

**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 ISP Ethics Officer sought advice to determine whether the Commander of ISP's Commercial Vehicle Enforcement Division could serve on the Board of Directors of a non-profit company whose technology for fixed scale facilities is used by ISP. SEC determined that the Commander's outside professional activity with the company would not create a conflict under IC 4-2-6-5.5 because the Commander's outside employment does not provide him with compensation of substantial value nor would it require his recusal from matters that are critical to the performance of his state employment duties. SEC further determined that a potential conflict of interest does not arise under IC 4-2-6-9 for the Commander because his official state duties do not include participating in decisions or votes on matters in which the company may have a financial interest. SEC recommended the ISP Ethics Officer still implement the proposed screening procedures for matters related to the company to prevent even the appearance of a conflict.

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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 to the Commission.

**BACKGROUND**

A state employee is the Ethics Officer for the Indiana State Police ("ISP"). The Ethics Officer requests an advisory opinion on behalf of the Commander of the ISP's Commercial Vehicle Enforcement Division ("CVED"). In this position, the Commander deals mostly with semi-trucks and the enforcement of federal regulations and state laws that govern them. The Commander is interested in serving on the board of directors ("Board") for Help, Inc., a not-for-profit company that develops technology related to fixed scale facilities. IBM is the parent company of Help, Inc.

ISP uses Help, Inc.'s PrePass technology to enable "safe" trucking companies' semis to bypass scales without pulling in for weight or inspections. The Indiana Department of Transportation ("INDOT") owns the scale facilities, and the Commander's division staffs these facilities with enforcement personnel.

On January 30, 2015, the Commander requested an Informal Advisory Opinion ("IAO") from the Office of Inspector General ("OIG") regarding the ethical implications of serving on the Board in addition to his official duties with ISP. In his IAO request, the Commander advised that the Deputy Commissioner of the Indiana Department of Revenue ("IDOR") has served as the chairman of the Board in the past and had encouraged the Commander to serve on the Board. The Commander's understanding is that each state pays a fee for a seat on the Board and that the IDOR has paid for the Commander's seat on the Board. The Board is made up of other states' police agency commanders (same or similar positions to the position the Commander holds with ISP). To the best of his knowledge, the ISP does not have a contract or MOU with Help, Inc. However, the Commander noted that, as the Commander of the CVED, he would have influence as to the ISP's use of their product.

The OIG issued an IAO on February 2, 2015, indicating that his circumstances implicated the rules in the Code pertaining to outside employment (42 IAC 1-5-5; IC 4-2-6-5.5) and conflict of interests; decisions and voting (42 IAC 1-5-6; IC 4-2-6-9). The Ethics Officer has requested a formal advisory opinion from the Commission on the application of these rules and has submitted a proposed screening mechanism for purposes of the requirements in IC 4-2-6-9(b). The proposed screening mechanism is as follows:

- 1) The Ethics Officer shall monitor the CVED Commander's involvement in any matter involving the entity (Help, Inc.) to ensure that the screening procedures are followed.
- 2) The CVED Commander of the ISP shall not engage in any binding contract with Help, Inc. while he is participating on the Board of Directors for the entity.
- 3) The involvement of the CVED Commander on the Board of Directors shall not serve as an endorsement by the ISP for any product of Help, Inc.
- 4) The CVED Commander shall serve as a representative of state government in an advisory role in policies that affect the safe movement of commerce on roadways and shall not operate outside of this scope.
- 5) This screen shall remain in place as long as the ISP has a member serving on Help, Inc.'s Board of Directors.

### **ISSUE**

What ethics issues, if any, arise for the Commander given his position as Commander of the ISP's CVED and his participation on Help, Inc.'s Board?

### **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 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 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.

The Commission generally defers to an agency's appointing authority or ethics officer regarding outside employment opportunities since it views them as being in the best position to determine whether a conflict of interest might exist between an employee's state duties and an outside employment opportunity. ISP has requested that the Commission review the Commander's outside employment/professional activity opportunity with the Board to determine if there is a conflict of interest under IC 4-2-6-5.5.

Based on the information provided, it does not appear that the Commander's outside professional activity as a Board member would create a conflict under this provision. Specifically, the information provided does not suggest that the Commander would receive compensation of substantial value or be required to recuse himself from matters that are critical to the performance of his state employment duties. Moreover, nothing presented suggests that the position would require the Commander 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. Further, the ISP Ethics Officer has established a policy to ensure the Commander's activities on the Board would not create a conflict of interest for himself or the ISP under this provision.

#### *B. Conflict of interests*

IC 4-2-6-9(a)(1) prohibits the Commander 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 Commander from participating in any decision or vote if a business organization, including a

not-for-profit company such as Help, Inc., in which he is serving as an officer, a director, a trustee, partner or employee, has a financial interest in the matter.

The Major is the Commander of the ISP's CVED. This division uses Help, Inc.'s PrePass technology as part of its enforcement of federal regulations and state laws that apply to semi-trucks. The Commander has been invited to serve on the Help, Inc. Board.

The Commander testified that he does not anticipate being involved in any decisions or votes in which Help, Inc. would have a financial interest, such as recommending that the State enter into a contract with Help, Inc., as part of his state duties. The Commander further provided that the PrePass technology had been in place for several years through a Memorandum of Understanding between the IDOR and Help, Inc. ISP does not have any involvement in this agreement. He does not anticipate the ISP having any involvement in any such agreement in the near future.

However, to avoid even the appearance of impropriety, the ISP has proposed screening procedures to prevent the Commander from involvement in any matters in which Help, Inc. may have a financial interest:

- 1) The Ethics Officer shall monitor the CVED Commander's involvement in any matter involving the entity (Help, Inc.) to ensure that the screening procedures are followed.
- 2) The CVED Commander of the ISP shall not engage in any binding contract with Help, Inc. while he is participating on the Board of Directors for the entity.
- 3) The involvement of the CVED Commander on the Board of Directors shall not serve as an endorsement by the ISP for any product of Help, Inc.
- 4) The CVED Commander shall serve as a representative of state government in an advisory role in policies that affect the safe movement of commerce on roadways and shall not operate outside of this scope.
- 5) This screen shall remain in place as long as the ISP has a member serving on Help, Inc.'s Board of Directors.

### *C. Confidential information*

The Commander 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 Commander 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 not-for-profit company, such as Help, Inc. 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 Commander is exposed to or has access to such confidential information in his position as Commander of the CVED, 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 Commander 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 Commander 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.

The Commander has stated that the IDOR has paid for his seat on the Board and ISP's Ethics Officer has advised that the Commander's service on the Board would be considered official state business. Therefore, the use of state funds for this purpose is not prohibited under the use of state property rule. Furthermore, to the extent the Commander's service on the Board is part of his state duties, he would not be prohibited from engaging in Board business during his normal working hours.

**CONCLUSION**

Subject to the foregoing analysis and the implementation of the screening procedures established by ISP, the Commander's outside professional activity with Help, Inc. would not be contrary to the Code.