ethics laws.

CONCLUSION

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

Respectfully Submitted,

Jennifer Cooper
Ethics Director