

42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)

An office director with DCS held outside employment as a therapist with a local counseling agency. Although this outside employment was approved by the director's superiors at DCS when he first assumed his role as the office director in 2002, DCS declined his request to continue as a therapist at the counseling agency in the fall of 2008. SEC found that the director's outside employment did not create a conflict of interest under the Code of Ethics; however, it acknowledged that whether the director could continue in his outside employment was left to the discretion of DCS pursuant to the agency's internal conflict of interest policy.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1).

BACKGROUND

A state employee is the Director of the Elkhart Office of the Department of Child Services ("DCS") and has been employed by DCS and held that position since 2002. In addition to his employment with DCS, the Director is employed as a therapist with a local counseling agency. He has held this position with the local counseling agency for the past 14 years. The Director's outside employment with the local counseling agency had been approved by his DCS superiors when he was first appointed Director of the Elkhart DCS office in 2002. The Director indicates that the local counseling agency has not had a contract with DCS to provide services for either DCS or probation clients at anytime during his 14 years with the Agency.

On October 23, 2008, the Director submitted a supplemental authorization form to DCS for his outside employment with the local counseling agency. His immediate supervisor forwarded the form on to the DCS Ethics Officer who in turn declined the request. In denying the authorization, DCS cites the agency's internal policy regarding outside employment.

ISSUE

Does the Director's outside employment with the local counseling agency create a conflict of interest under the Code of Ethics?

RELEVANT LAW

IC 4-2-6-5.5

Conflict of interest; advisory opinion by inspector general

Sec. 5.5. (a) A current state officer, employee, or special state appointee shall not knowingly:

(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; or

(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 or the individual's appointing authority or agency ethics officer granting approval of outside employment is conclusive proof that an individual is not in violation of subsection (a)(1) or (a)(2).

ANALYSIS

In this case, the Director's outside employment would create a conflict of interest according to IC 4-2-6-5.5 if his employment would trigger subsection (1), (2) and/or (3) of the statute. The restriction in subsection IC 4-2-6-5.5(a)(1) prohibits a state employee from accepting 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. In this case, DCS indicates that the Director's outside employment could potentially require him to recuse himself from certain matters if he becomes involved with a parent or child who is, or later becomes involved with DCS. However, it does not appear that the Director's employment with the local counseling agency presently requires him to recuse himself from official duties since the local counseling agency does not have any contracts with DCS or DCS clients. While this provision may be triggered if the local counseling agency provides services for DCS or families who are involved with DCS, it does not currently apply.

IC 4-2-6-5.5(a)(2) prevents a state employee from engaging in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment. While DCS contends that the Director's employment could possibly expose him to a situation where he would have access to confidential information that he may be required to disclose in the performance of his duties with the local counseling agency, the provision does not currently apply. More specifically, the provision does apply since the local counseling agency does not have any contracts with DCS or DCS clients.

IC 4-2-6-5.5(a)(3) prohibits an employee from using or attempting to use the individual's official position to secure unwarranted privileges or exemptions that are both of substantial value and not properly available to similarly situated individuals outside state government. The Director's outside employment with the local counseling agency would not appear to trigger the application of this provision.

Despite the fact that the Director's outside employment does not currently appear to create a conflict of interest according to IC 4-2-6-5.5, 42 IAC 1-6-1 allows the appointing authority of an agency to adopt policies, rules, or regulations concerning the subject matter of the Code of Ethics provided that such policies, rules, or regulations are at least as strict as the rule. In this case, DCS has adopted an internal agency policy that prohibits a DCS employee from having any outside employment or holding any contractual relationship that is:

- i. With any business entity, agency or individual that is subject to regulation by, or is doing business with, DCS; or
- ii. Capable of causing a continuing or recurring conflict between his/her private interests and the performance of his/her responsibilities to DCS, or that would impede the full and faithful discharge of his/her public duties.

CONCLUSION

The Commission finds that the Director's outside employment does not create a conflict of interest under the Code of Ethics. However, the Commission acknowledges that it is in the discretion of DCS to prohibit the Director from continuing his outside employment with the local counseling agency pursuant to the agency's internal conflict of interest policy.