

42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)
42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)
42 IAC 1-5-10 Benefiting from confidential information
42 IAC 1-5-11 Divulging confidential information
42 IAC 1-5-12 Use of state property
42 IAC 1-5-13 Ghost employment

An Indiana State Board of Nursing member recently accepted a position with an entity that is licensed and regulated by the Board. The Board member wanted to ensure that she would be permitted to continue this employment while simultaneously serving on the Board in compliance with the Code of Ethics. SEC found the arrangement proposed by the Board member and PLA, whereby she was screened from all regulatory matters related to her employer, was sufficient to avoid any potential conflicts of interest.

April 2014
No. 14-I-2

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

A special state appointee is a member of the Indiana State Board of Nursing (“Board”), a board of the Indiana Professional Licensing Agency (“PLA”). The special state appointee recently accepted employment with Medtech College (“Medtech”), an entity that is regulated/licensed by the Board.

In December 2013, the special state appointee and another Board member went to Medtech’s Greenwood campus to complete a site visit to review its nursing programs. The special state appointee, another Board member, and the Board Director, completed another site visit at Medtech’s Indianapolis campus the following day.

On January 16, 2014, the special state appointee attended a Board meeting. She and the other Board member that participated in the Medtech campus visits in December 2013 presented the results of the site visits and participated in the voting process association with those findings.

On January 27, 2014, the special state appointee received a call from a recruiter indicating that a school was looking to hire a nurse educator for a national nurse position to work with their Indiana schools. The special state appointee agreed to speak to the recruiter. She received a call from the chief operating officer of Medtech (“COO”) on January 29, 2014 to discuss the position. During the conversation, the special state appointee and the COO realized that she was one of the Board members that participated in the site visits to Medtech. She explained that she would have to recuse herself from all Board activity related to Medtech if she decided to formally interview for the position. The special state appointee interviewed for the position on January 30, 2014. She emailed the board director the following day to let her know that she had interviewed with Medtech and would need to recuse herself from matters related to Medtech. The special state appointee accepted the position on February 4, 2014. The special state

appointee sought a formal advisory opinion from the Commission at its first available meeting and she has not participated in any Board activities since accepting the position.

ISSUE

Is the special state appointee's recent acceptance of employment with Medtech, an entity regulated by the Board she serves on, contrary to the Code?

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 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).

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 I.A.C. 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 I.A.C. 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.

42 IAC 1-5-12 Use of state property

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

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 interest under IC 4-2-6-5.5 if it results in the special state appointee: 1) receiving compensation of substantial value if the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the special state appointee'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.

In this case, a conflict of interest would not appear to apply since the special state appointee would only be required to be screened from matters involving Medtech. She would still be able to participate in matters involving other providers. While it is arguable that her service on the Board is not considered "employment" for purposes of IC 4-2-6-5.5(a)(2), it does not appear that the special state appointee would be required to disclose confidential information that was gained during the course of her service on the Board. Moreover, so long she does 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, her employment with Medtech would not create a conflict under this provision with her duties on the Board.

B. Conflict of interests

A separate conflict of interest may arise for a special state appointee under IC 4-2-6-9 if she knowingly participates in a decision or vote in which certain persons have a financial interest in the outcome of the matter, including the appointee herself as well as a business organization in which she serves as an employee. "Financial interest" is defined in IC 4-2-6-1(a)(11) as an interest in a purchase, sale, lease, contract, option, or other transaction between an agency and any person or an interest involving property or services.

The special state appointee serves on the Board that regulates Medtech, her employer. It is likely that decision(s) or vote(s) related to Medtech will come before the Board. To the extent that Medtech would have a financial interest in any such decision or vote, a conflict of interest would arise for the special state appointee if she would participate in such decision(s) or vote(s).

IC 4-2-6-9(b) provides that 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. In this case, the special state appointee requested an advisory opinion from the Commission as provided in the rule and appears to have disclosed the potential conflict to her appointing authority.

IC 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the special state appointee seeking an advisory opinion from involvement in the matter. In this case, the PLA has established the following procedures to screen the special state appointee from all involvement with regulatory issues relating to Medtech:

1. Site visit protocol: The Board is required to make site visits to pre-licensure schools of Nursing at various times during the accreditation process and afterwards if problems arise. Prior protocol, and the suggested screen, is that no educator will be assigned to visit a site which is related to their educational institution. Example: Board Member A works at Indiana University- Bloomington. Board Member A would not be assigned to a site visit at Indiana University-South Bend. Board members already abstain from Board action that is related to their particular educational entity, i.e. the two Board members who are employed by Ivy Tech Community College abstain from Board votes regarding that institution.
2. FYI Only Notices: Board members sometimes receive information in their meeting packets that is not related to the Board's decision-making or official action. This "FYI" type of information is included in Board materials for review and is most commonly related to changes in personnel at a Nursing program. The information typically includes a cover letter from the Nursing program that references the change in personnel and a copy of the new employee's resume. The material is included for informational purposes only and does not require Board action. The Agency proposes to continue to present this information in the Board's meeting packet to all Board members.
3. Distribution of information that requires Board action: Currently, Board member meeting packets are posted electronically to a secure site for Board members to access and review. The proposed screen would change this process to the following:
 - A. Education materials that require Board action but do not involve any Board member's educational institution employer would continue to be posted electronically as part of the meeting packet;

Education materials which require Board action but do involve any Board member's educational institution will be emailed only to those Board members who are not affiliated with the educational institution. Board members who are affiliated with the educational institution will not receive any written materials regarding the educational institution and will abstain from the

Board vote. Board members will also be requested to leave the meeting while the remainder of the Board hears the information and makes a decision about any affiliated educational institution. Agency staff will utilize a form to ensure compliance with the proposed screen.

C. Confidential information

The special state appointee 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 special state appointee 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, such as Medtech. 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 special state appointee is exposed to or has access to such confidential information in her position on the Board, she would be prohibited not only from divulging that information but from ever using it to benefit anyone, including herself or her employer, in any manner.

D. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the special state appointee 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 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 special state appointee complies with these provisions she would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis and the implementation of the screening procedures established by the PLA, the special state appointee’s continued service on the Board and simultaneous employment with Medtech would not be contrary to the Code.