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ISDH was authorized by the General Assembly through Public Law 191-2013 to establish a foundation designed to solicit funds for agency programs. The ISDH Chief of Staff and interim Ethics Officer sought advice on whether the guidelines and disclosure form developed by ISDH adequately addressed all ethics issues related to fundraising by agency employees. SEC found ISDH staff would not violate applicable ethics rules by conducting the Foundation's business on state time since the legislature authorized such action via statute. Moreover, the standards and disclosures developed by ISDH sufficiently addressed any internal and external conflicts that could potentially arise for agency employees in conducting the Foundation's affairs.

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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(s).

BACKGROUND

A state employee serves as the Chief of Staff for the Indiana State Department of Health ("ISDH"), and another state employee serves as the interim Ethics Officer in the agency's Office of Legal Affairs. Public Law 191-2013 § 4 was codified as IC 16-19-3-30 and authorizes the ISDH to establish a nonprofit subsidiary corporation ("Foundation") that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. The ISDH has put together a set of standards along with a disclosure form to guide the conduct of agency employees as they perform work on behalf of the Foundation.

ISSUE

- 1) What are the potential ethics violations that could present themselves in the operation of a 501(c)(3), especially fundraising for the Foundation?
- 2) Do the guidelines and form developed by the ISDH adequately address necessary ethical considerations for the ISDH employees performing work on behalf of the Foundation?

RELEVANT LAW

42 IAC 1-5-1 Gifts; travel expenses; waivers

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

Affected: IC 3-9-2; IC 4-2-6

Sec. 1. (a) A state employee or special state appointee, or the spouse or unemancipated child of a state employee or special state appointee, shall not knowingly solicit, accept, or receive any:

- (1) gift;
- (2) favor;
- (3) service;

- (4) entertainment;
- (5) food;
- (6) drink;
- (7) travel expenses; or
- (8) registration fees;

from a person who has a business relationship with the employee's or special state appointee's agency or is seeking to influence an action by the employee or special state appointee in his or her official capacity.

(b) The following shall not be subject to this rule:

(1) Gifts, favors, services, entertainment, food, drink, travel expenses, or registration fees from public agencies or public institutions.

(2) Food or drink consumed at a public meeting to which at least twenty-five (25) individuals are invited. A meeting will be considered public if:

(A) the event is a reception or other gathering for public officials that is not arranged to solicit government procurement of goods or services;

(B) the employee is giving a speech or participating in a presentation in the employee's official capacity; or

(C) the meeting has a formal educational program that the employee is attending to assist him or her in performing official duties.

(3) Mementos or souvenirs of nominal value.

(4) Food or drink consumed by an employee during negotiations or other activities related to an Indiana economic development corporation economic development project.

(5) Gifts, favors, services, entertainment, food, or drinks from relatives, or a person with whom the employee or special state appointee has an ongoing social relationship, so long as:

(A) the gifts or other items of value are not deducted as a business expense; and

(B) the gift giver is not seeking to influence an action by an employee or special state appointee in that person's official capacity.

(6) Political contributions subject to IC 3-9-2 that are reported in accordance with applicable law.

(7) Nominal refreshments offered to a state employee or a special state appointee conducting official state business while the employee or special state appointee is at a workplace of a person who:

(A) has a business relationship; or

(B) seeks to influence official action;

with the employee's or special state appointee's agency.

(8) Discount and other promotional programs approved and made available to state employees and special state appointees through the state personnel department or the Indiana department of administration.

(c) An employee's or special state appointee's state officer or appointing authority may waive application of subsection (a) of this rule in individual cases when consistent with the public interest. The waiver shall:

(1) be in writing; and

(2) identify the following:

(A) The employee or special state appointee.

(B) The nature and value of the gift.

(C) The donor of the gift.

(D) Why acceptance of the gift is consistent with the public interest.

(d) Written waivers must be filed with the commission within thirty (30) days of receipt of the gift. The commission may review the written waivers. An appointing authority or state officer may designate authority to the agency's ethics officer to waive application of this rule on behalf of the appointing authority or state officer. The designation shall be in writing and filed with the commission.

(e) If a person wishes to reimburse the state for any part or all of the expenses incurred by the state for appearances of a state officer, employee, or special state appointee or their official representatives on behalf of the state, the person shall remit to the treasurer of state any such amounts. The treasurer of the state shall quietus the funds into the general fund.

42 IAC 1-5-12 Use of state property

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

Affected: IC 4-2-7

Sec. 12. A state officer, employee, or special state appointee shall not make use of state materials, funds, property, personnel, facilities, or equipment 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.

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 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any 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 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 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:

(1) 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

(2) 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.

(c) A written determination under subsection (b)(2) 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)(2) shall be filed with the appointing authority.

42 IAC 1-6-1 Other sources

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

Affected: IC 4-2-6-4

Sec. 1. An appointing authority of an agency or a state officer may adopt policies, rules, or regulations concerning the subject matter of this rule provided that the policies, rules, or regulations are at least as strict as this rule. All such policies, rules, or regulations shall be filed with the commission, but failure to file does not affect the validity of such policies, rules, or regulations as applied to the agency's or state officer's employees or special state appointees

ANALYSIS

As an initial matter, it is relevant to note that the Foundation is an “agency” for purposes of the Code. Specifically, the term “agency” is defined in I.C. 4-2-6-1(a)(2) and includes a private, nonprofit, government related corporation. Public Law 191-2013 § 4 was codified as IC 16-19-3-30 and authorizes the ISDH to establish the Foundation, a nonprofit subsidiary corporation that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code. The Foundation is a private, nonprofit, government related corporation that was specifically established to further the mission of the ISDH.

A. Solicitations

State employees and special state appointees are prohibited under 42 IAC 1-5-1 from soliciting, accepting, or receiving any: 1) gift, 2) favor, 3) service, 4) entertainment, 5) food, 6) drink, 7) travel expenses, or 8) registration fees from a person who has a business relationship with their agency or who is seeking to influence action by them in their official capacities. “Business relationship” is defined in IC 4-2-6-1(a)(5) to encompass: a) the dealings of a person with an agency seeking, obtaining, establishing, maintaining, or implementing a pecuniary interest in a contract or purchase with the agency, or a license or permit requiring the exercise of judgment or discretion by the agency; and b) the relationship a lobbyist—registered or unregistered—has with an agency.

While the Gifts rule applies to any of the eight enumerated items extended to individual employees or appointees, it does not extend to those items provided directly to an agency for general use. As a result, so long as all solicitations and accepted gifts are made for the benefit of the Foundation and not any individual employees or appointees, the Foundation employees would not violate the Gifts rule.

The policy drafted by the ISDH addresses this issue in Section III.D: Fundraising and Acceptance of Donations by establishing the time and manner in which any fundraising for the

Foundation is to be conducted. Furthermore, the policy prohibits employees from soliciting a vendor who has a contract or grant with the ISDH, is bidding on a contract or grant with the ISDH, is soliciting business from the ISDH, or is lobbying the ISDH. The policy does, however, permit the Foundation to accept any and all gifts as long as it does not appear as though the offer has been made in an attempt to improperly influence action by the ISDH or would present an appearance of impropriety.

B. Use of state resources

State officers, employees, and special state appointees are prohibited under 42 IAC 1-5-12 from making use of state materials, funds, property, personnel, facilities, or equipment 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. Similarly, state officers, employees, and special state appointees are prohibited under 42 IAC 1-5-13 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.

Since the Foundation is being created pursuant to the statutory authority outlined in IC 16-19-3-30, it would appear as though any work performed by the ISDH staff on behalf of the Foundation would be considered official state business for which use of state resources would be permitted. To the extent any such work would not be considered official state business, the ISDH personnel would still be able to use state resources to perform such work on state time if it is covered by standards developed by the agency in its policy.

Use of state employees and state resources to perform work on behalf of the Foundation is discussed in Section III.A Employee of the policy.

C. Conflicts of interest

A conflict of interest arises for a state officer, employee, or special state appointee who participates in any decision or vote in which s/he has knowledge that any of the following persons has a financial interest in the outcome of the matter: 1) the state officer, employee, or special state appointee; 2) a member of her/his immediate family; 3) a business organization in which s/he is serving as an officer, director, trustee, partner, or employee; or 4) any person or organization with whom s/he is negotiating or has an arrangement concerning prospective employment. "Financial interest" is defined in IC 4-2-6-1(a)(11) as an interest: a) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; b) involving property or services; or c) arising from employment or prospective employment for which negotiations have begun. The term excludes an interest: 1) of a state officer or employee in the common stock of a corporation unless the combined holdings of the corporation of the state officer or the employee, her/his spouse, and her/his unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation; and 2) that is not greater than the interest of the general public or any state officer or any state employee. An employee who identifies such a potential conflict of interest is required to notify his/her appointing authority and seek an advisory opinion from the Commission to determine whether a) procedures should be implemented to screen the employee from involvement in the matter, or b)

the interest is not so substantial that the Commission considers it likely to affect the integrity of the services the state expects from the employee.

The ISDH establishes a screening procedure to address any potential conflicts of interest—including those that may not necessarily implicate IC 4-2-6-9—in Section III A Employee of the policy. Notably, any ISDH's staff who will be performing work on behalf of the Foundation are first required to complete a Conflict of Interest Disclosure Statement developed by the ISDH that is designed to identify any potential conflicts before the individuals begin any such work. Pursuant to the policy, any potential conflicts that implicate IC 4-2-6-9 will be brought to the Commission consistent with IC 4-2-6-9(b) while those potential conflicts outside of IC 4-2-6-9 will be addressed by the proposed screen.

CONCLUSION

The ISDH's operation of the Foundation invokes consideration of ethics issues related to the solicitation of gifts, use of state property, ghost employment and conflicts of interest. The Commission finds that ISDH staff would not be in violation of any rules related to these issues by performing work for the Foundation because the non-profit was statutorily created and is therefore an agency for purposes of the Code. Moreover, the Commission is of the opinion that the guidelines and form developed and submitted to the Commission along with this request for an advisory opinion by the ISDH adequately address necessary ethical considerations for the ISDH employees performing work on behalf of the Foundation.