

42 IAC 1-5-5 Conflicts of interest; advisory opinion by Commission (IC 4-2-6-5.5)

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

42 IAC 1-5-12 Use of state property

42 IAC 1-5-13 Ghost employment

The IDHS Ethics Officer sought advice to determine whether the Medical Director of the State Emergency Medical Services could maintain his outside employment with various employers while IDHS awaits the funding for his full-time position. SEC determined that the Medical Director's continued outside employment with the Indianapolis EMS, IU School of Medicine, Eskenazi Hospital, IU Health, and the IRL would not create a conflict under IC 4-2-6-5.5. SEC further determined that a potential conflict of interest would arise for the Medical Director under IC 4-2-6-9 if he participates in any decisions or votes in which any of his employers has a financial interest in the outcome of the matter. The Commission approved the proposed screening mechanism for purposes of IC 4-2-6-9(b) so long as the IDHS Ethics Officer continually monitors the implementation of the screen and provides updates to the Commission regarding any adjustments made to the screen as the Medical Director's employment status changes with respect to each outside employer.

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No. 15-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 state employee is the Ethics Officer for the Indiana Department of Homeland Security ("IDHS"). The Ethics Officer requests an advisory opinion on behalf of the Medical Director of the State Emergency Medical Services ("EMS"). The Medical Director's position is a new one within the IDHS, created by the General Assembly during the 2014 Legislative Session. The Medical Director serves as the State EMS Director pursuant to an Employee Interchange Agreement authorized by IC 5-10-7 and executed with the Indiana University ("IU") School of Medicine. Funding for the Medical Director's IDHS position will most likely not be available until May 2015. Therefore, he is currently working on a part-time basis as a state employee and has other outside employers. The Medical Director's state work schedule currently fluctuates based upon his work schedule for these other employers.

The Medical Director's current outside employment includes serving as Deputy Medical Director for Indianapolis EMS, Professor of Emergency Medicine at the IU School of Medicine and Medical Director of the Indy Racing League ("IRL"). In addition, the Medical Director practices emergency medicine at Eskenazi Hospital as part of the IU Health practice group. Though this practice occurs at Eskenazi Hospital's emergency room, the Medical Director is paid for these services through IU Health.

IDHS expects to have funding available for the Medical Director's position of the State EMS by the summer of 2015, at which time he would become a full-time IDHS employee and leave his current employment with Indianapolis EMS and IU Health/Eskenazi Hospital. He intends to remain with the IRL and might continue to teach emergency medicine through the IU School of Medicine.

IDHS's Division of Fire and Building Safety, to which the Medical Director is assigned, and one of its affiliated commissions, the Indiana EMS Commission, regulates emergency medical technicians, paramedics, and providers of emergency medical services (and their facilities), in accordance with IC 10-19-7-2 and IC 16-31-2-7. The Medical Director currently serves on the EMS Commission, but his term expires on June 30, 2015, at which time he will no longer fit the practicing trauma care physician requirement for the position due to his full-time employment with IDHS.

The Medical Director does not have the authority to sign contracts on behalf of IDHS and the full extent of the Medical Director's function within IDHS and involvement with the EMS Commission has yet to be developed. However, IDHS recognizes that there is a strong possibility that a decision or vote concerning the certification, licensing, sanction, or funding of one of his outside employers or, more likely, an EMT/Paramedic/Provider working under that employer's direction, will come before him at the Division of Fire and Building Safety or EMS Commission and therefore present a conflict of interest for the Medical Director under IC 4-2-6-9.

IDHS has drafted a screening agreement to screen the Medical Director from any decision, discussion or vote by IDHS or the EMS Commission whose outcome might potentially involve, to their benefit or detriment, the financial interests of any of his outside employers (or employees, officers, or agents thereof). The agreement further contemplates that any decision-making authority the Medical Director has related to such matters be retained by his supervisor, the State Fire Marshal. The Medical Director is currently operating under the terms of this draft screening agreement which the Ethics Officer has submitted for the Commission's review.

The Ethics Officer asserts that the IDHS otherwise endorses the Medical Director's outside employment and does not believe such employment is incompatible with the Medical Director's IDHS duties or is in violation of IC 4-2-6-5.5.

ISSUES

1. Would a conflict of interest arise for the Medical Director under IC 4-2-6-9? If so, would the proposed screening procedure be appropriate to prevent a conflict of interest from arising for the Medical Director?
2. What other ethics issues, if any, arise for the Medical Director given his position at the State EMS at IDHS and his simultaneous outside employment?

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 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.

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 employee: 1) receiving compensation of substantial value if 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 official duties that his 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 official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

Based on the information provided by the IDHS Ethics Officer, it does not appear that the Medical Director's outside employment would create a conflict under this provision. Currently, the Medical Director's IDHS duties are not yet fully defined and his outside employment is not requiring his recusal from matters that are critical to the performance of his state employment duties. The Medical Director plans to cease all outside employment, with the exception of his

positions with the IRL and possibly the IU School of Medicine, once the funding becomes available and he is able to begin full-time employment with the IDHS. Further, the information provided does not suggest that the Medical Director would receive compensation of substantial value or that he would be required to recuse himself from matters that are critical to the performance of his state employment duties because of these two positions. Moreover, nothing presented suggests that any of the current or continued outside employment positions require the Medical Director to disclose confidential information that he may have access to by virtue of his state employment. Similarly, nothing presented suggests that he would use or attempt to use his state position for any unwarranted privileges or exemptions.

B. Conflict of interests

IC 4-2-6-9(a)(1) prohibits the Medical Director from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the Medical Director from participating in any decision or vote if a business organization which employs him has a financial interest in the matter.

Because funding for his position at the State EMS with IDHS is not yet available, the Medical Director is employed as Deputy Medical Director for the Indianapolis EMS, Professor of Emergency Medicine at the IU School of Medicine and Medical Director of the Indy Racing League. In addition, the Medical Director practices emergency medicine at Eskenazi Hospital as part of the IU Health practice group.

IDHS advises that it is possible that the Medical Director's positions at IDHS would require him to be involved in decisions or votes in which one or more of his employers may have a financial interest. Specifically, a decision or vote concerning the certification, licensing, sanction, or funding of one of his outside employers or, more likely, an EMT/Paramedic/Provider working under that employer's direction, may come before him at the Division of Fire and Building Safety or EMS Commission.

IC 4-2-6-9(b) provides that a state employee 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 IDHS Ethics Officer requested an advisory opinion from the Commission on the Medical Director's behalf as provided in the rule. So long as the Medical Director has notified his appointing authority of his potential conflict of interest, he would be in compliance with this part of the rule.

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 state employee seeking an advisory opinion from involvement in the matter. In this case, IDHS proposes the implementation of a screening procedure as follows:

The Medical Director will be screened from all IDHS and Indiana EMS Commission decisions and matters whose outcome might potentially involve, to their benefit or detriment, the financial

interests of Indianapolis EMS, the IU School of Medicine, Eskenazi Hospital, IU Health, and the IRL, or any employees, officers, or agents thereof. The Indiana State Fire Marshal has complete decision-making authority to the full extent of the Medical Director's authority at the State EMS, with respect to any such decision.

C. Confidential information

The Medical Director 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 Medical Director 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, such as a patient, and a business organization, such as IU Health. 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 Medical Director is exposed to or has access to such confidential information in his position with IDHS, he would be prohibited not only from divulging that information but from ever using it to benefit anyone in any manner.

D. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the Medical Director 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 Medical Director 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 Medical Director observes these provisions regarding his employment with the identified employers, such outside professional activities would not violate these rules.

CONCLUSION

Subject to the foregoing analysis and the implementation of the screening procedures established by the IDHS, the Medical Director's continued outside employment with the Indianapolis EMS, IU School of Medicine, Eskenazi Hospital, IU Health, and the IRL would not be contrary to the Code. The IDHS Ethics Officer, however, must provide updates to the Commission regarding changes to the screening procedures as the Medical Director's employment status changes with each outside employer. In addition, the Ethics Officer must continually monitor the implementation of the screen.